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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	REBECCA MARIE INGRAM, HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS and TORRY TANNER
RESPONDENTS	HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH
DOCUMENT	**BOOK OF AUTHORITIES TO THE REPLY OF THE APPLICANTS HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS, and TORRY TANNER**

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COURT OF QUEEN'S BENCH OF MANITOBA

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- and -	)	
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intervener.	)	
	)	Judgment delivered:
	)	October 21, 2021

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JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] This application raises significant constitutional issues in respect of government imposed public health restrictions in the context of the COVID-19 global pandemic.

[2] On March 20, 2020, the Manitoba government ("Manitoba") declared a province-wide 'state of emergency' under ***The Emergency Measures Act***, C.C.S.M. c. E80. It did so in order to protect the health and safety of all Manitobans and reduce the spread of COVID 19. From March 2020 and well into the early summer months of 2021, pursuant to the authority delegated to him under s. 67 of ***The Public Health Act***, C.C.S.M. c. P210, Manitoba's Chief Public Health Officer Dr. Brent Roussin ("CPHO") and his subdelegate, Dr. Jazz Atwal, issued successive Public Health Orders ("PHOs") which significantly affected the constitutional rights and freedoms to assemble and worship. The Minister of Health, Seniors and Active Living Cameron Friesen (as he then was), approved the PHOs.

[3] In implementing those PHOs to address the crisis that is the COVID-19 pandemic, has Manitoba and its public health officials limited fundamental rights and freedoms in a constitutionally defensible manner? Can those PHOs be properly challenged on administrative law grounds and on the basis of Canada's constitutional division of powers (paramountcy)? Those are the principal questions that arise on this application and those are the issues with which this Court must grapple.

II. OVERVIEW

A. THE PUBLIC HEALTH CRISIS

[4] Since March 2020, Manitoba along with the rest of the world has been battling COVID-19, the worst global pandemic in over a century. As of May 2021, COVID-19 had infected over 120 million people and killed more than 2.5 million people worldwide. Most of the deaths have occurred in persons over age 60 or those with underlying health conditions. However, COVID-19 has also caused serious illness requiring hospitalization and admission to intensive care units ("ICUs") across a wide spectrum of ages. For some, COVID-19 has had prolonged health implications, though this phenomenon is not yet well understood. While new vaccines have been developed, much uncertainty remains due to the manifestation of variants of concern that are more infectious and virulent.

[5] SARS-CoV-2, the new human virus that causes COVID-19, is highly communicable. Without public health interventions, it is reasonable to believe that the virus will grow exponentially. Such a rapid transmission of COVID-19 through the community would overwhelm the healthcare system leading to many more deaths and serious illness than has been experienced thus far. Such developments can be seen elsewhere in the world. Accordingly, to stop widespread exponential growth, public health officials all over the world have purposefully taken measures to "flatten the curve" of the pandemic. Since SARS-CoV-2 spreads through contact, one important and effective public health measure to contain the disease is to limit gatherings, especially prolonged contact indoors.

B. THE APPLICATION

[6] The applicants challenge by way of application, the constitutionality of specific sections of Manitoba's Emergency Public Health Orders made on November 21, 2020, December 22, 2020, and January 8, 2021 (the "impugned PHOs"). They also challenge subsequent orders of a substantially similar or identical nature, including the order dated April 8, 2021, which were in effect at the time of the hearing of the application in May 2021. The applicants contend that the identified and specific sections of the impugned PHOs and the restrictions on public gatherings, gatherings in private residences and the temporary closure of places of worship, all infringe ss. 2(a), 2(b), 2(c), 7 and 15 of the ***Canadian Charter of Rights and Freedoms*** ("***Charter***"). They have also as already mentioned, challenged the impugned PHOs on administrative law grounds and under the division of powers (paramountcy).

[7] Specifically, the applicants request that this Court determine and declare that Manitoba's Emergency Public Health Orders, which prohibit and/or restrict religious, private in-home and public outdoor gatherings, violate their ss. 2(a), 2(b), 2(c), 7 and 15 ***Charter*** rights and that those violations cannot be saved under s. 1 of the ***Charter***. In the alternative, the applicants request a determination and declaration that the PHOs are *ultra vires* s. 3 of ***The Public Health Act***. In the further alternative, the applicants request that this Court find that the PHOs, which prohibit and restrict religious gatherings, are inoperative because they conflict with s. 176 of the ***Criminal Code of Canada***.

C. THE DEFENCE OF THE PHOS

[8] The respondents (Manitoba) concede that the restrictions on gathering had the effect of limiting the freedoms of religion, expression and peaceful assembly under s. 2 of the ***Charter***. Despite Manitoba's concession respecting s. 2, they do not concede the alleged breaches of ss. 7 and 15 of the ***Charter***. Manitoba submits that given their (Manitoba's) concessions respecting the breaches under s. 2, it is not necessary to address or decide the ss. 7 and 15 issues and that this Court's determinations respecting any ***Charter*** issue should be confined to those related to Manitoba's s. 1 defence. As it relates to Manitoba's concession that s. 2 of the ***Charter*** has been infringed, they (Manitoba) contend that the limits on any s. 2 rights are constitutionally defensible in that they are reasonable, proportionate and justified in order to address a serious public health emergency: a global pandemic with grave, sometimes deadly consequences.

D. THE APPLICANTS

[9] The applicants in this case include both churches and individual applicants. The churches are: Gateway Bible Baptist Church; Pembina Valley Baptist Church; Redeeming Grace Bible Church; Grace Covenant Church; Slavic Baptist Church; Christian Church of Morden; and, Bible Baptist Church. The individual applicants are: Thomas Rempel; Tobias Tissen; and, Ross MacKay. Thomas Rempel is a deacon at Redeeming Grace Bible Church. Tobias Tissen is a minister at the Church of God. Ross MacKay is a Manitoba resident who attended a "Hugs Over Masks" rally in Steinbach, Manitoba, on November 14, 2020. MacKay did so in order to voice his concerns about what he views

as violations of Manitoban's human rights flowing from the COVID-19 lockdowns. Following his attendance at that rally, MacKay received a fine in the amount of $1,296.

E. THE INTERVENER

[10] It should be noted that following a contested motion, intervener status was granted to The Association for Reformed Political Action (ARPA) Canada on the basis of the applicable and governing legal test[1]. ARPA Canada is a not-for-profit, non-partisan organization which describes itself as "serving" at the intersection of government (including the courts) and Canada's reformed Christian community — a distinct minority religious group in Canada.

[11] ARPA Canada submits that it directs its mission to reform churches in Canada who primarily attend 175 reformed congregations across Canada. ARPA Canada has had a long-standing commitment to public engagement in issues of freedom of religion and religious discrimination in Canada.

[12] Pursuant to the narrow terms of their intervention, counsel for ARPA Canada provided the Court with both written and oral submissions. They did not participate in the examination of witnesses.

[13] As undertaken, counsel for ARPA Canada did indeed provide submissions that augmented rather than merely duplicated the submissions of the other religious parties. In that regard, amongst other things, counsel for ARPA Canada addressed what it described as arguments in connection to the importance of institutional pluralism in a free and democratic society and the need for its acknowledgment and protection. Such

[1] See *Hutlet v. 4093887 Canada Ltd. et al.,* 2015 MBCA 25

institutional pluralism necessarily contemplates the ongoing existence and functioning of faith-based institutions which in various ways, may play an important and legitimate role in enhancing the many aspects of a person's and a community's health.

[14] Where relevant and applicable to my determinations, I have considered and taken into account the thoughtful and distinct aspects of ARPA Canada's submissions.

F. THE NATURE OF THIS APPLICATION AND HEARING

[15] This case proceeded by way of application and involved the filing of numerous affidavits many of which were accompanied by expert reports garnered and adduced by the respective parties. As part of this application, various cross-examinations took place in open court in connection to a number of the affidavits that were filed. That *viva voce* testimony and "on the record" cross-examination was conducted in respect of specific and selected affiant witnesses, including a number of the experts. This took place over several days.

[16] It should be noted that these reasons (in relation to the applicants' challenge to the constitutionality of the specific sections of the PHOs and their administrative law and division of powers arguments) are being released concurrently with this Court's reasons respecting separate and distinct arguments made by the same applicants in relation to an earlier application. In that earlier application, the applicants challenged Manitoba's authority to delegate to Manitoba's CPHO and his sub-delegate, powers that resulted in the issuance of successive PHOs, which the applicants contend dramatically alter the lives of Manitobans, including what they say have been broad infringements of their constitutional rights and freedoms. For the reasons provided in that concurrently released

judgment, the applicants' challenge was dismissed. (See ***Gateway Bible Baptist Church et al. v. Manitoba et al.***, 2021 MBQB 218.)

G. THE SCOPE OF THE COURT'S FOCUS, EXAMINATION AND DETERMINATIONS ON THIS APPLICATION

[17] It is not an exaggeration to say that the global pandemic has challenged governments the world over, including all Canadian governments and their connected public health agents and agencies at both the federal and provincial levels. In a federal state like Canada, in the context of a mercilessly persistent pandemic, it is to the provincial governments that a particularly heavy day-to-day burden and responsibility falls as they attempt — in sometimes very distinct and divergent ways — to achieve, in exceptional circumstances, the requisite balance between public health protection and the restriction of fundamental freedoms in a manner that is both reasonable and legally justifiable.

[18] Manitoba, like all other provincial governments, has been criticized in different quarters for alternately having done too little too late, or for having moved too quickly to "reopen" or to loosen various restrictions that had been put in place. Conversely, Manitoba has also been criticized for having gone too far with some of the restrictions imposed, restrictions which some critics say are incongruous and inconsistent in nature given the objectives of the PHOs and given where Manitoba has chosen to draw (or not draw) certain other lines as part of its response to the pandemic.

[19] Whatever the nature and variety of the criticism, in the years and perhaps months to come, with the luxury of hindsight and new evolving scientific clarity, a needed post-mortem may indeed be conducted respecting the speed and nature of Manitoba's response to the unprecedented public health threat that COVID-19 continues to

represent. With such a post-mortem, the criticisms may become even more focussed and perhaps, understandings may be more common and nuanced respecting what was both good and bad in the different aspects of Manitoba's response. Leaving aside what I stipulate in the next few paragraphs is the appropriately more narrow and constrained nature of this Court's focus, given the still ongoing, fluid and threatening nature of the pandemic, not only is any such "post-mortem" outside the jurisdictional sphere and expertise of this Court, it is also definitionally premature. Accordingly, this case and these reasons are not intended and should be not read as a substitute for any such eventual post-mortem. Neither should these reasons be read as either a validation or a second guessing of Manitoba's policy choices and the adequacy or efficacy of its public health measures put in place to contain COVID-19. Instead, my still important, but more limited task is to evaluate whether the impugned restrictions on the identified fundamental freedoms are constitutionally defensible and whether they are legally impugnable on administrative law grounds and on the basis of the applicants' division of powers argument.

[20] In carrying out my analysis in respect of the constitutional and administrative law issues that I set out below at paragraph 23 and in underscoring the point made in the previous paragraph, I am mindful that this case is not a public inquiry into the national and provincial responses to the pandemic. This is instead, a legal challenge to specific portions of the identified PHOs. In that connection, this Court should not have to be reminded that like any court case, this case is defined by the pleadings. Put simply, as this is not a public inquiry, this case is not and should not be a probe or questioning of

every aspect of Manitoba's handling of the pandemic nor a challenge to every public health order or restriction. To repeat, while such a broader public assessment may very well come in due course, this Court's focus must be on the constitutionality of the identified portions of the orders in question. Unless relevant to the specific constitutional determinations I must make, this Court must take care to not conflate that constitutional assessment with an undue judicial focus on the wisdom of Manitoba's broader policy choices as it relates to what may have been the inadequacies or adequacies of the particular timing, scope and nature of the public health restrictions. Although the evaluative line and relevant parameters can be sometimes difficult to discern in the context of an adjudication of a ***Charter*** challenge, as Justice Binnie colourfully commented, a court case "should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight".[2]

[21] While this Court on this application was the recipient of a large amount of evidence, the relevance of that evidence must be tested by reference to what is in issue and it is the amended notice of application and the now well-established constitutional tests that define what is in issue. In respect of their notice of application, the applicants have not challenged every PHO made during the pandemic or even all aspects of a single PHO. For example, there is no challenge to any quarantine or self-isolation order made under ***The Public Health Act*** (*Self-Isolation and Contact Tracing Orders* and *Self-Isolation Order for Persons Entering Manitoba*). The amended notice of application is confined to

[2] *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at paras. 40-41

particular sections of the three impugned PHOs made on November 21, 2020, December 22, 2020 and January 8, 2021 (and any subsequent order of a substantial or identical nature) and Manitoba has responded accordingly. Specifically, the applicants challenge the orders in effect from November 22, 2020 until January 22, 2021, in relation to:

- Gatherings at private residences: Order 1(1);
- Public gatherings: Order 2(1); and
- Places of worship: Orders 15(1) and (3) in the November 21, 2020 PHO, which became Orders 16(1) and (3) in the December 22, 2020 and January 8, 2021 PHOs.

[22] Just as the relevance of the evidence is in large part rooted in the pleadings, so too is the relevant time frame. The COVID-19 pandemic is fluid and evolving. The situation in the spring of 2020 was markedly different from the summer of 2020, or from the fall of 2020 when the impugned PHOs were made, and from the circumstances existing today. Public health measures have necessarily and frequently varied in order to respond to the prevailing conditions of the COVID-19 pandemic. Manitoba's evidence and arguments are focussed on justifying the impugned PHOs in the relevant period from November 22, 2020 until January 22, 2021.

III. ISSUES

[23] Based on the initial pleadings filed by the applicants, this application raises the following issues:

***Charter Issues*:**

1. Did the restrictions on private gatherings, public gatherings or places of worship imposed in Orders 1(1), 2(1), 15(1) and 15(3) of the Public Health Order dated November 21, 2020, as subsequently amended on December 22, 2020 and January 8, 2021, limit rights under ss. 2(a), 2(b) or 2(c) of the ***Charter***?

2. Did the restriction on religious services at places of worship or the restriction on gatherings at private homes in the impugned PHOs interfere with the right to liberty or security of the person contrary to the principles of fundamental justice pursuant to s. 7 of the ***Charter***?

3. Did the closure of places of worship in the impugned PHOs discriminate on the basis of religion contrary to s. 15 of the ***Charter***?

4. If there are any violations conceded or determined in relation to ss. 2(a), 2(b), 2(c) and ss. 7 and 15 of the ***Charter***, can the restrictions in the impugned PHOs be justified as reasonable limits under s. 1 of the ***Charter***?

***Administrative Law Issue*:**

5. Were the impugned PHOs *ultra vires* because they failed to restrict rights or freedoms no greater than was reasonably necessary to respond to the COVID-19 public health emergency as required by s. 3 of ***The Public Health Act***?

***Division of Powers of Issue*:**

6. Were the impugned PHOs relating to places of worship inoperative under the doctrine of paramountcy because it conflicted with s. 176 of the ***Criminal Code***?

[24] Respecting the above questions in issue, for the reasons that follow, I have come to the following determinations:

a) Based on the position taken by Manitoba resulting in its appropriate concession, I have determined that the impugned PHOs do indeed limit and restrict the applicants' rights and freedoms as found in ss. 2(a), 2(b), and 2(c) of the ***Charter***.

b) In the circumstances of this case, it is necessary and just to address and decide the applicants' challenge respecting what they say were the alleged infringements to their ss. 7 and 15 rights under the ***Charter***. Having so considered the merits of the applicants' position in respect of those alleged breaches, I have nonetheless determined that the impugned PHOs did not infringe the applicants' ***Charter*** rights under ss. 7 and 15.

c) Insofar as Manitoba has conceded and I have found infringements of ss. 2(a), 2(b), and 2(c) under the ***Charter***, I have also determined that the restrictions in the impugned PHOs are constitutionally justifiable as reasonable limits under s. 1 of the ***Charter***.

d) Respecting the applicants' administrative law ground of review, I have determined that the impugned PHOs were not *ultra vires* (in any administrative law sense) and they met the requirements of s. 3 of ***The Public Health Act*** insofar as they restricted rights and freedoms no greater than was reasonably necessary in response to the COVID-19 public health emergency.

e) Respecting the applicants' division of powers ground, I have determined that the impugned PHOs do not conflict with the operation nor do they frustrate the purpose s. 176 of the ***Criminal Code*** and accordingly, they are not inoperative under the doctrine of paramountcy.

IV. LEGAL FRAMEWORK

[25] Given the positions taken by the parties on this application, I set out below for early reference, the following relevant provisions under the ***Charter***, ***The Public Health Act*** and the ***Criminal Code***.

[26] Sections 1, 2(a), 2(b), 2(c), 7 and 15 of the ***Charter*** provides as follows:

> **Rights and freedoms in Canada**
>
> 1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society
>
> **Fundamental freedoms**
>
> 2 Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly.
>
> . . .
>
> **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.
>
> . . .
>
> **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.

[27] Section 3 of ***The Public Health Act*** provides as follows:

> **Limit on restricting rights and freedoms**
>
> 3 If the exercise of a power under this Act restricts rights or freedoms, the restriction must be no greater than is reasonably necessary, in the circumstances, to respond to a health hazard, a communicable disease, a public health emergency or any other threat to public health.

[28] Section 176 of the ***Criminal Code*** provides as follows:

> **Obstructing or violence to or arrest of officiating clergyman**
>
> 176(1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who
>
> (a) by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent an officiant from celebrating a religious or spiritual service or performing any other function in connection with their calling, or
>
> (b) knowing that an officiant is about to perform, is on their way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a)
>
> (i) assaults or offers any violence to them, or
>
> (ii) arrests them on a civil process, or under the pretence of executing a civil process.
>
> **Disturbing religious worship or certain meetings**
>
> (2) Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.
>
> **Idem**
>
> (3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on a summary conviction.

[29] A more full discussion of these specific sections (along with the governing jurisprudence and the applicable legal tests) will be set out in the analysis section of this judgment.

V. STANDARDS OF REVIEW

[30] The issues in this case set out at paragraph 23 are all subject to different standards of review.

[31] Any review in respect of whether Manitoba has infringed any of the substantive ***Charter*** rights found under ss. 2, 7 and 15, is a review subject to a standard of correctness. However, if and where, as in the present case, a ***Charter*** right has been restricted, the standard of review respecting the justificatory framework (s. 1) may then become somewhat more complex. Where a ***Charter*** right has been infringed or restricted, the justificatory framework to be applied will depend upon the source of the breach. The salient question in that regard will be whether the source of the breach is connected to an administrative decision or statutory instrument.

[32] The issue to be determined by the Court as it relates to the standard of review in this case (concerning the justificatory framework on any ***Charter*** violations) is rooted in whether the CPHO's orders should be reviewed as delegated administrative decisions, or rather, more like statutory instruments. This question was addressed by Abella J. in ***Doré v. Barreau du Québec***, 2012 SCC 12. In that case, she noted a distinction between the analytical approach to be taken when reviewing the constitutionality of a law as compared to when reviewing an administrative decision that is said to violate the rights of particular individuals in a more administrative context. Where a court is reviewing the constitutionality of a law, the ***Oakes*** test is to apply (see ***R. v. Oakes***, [1986] 1 S.C.R. 103). Where a court is reviewing an administrative decision that is said to violate the rights of particular individuals, the question is whether that decision reflects a

proportionate balancing between the ***Charter*** rights and the objective of the measure. In the context of that review, the standard of review is reasonableness. It should be noted however, that if the administrative decision relates to whether an enabling statute violates the ***Charter***, the standard of review is correctness.

[33] In the present case, are the ***Charter*** infringing orders to be reviewed as delegated administrative decisions or more like statutory instruments?

[34] In ***Beaudoin v. British Columbia***, 2021 BCSC 512, at paragraphs 120, 124 and 212-221, Hinkson C.J. had occasion to apply the ***Doré*** framework to a review of the British Columbia chief public health officer's orders which orders *prima facie* violated s. 2 of the ***Charter***. Chief Justice Hinkson determined that the public health orders were more akin to an administrative decision under delegated authority than a law of general application. In that context, he determined that the chief provincial health officer was entitled to deference especially in the areas of science and medicine relating to COVID-19 and accordingly, the appropriate standard of review was reasonableness. Taking a different approach in the context of a similar challenge, the court in ***Taylor v. Newfoundland and Labrador***, 2020 NLSC 125, determined the case before it to be a ***Charter*** challenge to public health orders of general application issued by the province's chief medical officer of health. The court chose to apply the s. 1 ***Oakes*** test. In that instance, the orders at issue restricted travel into the province to prevent the spread of COVID-19.

[35] When I examine the background to the PHOs in the Manitoba context, I note that flowing from s. 67 of ***The Public Health Act***, Manitoba's CPHO exercises delegated

authority to issue PHOs with the approval of the minister. Different types of orders are contemplated under s. 67, some more specific and some more broad. In other words, some orders may apply to specific persons or places. For example, the CPHO may give directions to a particular healthcare organization to manage the threat or order a particular place to close. Some orders conversely, may be more broad where for example, the CPHO may restrict all public gatherings.

[36] When I examine the nature of the challenged PHOs in this case and the nature of their application, I am in agreement with Manitoba's suggestion that the impugned PHOs relating to gatherings and places of worship are, in essence, akin to legislative instruments of general application rather than an administrative decision that affects only particular individuals (see ***Springs of Living Water Centre Inc. v. The Government of Manitoba***, 2020 MBQB 185, at paragraphs 50-51). Given the nature of these orders, the restrictions on the ***Charter*** rights seem more appropriately reviewable under the justificatory framework of the s. 1 ***Oakes*** test rather than under the ***Doré*** framework. So while any restrictions on ***Charter*** rights found in this case will be reviewed and by necessity, justified under the s. 1 ***Oakes*** test, I, like Manitoba, acknowledge that the standard of review for these public health orders is not entirely clear or certain. It remains a reasonable argument that the impugned PHOs could also be properly reviewed as an administrative decision of delegated authority attracting the reasonableness review as set out under ***Doré***.

[37] Having now stipulated the reference point for review of possible justification of any ***Charter*** breaches in the present case (a review based on the ***Oakes*** test rather than

the ***Doré*** framework), I will once again note my agreement with Manitoba by saying that in the unique and particular circumstances of this case, little turns on the distinction between the ***Doré*** proportionality analysis and a formal application of the ***Oakes*** test under s. 1. As the Supreme Court of Canada has noted, the ***Doré*** proportionality analysis finds "analytical harmony" with and "works the same justificatory muscles" as the ***Oakes*** test (see ***Loyola High School v. Quebec (A.G.)***, 2015 SCC 12, at paragraph 40). Also, I note that under either framework, considerable deference is contemplated vis-à-vis the decision maker. Underscoring the point, Abella J. noted in ***Doré*** at paragraph 57 that both frameworks "contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies" when balancing ***Charter*** rights and broader objectives. In this connection, I note that Chief Justice Hinkson in ***Beaudoin*** specifically observed that deference was particularly appropriate when a court is addressing complex areas of science and medicine in relation to COVID-19, which he quite reasonably acknowledged, courts are not well suited to resolve. I will return later in this judgment (at paragraphs 280-83) to the complex and nuanced subject of "deference" respecting the assessment of what may be reasonable and justified limits where governmental decision making infringe upon fundamental constitutional freedoms.

[38] If as I noted above, the standard of review when using the s. 1 justificatory framework (for ***Charter*** breaches) remains less clear, the standard of review respecting the administrative law and the division of powers issues are more certain.

[39] The administrative law question respecting the compliance of the impugned PHOs in relation to s. 3 of ***The Public Health Act*** is reviewable on a standard of

reasonableness (see ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65).

[40] The questions surrounding the paramountcy issue is properly characterized as a constitutional question relating to the division of powers, which accordingly, requires a review on a standard of correctness (***Vavilov***, at paragraph 55).

VI. THE EVIDENCE ADDUCED

[41] As noted, the evidence received on this application came by way of a voluminous number of affidavits (and in many cases, via the attached reports and associated documents) and by way of in-court cross-examination of many of those affiants, particularly those who provided expert opinion evidence. While occasional objections were made respecting the scope and/or relevance of some of the opinion evidence, the respective parties did not directly challenge the qualifications and expertise of the many learned witnesses who provided their opinion, both in their affidavits and later, *viva voce*. Many, if not most of the affiants and/or witnesses, had impressive medical, nursing and/or academic backgrounds in areas related and relevant to public health generally, and in some cases, virology and immunology more specifically. Despite the absence of any direct challenge to the qualifications and expertise of the party's respective expert witnesses, given the issues and the governing legal tests, the cogency, persuasiveness and the weight to be given much of that expert evidence was nonetheless called into question by both parties, directly and indirectly, in cross-examination and in oral and written argument.

[42] The following individuals provided an affidavit(s) on behalf of the applicants:

- Christopher Lowe - sworn December 30, 2020 and March 25, 2021 – *pastor at Gateway Bible Baptist Church*
- Thomas Rempel - affirmed January 7 and March 26, 2021 – *deacon at Redeeming Grace Bible Church*
- Riley Toews - affirmed January 5 and March 24, 2021 – *pastor at Grace Covenant Church*
- Tobias Tissen - affirmed January 5 and March 26, 2021 – *minister at The Church of God*
- Ross MacKay - affirmed January 4 and April 1, 2021 – *self-employed resident of Winnipeg, Manitoba, who attended the Hugs Over Masks rally in Steinbach, Manitoba on November 14, 2020*
- Dr. Jay Bhattacharya - sworn January 5 and March 31, 2021 - *a world-renowned epidemiologist, medical doctor, PhD in economics, and full professor at Stanford University*
- Dr. Thomas Warren - sworn March 30, 2021 – *infectious diseases specialist and medical microbiologist currently practicing in Oakville, Milton, and Georgetown, Ontario*
- Dr. Joel Kettner - sworn April 1, 2021 – *associate professor in the Department of Community Health Sciences at the College of Medicine, University of Manitoba. Former chief medical officer of health and chief public health officer for Manitoba (1999-2012), regional medical officer of health in urban, rural and northern parts of Manitoba (1990-1999), and clinical work in general practice, emergency urgent care medicine*
- David Hersey - sworn April 20, 2021 – *senior paralegal at the Justice Centre for Constitutional Freedoms in Calgary, Alberta*

[43] The following individuals provided an affidavit(s) on behalf of Manitoba:

- Dr. Jared Manley Peter Bullard – affirmed March 5 and April 29, 2021 – *associate professor and section head of infectious diseases in the Department of Pediatrics & Child Health and Medical Microbiology at the University of Manitoba; associate medical director of Cadham Provincial Laboratory*
- Dr. Carla Loeppky – affirmed March 4 and April 30, 2021 – *PhD in Community Health Sciences; director and lead epidemiologist in the Epidemiology and Surveillance Unit in the Department of Health, Seniors and Active Living with*

the Government of Manitoba; assistant professor in the Department of Community Health Services, Max Rady College of Medicine, University of Manitoba

- Dr. Jason Kindrachuk – affirmed March 2 and April 29, 2021 – *PhD in biochemistry; assistant professor and Canada research chair in emerging viruses in the Department of Medical Microbiology & Infection at the University of Manitoba. Currently seconded as part of a 12-month research partnership agreement at the Vaccine and Infectious Disease Organization at the University of Saskatchewan leading and facilitating national COVID-19 research response efforts*

- Szilveszter Jozsef Komlodi – affirmed March 5, 2021 – *assistant deputy minister of Fiscal Management and Capital Planning with the Treasury Board Secretariat of the Government of Manitoba*

- Lanette Siragusa – affirmed March 5 and April 30, 2021 – *provincial lead health service integration and quality, and chief nursing officer with Shared Health Manitoba and assistant professor with the College of Nursing, University of Manitoba*

- Dr. Brent Roussin – affirmed March 8 and April 30, 2021 - *Manitoba's chief public health officer*

- Dr. James Blanchard – affirmed April 20, 2021 – *professor in the Department of Community Health Sciences, University of Manitoba; Canada research chair in Epidemiology and Global Public Health; and executive director of the Institute for Global Public Health, University of Manitoba*

[44] Of the above identified list of affiants for both the applicants and Manitoba, the following were subject to in-court cross-examination:

- Tobias Tissen

- Dr. Jay Bhattacharya

- Lanette Siragusa

- Dr. Jason Kindrachuk

- Dr. Carla Loeppky

- Dr. James Blanchard

- Dr. Brent Roussin
- Dr. Jared Manley Peter Bullard
- Dr. Thomas Andrew Warren
- Dr. Joel Kettner

[45] The evidence set out by Manitoba in the affidavits (identified at paragraph 43) provides much of the relevant background and context to the impugned PHOs and the related administrative and constitutional issues. That evidence includes the foundational basis — scientific and otherwise — for Manitoba's decisions and line drawing in relation to the restrictions imposed in the accompanying and impugned PHOs. Conversely, the evidence produced by the applicants (identified at paragraph 42) includes contrary scientific expert opinion, which contrary evidence, calls into question some of the science inextricably tied to and relied upon by Dr. Roussin in his decisions to issue the impugned PHOs.

[46] In the section that follows, I set out the submissions of the parties respecting the evidence adduced. The submissions largely represent the positions of the parties as it relates to the evidentiary foundation for their respective positions, legal and factual. Although most of the evidence adduced has a more obvious relevance to the ***Charter*** issues, the evidence in this case is also pertinent to and constitutes a backdrop for the administrative law issue and to a considerably lesser extent, to the somewhat more purely legal question regarding the division of powers. The submissions reflect both the oral and written presentation by the parties to the Court and they include specific reference to the evidence.

VII. SUBMISSIONS OF THE PARTIES RESPECTING THE EVIDENCE ADDUCED

[47] The evidence adduced by both parties in this case was voluminous and often complex. To fairly represent their positions on the evidence presented, I set out below as fully as possible, the submissions made to the Court.

[48] The adjudication on this application (taking place as it does in the midst of a pandemic) represents one of the first cases in Canada where the constitutional challenge to the public health restrictions is accompanied by full and corresponding evidence challenging and attacking the science upon which the government in question (in this case Manitoba) relies. As such, it behooves this Court to ensure that while obviously summarized, as complete an account as possible of the evidence and the related positions of the parties is outlined. In this way, while my related and relevant legal determinations will be seen to dispose of the constitutional issues before me, they will also be seen as a purposeful consideration but ultimately, a clear rejection of much of what the applicants submit as their foundational challenge to the science upon which Manitoba has relied and acted.

[49] As part of the presentation below setting out the submissions of the parties respecting the evidence on this application (both in affidavit and in cross-examination), I will where necessary and relevant (specifically in reference to the cross-examinations), provide my own assessment and evaluation of the evidence. I will do so in terms of its weight, cogency and persuasiveness in relation to the positions advanced by the parties and in relation to the relevant determinations I must make to decide this case, which determinations are made and further explained later in this judgment in the analysis

section. Those determinations should be assumed to be a product of a complete review of the available and in some cases, differing scientific evidence.

[50] Having observed, listened to and re-examined the totality of the evidence (and the submissions of the parties in respect of that evidence) it is my view that this is not a case where stark, zero-sum determinative findings of credibility need or will be made to rationalize divergent positions based on differing views and interpretations of what some say is the evolving scientific information. In other words, where, for example, the applicants' experts' evidence challenges Manitoba's experts on their interpretation of the science, absent a clear determination that the science that Manitoba's experts rely upon is wrong (a determination which I most definitely do not make), the determinative and salient question is not which experts do I completely accept or reject based on credibility or otherwise. Rather, to the extent differences in the expert evidence exists, the real question in the context of the issues that have been pled — particularly in relation to Manitoba's s. 1 defence — is whether there is nonetheless, a sufficiently sound and credible evidentiary basis (even in light of any opposing evidence) for Manitoba's claim that the limitations and restrictions placed on certain fundamental freedoms represent valid policy approaches which are reasonably justified and constitutionally defensible in Canada's free and democratic society. Put differently, after a review of any contrary scientific evidence and challenge, does there nonetheless remain a credible evidentiary record that supports Manitoba's position that any restrictions on the identified fundamental freedoms are rationally connected, minimally impairing and reasonable and

proportionate public health policy choices vis-à-vis what are acknowledged and conceded to be, Manitoba's pressing and substantial public health objectives?

A. SUBMISSION OF MANITOBA RESPECTING THE AFFIDAVIT EVIDENCE ADDUCED

[51] Given some of Manitoba's concessions respecting its infringement of s. 2 of the ***Charter*** and the resulting onus it bears under s. 1 to show that the infringements are justified in a free and democratic society, I will for the sake of coherence and clarity commence with the submissions made by Manitoba.

[52] To the extent the evidence does indeed support or establish what is set out below, Manitoba submits that if and where ***Charter*** infringements have occurred in the present case, they are infringements that are constitutionally defensible. In other words, Manitoba contends that the evidence reveals that there is a rational connection between the public health objectives and the impugned provisions and that the impugned restrictions minimally impair any ***Charter*** rights they infringe. No less important is Manitoba's position that the evidence demonstrates that any of the deleterious effects of the restrictions are far outweighed by the salutary benefits resulting from them.

(i) SARS-CoV-2 and the COVID-19 Pandemic

[53] On January 30, 2020, the World Health Organization declared the COVID-19 pandemic a Public Health Emergency of International Concern. COVID-19 is a disease caused by a novel coronavirus called SARS-CoV-2. The first case was identified in Wuhan, China, in December 2019 but soon spread all over the world. As of early March, there were 114 million cases and more than 2.5 million deaths. The numbers continued to

climb. The first known case of the virus in Manitoba was on March 12, 2020.[3] As of early February 2021 there have been over 30,000 cases in Manitoba and more than 2,500 serious cases including hospitalizations or deaths.[4]

[54] COVID-19 is highly communicable and contagious. The virus spreads from person to person through respiratory droplets and aerosols (smaller droplets) that are expelled when a person breathes, talks, coughs, sneezes, sings or shouts. It is primarily transmitted when the virus comes into contact with another person's nose, mouth or eyes. It may also be spread when a person touches another person (e.g., handshake) or touches a surface containing the virus and then transfers it to their mucous membrane.[5]

[55] Scientific studies have demonstrated that SARS-CoV-2 can be transmitted by persons who are asymptomatic (those who never develop symptoms) and especially those who are pre-symptomatic (those who do not yet display symptoms but will develop them). There is strong scientific evidence that transmission of SARS-CoV-2 primarily occurs from a few days before symptom onset until about five days after.[6] While healthy children (at least prior to the increasingly dangerous virulent variants) tend to experience less severe disease, they can transmit the virus. There is evidence that older children and teenagers can spread the virus as efficiently as adults.[7]

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[3] Affidavit of Dr. Brent Roussin [Roussin], paras. 21-22
[4] Affidavit of Dr. Carla Loeppky [Loeppky], Exhibit H
[5] Roussin, paras. 24-26, Exhibit 3; Affidavit of Dr. Jason Kindrachuk [Kindrachuk], Exhibit B, pp. 6-7
[6] Roussin, para. 26; Kindrachuk, Exhibit B, pp. 7-10
[7] Roussin, para. 26; Kindrachuk, Exhibit B, p. 10

[56] Since the virus is typically spread through respiratory droplets, gatherings involving prolonged close contact are of particular concern. According to Health Canada guidelines, a high-risk exposure (close contact) includes anyone who has shared an indoor space with a positive case for a prolonged period (15 minutes over a 24-hour period). Certain locations and activities pose a greater risk. Most transmission occurs in indoor settings, especially with poor ventilation. Singing, talking loudly or breathing heavily can also increase the risk of transmission. This explains why gathering in places such as fitness classes, theatres, restaurants, places of worship and choir practice are identified as of particular concern. Multiple super-spreader events have been linked to close contacts including at places of worship.[8] In Manitoba, Epidemiology and Surveillance identified a number of clusters or outbreaks in relation to faith-based gatherings or funerals in many regions of the province, which is consistent with data from other jurisdictions and the scientific literature.[9] For the same reason, private residences have been identified as a significant source of transmission.[10]

[57] COVID-19 entails a range of clinical symptoms. The most common symptoms include fever, cough, fatigue, shortness of breath, loss of appetite, loss of smell and taste. The disease can vary widely in seriousness. Some people remain asymptomatic. Others experience relatively mild symptoms or feel very ill but recover fully. But for some, COVID-19 is very serious leading to hospitalization, ICU admission or death. Older adults (over age 60) and people of any age with a variety of underlying medical conditions are

[8] Roussin, paras. 26-27, 155-160, Exhibits 12 and 13; Kindrachuk, Exhibit B, pp. 11-12
[9] Loeppky, para. 14; Roussin, para. 160
[10] Affidavit of Dr. Jay Bhattacharya, sworn January 5, 2021 [Bhattacharya 1], Exhibit C, pp. 19, 26

at greater risk of experiencing severe disease and outcomes. Among others, these underlying comorbidities include heart disease, lung disease, hypertension, diabetes, kidney disease, liver disease, obesity, along with other immunocompromised individuals (e.g., persons with cancer or undergoing chemotherapy).[11]

[58] In Manitoba, data current to February 8, 2021 shows that 8.1 per cent of all COVID-19 cases are very severe, resulting in hospitalization or death. While a large majority of deaths have occurred in people over age 60, fatalities are not limited to that category. Moreover, approximately one third of hospitalizations in Manitoba and 44 per cent of ICU admissions have been in persons under the age of 60.[12] Indigenous people in Manitoba are also more vulnerable to COVID-19. For example, a disproportionate number of COVID-19 cases (31 per cent) have been First Nations persons, more than half of which have been off reserve. Among First Nation individuals, the median age is 51 for hospitalizations and 57 for ICU admissions.

[59] For a certain segment of the population, COVID-19 has resulted in persistent long-term symptoms (sometimes serious), such as difficulty breathing. These "long hauler" cases are not limited to an older demographic. In one journal, it was estimated that 10 per cent of people infected with COVID-19 experienced prolonged symptoms. An Italian study suggested 44 per cent of recovered COVID-19 patients reported a worsened quality of life. However, further study is needed and it remains too early to draw any firm conclusions about the long-term effects.[13]

[11] Roussin, paras. 30-33
[12] Roussin, paras. 33-35, Exhibits 4 and 21; Loeppky, Exhibit H
[13] Roussin, para. 36; Kindrachuk, p. 15

[60] SARS-CoV-2, like all viruses, changes as it replicates. Many of these mutations are of little clinical significance. However, the more the virus is allowed to spread, the greater the opportunity for variants of concern to develop. These variants may exhibit increased transmissibility or disease severity. They may also impact the efficacy of vaccines or therapeutic treatments. As of the spring of 2021, three variants of concern have been identified, which are present in Manitoba.[14]

[61] SARS-CoV-2 is a new human virus. While far more is known about the virus today than at the beginning of the pandemic in early 2020, much uncertainty remains. The state of scientific knowledge continues to evolve rapidly and many studies continue around the world to shed light on difficult questions such as whether immunity is lasting after exposure or vaccination, the impact on children, variants of concern, potential long-term effects of COVID-19, the efficacy of non-pharmaceutical interventions, among many others. Studies are likely to continue long after the pandemic ends. Despite the uncertainty, public health decisions must be made quickly, in real time and under rapidly changing epidemiological situations as the pandemic unfolds. These decisions are based on the best available scientific evidence at the time.[15]

(ii) Manitoba's Pandemic Response

[62] The office of the chief public health officer along with the Department of Health and Seniors Care play a leading role in Manitoba's response to the COVID-19 pandemic. They work closely with many specialists in a variety of health disciplines. In February

[14] Roussin, paras. 28-29; Kindrachuk, Exhibit B, pp. 16, 17, 18
[15] Roussin, paras. 37-45; Kindrachuk, Exhibit B, pp. 14-17

2020, Manitoba established an Incident Command structure to manage the pandemic response. It is co-chaired by Chief Public Health Officer Dr. Brent Roussin and Chief Nursing Officer Lanette Siragusa of Shared Health Manitoba. In addition to the Incident Command, Manitoba has established a Testing Task Force to oversee testing initiatives, the Centralized COVID Cases and Contact Team to operate contact tracing and the Vaccine Task Force to plan and conduct vaccinations.[16]

[63] Notably, Dr. Roussin and his team continually review new scientific evidence as it emerges from around the world. He notes that officials in Manitoba work collaboratively with their counterparts and experts from across Canada and internationally to share knowledge, experience and best practices. The fight against COVID-19 has been the subject of extensive interjurisdictional coordination and efforts. The CPHO's office regularly participates in meetings of federal-provincial-territorial special advisory and technical advisory committees to coordinate the response and share the most up-to-date information about COVID-19. Weekly meetings are held among the chief medical officers of health from every Canadian jurisdiction. Canada's Chief Public Health Officer Dr. Tam, is also in regular contact with her international counterparts to keep abreast of evolving scientific knowledge and best practices.[17]

[64] When it comes to public health decision making, a wide variety of experts regularly share information upon which the CPHO can rely. This includes public health experts, epidemiologists, basic scientists such as virologists and immunologists, laboratory experts, acute care specialists and other health care professionals, policy analysts, the

[16] Roussin, paras. 15-19
[17] Roussin, paras. 42-45

Department of Health and Seniors Care and elected officials.[18] Dr. Roussin also brings to bear his expertise in Public Health and Preventive Medicine, a medical specialty concerned with the health of populations.

[65] In addition to meeting the requirements of ***The Public Health Act***, the CPHO follows the principles underlying sound and ethical public health decision making, namely: effectiveness, proportionality, necessity, least infringement and public justification. These principles have also been summarized as: (1) the harm principle; (2) least restrictive or coercive means; and, (3) reciprocity (public assistance for citizens who comply with their duties) and transparency (e.g., engaging with affected stakeholders).[19]

(iii) *Public Health Orders are Progressive and Responsive to the Course of the Pandemic*

[66] As Dr. Roussin explains, since March 2020, Manitoba has implemented a variety of measures in response to the COVID-19 pandemic, which are generally consistent with measures seen across Canada and the rest of the world. The public health consensus is that limiting the number and duration of contacts is necessary to prevent the exponential spread of SARS-CoV-2 and keep it within manageable limits. If the number of serious COVID-19 cases overwhelms our healthcare system, this will result in greater morbidity and death including for non-COVID-19 patients. Hence the need to "flatten the curve". The precise scope and extent of measures are informed by the circumstances of the pandemic, epidemiological evidence and a variety of key indicators such as the rate of growth, increases in serious outcomes (hospitalizations, ICU admissions and deaths), the

[18] Roussin, para. 41
[19] Roussin, para. 54

extent of community transmission, clusters, test positivity rates, capacity for testing and contact tracing and of critical importance, the strain on the healthcare system.[20]

[67] The public health orders are not static. Public health officials have continually monitored the fluid and evolving pandemic and have, they say, modified the public health measures progressively to ensure they are responsive to prevailing epidemiological evidence and proportionate.

[68] The early response to the pandemic in the spring of 2020 was characterized by limited knowledge and tremendous uncertainty. Public health officials had witnessed what had happened in places like Italy and New York. Starting in March 2020, indoor and outdoor gatherings, including places of worship, were limited to 50 people. Retail establishments remained open with physical distancing, but theatres and gyms were closed. Restaurants and hospitality premises were limited to the lesser of 50 people or 50 per cent capacity. Gathering limits were reduced to 10 on March 30. Starting April 1, business not listed in a schedule were closed except for online, pick up and delivery. Restaurants were restricted to delivery and take out. At no time did the PHOs place any restrictions on the delivery of health care. Fortunately, Manitoba was spared widespread community transmission and did not experience a large number of cases during the first wave of the pandemic in the spring of 2020.[21]

[69] Beginning May 22, 2020, the gathering restrictions were relaxed to allow 25 people indoors and 50 people outdoors, including places of worship. This reflected the growing understanding that the risk of transmission was greater in indoor settings. As the summer

[20] Roussin, paras. 58, 86-89
[21] Roussin, paras. 94-95

progressed, restrictions were gradually and progressively eased. By June 21, gathering sizes generally increased to 50 people indoors or 100 people outdoors. Many businesses opened to 75 per cent capacity subject to physical distancing requirements. By July 24, businesses could generally fully reopen at full capacity with physical distancing, unless otherwise specified in the orders. Religious services were permitted up to 500 persons or 30 per cent capacity. These restrictions continued essentially in this form until the fall. While life certainly did not return completely to normal, despite the ever-present spectre of COVID-19, the temporarily improving circumstances were accompanied by a significant relaxation of public health restrictions and more freedom to gather.[22]

(iv) Fall 2020 - The "Circuit Break"

[70] Things changed dramatically when the second wave hit in the fall of 2020. Particularly after Thanksgiving, the virus began to spread rapidly throughout the community in an uncontrolled manner. The Capital Region was placed under Level Red (Critical) restrictions by the end of October and ten days later, on November 12, the entire province followed suit. The rising number of serious COVID-19 cases was threatening to overwhelm the capacity of our hospitals and ICUs to cope. Manitoba's healthcare system was said to be on the precipice. Unless urgent action was taken to regain control of the virus and significantly reduce the number of hospitalizations and ICU admissions, Manitoba was on the verge of exceeding the ability to deliver urgent care for patients, whether for COVID-19 or otherwise. Swift and decisive action was seen as

[22] Roussin, paras. 98-99. A more detailed chronology of the public health orders pertaining to gatherings and places of worship leading up to, during and after the circuit break can be found at Roussin, paras. 107-154

essential. The impugned PHOs were intended as a "circuit break" to flatten the curve and avoid even greater loss of life or serious illness than was already being experienced.[23]

[71] The CPHO's assessment was based on a variety of key indicators, current epidemiological evidence and modelling presented to him on October 15 and again on November 10, 2020. This evidence included the following:

i) Manitoba was experiencing exponential growth of the virus. New cases were doubling every two weeks.[24] Cases escalated shortly after Thanksgiving (October 12). During the week of October 19-24, Manitoba had 1,038 new cases of COVID-19, close to the higher end of the projected range in the model. There was a significant spike of 480 new cases in one day on October 30. The case numbers were expected to continue rising, leading to greater hospitalizations and death.[25]

ii) Manitoba had the highest per capita rate of active COVID-19 cases in the country.[26]

iii) The test positivity rate had soared to over 10.5 per cent provincially.[27]

iv) Community spread had started to occur rampantly in all regions of the province.[28]

v) The dramatic rise in COVID-19 cases put the effectiveness of the contact

[23] Roussin, paras. 99-106, 147-151
[24] Loeppky, para. 16; Roussin, para. 102
[25] Affidavit of Lanette Siragusa [Siragusa], para. 15; Loeppky, paras. 16-17, Exhibits E, F, H
[26] Roussin, para. 102
[27] Roussin, para. 102
[28] Roussin, paras. 100, 102; Loeppky, para. 16

tracing program in jeopardy.[29] This is a key public health tool used to prevent the spread of a virus.

vi) Cases in young adults (aged 20-39) and seniors (aged 60 and older) were increasing very quickly. The latter group being at highest risk of severe outcomes. The impact on older and vulnerable populations was very concerning. First Nations had a test positivity rate of over 12 per cent and a disproportionate number of COVID-19 cases.[30]

vii) COVID-19 related deaths and hospitalizations were rapidly escalating. Epidemiological data shows that 7 per cent of people diagnosed with COVID-19 required hospitalization and 1.3 per cent will require ICU care.[31] When active cases of COVID-19 surge, the system can expect hospitalizations to rise about 10 days later.[32]

viii) The healthcare system was under tremendous strain. Elective surgeries were delayed because there was a need to redeploy medical staff to critical care, medicine and personal care homes to handle COVID-19 cases. This was exacerbated by the fact some hospital staff were also exposed to the virus.[33]

ix) Modelling presented on November 10 showed that Manitoba was tracking along the worst-case scenario in terms of number of cases. Case numbers

[29] Loeppky, para. 17
[30] Roussin, para. 103; Loeppky, para. 17
[31] Roussin, para. 103; Loeppky, paras. 9, 17
[32] Siragusa, para. 15
[33] Siragusa, paras. 10-11

were expected to rise to 400-1,000 new cases each day by December 2020. Deaths were also expected to rise sharply, potentially doubling to 219 on December 10 with an estimated range of up to 597 deaths on that date. In fact, as of December 10, Manitoba experienced 478 deaths, at the higher end of the projected range.[34]

x) Modelling projected that without intervention, the rapid rise in infections could soon overwhelm our acute care system. COVID-19 patients were projected to require Manitoba's total capacity to provide ICU care by November 23 and would require 100 per cent of Manitoba's capacity to staff clinical hospital beds by mid-December 2020, leaving no room for other patients. The model was based on a maximum ability to provide ICU care for 124 patients. Manitoba's pre-COVID ICU capacity was 72 patients so the system was already under significant strain. On November 17, there were discussions about developing a triage policy to determine who would receive care in the event critical care resources were depleted. Surgical wards were transitioned into COVID-19 Medicine Units and staff were redeployed to create additional ICU capacity.[35]

xi) There was concern that the rise in COVID-19 numbers would coincide with the Christmas holiday season when many hospital staff had planned vacation. Most staff were not able to pick up extra shifts to fill scheduling

[34] Loeppky, paras. 16, 18, Exhibits E and F, pp. 32, 39, 44, 46
[35] Roussin, para. 104 ; Siragusa, paras. 16-18; Loeppky, paras. 15-18, Exhibits E and F, pp. 32, 39, 44, 46

gaps due to stress and exhaustion.[36]

xii) Numerous protocols and precautions had been implemented to protect vulnerable populations in congregate living settings such as personal care homes and on First Nations communities. These measures worked well in the spring and summer but unfortunately, despite these efforts, outbreaks had occurred in these high-risk settings.[37]

xiii) Nine clusters associated with faith-based gatherings, including choir practice and funerals, were identified to have occurred in the fall of 2020.[38]

[72] As a result of added the burden of COVID-19, on December 10-11, 2020, Manitoba reached a peak of 388 hospitalizations and 129 patients in ICU.[39] Therefore, at its peak, COVID-19 resulted in significantly more patients who required ICU care than the system would normally handle (79 per cent more than the usual 72 patients).

[73] Dr. Roussin and public health officials took into account the unintended effects of the restrictions such as adverse economic or mental health impacts but in light of the gravity of the situation, believed these were the minimum measures necessary to protect public health.[40]

[74] After the restrictions were put in place, COVID-19 numbers began to decline, consistent with what the modelling predicted.[41] The Level Red public health measures implemented during the fall of 2020 along with the public's cooperation and compliance

[36] Siragusa, para. 20
[37] Siragusa, para. 22; Roussin, para. 165, Exhibits 14-16
[38] Loeppky, para. 14
[39] Siragusa, para. 19
[40] Roussin, para. 87
[41] Loeppky, para. 20, Exhibit F, pp. 50-51 and Exhibit G, pp. 15, 17

with those PHOs changed the trajectory of COVID-19 cases and eased the burden on acute care resources. Manitobans flattened the curve and avoided a disastrous situation.[42]

(v) The Impugned Public Health Orders

[75] November 12, 2020 was the first day of the province-wide "Circuit Break" PHO. At that time, places of worship had to close to in-person religious services. Gatherings were limited to five persons. Starting November 20, 2020, persons were also no longer allowed to gather in private residences subject to certain exceptions, including for health care, personal care and educational instruction or tutoring.[43]

[76] The applicants challenge specific orders from three PHOs that were in effect during three different time periods:

(i) Orders 1(1), 2(1), 15(1) and 15(3) of the November 21, 2020 PHO, in effect from November 22 until December 11, 2020.

(ii) Orders 1(1), 2(1), 16(1) and 16(3) of the December 22, 2020 PHO, in effect from December 23, 2020 to January 8, 2021.[44]

(iii) Orders 1(1), 2(1), 16(1) and 16(3) of the January 8, 2020 PHO, in effect from January 8 to January 22, 2021.

[42] Siragusa, para. 21; Loeppky, para. 22
[43] Roussin, paras. 147-150
[44] The applicants do not challenge the PHO in effect from December 11 to December 22, however, there was no material difference from the orders that followed on December 22, 2020 or January 8, 2021

[77] Order 1 in each of these impugned PHOs dealt with restrictions on gatherings at private residences. The November 21 PHO provided:

> ORDER 1
>
> 1(1) Subject to subsections (2) and (3), a person who resides in a private residence must not permit a person who does not normally reside in that residence to enter or remain in the residence.
>
> 1(2) Subsection (1) does not prevent a person from entering the private residence of another person for any of the following purposes:
>
> (a) to provide health care, personal care or housekeeping services;
>
> (b) for a visit between a child and a parent or guardian who does not normally reside with that child;
>
> (c) to receive or provide child care;
>
> (d) to provide tutoring or other educational instruction;
>
> (e) to perform construction, renovations, repairs or maintenance;
>
> (f) to deliver items;
>
> (g) to provide real estate or moving services;
>
> (h) to respond to an emergency.
>
> 1(3) A person who resides on their own may
>
> (a) have one other person with whom they regularly interact attend at their private residence; and
>
> (b) attend at the private residence of one person with whom they regularly interact.

[78] Order 1 of the December 22, 2020 and January 8, 2021 impugned PHOs were substantially the same. Exceptions were added in subsection 1(2) for a landlord to enter a rented premises and for the purpose of moving residences. Subsection 1(3) was renumbered as 1(4). A new subsection 1(3) added an exception allowing persons to attend at a home-based business that was permitted to open under the PHO. A new

subsection 1(5) allowed university and college students to live at the private residence of another person in the community where the university or college is located.

[79] Order 2 in each of the impugned PHOs limited public gatherings to five people, except as otherwise permitted. The November 21 PHO provided:

> ORDER 2
>
> 2(1) Except as otherwise permitted by these Orders, all persons are prohibited from assembling in a gathering of more than five persons at any indoor or outdoor public place or in the common areas of a multi-unit residence.
>
> 2(2) This Order does not apply to a facility where health care or social services are provided or any part of a facility that is used by a public or private school for instructional purposes.
>
> 2(3) For certainty, more than five persons may attend a business or facility that is allowed to open under these Orders if the operator of the business or facility has implemented the applicable public health protection measures set out in these Orders.

[80] Order 2 remained substantially the same in the December 22, 2020 and January 8, 2021 PHOs. The one difference was that these two subsequent PHOs included the following exception for organized outdoor gatherings in cars, which had been put in place beginning on December 11, 2020:

> 2(2) This Order does not apply to an organized outdoor gathering or event which persons attend in a motor vehicle if
>
> (a) all persons stay in their motor vehicle at all times while at the site of the gathering or event;
>
> (b) persons in a motor vehicle do not interact with any person not in their motor vehicle while at the site of the gathering or event; and
>
> (c) all persons in a motor vehicle reside in the same residence or receive caregiving services from another person in the motor vehicle.

[81] Order 15 in the November 21, 2020 PHO limited gatherings at places of worship. It provided:

> ORDER 15
>
> 15(1) Except as permitted by subsections (3) and (4), churches, mosques, synagogues, temples and other places of worship must be closed to the public while these Orders are in effect.
>
> 15(2) Despite subsection (1), religious leaders may conduct services at places of worship so that those services may be made available to the public over the Internet or through other remote means.
>
> 15(3) A funeral, wedding, baptism or similar religious ceremony may take place at a place of worship provided that no more than five persons, other than the officiant, attend the ceremony.
>
> 15(4) This Order does not prevent the premises of a place of worship from being used by a public or private school or for the delivery of health care, child care or social services.

[82] Order 15 was renumbered as Order 16 in the December 22 and January 8 PHOs. The restrictions on places of worship remained substantially unchanged except that as of December 11, the following provision was added to allow places of worship to hold an outdoor religious service in vehicles, in accordance with subsection 2(2) discussed above:

> 16(4) This Order does not prevent a church, mosque, synagogue, temple or other place of worship from conducting an outdoor religious service that complies with the requirements of subsection 2(2).

[83] Starting on January 22, 2021, restrictions in impugned PHOs started to ease in light of improving indicators coming out of the Circuit Break, except in northern Manitoba and remote communities. First, outdoor gatherings were relaxed somewhat at private residences. The limit on funerals was expanded to 10 persons. On January 28, up to two persons could visit a private residence. As of February 12, the same PHO applied

province wide. Ten persons were now permitted at weddings and funerals. Places of worship could hold in-person services with up to 50 people or 10 per cent of usual capacity.[45] At the time of this hearing, a private residence could allow either two visitors or create a bubble with persons from another residence. Outdoor gatherings had been expanded up to 10 persons on private property or 25 persons on public property. Regular in-person religious services could have up to 100 people or 25 per cent of usual capacity.[46]

B. SUBMISSION OF THE APPLICANTS RESPECTING THE AFFIDAVIT EVIDENCE ADDUCED

[84] In addition to and separate from their positions on the other identified questions in issue, the applicants have adduced evidence which they submit demonstrates that Manitoba has not met the requisite onus so as to establish that the restrictions in the impugned provisions of the public health orders are constitutionally justified pursuant to the governing test in connection to s. 1 of the ***Charter***. The applicants submit that the totality of the evidence (which obviously includes their own experts and their cross-examination of Manitoba's experts) reveals that there is no rational connection between the public health objectives and the impugned provisions. Neither say the applicants is there persuasive evidence to support Manitoba's position that the impugned restrictions minimally impair the ***Charter*** rights they infringe. Further, the applicants insist that the

[45] Roussin, paras, 152-154. A more detailed history of the PHOs is set out in the affidavit at paras. 107-154

[46] COVID-19 Prevention Order (March 25, 2021)

deleterious effects of the restrictions are severe and they outweigh any salutary effects resulting from them.

[85] As part of their overall position as advanced in their own evidence and in their cross-examination of the various Manitoba experts, the applicants make certain key assertions. The applicants contend that:

- the modelling data that Manitoba used to justify the orders is flawed and unreliable;
- Manitoba failed or refused to estimate the potential years of life saved by these orders and weigh the results of those conclusions against the loss of life and profound damage resulting from the orders;
- Manitoba failed or refused to consider the opinions of between 45,000 and 50,000 medical doctors and scientists who authored and signed the *Great Barrington Declaration* advocating against "locking down" societies (the *Great Barrington Declaration* recommended taking more focussed and special precautions to protect the elderly in immunocompromised populations);
- Manitoba failed to conduct a risk assessment prior to enacting the orders and as a result, failed to account for significant harms to the public. The applicants argue that Manitoba failed or refused to correct course when they say certain legal, social and economic devastation of the orders became apparent. It is the position of the applicants that the lockdowns have caused deaths and other harms from suicide, domestic abuse, increased drug use, mental illness, delayed diagnosis and cancelled surgeries and other harms to society;

- Manitoba failed or refused to complete a cost-benefit analysis of what the applicants call "the lockdown" of the Manitoba population through the impugned orders and that Manitoba similarly failed over the progression of time, to conduct the necessary review of the disproportionate damage the orders have cost to society generally.

[86] While the applicants have argued that there are multiple factors which ought to lead this Court to the conclusion that Manitoba has not met their s. 1 onus, a fundamental part of their argument relates to what they say is the inadequacy or inconclusiveness of any supporting scientific evidence which the applicants have challenged and which they say is inextricably connected to Dr. Roussin's decisions to issue the impugned PHOs.

[87] In challenging Manitoba's scientific evidence with their own affidavit evidence and in the cross-examinations they conducted of Manitoba's expert witnesses, the applicants take aim at what they suggest is Manitoba's inadequate appreciation, misunderstanding and misuse of such factors as:

- the morbidity danger of COVID-19;
- the asymptomatic transmission of COVID-19;
- the RT–PCR testing, infectiousness and Cycle thresholds;
- herd immunity;
- the likelihood of any spread of COVID-19 outdoors;
- the ability to control the spread of COVID-19 in religious settings; and
- variants of concern.

[88] Some of the connected submissions of the applicants and their challenge to Manitoba's evidentiary foundation are set out below.

(i) Mortality Danger of COVID-19

[89] Dr. Jay Bhattacharya, a world-renowned epidemiologist, medical doctor, PhD in economics, and full professor at Stanford University, identified in his January 5, 2021 expert report that for a majority of the population, including the vast majority of children and young adults, COVID-19 poses less of a mortality risk than the seasonal influenza. According to a meta-analysis by Dr. John Ioannidis, the median infection survival rate from COVID-19 is 99.77 per cent. For COVID-19 patients under 70, the meta-analysis finds an infection survival rate of 99.95 per cent.[47]

[90] Dr. Bhattacharya wrote that a study of COVID-19 in Geneva published in the prestigious journal *The Lancet* provided a detailed breakdown of the infection survival rate: 99.9984 per cent for patients 5 to 9 years old; 99.99968 per cent for patients 10 to 19 years old; 99.991 per cent for patients 20 to 49 years old; 99.86 per cent for patients 50 to 64 years old; and 94.6 per cent for patients above 65 years old.[48]

[91] Manitoba's affiants do not dispute that COVID-19 poses the greatest risk of death to older people.

(ii) Asymptomatic Transmission of COVID-19

[92] In his January 5, 2021 affidavit, Dr. Bhattacharya identified two recent, significant peer-reviewed studies which found that asymptomatic spread of COVID-19 is significantly

[47] Bhattacharya 1, Exhibit C, p. 2
[48] Bhattacharya 1, Exhibit C, p. 3

lower than symptomatic spread. Specifically, one of the studies, a meta-analysis of 54 studies in the *Journal of American Medical Association Network Open,* confirmed that within households where none of the safeguards that restaurants are required to apply are typically applied, symptomatic patients passed on the disease to household members in 18 per cent of instances, while asymptomatic patients passed on the disease to household members in 0.7 per cent of instances.[49]

[93] Dr. Bhattacharya also cited another study of 10 million residents of Wuhan, China, who were tested for the presence of the virus. Only 300 cases of COVID-19 were found and all were symptomatic. Contact tracing identified 1,174 close contacts of these patients, and none of them tested positive for the virus.

[94] Dr. Bhattacharya concluded, based on his review of the medical literature, that asymptomatic individuals are on an order of magnitude less likely to infect others than symptomatic individuals, even in intimate settings such as households where people do not typically wear masks or socially distance. He concluded that the spread of COVID-19 in less intimate settings by asymptomatic individuals, such as in places of worship, is less likely than in households.

[95] Dr. Jason Kindrachuk, an infectious diseases specialist and assistant professor at the University of Manitoba, also discussed asymptomatic transmission. He concluded that while SARS-CoV-2 transmission is likely lower from individuals with asymptomatic infections as compared to symptomatic cases, those in the "pre-symptomatic" phase of disease appear to be able to transmit the virus similarly to symptomatic individuals.[50]

[49] Bhattacharya 1, Exhibit C, p. 8
[50] Kindrachuk, Exhibit B, pp. 9-10

[96] Dr. Bhattacharya had not previously addressed "pre-symptomatic transmission" of the disease in his January 5, 2021 expert report. In his responding affidavit, Dr. Bhattacharya attempted to address Dr. Kindrachuk's evidence by explaining that in his previously cited *JAMA Netw Open* meta-analysis study, the authors concluded that household transmission of the disease from asymptomatic and "pre-symptomatic" patients occurred 0.7 per cent of the time. He also revealed that many of Dr. Kindrachuk's studies were taken into consideration in the larger meta-analysis from *JAMA Netw Open,* which ultimately determined the vanishingly low rate of asymptomatic and pre-symptomatic transmission.[51]

(iii) *RT-PCR Testing, Infectiousness, and Cycle Thresholds*

[97] Dr. Bhattacharya explains in his January 5, 2021 report that the RT-PCR test for the SARS-CoV-2 virus is at the heart of the testing system adopted by Canada. He explains that the test amplifies the virus, if present, by a process of repeatedly doubling the concentration of viral genetic material. If the viral load is small, many doublings are required before it is possible to detect the virus. He explains that labs decide in advance how many doublings of the genetic material they will require before deciding that a sample is negative for the presence of the virus. This threshold or "cycle time" determines the rate at which a positive test result will be returned when the original sample does not include viral concentrations in sufficient amount to be infectious.

[98] Dr. Bhattacharya's evidence suggests that a higher-cycle threshold increases the false positive rate of the PCR test because even if a non-infectious viral load is present in

[51] Affidavit of Dr. Jay Bhattacharya, sworn March 31, 2021 [Bhattacharya 2] Exhibit A, p. 10

the sample obtained from the patient, a large number of permitted doublings could amplify whatever minute or fragmentary viral segment is present such that the test result is positive. A positive test result obtained in this fashion does not mean that such an individual is infectious or contagious. On the contrary says Dr. Bhattacharya, as an individual who tests "positive" using a high-cycle threshold is exceedingly unlikely, or even impossible, to be a transmission risk at all.

[99] Dr. Bhattacharya asserts that the PCR test is not the gold standard for determining whether a patient is infectious. He says that from an epidemiological point of view, infectivity measurement is more important than a measurement of whether the virus is present, since it is possible for a patient to have non-viable viral fragments present, a positive PCR test, and yet not be infectious. He cites a study published in the *European Journal of Clinical Microbiology & Infectious Diseases*, which determined that culture positivity of the virus decreased progressively by Ct values to reach 12 per cent at a Ct of 33. That means only 12 per cent of the samples spun at a Ct of 33 had a positive culture. Further, no culture was able to be obtained from samples with a Ct of greater than 34. Dr. Bhattacharya also cited a study published in top epidemiological journal *Eurosurveillance*, which found that if 27 cycles are needed for a positive test, the false positive rate is 34 per cent; if 32 cycles are needed for a positive test, the false positive rate is 92 per cent; if more than 40 cycles are needed for a positive test, the false positive rate is nearly 100 per cent.[52]

[52] Bhattacharya 1, Exhibit C, p. 37

[100] Dr. Bhattacharya noted that the WHO published an Information Notice on December 8, 2020 warning users of PCR tests and that it had received user feedback on an elevated risk for false SARS-CoV-2 results when testing specimens using PCR test.[53]

[101] The applicants acknowledge the evidence of Dr. Jared Bullard, a microbiologist employed by Manitoba who works in the Cadham Provincial Lab ("CPL") where all of the PCR tests are analyzed for COVID-19. Dr. Bullard provided an affidavit on behalf of Manitoba wherein he explained how PCR tests work and explained his practice with those tests in the lab. He admitted that the CPL uses a total of 40 cycles of amplification. He explained that specificity is the proportion of people who do not have COVID-19 that the test will call negative, and that poor specificity results in false positives. He further explains that the specificity of the PCR test is greater than 99.9 per cent — i.e., less than 1 in 1,000 will have a false positive result.[54]

[102] He stated that SARS-CoV-2 is detectable by RT-PCR for up to three months.[55]

[103] Dr. Bullard referred to his own study which found that samples with a Ct value of 25 or greater did not grow SARS-CoV-2 in cell culture, and another study published in the *Clinical Infectious Diseases Journal* (also referred to in Dr. Bhattacharya's January 5, 2021 expert report) which found that for SARS-CoV-2 in cell culture, 70 per cent had a positive culture at a Ct of 25, 20 per cent had a positive culture at a Ct of 30, and less than 3 per cent had a positive culture at a Ct of 35. Dr. Bullard asserted that if an individual tests positive, he has the SARS-CoV-2 pathogen and has been diagnosed with COVID-19.[56] He

[53] Bhattacharya 1, Exhibit C, p. 38
[54] Affidavit of Dr. Jared Manley Peter Bullard [Bullard], Exhibit C, lines 85-86, 131-136
[55] Bullard, Exhibit C, lines 148-149
[56] Bullard, Exhibit C, line 217

concluded, however, that no single SARS-CoV-2 PCR Ct value in isolation can be used to determine infectiousness of a case and must be interpreted in the overall clinical context.[57]

[104] Dr. Bullard's expert report revealed that in December 2020, out of 5,825 positive PCR results in Manitoba, 18 per cent had a Ct of 25-30, 18 per cent had a Ct of 30-36, and 7 per cent had a Ct of 36-40.[58]

[105] In response, Dr. Thomas Warren, an infectious disease specialist and medical microbiologist and adjunct professor at McMaster University, agreed with Dr. Bullard that a positive PCR test represents the identification of SARS-CoV-2 virus fragments. Dr. Warren clarified however that a positive PCR test result did not necessarily indicate that the entire virus is present or that the patient has COVID-19. He responded to Dr. Bullard's assertion that a PCR has a specificity of greater than 99.9 per cent, and stated that while a positive test means there is a 99.9 per cent likelihood that the person has or recently had the SARS-CoV-2 virus in their body, it does not mean that the person is infectious or that they have COVID-19 disease (symptoms). In this regard, Dr. Warren concluded that the presence of SARS-CoV-2 virus as detected by PCR is necessary but not sufficient to indicate either infectiousness or COVID-19 disease properly defined.[59]

[106] In response to Dr. Bullard, Dr. Bhattacharya analyzed the December 2020 lab data and found that 25 per cent (1,456) of the 5,825 people that Manitoba considered a

[57] Bullard, Exhibit C, lines 157-170
[58] Bullard, Exhibit C, lines 193-195
[59] Affidavit of Dr. Thomas Warren [Warren], Exhibit B, pp. 3, 5-6

"positive" case in December 2020 had Ct values that strongly suggested they were not infectious.[60]

[107] Both Dr. Bhattacharya and Dr. Warren in response to Dr. Bullard referred to the second warning from the WHO on January 20, 2021 where it gave guidance on PCR testing which states: "health care providers must consider any result in combination with timing of sampling, specimen type, assay specifics, clinical observations, patient history, confirmed status of any contacts, and epidemiological information." Further, the WHO guidance advises: "the probability that a person who has a positive result (SARS-CoV-2 detected) is truly infected with SARS-CoV-2 decreases as prevalence decreases, irrespective of the claimed specificity."[61]

(iv) Herd Immunity

[108] Dr. Bhattacharya writes that the science strongly suggests that recovery from SARS-CoV-2 infection will provide lasting protection against reinfection, either complete immunity or protection that makes a severe reinfection extremely unlikely. He writes that herd immunity, a scientifically proven phenomenon, occurs when enough people have immunity so that most infected people cannot find new uninfected people to infect, leading to the end of the pandemic.[62] He suggests a strategy of "focused protection" to better protect the elderly while allowing the rest of society to live their lives.[63] This approach of "focused protection" has been endorsed by over 50,000 scientists, physicians

[60] Bhattacharya 2, Exhibit A, p. 13
[61] Warren, Exhibit 8, p. 3; Bhattacharya 2, Exhibit A, p. 14
[62] Bhattacharya 1, Exhibit C, p. 33
[63] Bhattacharya 1, Exhibit C, p. 34

and other medical professionals and is set out by Dr. Bhattacharya (its co-author) in the *Great Barrington Declaration*.

[109] Dr. Kindrachuk disagrees with Dr. Bhattacharya's approach and cites the example of Manaus Brazil, which he states was devastated by the first wave of the pandemic with 4.5-fold excess mortality. He cited a seroprevalence study which found that 76 per cent of the Manaus population was infected with SARS-CoV-2 and had antibodies by October 2020, but virus transmission continued anyway with a devastating surge of SARS-CoV-2 infections by mid-January 2021. He concluded that the data from Brazil provides supportive evidence that a herd immunity approach through natural infections could have devastating impacts on public health.[64]

[110] In reply, Dr. Bhattacharya points out that the Manaus Brazil example is based on a single, flawed, seroprevalence study conducted in Manaus in mid-2020. He states that the 76 per cent estimate was not based on a random survey, but on blood donors, who are a very select group of people in the developing world. He illustrates that the seroprevalence among the blood donors was 52 per cent, which was adjusted upwards based on questionable mathematical modelling of waning antibodies. He also states that it is impossible to conclude that lockdowns in a single location are a good strategy to control the epidemic.[65]

[64] Kindrachuk, TAB 8, pp. 16-17
[65] Bhattacharya 2, Exhibit A, p. 18

(v) Spread of COVID-19 Outdoors

[111] The applicants insist in their submissions that Manitoba has not provided any scientific evidence that COVID-19 transmits easily outdoors or that being outdoors amongst other people is a risk to the Manitoba population.

(vi) COVID-19 Spread in Religious Settings

[112] Dr. Bhattacharya asserts that places of worship can safely hold indoor worship services, with minimal effect on the spread of COVID-19 disease, by following guidelines recommended by the CDC. Such guidelines include recommendations to protect staff who are at higher risk for severe illness, engaging in handwashing, mask wearing when social distancing is difficult, social distancing, disinfecting the worship space before and after each service, minimizing food sharing, encouraging symptomatic congregants to stay home, and posted signs about COVID-19 disease.[66]

[113] He referred to medical studies which revealed that church attendance provides psychological benefits for attendees, especially for adolescents. He also referred to medical studies which showed the psychological benefits provided by communal singing in the process of worship which is shown to foster a sense of belonging and connectedness that is crucially important with measurable effects on mental health.[67]

[114] Dr. Roussin's reasoning for closing places of worship in November 2020 is that activities at those places are comparable to theatres, concert halls, or indoor sporting

[66] Bhattacharya 1, Exhibit C, pp. 24-25
[67] Bhattacharya 1, Exhibit C, p. 25

events, and involve prolonged contact between persons, which could include hugging, handshaking, choirs, singing, and sharing items.[68]

[115] In Dr. Carla Loeppky's affidavit, she refers to clusters associated with attendance at faith-based events between August 2020 - February 2021. She also includes a chart which is called "Potential Acquisition Settings are Diverse" in which it is identified that in the one-month period of September 1, 2020 – October 2, 2020, 3.2 per cent of cases were potentially acquired at faith-based settings.[69]

(vii) Variants of Concern

[116] Dr. Kindrachuk and Dr. Roussin[70] first raised the issue of "Variants of Concern" (VOC) in their affidavits. (I note by way of judicial notice that since the hearing of this matter, public and scientific concern for VOCs have become even more acute.) Dr. Kindrachuk states in his affidavit that variant B.1.1.7 has increased transmissibility ranging from 30 - 70 per cent over circulating non-VOCs and has been associated with increased risk of severe and fatal disease in hospitalized patients. He recommends decreased community transmission to reduce the potential for additional emergence of VOCs. [71]

[117] In response, Dr. Bhattacharya explained that VOCs do not escape immunity provided by previous infections or by the COVID-19 vaccines. He states that the presence of VOCs pose little additional risk of hospital overcrowding or excess mortality, and that such predictions are based on faulty modelling. He cites Florida as an example of a

[68] Roussin, paras. 155-156
[69] Loeppky, Exhibit E, p. 17
[70] Roussin, paras. 28-29
[71] Kindrachuk, TAB B, p. 16

jurisdiction where UK variant B.1.1.7 is widespread but cases have dropped sharply. He explains that vaccines have decoupled the growth in COVID-19 cases from COVID-19 mortality. While cases in Canada have gone up in March 2021, deaths have continued to fall.[72] Finally, Dr. Bhattacharya points out that if restrictive public health measures did not work to protect Canadians from the less infectious COVID-19, there is little reason to expect that they would work to suppress VOCs.[73]

[118] Having examined in the two previous sections the submissions and positions of Manitoba and the applicants respecting the initial and responding affidavit evidence that was adduced, I now turn to the cross-examination that was conducted by both parties of some of the selected affiants. I then proceed to provide the Court's assessment of all of the evidence, including that which was heard in any of the cross-examinations.

VIII. THE CROSS-EXAMINATIONS ON THE AFFIDAVITS

[119] As earlier noted, the applicants' challenge to what Manitoba contends is the supporting scientific evidence for the impugned PHOs continued in their (the applicants) cross-examinations of the selected Manitoba affiants. So too did Manitoba in its own cross-examination of the selected applicants' affiants continue with its defence of a scientific evidentiary foundation, which (in the context of its response to an unprecedented pandemic) Manitoba maintains constitutes a sound and compelling basis for the public health policy choices and restrictions contained in the impugned PHOs.

[72] Bhattacharya 2, Exhibit A, pp. 8-9
[73] Bhattacharya 2, Exhibit A, p. 10

[120] With the above in mind, the Court paid close attention to all of the cross-examinations conducted. I present below only a selected sampling of some of the segments of the cross-examinations that the respective parties deemed particularly relevant and which they wished to highlight for the Court's consideration.

A. THE APPLICANTS' CROSS-EXAMINATION OF SELECTED MANITOBA AFFIANTS

(i) Dr. Brent Roussin

[121] Although all of Manitoba's witnesses came under scrutiny in the course of the applicants' cross-examinations, the cross-examination of Dr. Roussin represented a particularly significant part of the applicants' challenge to Manitoba's position. The applicants highlighted a number of points from Dr. Roussin's cross-examination. These points included the following:

- That there are no social scientists or economists on his public health team;
- That he acknowledged that the most common transmission of the virus appears to be from infectious droplets or aerosols discharged from an infected person by exhaling, coughing, talking loudly, or similar activities;
- Asymptomatic spread is not a significant driver of infection and spread of the virus;
- Variants of Concern are not what caused Dr. Roussin to implement the public health orders;
- For most infected people, the symptoms they experience will be mild, of short duration, largely benign, and followed by a full recovery and complete return to normal health;
- 91.9 per cent of all cases of COVID-19 in Manitoba did not have a severe outcome, hospitalization or death;
- The 8.1 per cent of cases suffering a severe outcome are primarily over the age of 60, with significant comorbidities and amongst the Indigenous community;

- Manitoba has known the cohorts most at risk of severe outcomes since the beginning of the pandemic;
- There is a distinction between the SARS-CoV-2 virus, and the disease COVID-19 (meaning symptoms or pathological effects from infection by the virus);
- PCR tests identify the presence of SARS-CoV-2 virus RNA fragments;
- A positive PCR test for the presence of SARS-CoV-2 virus fragments is considered a case of COVID-19 disease in Manitoba;
- A positive PCR test indicates the person would have been exposed to the virus potentially 100 days earlier;
- Public health does not know if a positive PCR test is infectious or infected with the virus;
- Public health is aware that the test could have detected only dead viral fragments in the person's nose;
- Public health is not provided with Ct values and has not mandated reporting of Ct values;
- Dr. Roussin acknowledges that Ct value is inversely correlated with infectiousness of the sample tested;
- Dr. Roussin is aware of the research conducted by Dr. Bullard and Dr. Loeppky, which found low probability of infectiousness in positive PCR tests even at cycle thresholds lower than 25;
- Dr. Roussin is also aware that studies indicated only 28.9 per cent and 31 per cent of the positive PCR tests sampled were likely infectious;
- Manitoba will cycle tests up to 40 cycles to find a positive result;
- The public is not told if a positive case is infectious and public health is not told if the positive case has the disease COVID-19;
- It is not generally explained that a positive case may not be able to infect anyone else or that it may be a case of an old exposure going back some 100 days;
- Dr. Roussin acknowledges that the number of positive cases is one of the most important factors in deciding to implement the public health orders;
- The public health measures have generally not stopped community

transmission of the virus;

- While the knowledge of the virus has evolved, the public health response has not;
- Both COVID-19 and influenza have a one- to three-day pre-symptomatic period;
- Dr. Roussin acknowledges that some jurisdictions did not implement public health measures like the ones implemented in Manitoba (see Sweden for example);
- Cases peaked on November 12, 2020, and trended downward after that and hospitalizations peaked on December 10 and 11, 2020;
- There were 3,084 clinical beds in Manitoba as of November 30 and 173 ICU beds in Manitoba as of November 30, 2020;
- There were 129 patients in the ICU both COVID and non-COVID;
- The change to permit churches in cars did not result from a change in the science;
- The only study conducted on harms resulting from the public health orders was the November 1, 2020 document found at Exhibit "D" to the affidavit of Dr. Loeppky; and
- Manitoba has not produced any data about the rate of transmission of the virus in settings other than churches with which to compare the relative risk in different settings.

[122] In addition to the above points extracted on cross-examination, additional detail and nuance were provided by Dr. Roussin touching upon the above and other matters.

[123] As part of his decision-making framework and team, he noted that an "Incident Command" structure (in which he and Lanette Siragusa lead) was created in February 2020. It flowed from an existing respiratory virus steering committee which they co-chaired in 2019. Manitoba had initiated an emergency response plan within the Incident Command structure before cases of COVID-19 arrived in Manitoba. Dr. Roussin

had also started participating in a special advisory committee with federal, provincial, and territorial chief public health officers in mid-January 2020.

[124] Dr. Roussin explained his approach as one meant to identify the most vulnerable people for severe outcomes and reduce overall transmission. Strategies included surveillance, case identification, contact identification and public health measures. The general goal was to minimize morbidity/mortality while also minimizing social disruption. While he did acknowledge that it was known that older people, primarily over 60, were the most vulnerable, it was also known that a significant portion of the population has underlying conditions that make them more vulnerable (lung disease, heart disease, diabetes, obesity and the immunocompromised).

[125] Although the current variant of concern was not a driver of the impugned PHOs, the fact that it was known that mutations occur in this type of virus was certainly a factor in Manitoba's response. In other words, unchecked transmission increases risk, which could then lead to more virulent VOCs.

[126] In the course of his being questioned extensively on case definitions, on the subject of what constitutes a case, on the subject of the PCR test and whether some persons with positive PCR tests are not likely to have been infectious at the time of the test, Dr. Roussin also responded by noting as follows:

> — The case definition is created at a national level — at the advisory committee. It is very consistent across the country, which accordingly, permits comparison;
>
> — The use of the total positive PCR tests per day (adjusted to remove duplicate tests) is for surveillance purposes. That is, it gives them a good picture of the "disease burden" in society;

— Leading up to the circuit break in November, he was accurately able to predict that hospital admissions would equal 7 per cent of the daily reported case numbers in 10 to 14 days. ICU admissions would equal 1.4 per cent;

— If the number of cases/positive tests is doubling in a certain time period, it will identify a trend and provide a very accurate picture of the spread of the virus;

— At a population level, with 1,000 tests per day, the PCR tool is very important;

— At the individual level, you need clinical assessment; direction for individuals to self-isolate depends on an overall assessment — positive cases are only directed to self-isolate if they cannot rule out infectiousness; and

— There is very little asymptomatic testing that occurs in Manitoba. Most asymptomatic testing is done of persons who have had significant exposure to a positive case.

[127] Dr. Roussin explained in his testimony about how he had an obvious concern for how the uncontrolled spread of the virus would have a significant impact on hospitals. In this regard, the impact would not just be the direct impact of COVID-19, but also the indirect impact flowing from a flood of cases into the hospital where non-COVID-19 patients would be affected as well. Indeed, this is what Dr. Roussin noted was happening in November and December when many surgeries had to be postponed, which in turn, has an effect on morbidity and mortality.

[128] Dr. Roussin's evidence was clear in saying that he did consider collateral harms that might flow from the PHOs. In that regard, he considered addiction, domestic abuse, and received reports from specialty leads in psychiatry and psychology in the health system. They reported back to him that the benefits of the measures still outweigh the harms. In short, Dr. Roussin was clear that he was engaged consistently with clinical

leads and specialists and was always considering the unintended consequences of the PHOs. He recognized that the restrictive PHOs can disproportionately impact communities, but he also recognized the much greater and disproportionate effect that widespread transmission could have on the vulnerable.

[129] On the subject of modelling, Dr. Roussin noted that he works with a team of modelers who are experts and highly specialized. They work at a national level with other modelers to provide the best information possible.

[130] Dr. Roussin provided evidence that in the late spring and early summer of 2020, ministers and MLAs led a widespread consultation with members of the faith community. This engagement and consultation included surveys and discussion after which, the feedback was brought back to public health. These consultations created a guidance document.

[131] When cross-examined about the restrictions with respect to places of worship, he provided a wide range of information respecting what was considered, balanced and attempted given the urgent public health objectives. In that context, he provided important information with respect to the assessment of risk and how the assessment of risk was in part based on how the virus transmits in a particular type of setting.

[132] Respecting the *Great Barrington Declaration* and the concepts of natural or herd immunity and focused protection, Dr. Roussin observed that much is still unknown in respect of the duration of immunity from infection in the context of COVID-19. This is especially so in relation to the variants of concern. Dr. Roussin emphasized vaccination as the preferred method of immunization, which has the benefit of not subjecting the

entire population to illness. As it relates to targeted protection, Dr. Roussin provided testimony and explanation with respect to Manitoba's approach.

[133] In reviewing Dr. Roussin's testimony and cross-examination, I can say that I found that he gave straightforward and credible evidence that assisted in augmenting and refining aspects of his affidavits. Even when he was forcefully challenged and required to address certain and occasional inconsistencies or incongruities in approach or method based on what was either incomplete, evolving or the sometimes imperfect science, Dr. Roussin provided clarifying background and explanations for his decisions and concerns, all of which were clearly rooted in his challenging duty performed pursuant to s. 3 of ***The Public Health Act***. It is a duty, which following his testimony, I find he performed reasonably in attempting to respond to a public health emergency with measures that, however difficult, restricted freedoms no greater than necessary. Leaving aside whether Dr. Roussin and Manitoba generally can be justifiably criticized for having taken some of their decisions too slowly and late (criticisms voiced by critics asserting a very different perspective than that of the applicants), the decisions and the accompanying balancing when they finally did take place, were nonetheless clearly based on *prima facie* current and reliable scientific information and knowledge gathered from Canada and around the world. The sources would have also included peer-reviewed articles, recommendations from the WHO and from the lessons learned from the experiences in other jurisdictions.

[134] In the end, Dr. Roussin presented as a dedicated chief public health officer, who as I will repeat later, relied on all of the evidence available, including the scientific

evidence, which despite its evolving and still incomplete nature, I find to be reliable. In doing so, Dr. Roussin drew reasonable inferences and applied common sense.

Lanette Siragusa, Dr. Jason Kindrachuk, Dr. Carla Loeppky, Dr. James Blanchard, and Dr. Jared Bullard

[135] In addition to Dr. Roussin, also subject to cross-examination by the applicants were the above noted Manitoba affiants. While all of these affiants provided important information in their affidavits and in their subsequent cross-examination testimony, their cross-examinations were not on my assessment, as determinative as the cross-examination conducted of Dr. Roussin. Accordingly, while I have fully considered and taken into account their affidavits and the challenges brought to them by the applicants (as highlighted in the oral and written submissions made by the applicants), I propose to deal with my account of their cross-examinations in a more summary fashion.

(ii) Lanette Siragusa

[136] Lanette Siragusa is the provincial lead health service integration and quality chief nursing officer. With Dr. Roussin, she is a principal participant in the Incident Command structure for COVID-19. She explained that her focus is on the clinical side of the province's health system response (and not the public health response). That focus includes all users of the health system, COVID-19 patients and all other patients.

[137] Ms Siragusa was challenged by the applicants with respect to the concerns in numbers and with respect to the degree to which the healthcare system was truly being overwhelmed. In cross-examination, she acknowledged that her team anticipated and planned for 173 ICU beds. Questions were raised with respect to the identified shortage and what were in fact the available beds vis-à-vis the number of patients in the ICU. In

respect of ICU capacity, Ms Siragusa explained that the reported numbers reflected both general ICU and cardiac ICU capacity (which is 14). She noted that this would not normally be an encroachment on cardiac ICU, but in the circumstances, it might have been necessary to encroach depending on the exigencies and priorities. As it relates to the report that medicine beds could be increased by more than 600 beds by November 30, 2020, she did not confirm that staffing was actually in place, but that a plan was in place. Equipment and supplies had been purchased, but it was still left to determine the needs of the patients.

[138] In the context of the pressures on the healthcare system, Ms Siragusa noted that with COVID-19 and the outbreaks, hundreds of staff were off sick. She also explained that even if there were 173 critical care spaces, in her view, the 129 patients represented a system that was at full capacity. Given the shortages of staff, nurses who had never worked in critical care were now being added. Even at 129 patients, Ms Siragusa noted that the staff and the physicians felt exhausted physically, mentally, and spiritually. In other words, the fact that 173 ICU spaces were identified did not necessarily mean that the person power was in place to do what needed to be done in the way it needed to be done. In short, the circumstances in mid-December 2020, were quite dire.

[139] Although Ms Siragusa noted that cancellation of surgeries were required, it was not the public health orders that gave rise to those cancellations. Cancellations were decided by medical clinical experts based on what was happening in the hospitals. The purpose was to provide for greater capacity to respond to COVID-19. In some circumstances, COVID-19 outbreaks occurred in hospitals. In those instances, staff

became infected and had to be isolated, which also contributed to the need to cancel surgeries.

[140] In the end, Ms Siragusa seemed to suggest that throughout the second wave, despite the incredible pressures, the system did not break. It was able to address the increase in usage from COVID-19 patients despite the challenges. She acknowledged that sacrifices were made to elective surgeries and that there would be repercussions from that. Nonetheless, in dealing with both COVID-19 cases and non-COVID-19 related patients, Ms Siragusa allowed that while the service that was provided was not always the "gold standard" it was the best that could be done in the circumstances.

(iii) Dr. Jason Kindrachuk

[141] In his cross-examination, Dr. Kindrachuk agreed with the WHO definition of "herd immunity" suggesting that it is the indirect protection from an infectious disease that happens when a population is immune through vaccination or immunity developed through previous infection. In this context, he acknowledged "in theory" it could be achievable through infection and if and when it occurs, it can slow or stop further spread of the virus in the community. Nonetheless, Dr. Kindrachuk insisted that it is challenging to determine when herd immunity will be reached, or if it can be reached. He noted that the Manaus Brazil study does not suggest that herd immunity is impossible, but it does suggest that there are challenges to trying to determine if and when herd immunity might be reached. He insisted that so far, herd immunity has not been proven for sustained immunity from natural infection.

[142] Dr. Kindrachuk maintained that vaccinations are the best means to achieve herd immunity. It is faster and safer than herd immunity through natural exposure. He noted that one important question relates to whether with natural immunity, such immunity is sustained for a long enough period of time to be able to reach a sustained herd immunity threshold.

[143] When questioned about other measures, he acknowledged that masks, physical distancing and handwashing are useful in preventing COVID-19 transmission as is proper ventilation for indoor spaces.

[144] Dr. Kindrachuk noted that because of the variants of concern, there is now an increased burden of disease on younger ages. They now are more vulnerable than they had been even in early 2020. Nonetheless, it was Dr. Kindrachuk's view at the time of his testimony (at the application hearing), that within a few months, vaccines and restrictions when used together, could turn the tide of the epidemic.

(iv) *Dr. Carla Loeppky*

[145] Dr. Carla Loeppky is the director and lead epidemiologist in the Epidemiology and Surveillance Unit with the Department of Health, Seniors and Active Living. Epidemiology information provides further evidence for the decision makers in respect of public health orders. Such reports were provided to Dr. Roussin, cabinet ministers and the health incident command group.

[146] In her cross-examination, Dr. Loeppky was challenged in respect of the lab reports that her department receives. In that regard, she acknowledged that they do not get information on symptom onset, nothing about pre-existing conditions, nothing about

immune response, nothing about the amount of virus in the sample, and nothing in respect of symptom to time to onset. Similarly, when Dr. Loeppky's department gets a positive test result, it has no idea of how infectious the positive patient is. Indeed, once a positive test is sent to Dr. Loeppky's department, it is a case of COVID-19.

[147] She acknowledges that a clinical evaluation is not provided along with the positive PCR results. Dr. Loeppky's department reports all data to public health, but she acknowledges that report summaries to the media do not report how many test positive results are infectious. Despite that fact, it is Dr. Loeppky's view that the information they provide to the general public strikes a balance with providing important details on a daily basis. She does not think that adding information about infectiousness would be beneficial.

[148] When questioned about clusters of the virus, Dr. Loeppky explained that by definition, a cluster implies transmission. In those instances, one looks for symptomatic people linked by person, place and time — linkages, groupings, dynamics. This would not include positive people whose infectious period had ended months ago. As it relates to clusters in churches, Dr. Loeppky acknowledged that they cannot be certain that persons picked up their infection at church. In a cluster, there is an assumption that others got infected by the index case, although that cannot be certain. In reality, in every cluster, there will be an index case that got the infection from elsewhere and brought it to the location of the cluster.

[149] As it relates to the use of models, Dr. Loeppky acknowledged that models can be a very useful tool to help guide decision making. In the context of the current pandemic,

Dr. Loeppky noted a close correlation between models and what in fact happened in "real life".

(v) Dr. James Blanchard

[150] Dr. James Blanchard was cross-examined as someone who has experience in practicing medicine for two years in northern Manitoba, was a provincial epidemiologist in the 1990s and is currently assisting several countries (India, Pakistan and some African countries) in their COVID-19 response. While one of Manitoba's affiants, he is not currently advising Manitoba in respect of its COVID-19 response or strategy.

[151] In his cross-examination, he acknowledged that COVID-19 has many similarities to the flu, but that there are nonetheless, very important differences. These differences are what is important in understanding the epidemic's potential and control measures.

[152] Certain parts of Dr. Blanchard's evidence were juxtaposed with that of Dr. Kettner, one of the applicants' affiants. The evidence of Dr. Kettner suggests a response to COVID-19 that would be based on local epidemiological analysis and calculations. Dr. Blanchard disagrees with this approach and believes that a rapid and effective response should not be based predominately on what you discover locally. In that regard, Dr. Blanchard takes the position that it is possible to set policies based on what is learned elsewhere in the world and about how the virus behaves elsewhere. He notes that local calculation is not necessary. While it is necessary to understand the local context (for the purposes of the required rapid response), one nonetheless needs to use evidence acquired from elsewhere with respect to issues of transmissibility, fatality, etc.

Dr. Blanchard noted that it can often take too long to do a local analysis and that local information may not be as robust.

[153] It was the evidence of Dr. Kettner that the risk of acquiring the virus in church was low based on numbers of church-based clusters. However, Dr. Blanchard points out that such an opinion ignores the fact that cases were already low in Manitoba during that period when churches were open. Dr. Blanchard maintains that the virus can nonetheless spread in church settings. He also notes that Dr. Kettner appears to have examined the Manitoba experience without considering the potential for transmission if the virus became more widespread. It is in this context that Dr. Blanchard notes that it becomes useful to examine the situation elsewhere by which it is possible to observe what would happen and has already happened if the virus was widespread.

[154] Dr. Blanchard also noted in his evidence that vaccines are a major factor in protecting the vulnerable. He is not of the view that natural immunity protects the vulnerable and indeed points out the obvious, that the vulnerable would have to get sick first.

[155] Dr. Blanchard agrees that we do have to assess the impacts of policy and that public health measures can indeed have negative effects. Still, when a global examination is taken of the current pandemic, it is possible to see what has happened where there has been little control of the pandemic and how the results can often lead to chaos in healthcare systems and accompanying huge economic disruption. This chaos and disruption he points out are usually caused by the severity of the COVID-19 wave and not the public health measures.

[156] Importantly, Dr. Blanchard noted that on the subject of variants, Manitoba was correct to restrict gatherings because of the potential danger of the virus mutate. This concern is well-founded and arose early on because of what happened with similar viruses: SARS and MERS. Both of those viruses had high-fatality rates and there is a concern that the COVID-19 virus could similarly mutate to lead to even greater fatality rates and greater infectiousness.

[157] Dr. Blanchard noted that part of his concern with "focused protection" is that the increased number of actual cases needed to get to herd immunity would accentuate the risk of more mutations along with a much higher level of mortality and morbidity. To permit this to happen according to Dr. Blanchard, particularly before vaccines are distributed and properly in place, would be reckless public health policy.

[158] Dr. Blanchard maintained in cross-examination that transmission is slowed by public health policy and that a strategy to flatten the curve (reduce transmission) can effectively delay naturally-acquired immunity because the plan would be to provide immunity by vaccine instead of by infection (which involves getting sick). It is interesting to note that on the subject of immunity, it was Dr. Blanchard's position that assuming that 70 per cent infection is needed for herd immunity by natural infection, there would be a resulting 12,000 more deaths in Manitoba. In this connection, Dr. Kettner did not consider the impact on morbidity and mortality or the fact that if the policy of herd immunity through natural infection is followed, it would inevitably lead to many more fatalities.

[159] Dr. Blanchard raised serious questions about the impracticality of successfully implementing the approach advocated in the *Great Barrington Declaration*.

[160] As it relates to public health orders and the accompanying restrictions on churches, Dr. Blanchard views Dr. Kettner's approach as unwise policy. According to Dr. Blanchard, the purpose of restricting indoor gathering is to prevent transmission at a population level. That does not mean treating all indoor gatherings equally. While PHOs ought to be equally applied to similar settings, it is necessary for officials to look at how that application may function in terms of an impact on the epidemic more generally and on society. There is a difference between equitable impacts and equality in terms of how measures are applied. Coherence is important and that will involve balancing various considerations and impacts in respect of differing social and economic activities. It is important says Dr. Blanchard that policies are coherent and balanced in order to get the public to comply with the constraints.

(vi) *Dr. Jared Bullard*

[161] In his cross-examination, Dr. Jared Bullard confirmed that he provided advice in respect of Manitoba's public health response to COVID-19.

[162] He acknowledged that PCR tests do not look for the whole virus, but rather parts or fragments of the nucleic acid particular to SARS-CoV-2. He also noted that PCR tests do not detect replicative virus or infective virus and that PCR tests can pick up viral fragments in the back of the nose going back 100 days after the exposure to the virus. He also opined that PCR tests can pick up viral fragments in the back of the nose up to 60 to 90 days after infection by the virus. Also, it is possible for fragments of SARS-CoV-2

to be detected in the nose with a positive PCR test in a person who was never actually infected by the virus.

[163] He confirmed that Manitoba uses PCR test platforms that employ 40 and 45 cycles. The Ct value inversely correlates with the amount of genetic material in the sample tested. The higher the Ct value, the lesser amount of genetic material in the sample. The lower the Ct value, the higher the amount of genetic material in sample. Dr. Bullard pointed out that it is increasingly clear that there is a correlation between Ct value and the infectiousness of a PCR positive sample. Dr. Bullard noted that studies have found that amongst other variables considered, Ct value was significant in predicting infectiousness.

[164] As with Dr. Roussin, when I consider the affidavit evidence of Ms Siragusa, Dr. Kindrachuk, Dr. Loeppky, Dr. Blanchard, and Dr. Bullard (along with their roles described and opinions offered), they all provide credible and reliable assertive foundational evidence for Manitoba's position on its s. 1 defence. When I consider as well that evidence in light of the respective cross-examinations on their affidavits and the sometimes direct and indirect challenges made to the medical and scientific information used by those individual affiants and Manitoba more generally, there is no new or convincing basis that would cause me to conclude that either those affiants or Manitoba did not have the requisite medical and scientific basis upon which to rely for their opinions or in some cases, their actions. More specifically, following their cross-examinations, there is nothing that would persuasively suggest (as the applicants in this case have) that deaths from COVID-19 are not real, that positive PCR cases of COVID-19 are not real,

that Manitoba's modelling projections were proven incorrect and/or that in making the difficult decisions required of them, these public health officials failed to properly balance collateral effects.

B. MANITOBA'S CROSS-EXAMINATION OF SELECTED APPLICANT AFFIANTS

(i) Dr. Jay Bhattacharya

[165] As in the case of Dr. Roussin's cross-examination as conducted by the applicants, Dr. Bhattacharya's cross-examination as conducted by Manitoba represented a significant part of Manitoba's defence of its own position (and a response to the applicants' challenge) respecting the medical and scientific evidentiary foundation upon which Manitoba relies.

[166] Dr. Bhattacharya testified as an expert in health economics. He researches and writes primarily in the field of health outcomes related to various financial parameters in the United States, including Medicare, private insurance coverage, physician spending, the *Affordable Care Act*, NIH funding and the ownership of facilities. Prior to COVID-19, he had done limited work in respect of anything dealing with viruses and much of what he did was connected to economics. He acknowledged in the course of his cross-examination that his knowledge of immunology is based on his studies in medical school and the articles he has since read.

[167] When asked whether COVID-19 poses a risk to health, Dr. Bhattacharya acknowledged that for a segment of the population, COVID-19 may pose a significant risk of death. He also acknowledged that studies throughout the world have demonstrated that actual infections are much higher than known infections since many

people may choose not to get tested or do not recognize the need to be tested. Dr. Bhattacharya accepts that irrespective of the infection/fatality rate, COVID-19 has resulted in a very large number of deaths, including over 3 million worldwide, approaching 600,000 in the United States and as of the earlier part of 2021, 24,000 in Canada.

[168] On the subject of the spread of COVID-19 by individuals who do not display symptoms, Dr. Bhattacharya admitted that an important part of his opinion rests on the proposition that asymptomatic transmission of the virus is very rare. Indeed, it would appear that Dr. Bhattacharya did not distinguish between asymptomatic transmission and pre-symptomatic transmission, instead characterizing both concepts as "asymptomatic transmission". It was Dr. Bhattacharya's position in his second report that the "clear implication of this scientific fact is that many intrusive lockdown policies … could be replaced with less intrusive symptom checking requirements, with little or no detriment to infection control outcomes". Despite being confronted in the course of his cross-examination with commentary from the literature that one would have expected would precipitate more nuance in Dr. Bhattacharya's position, Dr. Bhattacharya continued to insist that asymptomatic transmission, including pre-symptomatic transmission, had an upper limit of 0.7 per cent secondary attack rate.

[169] Dr. Bhattacharya discussed non-pharmaceutical interventions in both his reports and noted that "lockdowns" delay infections into the future rather than preventing them from occurring altogether. He did agree that they can be used to reduce the peak number of infections and also agreed that delaying infections until vaccines can be made and made widely available was an approach that could be followed.

[170] When asked about the harms of "lockdowns" Dr. Bhattacharya acknowledged that the PHOs do not directly cause falling vaccination rates, declines in cardiac care, or declines in cancer screening or elective surgeries.

[171] Dr. Bhattacharya had earlier in one of his reports asserted that social isolation had contributed to a large rise in dementia related deaths. When confronted with the entirety of an article that he cited in his report, Dr. Bhattacharya acknowledged that there were in fact several reasons given for the increase in such deaths.

[172] Dr. Bhattacharya had opined in his reports that because of the social isolation relating to the lockdowns and restrictions, deaths due to suicide would increase. He did acknowledge when confronted with Canadian suicide statistics, that there was a drop in suicides in 2020.

[173] When asked in cross-examination about the reality that in Manitoba, even during the restrictions, persons could always go outside to socialize, walk, exercise, etc., with other persons, he noted that to the extent that those activities were not restricted, Manitoba may not have imposed a true "lockdown".

[174] Again, when speaking to the issue of harms during the lockdown, Dr. Bhattacharya acknowledged that provincial and federal economic policies designed to support workers and any legislation permitting persons to not work if they have particular vulnerabilities, would indeed act to assist in the protection of workers.

[175] On the subject of COVID-19 restrictions in children, Dr. Bhattacharya had earlier noted in his first report, various harms caused by school closures. Dr. Bhattacharya had

apparently not taken into account in his analysis, Manitoba's decision to keep schools open, a decision with which Dr. Bhattacharya indicated he agreed.

[176] Respecting recommendations around religious services and any related restrictions, Dr. Bhattacharya acknowledged in cross-examination that he had failed to note that the WHO has stated that if and where necessary, religious exercises should be conducted remotely and virtually wherever possible.

[177] On the subject of the *Great Barrington Declaration*, he acknowledged that there are significant disagreements about the policies flowing from the *Great Barrington Declaration*. He acknowledges that many scientists around the world do not accept his approach and indeed, feel that it is not appropriate. More specifically and in respect of the concept of "focused protection", Dr. Bhattacharya acknowledges that many of Manitoba's measures are consistent with the concept including the following:

- limiting visitors to PCHs and hospitals;
- limiting staff to work in one PCH;
- limiting the contact with different staff residents;
- PPE for staff;
- protecting the Indigenous population;
- workplace safety laws;
- amendments to employment laws to allow persons to stay home when sick;
- use of human rights laws to protect vulnerable employees;
- telehealth for vulnerable persons; and
- prioritizing health care workers, residents of PCHs and elderly for vaccinations.

[178] In response to questions concerning the *Great Barrington Declaration* and about which measures and how they might be reasonably implemented by government, Dr. Bhattacharya noted that it would be for government to determine how to best implement the principles of the declaration as it was not his role to do so.

[179] Dr. Bhattacharya acknowledged that lockdowns could be used as a last resort and suggested that a jurisdiction could build more hospitals before considering a lockdown. In this regard, he did however acknowledge that hospital capacity is not just a question of space, but also staffing.

[180] Respecting PCR tests, Dr. Bhattacharya noted that the PCR test was never designed to measure infectiousness and that a single PCR test is but a snapshot in time.

[181] I have reviewed carefully the testimony and cross-examination of Dr. Bhattacharya given the importance of his evidence to the position being advanced by the applicants. In considering Dr. Bhattacharya's evidence, the Court must acknowledge without hesitation his undisputed and strong academic credentials as a professor at one of the world's leading universities. Despite those obvious credentials and general qualifications, questions can be and were raised respecting the weight that should attach to some of his opinions and views on the specific topics of immunology and virus spread. On these topics — in the absence of a more consistent and more specialized long-term academic focus and a more obviously rooted practical and clinical experience — some of Dr. Bhattacharya's opinions and views can be justifiably challenged.

[182] Leaving aside the precise nature and depth of Dr. Bhattacharya's practical experience and specific academic focus, it is nonetheless clear that notwithstanding the

support that was mobilized for the *Great Barrington Declaration*, many of Dr. Bhattacharya's opinions and prescriptions on the subject of the preferred and most effective public health responses to the pandemic, are opinions and prescriptions that fall outside the mainstream consensus that has congealed amongst most medical and scientific experts and governments the world over. I address more specifically the serious and relevant questions surrounding the *Great Barrington Declaration* later in this judgment at paragraphs 306-15.

[183] While Dr. Bhattacharya's contrary and in some cases contrarian views are decidedly not a disqualification from an important role in what has to be a continuing and rigorous scientific conversation and method, the views of Dr. Bhattacharya need be seen as views and opinions that are not supported by most of the scientific and medical community currently advising on and formulating the ongoing public health responses to a pandemic that continues to threaten too much of the world's population.

[184] So although Dr. Bhattacharya's opinions have obviously been carefully considered by the Court as part of the applicants' evidentiary foundation generally and as part of the applicants' challenge to the science relied upon by Manitoba more specifically, there was in the end, little in the evidence of Dr. Bhattacharya (or the cumulative evidence of all of the applicants' witnesses) that would cause me to seriously doubt the science upon which Manitoba is relying. Similarly, there is little in Dr. Bhattacharya's evidence that would cause me to doubt as to whether Manitoba has established what it must establish in order to discharge its onus on its s. 1 defence (of the impugned orders) on a balance of probabilities.

(ii) Dr. Thomas Warren

[185] Dr. Warren in an infectious diseases specialist and medical microbiologist, and a physician in Ontario. Amongst other things, he works in a lab that does PCR tests for COVID-19.

[186] Dr. Warren testified that he is seeing the strain on the hospital system such that his own hospital often takes patients from the bigger hospitals in surrounding areas.

[187] Dr. Warren acknowledges that while the research is clear that transmission by asymptomatic patients does occur, it is less likely. He acknowledged that it is difficult to differentiate asymptomatic from pre-symptomatic cases in studies and he further acknowledged that the issue of pre-symptomatic transmission is still an open question and that evidence regarding the impact of pre-symptomatic transmission is not conclusive.

[188] Dr. Warren testified that the PCR test is "a point in time test" that identifies virus by replicating genes, which may be whole virus or fragments. PCR test yields a semi-quantitative figure called Ct, which represents the number of doublings done through replications before a result is obtained. It was his evidence that if he had a patient with a positive test he would follow the government regulations and isolate a patient newly diagnosed with COVID-19, regardless of what the Ct value indicated.

[189] Dr. Warren also testified that when SARS-CoV-2 enters the body, it replicates in a portion of the population, but not in every person.

[190] Dr. Warren also observed that the SARS-CoV-2 virus can enter the nose and not actually infect the person due to prior existing immunity or because it was a small amount

that entered the nose. It is possible in that scenario that the virus could be picked up on a PCR test even though the person was not actually infected with SARS-CoV-2.

(iii) Dr. Joel Kettner

[191] Dr. Kettner is the former CPHO for Manitoba at which time he managed the flu pandemic every year and was also present during the H1N1 virus. Dr. Kettner noted that it was important to stay atop and keep track of trends in case positivity rates, and monitor hospital admissions and the number of people who are succumbing from a particular disease. From his perspective, Dr. Kettner observed that he would want to know much more about the deaths in question and whether COVID-19 played a role. In the context of the H1N1 epidemic, Dr. Kettner explained that he wanted to know how other factors may have resulted in persons coming to the ICU. He explained that this requires a complex surveillance system to look at the reported deaths. He did acknowledge however, that he himself did not get this sort of information when he managed the H1N1 epidemic as they did not have sufficient surveillance capacity at that time. In that connection, he suggested that there is currently more information and technology available, which would be helpful for the surveillance he identified.

[192] Dr. Kettner accepted that it would be unusual for public health officials to look into individual information in order to get the information they need on a population basis. He recognizes that there is indeed a lot of information available from a variety of locations, such as ER, death reports, hospitals, etc.

[193] Dr. Kettner accepted that pandemics are difficult on the public and agreed that COVID-19 is causing a lot of deaths and a lot of people are required to go to hospital. In

the case of his experience with SARS, he noted that it was a serious problem and involved a lot of work in public health notwithstanding that Manitoba never had a case.

(iv) Tobias Tissen

[194] As Manitoba has submitted, Mr. Tissen's testimony and cross-examination establishes that where government does no more than simply make a request for voluntary compliance with public health recommendations, such a simple request is usually not sufficient to ensure the necessary compliance in respect of what is an extraordinary global public health pandemic.

[195] Somewhat defiantly, Mr. Tissen testified in cross-examination that his church has done no more during the pandemic than what it has always done: ask congregants who feel sick to stay at home. A video was played during the course of his cross-examination, which demonstrated that during the pandemic, there has indeed been an overt and apparently defiant resistance to the government's public health messaging. During the video that was played in open court, it was possible to see the church service that was held. Despite the fact that the church service was taking place when the church premises were required to be closed, the images on the video revealed very high numbers (at least 100 or more people) where no physical distancing was taking place, no masks were being used and vocalization and singing dominated much of the service.

[196] As Manitoba has suggested, there are obvious limits to the effectiveness of voluntary requests for compliance.

IX. THE COURT'S ASSESSMENT OF ALL OF THE EVIDENCE FOLLOWING THE CROSS-EXAMINATIONS

[197] Given my findings and determinations clearly set out in the analysis section of this judgment (commencing at paragraph 203), in presenting the above highlights of the cross-examinations, I have commented upon the witnesses' evidence and the challenge to their evidence selectively and only where obviously necessary to understand and support the basis for my findings and determinations made in the context of my legal analysis. As has already been noted and will be further explained later in my analysis, in most instances, where differences in the expert evidence exists, those differences and the evidence underlying those differences do not sufficiently persuade me that the supporting evidence that Manitoba invokes for its position is, in the final analysis, lacking in reliability, credibility or cogency such so as to compromise its s. 1 defence. Indeed, on an "all things considered" assessment of the evidence, I have no difficulty concluding that even where Manitoba's response to the various waves of the pandemic could be properly criticized in hindsight as too slow and not sufficiently broad, the restrictions that were eventually imposed represent public health policy choices rooted in a comparatively well-accepted public health consensus. As Dr. Roussin noted, the impugned restrictions were generally consistent with measures seen across most of Canada and the rest of the world.

[198] I appreciate that specific aspects of Manitoba's evidentiary foundation can be parsed and challenged based on what in some cases may be alternative readings or interpretations of the evolving science. That said, in the face of Manitoba's otherwise reliable and credible expert witnesses (an assessment which the cross-examinations did

not change), absent a more persuasive and conclusive evidentiary challenge to Manitoba's witnesses and their evidence, the evidence of the applicants and their challenge on cross-examination represent at best, a contrary if not contrarian scientific point of view. While that view and challenge may be deserving of rigorous consideration in the ongoing scientific conversation, as it was presented in this case in the affidavits and on cross-examination, it did not demonstrate or satisfy me that Manitoba has failed to discharge its onus in the context of the s. 1 justificatory framework. Manitoba's position and its supporting expert evidence represent an appropriately "all things considered" reasonable basis for the decisions that it took respecting the restrictions that were ultimately imposed — decisions which I find on the evidence, were made on the basis of credible science.

[199] In different ways, depending upon their role, position or expertise, all of Manitoba's experts have persuasively conveyed and supported the essence of Manitoba's position in this case. It is a position that acknowledges that pandemics are indeed extremely difficult on a population. It is a position that also convincingly contends that COVID-19 has caused serious illness and death, particularly in older adults, but also, in vulnerable populations of all ages. Based on s. 67 of ***The Public Health Act***, the CPHO has been delegated the onerous and formidable task of implementing measures (with the approval of the minister) to prevent or lessen the danger to public health posed by COVID-19. By necessity, these measures will include that which will prevent exponential growth of the virus from overwhelming our limited health care resources, while trying to minimize the hardship and disruption that these restrictions impose on our day-to-day lives. As all the relevant witnesses have acknowledged, it is an awesome challenge to find the requisite

balance. Despite some of the contrary evidence and cross-examination, the search for and calibration of that balance is not necessarily amenable to a sterile quantitative metric.

[200] When I consider the cross-examination of Manitoba's experts as conducted by the applicants, I certainly note and accept those points where valid and reasonable disagreement can be stipulated as it relates to what might still be some of the evolving science. That said, in the absence of convincing evidence of any obvious or definitively faulty science being applied by Manitoba (and in this case, I have seen none), Manitoba's own evidence convinces me that it is on solid ground in its s. 1 defence of measures and restrictions, which I repeat, represent the public health consensus and approach followed across most of Canada and the world.

[201] As it relates to the specific measures taken and the public health choices made, my consideration and assessment of the cross-examination of the witnesses on both sides (but particularly the challenge to those Manitoba experts) has been conducted mindful of Manitoba's solid reliance on what I find is credible science and also, mindful of what Manitoba has consistently argued as part of its theory. In that regard, it cannot be forgotten that in the fall of 2020, at the height of the second wave, COVID-19 cases were running rampant. Deaths and serious cases requiring hospitalization and intensive care were escalating rapidly and projected to continue rising. The healthcare system was under tremendous strain. As Manitoba had noted, "we were nearing the cliff edge". In light of these serious circumstances, Manitoba and its witnesses have credibly and persuasively asserted and I accept, that decisive action was essential to regain control over the spread of the virus in order to save lives, minimize serious illness and relieve the

intense burden on Manitoba's healthcare system. Those witnesses who testified on behalf of Manitoba and who were in a position to exercise the necessary authority, made it clear that they did not believe that they "could afford to get it wrong".

[202] While I will provide my detailed legal analysis and explain my application of the governing law (and the related legal tests) in the next section of this judgment, I wish to be clear about my findings respecting the convincing factual foundation presented by Manitoba. In that connection, I say that notwithstanding some of the thought provoking testimony of some of the applicants' experts, I am persuaded by the evidence of Manitoba's experts and I find that the credible science that they invoked and relied upon, provides a convincing basis for concluding that the circuit-break measures, including those in the impugned PHOs, were necessary, reasonable and justified.

X. ANALYSIS

[203] In the analysis that follows, I propose to address and explain my determinations with respect to the three categories of issues that present in this case: the ***Charter*** issues, the administrative law issue, and the division of powers issue.

A. *CHARTER* ISSUES

Issue #1: ***Did the restrictions on private gatherings, public gatherings or places of worship imposed in Orders 1(1), 2(1), 15(1) and 15(3) of the Public Health Order dated November 21, 2020, as subsequently amended on December 22, 2020 and January 8, 2021, limit rights under ss. 2(a), 2(b) or 2(c) of the Charter?***

Section 2(a) of the Charter

[204] Section 2(a) of the ***Charter*** reads as follows:

> **Fundamental Freedoms**
> Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion.

[205] Freedom of religion under the ***Charter*** contemplates the right to entertain religious beliefs, to declare those beliefs openly and without fear of hindrance or reprisal and to manifest religious belief by worship and practice or by teaching and dissemination. Section 2(a) is engaged when an impugned law or state conduct interferes with the ability to act in accordance with a sincerely-held religious belief or practice, in a manner that is more than trivial or insubstantial. Freedom of religion includes the ability of religious adherence to come together and create cohesive communities of belief and practice (see ***R. v. Big M Drug Mart Ltd.***, [1985] 1 S.C.R. 295, at 336 (paragraph 94); ***Law Society***

of British Columbia v. Trinity Western University, 2018 SCC 32, at paragraphs 62-64).

[206] Manitoba concedes and I find that the restriction on in-person religious gatherings as found in the impugned PHOs is a *prima facie* limit on freedom of religion that must be justified under s. 1 of the ***Charter***.

Section 2(b) of the Charter

[207] Section 2(b) of the ***Charter*** reads as follows:

> **Fundamental Freedoms**
> Everyone has the following fundamental freedoms:
> . . .
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[208] Freedom of expression protects all nonviolent activities that convey or attempt to communicate meaning. A law or government action that has the purpose or effect of interfering with such activity is a *prima facie* interference with freedom of expression. Section 2(b) protects listeners as well as speakers (see ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927, at 968-72; ***Beaudoin***, at paragraphs 169-70).

[209] Although Manitoba notes that the restrictions on religious gatherings that flow from the impugned PHOs do not have the purpose of restricting expression, Manitoba does concede that they have that effect. Manitoba similarly concedes that the restriction on the size of public gatherings could have the effect of limiting the applicant MacKay's freedom of expression. Manitoba notes that while MacKay was entirely free to protest

the COVID-19 measures and convey any message at a protest rally, the size of those groupings was limited (see ***Beaudoin***, at paragraph 169).

[210] To confirm, Manitoba concedes and I find that there is as argued a *prima facie* interference with freedom of expression that must be justified under s. 1 of the ***Charter***.

Section 2(c) of the Charter

[211] Section 2(c) of the ***Charter*** reads as follows:

> **Fundamental Freedoms**
> Everyone has the following fundamental freedoms:
>
> . . .
>
> (c) freedom of peaceful assembly.

[212] Section 2(c) of the ***Charter*** guarantees the freedom of peaceful assembly. As noted by counsel in the present case, there is relatively little jurisprudence interpreting this provision. The protection contemplates what is inherently a group activity (see ***Beaudoin***, at paragraph 173).

[213] The jurisprudence confirms that the freedom of assembly and association are by definition, collective and public in nature. Section 2(c) guarantees access to and the use of public spaces, including parks, squares, sidewalks and buildings subject to reasonable regulations governing the use of those places and having regard to public health and safety (see ***Hussain v. Toronto (City)***, 2016 ONSC 3504, at paragraphs 38 and 44). As the freedom of assembly can often be integral to freedom of expression, issues surrounding peaceful assembly are often subsumed under the freedom of expression and the infringement can be often resolved under s. 2(b) (see ***British Columbia Teachers' Federation v. British Columbia Public School Employees' Assn.***, 2009 BCCA 39,

at paragraph 39). Again, to the extent that the impugned PHOs place limits on expression by prohibiting public gatherings to protest or comment on important matters of public interest, Manitoba concedes that there is a *prima facie* limit on free assembly. Manitoba is less willing to concede the applicants' claim that restricting gatherings in places of worship violates freedom of assembly by preventing church services, bible studies and prayer meetings. It is Manitoba's position that this is arguably better addressed directly under the freedom of religion. I agree.

[214] Despite the above qualification, Manitoba does concede and I so find that the *prima facie* limits the PHOs place on the freedom of religion, expression and assembly, require justification under s. 1 of the ***Charter***.

[215] With Manitoba's concessions and my findings that the impugned PHOs *prima facie* limit aspects of the freedom of religion under s. 2(a), freedom of expression under s. 2(b), and freedom of peaceful assembly under s. 2(c) of the ***Charter***, further analysis will have to be conducted with respect to these breaches pursuant to the ***Oakes*** test and the justificatory framework found under s. 1 of the ***Charter***. Prior to proceeding with that analysis, I will now address what the applicants contend are the two other alleged ***Charter*** breaches respecting ss. 7 and 15.

[216] As noted, the applicants raised two other alleged ***Charter*** breaches. Those issues were reduced to the following questions:

- Did the restriction on religious services at places of worship or the restriction on gatherings at private homes in the impugned PHOs interfere with the right to liberty or security of the person contrary to the principles of fundamental justice pursuant to s. 7 of the ***Charter***?

- Did the closure of places of worship in the impugned PHOs discriminate on the basis of religion contrary to s. 15 of the ***Charter***?

Preliminary Matter Raised by Manitoba Concerning the Alleged ss. 7 and 15 Breaches

Given Manitoba's concession respecting the violation of s. 2 and given the necessity of its s. 1 defence, should this Court consider and adjudicate the alleged ss. 7 and 15 breaches or as Manitoba suggests, is it unnecessary to do so?

[217] As a preliminary matter, before addressing the applicants' substantive arguments respecting the alleged breaches of ss. 7 and 15 of the ***Charter*** as identified above, the Court is required to determine whether to cede to Manitoba's position that in the circumstances of this application, the Court ought not to consider the alleged s. 7 and s. 15 breaches because "it is unnecessary to do so".

[218] It is the position of Manitoba that the impugned PHOs did not violate ss. 7 or 15 of the ***Charter***. However, Manitoba goes further and insists that it is unnecessary for the Court to address or decide the s. 7 and s. 15 issues (and it submits that this Court ought not to do so) because Manitoba has conceded the violations of s. 2 under the ***Charter*** and it says that the factual matrix underpinning those other ***Charter*** claims (i.e., ss. 7 and 15) is largely indistinguishable from the primary argument centered on the freedoms protected in s. 2. Manitoba contends that "the justification under s. 1 will be identical regardless of the ***Charter*** breach alleged".

[219] In addition to the above, Manitoba takes the position that the fact that a case was fully argued is insufficient to warrant deciding difficult ***Charter*** issues and laying down guidelines with respect to future cases simply because it might be "helpful" to do so (see ***Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)***,

[1995] 2 S.C.R. 97, at paragraph 13). Manitoba emphasises that there are many examples of cases in which the Supreme Court of Canada has declined to determine whether a specific ***Charter*** provision was breached, having already found a violation of a different ***Charter*** provision. As Manitoba points out, this includes cases where the court declined to address s. 7 or s. 15 because s. 2 or another ***Charter*** provision had been violated (see ***Carter v. Canada (A.G.)***, 2015 SCC 5, at paragraph 93); ***Devine v. Quebec (A.G.)***, [1988] 2 S.C.R. 790, at paragraph 31; ***R. v. Ladouceur***, [1990] 1 S.C.R. 1257, at 1278; and, ***R. v. Taylor***, 2014 SCC 50, at paragraph 36).

[220] Manitoba draws an analogy to the judgment in ***Law Society of British Columbia v. Trinity Western University***. In that case, the Law Society of British Columbia refused to accredit the law school because of its religious covenant prohibiting same-sex intimacy. While the case obviously touched freedom of religion, it also had implications for ss. 2(b), 2(d) and 15 of the ***Charter***. In that case, the court determined that the factual matrix underpinning the other ***Charter*** claims was largely indistinguishable and the primary argument centered on freedom of religion. In other words, whether the claim was articulated in terms of freedom of religion, expression, association or protection from discrimination, the limit was subject to the same proportionality analysis. Manitoba is insistent that the same analysis applies in the present case.

[221] In urging the Court not to consider or decide ss. 7 or 15 issues, Manitoba points to the fact that the applicants assert that the impugned PHOs interfere with liberty and security of the person by restricting the liberty of religious officials to hold religious services by regulating access to private homes. Manitoba also emphasizes that the

applicant Tissen asserts that restricting his ability to worship at church while permitting liquor and grocery stores to remain open, arbitrarily limits his security of the person. Manitoba's submission is that these allegations essentially duplicate the claims under ss. 2(a) and 2(c). Further, Manitoba maintains that as the applicants' claim that limiting home gatherings arbitrarily interferes with liberty and security of a person, the government's justification under s. 1 will be identical. Manitoba says that whether a law limits one or more ***Charter*** rights does not change the proportionality analysis under s. 1.

[222] In considering Manitoba's position, I have taken note that in ***Beaudoin***, a case similar to the present case, the government also conceded a violation of s. 2 ***Charter*** rights. In ***Beaudoin***, Hinkson C.J. declined to address s. 7.

[223] In summary, as it relates to the applicants' arguments concerning ss. 7 and 15, Manitoba urges this Court to conclude that this case is best analyzed under the rubric of s. 2 of the ***Charter*** and more specifically (given Manitoba's concession that s. 2 was breached), the framework of s. 1 which will determine whether the acknowledged limitations are reasonable and justified.

[224] On this preliminary question as to whether or not the Court should address and decide the applicants' ss. 7 and 15 arguments, I have given the position of Manitoba full consideration. I have also noted the applicants' strenuous objection to the position of Manitoba and to the prospect of the Court sidestepping what the applicants submit is still an essential part of its constitutional challenge.

[225] This Court certainly accepts and has affirmed the general proposition that courts should not make unnecessary constitutional pronouncements or "decide issues of constitutional law that are not necessary to the resolution of the matter that is before the court in a given case" (see ***R. v. Assi***, 2021 MBQB 44, at paragraph 13). That said, in the unique circumstances of this case, given the distinct protections that fall within ss. 7 and 15, given the distinct legal tests applicable to each section and given the specifically adduced evidentiary foundation produced through some of the individual applicants, it is not obvious that on this constitutional challenge and in the context of the impugned and unprecedented emergency restrictions attaching to fundamental freedoms, that the Court's proper response is to avoid what are not obviously "unnecessary constitutional pronouncements".

[226] Manitoba in no way concedes any infringements as having taken place respecting ss. 7 and 15. While Manitoba's defiant position following a more full analysis may very well be justifiable on the facts and the applicable law, in a case like the present one however, where the legal analysis — despite the similarities — may still be somewhat different (with possible implications for the s. 1 defence), Manitoba's submission does not convincingly or inexorably lead to the conclusion that the Court's consideration of the alleged ss. 7 and 15 breaches is superfluous or unnecessary for the resolution of the matters before me.

[227] Given the similarities between aspects of some of the factual and legal determinations that would have to be made in a s. 7 analysis with those that have to be made under s. 1, it is not clear that any unfavourable (to Manitoba) factual findings and

legal determinations that could be made in a s. 7 analysis might not have a negative impact on Manitoba's s. 1 defence. In that connection, to preempt that possibility, given the specific foundational evidence that has been adduced by the applicants, seems neither fair nor just.

[228] I express as well, my discomfort at preempting the ss. 7 and 15 arguments and determinations simply because Manitoba has necessarily conceded the identified infringements under s. 2. In my view, analytically, it does not follow from such a concession in the unique and particular circumstances of this case that the applicants will get all of the determinations their position deserves in the context of what Manitoba proposes as a sole analysis under the s. 1 justificatory framework.

[229] Having rejected Manitoba's position on this preliminary matter, the Court will accordingly consider and adjudicate the applicants' challenge pursuant to ss. 7 and 15. It should be clear that the Court's reasons for doing so are not only because (as Manitoba has warned against) those issues were fully argued by the applicants or simply because it might be "helpful" to lay down guidelines respecting difficult future ***Charter*** issues. Rather, the Court's decision to fully consider the ss. 7 and 15 arguments in this unprecedented constitutional challenge is grounded in the reality that these challenges represent in the present case, distinct questions that have to be properly adjudicated to fully and fairly resolve this case in a manner that best legitimizes the result.

[230] Manitoba has not persuaded me that in the present case, it is inappropriate to consider ss. 7 and 15 of the ***Charter*** because "it is unnecessary to do so". Accordingly, I set out below my analysis respecting the issues relating to those alleged breaches.

Issue #2: ***Did the restriction on religious services at places of worship or the restriction on gatherings at private homes in the impugned PHOs interfere with the right to liberty or security of the person contrary to the principles of fundamental justice pursuant to s. 7 of the Charter?***

[231] Section 7 of the ***Charter*** 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.

[232] To establish a violation of s. 7 of the ***Charter***, the onus is on the claimant to prove that: 1) the law interferes with or deprives them of their right to life, liberty or security of the person; and 2) such deprivation is not in accordance with the principles of fundamental justice.

[233] As it relates to the liberty interest in s. 7, the applicant Ross MacKay argues that the orders which not only closed all churches and stores (except the limited few that sold "essential" items), but also, prohibited him from having visitors to his home, visiting anyone else at their homes or protesting, were orders whose relevant provisions all infringed his s. 7 right of liberty. Mr. MacKay submits that his movements have been severely curtailed and that these restrictions have had the effect of treating him and all Manitobans as though they were "under house arrest".

[234] In connection with the above restrictions identified by Mr. MacKay, the applicants invoke the Supreme Court of Canada judgment of ***R. v. Heywood***, [1994] 3 S.C.R. 761, at 789 (paragraph 45), where the court held that state prohibitions affecting one's ability to move freely violate liberty and security interests, especially when non-compliance with those prohibitions could result in a jail sentence. In the present case, the applicants

contend that the PHOs have completely prohibited the applicants' ability to move freely, and the consequences of violating those PHOs include a fine, imprisonment, or both.

[235] The applicants also rely upon the Supreme Court of Canada's judgment in ***Carter,*** at paragraph 62, wherein it was held that the s. 7 right to liberty also protects a sphere of personal autonomy involving "the right to make fundamental personal choices free from state interference" and "inherently private choices" that go to the "core of what it means to enjoy individual dignity and independence". It is the position of the applicants that the prohibitions on gathering at private homes, to protest, or for in-person worship, restrict the right of participants to make personal choices free from state interference.

[236] In making the arguments they make concerning the infringements on the liberty right under s. 7, the applicants forcefully assert that the risk of severe illness or death from the virus for persons under 70 years of age is less than influenza. They insist that in a free society, the PHOs' "oppressive overturning of fundamental rights and freedoms" in such circumstances, particularly in light of the scientific evidence Manitoba relies upon, cannot be justified. Put simply, it is the applicants' position that COVID-19 is not a sufficient threat to most of the populace such that the state can prevent a free people from the exercise of their fundamental right to gather and worship if they choose. The applicants go further and say that the PHOs' restrictions on gathering outdoors, for corporate worship and home worship are nothing short of "tyrannical".

[237] Respecting the alleged breaches to the right to security of the person, the applicants have argued that "security of the person" is generally given a broad interpretation and has both a physical and psychological aspect. In that regard, the

applicants submit that the right to security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" (see ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519, at paragraph 136). The applicants also emphasize that security of the person is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (see ***New Brunswick (Minister of Health and Community Services) v. G. (J.)***, [1999] 3 S.C.R. 46, at paragraph 56).

[238] In the present case, the applicants, Mr. MacKay and Mr. Tissen, provided evidence describing how they have suffered psychologically throughout these lockdowns. For his part, Mr. MacKay described how he has been "devastated" by the resulting stress from the restrictions. Mr. Tissen described a similarly painful mental suffering exacerbated by the fact that as pastor, the restrictions have prevented him from carrying on his biblical duties and from caring for the mental and spiritual health of his congregation who have been prevented from gathering to worship.

[239] The applicants also argue that the above s. 7 rights and the alleged breaches of them involved an interference or deprivation not in accordance with the principles of fundamental justice. In that regard, they submit that the restrictions were arbitrary, overbroad and grossly disproportionate in connection to their objective.

[240] Concerning arbitrariness, the applicants argue that in the absence of some justification in the medical evidence, the closure of gatherings for worship and the restrictions on outdoor and private indoor gatherings (when gatherings indoors at big box

stores, grocery stores, liquor stores, and cannabis stores is permitted) is clearly arbitrary. The applicants insist that no compelling evidence has been provided so as to connect the ban/restrictions to the purpose of preventing the overwhelming of hospitals, reducing COVID-19 spread and reducing mortality. It is the position of the applicants that Manitoba is unable to prove that unlike so many secular activities, religious worshipping presents an unacceptable public health risk such that it must be restricted as it has. The applicants submit that the same argument applies to at-home and outdoor gatherings. Therefore say the applicants, the PHOs are arbitrary.

[241] As it relates to overbreadth, the applicants submit that the stated purpose of the PHOs is to preserve hospital capacity, prevent morbidity and prevent community spread. However say the applicants, by prohibiting in-person worship, outdoor gatherings of more than five people and visitors to private homes, the scope of the PHOs is too wide. The applicants repeat that there is no compelling scientific evidence about the spread of COVID-19 outdoors, or evidence that COVID-19 is more transmissible at a place of worship as opposed to a grocery, big box, liquor, or cannabis store. The applicants maintain that the class of persons to whom these PHOs apply is too wide and that they apply to every Manitoban notwithstanding the fact that the applicants say, the science is clear that for people under the age of 65, there is a 99.97 per cent chance of recovery if and when COVID-19 was to strike.

[242] In arguing overbreadth, the applicants have submitted that the PHOs should be targeted to immunocompromised populations and elderly people who are at the greatest risk of the disease. They say that the science does not support the notion that COVID-19

is transmissible through asymptomatic people. Therefore say the applicants, there is no valid medical or scientific reason to prevent healthy, asymptomatic people from gathering at churches, outdoors or in their homes. According to the applicants, these non-infectious people do not present a risk of spreading COVID-19 to anyone and therefore the PHOs as implemented, are overbroad.

[243] Respecting gross proportionality, the applicants use as the requisite and appropriate reference point, what are in the present case, the objectives of the PHOs, which are to reduce the spread of COVID-19, preserve hospital capacity and reduce morbidity. Given the restrictions on freedoms as contained in the PHOs, the applicants say that the physical and psychological damage done to Manitobans is grossly disproportionate to the potential benefits of the PHOs. While the applicants emphasize their position on the potential "harms" of the PHOs in their s. 1 argument, they also at this stage (in respect of gross disproportionality) cite a University of British Columbia study that highlighted the self-reported increase in suicidal thoughts and increased substance abuse among residents of Manitoba and Saskatchewan in 2020. The applicants reference what they describe as an "explosion in overdoses" in Canada and the overall damage to mental health flowing from forced isolation from family and friends.

[244] It is part of the applicants' theory generally and their position more specifically on gross proportionality that one of the troubling aspects of the PHOs is that the very act of keeping families isolated to their own houses, actually increases the risk of death to elderly family members who have to spend more time with adolescents and younger adults who the applicants suggest might be carrying COVID-19 into the house.

[245] I have considered carefully the applicants' position and arguments respecting s. 7 of the ***Charter***. For the reasons that follow, I have determined that the impugned PHOs do not breach s. 7 of the ***Charter*** as alleged by the applicants.

Did the Impugned PHOs Limit Liberty or Security of the Person?

[246] The s. 7 rights to liberty and security of the person were discussed in ***Carter*** (at paragraph 64):

> Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88, per Sopinka J., referring to *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55-57; *Chaoulli*, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.

[247] It is clear that the right to liberty protects the freedom from physical restraint and the autonomy to make fundamental personal choices. I am in agreement with Manitoba's submission that this does not mean however that a limit on a fundamental freedom protected by s. 2 is sufficient to establish a violation of liberty under s. 7. Manitoba is on solid ground when it argues that these are distinct ***Charter*** rights. In this regard, Manitoba relies upon ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, at paragraph 80, wherein the Supreme Court of Canada cautioned that courts must be careful to not conflate liberty or security of the person with dignity, self-worth and emotional well-being. The risk being that s. 7 would then become as Manitoba

suggests, all inclusive and that there would be "serious reason to question the independent existence in the ***Charter*** of other rights and freedoms such as freedom of religion and conscience or freedom of expression."

[248] Accordingly, if the right to liberty protects the freedom from physical restraint and the autonomy to make fundamental choices, and as explained above, it is necessary to remain mindful of the need to not conflate liberty or security with dignity, self-worth and emotional well-being, it is also instructive to note what must be demonstrated to establish a breach of security of the person. In that regard, in order to establish a breach of security of the person, the claimant must provide evidence of serious psychological harm caused by the state that goes beyond the ordinary stress and anxiety that a person might suffer as a result of state action (see ***Blencoe***, at paragraphs 81–86).

[249] At its core, the applicants in the present case argue that the impugned PHOs restrict the liberty and security of the person in two ways. First, they say that the measures restrict the liberty of religious officials to hold religious services. Second, the applicants say that the restrictions regulate "access to and from homes treating Manitobans as though they are criminals and under house arrest".

[250] Manitoba responds to the first point by readily conceding that religious officials were in fact prohibited from holding religious services in person at a place of worship for a period of 13 weeks. Nonetheless, it is Manitoba's position (a position that I accept) that the restriction on a freedom to engage in religious practice is properly addressed by s. 2(a) rather than s. 7 of the ***Charter***. On the second point, Manitoba correctly insists that at no time were Manitobans treated as criminals under house arrest. Manitoba points

out that there has never been an order requiring persons to remain in their homes or to refrain from seeing friends and family in small groups. Although the impugned PHOs did limit gatherings inside homes while these orders were in effect, it was still possible for persons to visit outside of a residence as long as they complied with gathering size limits. While Manitoba acknowledges that no one would question the emotional and psychological benefit of meeting in person compared to a more remote contact, Manitoba also submits (and I agree) that there is no evidence of the kind of serious psychological harm or suffering as set out in ***Blencoe***, at paragraph 80. This is particularly so where, as Manitoba has emphasized, the impugned restrictions were time limited to 13 weeks.

[251] I note as well that the PHOs did not preclude a person from entering another private residence for the purposes of providing health care (which Manitoba emphasizes was not limited to physical care), personal care, tutoring, or other educational instruction or to respond in cases of emergency. Accordingly, a minister from a religious institution was still able to attend to an adherent's home for any of those identified purposes — including one-on-one counselling for a mental health purpose or personal care purpose or, to provide religious education. I further note that there was an exception provided in Orders 15 and 16, which permitted a place of worship to continue to be used for the delivery of health care, child care or social services.

[252] For the reasons provided, the impugned provisions do not limit liberty or security of the person as those rights have been explained in the jurisprudence. To the extent that any of the PHOs interfere with the applicants' activity, that interference is best

understood and considered in the context of Manitoba's s. 1 defence resulting from its concession of the s. 2 breaches.

[253] Having made the determination I have that the impugned PHOs do not limit liberty or security of the person as defined in the jurisprudence, my analysis respecting s. 7 could conclude here as the applicants' challenges on this issue cannot now succeed. However, in the event that I am in error in respect of this first determination and in order to provide a complete analysis, I will proceed to consider what would have been the next relevant question in the s. 7 analysis.

Does any Deprivation of s. 7 Comport with the Principles of Fundamental Justice?

[254] It is well established that a law will be contrary to the principles of fundamental justice if the infringement of or interference with the s. 7 rights is arbitrary, overbroad or grossly disproportionate.

[255] For the reasons that follow, I am not persuaded that had any interference with the s. 7 rights occurred, that they were arbitrary, overbroad or grossly disproportionate. Instead, I am of the view that any restrictions with respect to those rights were and are in accord with the principles of fundamental justice.

Are the Impugned PHOs Arbitrary?

[256] A law is arbitrary when there is no rational connection between the limit on the right and the object of the law. An arbitrary law is one that limits rights but is not capable of fulfilling or in any way furthering the objectives of that law (see ***Carter***, at paragraph 85; ***Canada (A.G.) v. Bedford***, 2013 SCC 72, at paragraph 111).

[257] In the present case, it is clear from the evidence that the object of limiting gatherings (either in public places, private residences or places of worship) is to prevent, reduce or eliminate the likelihood of spreading COVID-19 in order to minimize death and serious illness. The evidence as I have accepted it, suggests persuasively that prolonged close contact, especially indoors, transmits SARS-CoV-2. As will be discussed later in the s. 1 analysis, the rational connection between the restrictions on in-person gatherings and their object of decreasing the likely spread of COVID-19 has been set out convincingly by Manitoba. It is not reasonable to suggest that individual rights in this case have been limited arbitrarily.

Are the Impugned PHOs Overbroad?

[258] Overbreadth can be seen as closely related to arbitrariness. A law is overbroad when it targets some conduct that appears to have no relation to its purpose. While an impugned order may not be arbitrary in all of its applications, it may nonetheless be arbitrary in part (see ***Carter***, at paragraph 85; ***Bedford***, at paragraph 12).

[259] In the present case, I find that the restrictions on gathering do not encompass conduct that poses no risk of transmission or has no relation to the object of the orders in question. I accept Manitoba's position that it is impossible to rule out the transmission at gatherings. Based on the evidence, this is so because asymptomatic and pre-symptomatic individuals may unknowingly transmit the virus to unsuspecting persons.

[260] Manitoba is correct when they point out that the applicants appear to have misconstrued the principles of arbitrariness and overbreadth when they compare the impugned PHOs to other orders (for example, those orders dealing with retail

businesses). In that regard, arbitrariness and overbreadth focus on the link between the impugned measures and the objective of those measures. For the purposes of s. 7, it is irrelevant to compare the impugned PHOs to other restrictions. The fact that some places of business are allowed to remain open (subject to various restrictions) does not in any way negate the rational connection that exists between the impugned PHOs and their object. Further, the PHOs in question restrict similar types of gatherings whether religious or secular in nature such as movie theatres, plays and/or concerts. Indeed, the secular activities are also protected by s. 2(b) of the ***Charter***. Insofar as retail locations are subject to different restrictions, it is as Manitoba persuasively has argued, owing to the fact that people are not gathering in those locations for a long period of time or in the same way (see also ***Beaudoin***, at paragraphs 228-30).

Are the Impugned Orders Grossly Disproportionate?

[261] No interference with a s. 7 right is permissible where it is grossly disproportionate to the object of the measure. This principle presents (for any party raising gross disproportionality), a very high bar and it applies only in extreme cases where the alleged interference or deprivation is totally out of sync with the objective. In ***Carter***, at paragraph 89 and ***Bedford***, at paragraph 120, it is confirmed that a determination of gross disproportionality requires a measure that is entirely outside the norms accepted in our free and democratic society. The Supreme Court of Canada provided by way of an example the situation where life imprisonment existed as a potential sanction for spitting on the sidewalk.

[262] In the present case, to determine whether any deprivation of a s. 7 right is grossly disproportionate to the object of the measure, the Court is required to consider the significance of the limitation on the s. 7 rights (the gathering at homes, public places and in-person religious services) and determine if the deprivation is so extreme that it is totally out of sync with the critical importance of the public health objective, which is to prevent death, serious illness and the overwhelming of the healthcare system. In my view, the applicants have not satisfied me that the interference with or the deprivation of any s. 7 rights in the present case represents an interference or deprivation that is grossly disproportionate and/or entirely outside the norms accepted in our free and democratic society. I make that determination, mindful of, amongst other things, the following convincing factors that Manitoba has invoked in support of its position:

- Manitoba has never denied, minimized or questioned the importance of gathering — including for faith-based communities for whom communal worship is central to their religious beliefs. Manitoba has also never questioned the importance of physical contact and socializing as part of the human experience in a community;

- In none of the impugned PHOs were religious services prohibited. They could continue to be offered remotely. Manitoba accepts however, that for some, a remote religious service is not an adequate substitute for in-person religious services, which is at the core of their beliefs;

- Since December 11, 2020, religious services could also take place in person, outside in motor vehicles, in accordance with Order 2(2);

- Funerals, weddings, baptisms or similar religious ceremonies could take place subject to a limit of five persons other than the officiant (Order 15(3) or 16(3));

- The impugned PHOs did not prevent a person, including a religious official, from entering a private residence for the purpose of providing mental health or spiritual care such as counselling (Order 1(2)(a)). Counselling and addiction support could also be delivered remotely to individuals or groups;

- Tutoring or other individualized educational instruction was also able to be provided. This was not restricted to secular education. The gathering limits did not prevent a person from entering a private residence to provide religious tutoring or other religious educational instruction (Order 1(2)(d)). Religious education could also be delivered to groups remotely;

- The impugned PHOs did not prevent places of worship from being used by a public or private school (including for religious education) or for the delivery of health care, child care or social services (Order 15 and 16);

- To the extent that one of the applicants raises concerns about summer bible camps, the impugned PHOs did not take effect until November 22. Throughout the summer months until November 12, 2020, the public health orders allowed summer camps as long as each group had up to a maximum of 50 children and that there were no joint activities between different groups. It was only the overnight camps that were prohibited; and

- Places of worship were treated in the same way as similar indoor gatherings involving prolonged close contact, such as movie theatres, plays, concerts, sporting events. As earlier indicated and as Manitoba has conceded, these activities are also protected under s. 2 of the ***Charter***.

[263] Manitoba readily concedes in its submissions that the impact on rights were surely difficult for the citizens of Manitoba — whether they be religious or secular. Nonetheless, they insist and I agree that the nature and significance of that impact is not such that it translates into a determination of gross disproportionality.

[264] Separate from the earlier noted factors that Manitoba submits are germane in assessing the significance of the deprivations in question, Manitoba also argued that the following considerations are relevant in establishing that the restrictions were not disproportionate or totally out of sync with the overwhelming importance of the public health objective animating the impugned orders:

- The CPHO did not impose the stricter restrictions on gatherings and in-person services at places of worship until Manitoba started to experience exponential growth of the virus that put lives at risk and the healthcare system in jeopardy;

- In the fall of 2020, the situation in Manitoba was serious. By November 2020, community spread of the virus was rampant. As of November 10, Manitoba had the highest per capita rate of active COVID-19 cases in Canada. The test positivity rate had soared to over 10.5 per cent provincially suggesting province-wide transmission. Newly reported cases were doubling every two weeks, which also translated into a large increase of severe cases. It was becoming an increasing challenge to conduct contact tracing (see the evidence of witnesses Dr. Brent Roussin and Dr. Carla Loeppky);

- COVID-19 related deaths and hospitalizations were rapidly escalating. Despite significant efforts to redeploy staff to maximize hospital and ICU capacity, acute care capacity was being overwhelmed (see the evidence of witness Lanette Siragusa). Epidemiological modelling projected that Manitoba was on the verge of exceeding its hospital and ICU capacity. Indeed, on November 10, 2020, there were only eight ICU beds left in Manitoba. It was projected that COVID-19 patients would require 100 per cent of Manitoba's ICU beds by November 23 and hospital capacity would be exceeded by mid-December unless action was taken;

- On December 10 - 11, Manitoba hit what was up until that point, its peak of hospitalizations with 129 patients in ICU and 388 hospitalizations due to COVID-19. This exceeded the province's ICU capacity, however, Manitoba did manage to address the situation with additional resources (see the evidence of witness Lanette Siragusa);

- Concerns remained that exceeding hospital and ICU capacity could lead to more preventable deaths and adverse health outcomes for both COVID-19 patients and other patients who may have been unable to access timely care, as was being experienced in other parts of the world where COVID-19 was hitting hard;

- Faith-based gatherings at places of worship involved prolonged contact in an indoor setting, which could be seen to heighten the risk of virus transmission. The gatherings often involved activities such as singing and ceremonial rituals that also heightened the risk of spread. There had already been clusters and outbreaks of COVID-19 at faith-based gatherings in Manitoba, which was consistent with the experience in other jurisdictions in Canada and elsewhere (see the evidence of witnesses Dr. Brent Roussin, Dr. Carla Loeppky and Dr. Jason Kindrachuk. See also ***Beaudoin***, at paragraphs 151-152, 226, 233, and 238 -39);

- Gatherings in homes was also deemed a significant source of transmission due to prolonged contact in close proximity;

- The measures implemented were intended to protect vulnerable groups who are seen as more prone to serious outcomes (death or hospitalization) when infected by COVID-19. This group of persons includes those over the age of 60 and people who may have a variety of underlying conditions — underlying conditions which are not limited to those over 60. It is noted that approximately one-third of the hospitalizations and 44 per cent of COVID-19 patients admitted into ICU have been under the age of 60 (see the evidence of witness Dr. Carla Loeppky). Manitoba notes that as of February 22, 2021, more than 37 per cent of all severe outcomes (hospitalizations, ICU cases and deaths combined) in Manitoba were among persons under the age of 60. Almost 17 per cent of severe cases were amongst persons under the age of 40 (see the evidence of witness Dr. Carla Loeppky);

- First Nations populations were also seeing escalating positivity rates and a disproportionate number of COVID-19 cases. The median age of hospitalizations for First Nations has been 51; and

- The "circuit break" was temporary. As Manitoba has noted, the impugned PHOs were in place for 13 weeks, but they were reassessed at regular, shorter intervals to ensure they remained necessary. Those measures were implemented to regain control over the rapid community spread of the virus and any consequent serious harm. Once the curve was flattened, there was gradual ease of restrictions.

[265] In considering the applicants' arguments with respect to gross disproportionality, I have no hesitation in concluding based on the evidence before me, that the pandemic's presence in Manitoba demanded decisive action in order to reduce the spread of the virus and in order to flatten the curve. Manitoba is not exaggerating when they state that lives were at stake. Indeed, at various points and with appropriate concern, many critics called for a quicker and more expansive response than actually occurred. Separate from whether they were sufficiently timely or adequate, I have no difficulty concluding that any of the restrictions on gatherings and in-person faith services that were eventually implemented, were as Manitoba has argued, temporary and necessary. While the impact of these restrictions on the rights in question should not be indifferently ignored or

minimized, such impact was certainly not disproportionate or totally out of sync with the critically important objectives which included preserving the healthcare system, protecting the general public health, and saving the lives of particularly vulnerable persons.

[266] Given my earlier determinations respecting arbitrariness and overbreadth, I have concluded that even had any interference occurred with respect to the s. 7 rights (which I have determined did not occur), such interference was in accord with the principles of fundamental justice.

[267] Accordingly, the applicants' challenge pursuant to s. 7 of the ***Charter*** is dismissed.

Issue #3: ***Did the closure of places of worship in the impugned PHOs discriminate on the basis of religion contrary to s. 15 of the Charter?***

[268] Section 15 of the ***Charter*** reads as follows:

> **Equality before and under law and equal protection and benefit of law**
>
> 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.

[269] It is the position of the applicants that the impugned PHOs discriminate on the basis of religion in that they classify liquour, cannabis and big-box retailers as "essential" and therefore allow them to remain open. The applicants contend that the PHOs classify churches and religious gatherings as "non-essential" and for that reason require them to close. Put simply, the applicants submit that it is discriminatory to allow people to assemble in liquor and grocery stores, but not worship at church.

[270] As I explain in the paragraphs that follow, the applicants have inaccurately described Manitoba's use of the adjective "essential" as it relates to churches and religious gatherings just as they have also failed to appreciate that the distinction in question (between what is permitted to remain open and what must remain closed) is not based on religion. Accordingly, I have determined that the impugned PHOs do not discriminate contrary to s. 15 of the ***Charter***.

[271] When a court considers a challenge on the basis of s. 15 of the ***Charter***, it must first ask whether the impugned law, on its face or in its impact, creates a distinction based on enumerated or analogous grounds. If it does, it must be determined whether the law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage (see ***Kahkewistahaw First Nation v. Taypotat***, 2015 SCC 30, paragraphs 18–19).

[272] In considering the position advanced by the applicants in respect of s. 15, I am struck by how the applicants suggest that the descriptions "essential" and "non-essential" are used. In this regard, I agree with Manitoba that the applicants have not accurately described the PHOs. The impugned PHOs do not characterize certain retailers as "essential" nor do they characterize churches or religious gatherings as "non-essential". Nowhere in the impugned PHOs does it imply that places of worship or religious practices are not essential or are of lesser importance than retail establishments. When one examines Order 4 for example, it can be seen that it provides that businesses listed in Schedule A, may open to provide goods and services to the public, subject to capacity limits and other public health measures like physical distancing. Order 5 states that a

retail business permitted to remain open may only sell "essential items" listed in Schedule B in person. Any "non-essential items" must be removed from public access inside the store. They go on to note that both "essential items" and "non-essential" items may be sold remotely, online or by phone and made available for delivery or pick up. Pursuant to Order 6, facilities or businesses not listed in Schedule A are required to close for in-store shopping, but may continue to sell those goods remotely. In other words, the adjectives essential and non-essential are not used as the applicants suggest and insofar as the distinction between essential and non-essential items is made, it is made for the purpose of determining which items may be bought in store rather than purchased only remotely.

[273] Insofar as the applicants are accurate in stating that certain retailers (those listed in Schedule A) were permitted to remain open for in-store purchases of "essential items" while places of worship were required to remain closed for in-person services, those closures were not because religious services are viewed as inessential or less important. Rather, those closures were rooted in the government's position as found and supported in the evidence, that the nature of such gatherings pose a heightened risk of transmission (see the evidence of the witness Dr. Brent Roussin).

[274] It is essential to note that the impugned PHOs do not create any distinction based on religious beliefs or the religious or non-religious nature of the location. Any distinction between facilities that could remain open and those required to close was based solely on the level of risk of viral transmission posed by the type of gathering or activity. As Manitoba has argued, retail stores typically involve transient contact between individuals

who are only in close proximity for a relatively short duration. Such contact is accurately described as transactional in nature. Places of worship are often gatherings of individuals who are in close contact for prolonged periods of time. Moreover, the nature of religious services will often involve behaviours that carry a higher risk of transmission such as singing, choirs, and the sharing of communal items (see the evidence of the witnesses Tobias Tissen, Riley Toews, Christopher Lowe, and Thomas Rempel). Places of worship have been treated very much like movie theatres, sports facilities, plays, restaurants or other venues that involve prolonged periods of close contact, which by extension, pose a higher risk of viral transmission. While no one would suggest that transmission cannot or does not occur in retail stores for example, the distinction in question is, as Manitoba has insisted, about balancing risk and not about religion.

[275] In summary, it is well to note that the basis of the distinction identified by the applicants for their s. 15 argument is one that is rooted in what the Supreme Court of Canada has said is not a demeaning stereotype, but rather, a neutral and rationally connected policy choice (see ***Alberta v. Hutterian Brethren of Wilson Colony***, 2009 SCC 37 (at paragraph 108):

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(a). There is no breach of s. 15(1).

[276] Given that the distinction(s) in question in this case do not involve distinctions based on religion (religious beliefs or the religious or non religious nature of the location),

the applicants' arguments under s. 15 cannot succeed. Accordingly, their s. 15 challenge is dismissed.

<u>Issue #4</u>: ***Are the violations in relation to ss. 2(a), 2(b) and 2(c) of the Charter, as caused by the impugned PHOs, justified as reasonable limits under s. 1 of the Charter?***

[277] For the reasons earlier explained, the Court will be reviewing Manitoba's argument (that the restrictions on the s. 2 rights are justified as reasonable limits under s. 1 of ***Charter***) on the basis of the well-known ***Oakes*** test. The ***Oakes*** test sets out an analytical and potentially justificatory framework that requires the court to determine whether the defending party has discharged its onus (on a balance of probabilities) to demonstrate the following:

1. That the objective of the measure giving rise to the restriction is pressing and substantial.
2. That the means employed was proportionate to the objective.

[278] The proportionality requirement will be satisfied where: 1) there is a rational connection between the means chosen and the objective; 2) the measure minimally impairs the rights at issue; and 3) there is proportionality between the salutary and deleterious effects of the measure (see ***Hutterian Brethren***, at paragraph 186).

[279] The proportionality inquiry is both normative and contextual. The inquiry requires a court to look at the broader picture in an effort to balance the interests of society with those of individuals in groups (see ***R. v. K.R.J.***, 2016 SCC 31, at paragraph 58). In a case like the present, where individual rights compete with the public good and societal interests that are themselves protected by the ***Charter*** (because the health and lives of

others are at stake), it is more likely that a restriction on rights may be found proportionate to its objective (see ***Carter***, at paragraphs 94-96). The case law has confirmed that the proportionality requirement does not require perfection, but rather, that the limits on the rights in question be reasonable (see ***R. v. K.R.J.***, at paragraph 67).

[280] Mindful of the above, where a broader contextual analysis is appropriate, some deference or "a margin of appreciation" may be afforded to governments when a court is determining whether a law is justified under s. 1 of the ***Charter***. This perspective and the resulting margin is particularly important where a case gives rise to complex issues that involve a multitude of overlapping and conflicting interests. In that regard, it was noted by McLachlin C.J. in ***Hutterian Brethren*** that the principal responsibility for the making of difficult choices and the drawing of necessary lines falls on the elected legislature and those it appoints to carry out its policies. In that context, she noted that the ***Charter*** "does not demand that the limit on the right be perfectly calibrated, judged in hindsight" but rather that it be reasonable and justified. She noted as follows (at paragraph 37):

> If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused. Courts recognize that the issue of identity theft is a social problem that has grown exponentially in terms of cost to the community since photo licences were introduced in Alberta in 1974, as reflected in the government's attempt to tighten the scheme when it discontinued the religious exemption in 2003. The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened.

> A degree of deference is therefore appropriate: *Edwards Books*, at pp. 781-82, *per* Dickson C.J., and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 43, per McLachlin C.J.
>
> [emphasis added]

[281] Manitoba reminds the Court in this case that public health officials have been required to respond to a novel and complex pandemic. They have been required to make decisions quickly and in real time, in rapidly changing circumstances and in a climate of scientific uncertainty and evolving knowledge. Given that reality, while courts cannot abdicate their responsibility as protectors of the Constitution, neither should they forgot that the factual underpinnings for managing a pandemic are essentially scientific and involve medical matters that fall outside the institutional expertise of courts. When determining whether any related restriction on rights is constitutionally defensible, the courts should be wary of second guessing those who are managing a pandemic on the basis of their democratic responsibility or their properly delegated authority, particularly when there may be divergent opinions or schools of scientific thought (see ***Beaudoin***, at paragraphs 120-21; ***Lapointe v. Hôpital Le Gardeur***, [1992] 1 S.C.R. 351, at paragraph 31; ***Taylor v. Newfoundland and Labrador***, at paragraphs 457-58; ***Trest v. British Columbia (Minister of Health)***, 2020 BCSC 1524, at paragraph 91).

[282] In cases like the present, public decision makers are often called upon to balance the salutary effects of the public health measures against potential negative effects the severity of which, Manitoba has emphasized may be extremely difficult to predict or quantify. Manitoba is well to cite as they do, McLachlin J. (as she then was) in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199, where she held

that the civil standard of proof under s. 1 does not require "scientific demonstration" or the "standard required by science" (at paragraph 137).

[283] The often complicated and subtle task of a court when fulfilling its role as protector of fundamental freedoms while providing a margin of appreciation to governments attempting to balance complex issues that involve a multitude of overlapping and conflicting interests, was well described and addressed by Burrage J. in ***Taylor v. Newfoundland and Labrador*** (at paragraphs 456-64). Although Burrage J. correctly acknowledged that constitutional rights do not disappear in a pandemic, he also stressed the need for the necessary deference when examining COVID-19 public health measures within the justificatory framework of the s. 1 ***Charter*** analysis (at paragraphs 456-59, 463-64):

> It is at this point that I digress briefly to consider the role of deference to the CMOH and the institutional capacity of the Court.
>
> I am mindful of the fact that while travel restriction has legal force, it is in essence a medical decision directed towards protecting the health of those in this province. The qualifications of the CMOH to make this decision are not challenged. Furthermore, in the exercise of her authority the CMOH draws upon specialized resources at her disposal. This team approach is conducive to informed decision making based on the best medical evidence available.
>
> To this I would add that the courts do not have the specialized expertise to second guess the decisions of public health officials.
>
> In the context of the COVID-19 pandemic Chief Justice Roberts of the Supreme Court of the United States, for the majority, had the following to say regarding deference and the role of the judiciary (*South Bay United Pentecostal Church et al v. Gavin Newsom, Governor of California, et al.,* No. 19A1044 (USSC) at p. 2):
>
> > The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those official "undertake [ ] to act in area fraught with medical and

> scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).
>
> . . .
>
> I accept the Applicant's argument that the pandemic is not a magic wand which can be waved to make constitutional rights disappear and that the decision of the CMOH is not immunized from review.
>
> However, it is not an abdication of the court's responsibility to afford the CMOH an appropriate measure of deference in recognition of (1) the expertise of her office and (2) the sudden emergence of COVID-19 as a novel and deadly disease. It is also not an abdication of responsibility to give due recognition to the fact that the CMOH, and those in support of that office, face a formidable challenge under difficult circumstances.
>
> [emphasis added]

[284] Despite what is suggested in some of the jurisprudence as the need for deference in certain cases involving a s. 1 analysis, the applicants in this case correctly emphasize that the onus of justification rests with the government. They also emphasize the requirement that any restrictions on fundamental freedoms need be demonstrably justified with a strong and cogent evidentiary foundation. Put simply, in the present case, the applicants submit that strong evidentiary foundation does not exist and that the PHOs are not reasonable or demonstrably justified and that they fail all three parts of the proportionality inquiry. That is, the applicants insist that there is no rational connection between the PHOs' objectives and the PHOs, that the impugned restrictions do not minimally impair the ***Charter*** rights they infringe, and that the severely deleterious effect of the impugned restrictions far outweigh any salutary effect resulting from them.

[285] In arguing that there is no rational connection between the PHOs' objectives and PHOs, the applicants submit that Manitoba has not shown a rational connection between

the infringement and the benefits sought on the basis of reason or logic (see ***Hutterian Brethren***, at paragraph 48). In this connection, the applicants impugn Dr. Roussin's emphasis and reliance upon positive PCR test results, which the applicants argue are unreliable to determine infectiousness/contagiousness. The applicants also underscore the negligible risk of asymptomatic transmission, the use of unreliable models, the absence of scientific evidence to justify restrictions on outdoor gatherings, poor evidence to show that places of worship needed to be closed/restricted and what the applicants characterize as the failure on the part of Manitoba, to conduct a cost/benefit analysis. In addition to the foregoing, the applicants suggest that given that the PHOs do not bear any rational connection to their objectives — even on the basis of reason and logic — the restrictions in question are unjustifiably arbitrary.

[286] As it relates to their argument that the restrictions do not minimally impair the ***Charter*** rights they infringe, the applicants contend that there is insufficient evidence to justify the restrictions placed on religious settings, religious activities, private in-home gatherings, and outdoor gatherings. It is the position of the applicants that Manitoba has failed to explain through cogent and persuasive scientific evidence why a significantly less intrusive and equally effective measure or sets of measures were not chosen to address the pressing and substantial objectives that Manitoba has identified.

[287] The applicants argue that Manitoba has tendered no evidence to indicate that the risks that Dr. Roussin associates with religious activities cannot be mitigated by measures less extreme or drastic than outright prohibiting in-person worship. The applicants say that Manitoba has failed to provide specific evidence that in-home gatherings have

resulted in outbreaks of COVID-19 such so as to justify a complete prohibition on the home gatherings that were addressed by the PHOs. The applicants also argue that Manitoba has provided no evidence that restricting outdoor gatherings and protests advances the objective of preventing the transmission of COVID-19.

[288] In making their argument that Manitoba has failed to minimally impair ***Charter*** rights, the applicants point to the evidence and the work of their witness Dr. Bhattacharya, the co-author of the *Great Barrington Declaration*. The position advanced relies upon the premise that it is necessary to build herd immunity in a population by allowing people at low risk of death to live their lives normally while protecting those who are at a higher risk. This approach is called "focused protection" and as Dr. Bhattacharya and the applicants have emphasized, it is an approach which has been endorsed by more than 50,000 scientists, physicians and other medical professionals worldwide. It is the position of the applicants that the "focused protection" approach would have been significantly less intrusive and equally effective. It is an approach which as explained, would have involved the frequent testing of staff and visitors at long-term care homes, minimizing staff rotation, promoting grocery delivery to elderly people at home and having them meet family members outside. For those not vulnerable, it would involve promoting handwashing and staying home while sick, and otherwise encouraging citizens to continue living their lives.

[289] In addition to their contention that the impugned PHOs failed the rational connection and minimal impairment test, the applicants also submit that the PHOs have had egregiously severe and unprecedented deleterious effects without yielding any

discernable benefit supported in the evidence. The deleterious effects include, amongst other things, the emotional, psychological and practical impact of limiting and prohibiting what are for many, the sacred religious and spiritual practices of their faith (which the applicants emphasize are compelled by their most deeply held convictions). The negative impact also includes the immense stress, anxiety, despair and depression that comes from unprecedented social isolation. Juxtaposed with these deleterious effects say the applicants, is the reality that "lockdowns don't work". It is the position of the applicants that countries that had a population predisposed to worse COVID-19 infection had worse outcomes irrespective of whatever lockdown policies they implemented. Citing their expert Dr. Bhattacharya, the applicants insist that lockdowns push cases into the future, but they do not prevent them altogether. Further relying upon the research and study of Dr. Bhattacharya, the applicants insist that "in the vast majority of cases, there is no detectible effect of lockdowns on COVID-19 mortality.[74]

[290] Having closely examined all of the arguments raised by the applicants in response to the position of Manitoba and having reviewed the evidentiary foundation before me, I have determined as I explain below, that Manitoba has established that the restrictions placed on s. 2 rights as a result of the impugned PHOs are justified as reasonable limits under s. 1 of the ***Charter***.

[291] As will be apparent from the discussion below, I have undertaken the requisite legal analysis respecting the requirements for proportionality and I have determined, based on the evidence and the governing law, that Manitoba has discharged its onus. I

[74] Bhattacharya 2, pp. 1 & 2

have also determined that this constitutional challenge exemplifies those cases involving complex issues with a multitude of overlapping interests wherein it must be recognized that "the primary responsibility for making the difficult choices involved in public governance", falls on the elected legislatures and/or those to whom policy-making power has been properly delegated.

[292] In the context of this deadly and unprecedented pandemic, I have determined that this is most certainly a case where a margin of appreciation can be afforded to those making decisions quickly and in real time for the benefit of the public good and safety. I say that while recognizing and underscoring that fundamental freedoms do not and ought not to be seen to suddenly disappear in a pandemic and that courts have a specific responsibility to affirm that most obvious of propositions. But just as I recognize that special responsibility of the courts, given the evidence adduced by Manitoba (which I accept as credible and sound), so too must I recognize that the factual underpinnings for managing a pandemic are rooted in mostly scientific and medical matters. Those are matters that fall outside the expertise of courts. Although courts are frequently asked to adjudicate disputes involving aspects of medicine and science, humility and the reliance on credible experts are in such cases, usually required. In other words, where a sufficient evidentiary foundation has been provided in a case like the present, the determination of whether any limits on rights are constitutionally defensible is a determination that should be guided not only by the rigours of the existing legal tests, but as well, by a requisite judicial humility that comes from acknowledging that courts do not have the specialized

expertise to casually second guess the decisions of public health officials, which decisions are otherwise supported in the evidence.

(i) THE PRESSING AND SUBSTANTIAL OBJECTIVES OF THE IMPUGNED PHOS

[293] The applicants have not contested the pressing and substantial nature of the objectives of the impugned PHOs. The concession is wise as the objectives are clearly meant to protect public health and more specifically, they are meant to save lives, prevent serious illness and stop the exponential growth of the virus from overwhelming Manitoba's hospitals and acute healthcare system. By any estimation, such objectives in the context of a pandemic are pressing and substantial.

[294] In acknowledging the pressing and substantial objectives of the impugned PHOs, it is well to note the backdrop to those orders that were first implemented in the fall of 2020 when the community transmission of COVID-19 was raging. As was noted in the evidence, cases were doubling every two weeks and deaths were rising fast. Not surprisingly, Manitoba's ICU and hospital capacity was being stretched to the maximum by those suffering from COVID-19. There was indeed an urgent need to immediately address the COVID-19 infections and flatten the curve as Manitoba's hospitals and ICUs were in significant jeopardy of being overrun (see the affidavits of Dr. Brent Roussin, Dr. Carla Loeppky and Lanette Siragusa).

[295] The protection of public health has long been acknowledged as a pressing and substantial objective and currently, in the context of this COVID-19 pandemic, that objective has never been more obvious (see ***Springs of Living Water Centre Inc. v. The Government of Manitoba***; ***Taylor v. Newfoundland and Labrador***, at

paragraphs 426, 437; ***Beaudoin***, at paragraphs 224, 228; ***Toronto International Celebration Church v. Ontario (Attorney General)***, 2020 ONSC 8027; ***Ingram v. Alberta (Chief Medical Officer of Health)***, 2020 ABQB 806).

(ii) THE RATIONAL CONNECTION BETWEEN THE INFRINGING MEASURES AND THE OBJECTIVES

[296] In order to demonstrate a rational connection, a government must show a causal connection between the infringement and the benefit sought on the basis of reason or logic. A government need only show that it is reasonable to suppose that the measure in question may further the objective(s), not that it will absolutely do so. It is not a high threshold. There must however be a rational link between the infringing measure and its goal or object (see ***Hutterian Brethren***, at paragraphs 48, 51).

[297] In the present case, I have no difficulty in concluding, based on logic, reason and a common sensical understanding of the evidence (see amongst others, the evidence of Dr. Brent Roussin, Dr. Jason Kindrachuk, Dr. Carla Loeppky) that the measures taken to limit gatherings, including in places of worship, are rationally connected to the goal of reducing the spread of COVID-19. As the evidence has demonstrated, the virus is spread through respiratory droplets. It is reasonable and logical to conclude as has been suggested, that the risk of transmission is particularly high in gatherings involving close contact for prolonged periods. It is not surprising that outbreaks of COVID-19 have occurred in various gatherings, including in places of worship.

(iii) MINIMAL IMPAIRMENT: THE IMPUGNED PHOS LIMIT THE S. 2 RIGHTS IN A MANNER THAT IS REASONABLY TAILORED TO THE OBJECTIVE

[298] The minimal impairment requirement in a s. 1 analysis requires that the impugned PHOs limit rights in a manner that is reasonably tailored to the objective. If there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner" as compared with the measure or means under challenge, then the law in question will fail the minimal impairment test (see ***R. v. K.R.J.***, at paragraph 70). In examining for minimal impairment, the government's decision must be seen to fall within a reasonable range of outcomes. In that sense, the inquiries are highly contextual (see ***Law Society of British Columbia v. Trinity Western University***, at paragraph 81).

[299] In ***RJR-MacDonald***, the Supreme Court of Canada suggested that when considering the minimal impairment aspect of the proportionality requirement, courts may often accord a measure of deference especially where issues are scientific or socially complex and where it may be said that government may be better positioned than courts to choose amongst a wide range of alternatives. The Supreme Court of Canada observed as follows (at paragraph 160):

> . . . The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement: . . . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

[300] In attempting to protect the population from the ravages of the pandemic, Manitoba acknowledges that the CPHO must attempt to balance a number of competing interests, including economic, social, mental health, limited acute care resources, and as well, the degree of public acceptance and compliance. These are all complex considerations, which Manitoba has argued and I accept, are not amenable to any easy calculous and they are indeed, the type of considerations that commend some deference to state action taken in response to COVID-19. As the Supreme Court of Canada noted in ***Irwin Toy Ltd.*** (at 993-94):

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources.

[301] If the inquiry into whether Manitoba's decisions respecting the impugned PHOs fell within a reasonable range of outcomes is indeed (as suggested by the jurisprudence) highly contextual, then it is both necessary and instructive to examine the situation facing the province in and around October to November 2020. The evidence in that regard supports Manitoba's assertion that the situation was dire and that the weeks following Thanksgiving 2020, saw in Manitoba a rapid escalation in cases including a significant spike of 480 new cases on October 30 alone. The Capital Region was put into Level Red indicating uncontained community spread and significant strain on Manitoba's healthcare system. Manitoba points out that 10 days later, on November 12, the entire province was in Level Red. To make the point even more clearly, Manitoba had the highest per capita rate of active cases in the country. COVID-19 infections were growing exponentially with cases doubling every two weeks. Manitoba's witnesses pointed out

that the positivity rate had by then soared to 10.5 per cent provincially. It had been noted that Indigenous people (who as was explained, were more vulnerable) were seen as disproportionately affected in terms of number of cases. On top of that, Manitoba was on the verge of losing its ability to contact trace effectively. Hospital and ICU resources according to Manitoba, were under extreme duress and the modelling information provided by Epidemiology and Surveillance projected that in the absence of significant action, within a very short time, the hospitals and ICUs would no longer be able to cope with the influx of new COVID-19 cases (see the affidavits of Dr. Roussin, at paragraphs 100-06; Dr. Carla Loeppky, at paragraphs 16-19, Exhibits E and F; Lanette Siragusa, at paragraphs 15-20).

[302] By December 10, 2020, after the Level Red restrictions were imposed, Manitoba peaked at 129 patients in ICU. Dr. Roussin concluded, based on all the data that was before him, that a temporary circuit break was essential to significantly reduce the number of contacts and regain control of the pandemic. Based on the evidence presented, Manitoba argues and I agree, that Dr. Roussin had a strong basis for determining that in his professional judgment, any lesser restriction would not have sufficed.

[303] In its written submissions to the Court, Manitoba provided a number of reasons in support of its position as to why the impugned PHOs were minimally impairing (see the application brief of the respondents, filed April 12, 2021, at paragraphs 152(a) through 152(j)). For the purpose of completeness and to fully understand and appreciate the context in which Manitoba drew the lines it did and made the decisions which I find fell

within a reasonable range of outcomes, I replicate below the entirety of the reasons provided by Manitoba at paragraph 152 to their brief:

> [152] Manitoba submits that the impugned PHOs are minimally impairing for a variety of reasons:
>
> a) Throughout the pandemic, public health officials have continually monitored and reassessed the situation in order to tailor orders to the prevailing circumstances. Orders have been regularly changed, either tightening or relaxing restrictions as warranted approximately every 2 - 4 weeks. For example, after the first wave, the public health restrictions were relaxed. Since July 24, 2020, businesses could generally re-open and gathering sizes were only limited to 50 persons indoors and 100 people outdoors. Places of worship could have up to 500 people or 30% of usual capacity. When the pandemic began to worsen in October 2020, the CPHO did not immediately close things down or eliminate gatherings. He took a focused and measured approach based on the epidemiological data and other indicators available to him. For example, from November 12 to 20, 2020, the limit on religious services was reduced from 500 to 250 people or 20% except in the Capital Regions where it was 100 people or 15%.[75] The history of orders demonstrates they were responsive and progressive. Tighter gathering restrictions were not put into place in the impugned PHOs until the pandemic became critical and more urgent intervention was necessary.
>
> b) The public health orders applied regionally when possible, so that restrictions could vary with the severity of community transmission. For example, on October 1, 2020 a more restrictive limit on gatherings including in private residences was imposed only in the Capital Region. The limit on religious gatherings also depended on the situation in particular locations.
>
> c) Unlike some other jurisdictions, there was no curfew imposed or a "shelter in place" order that would prevent people from leaving their home other than for limited reasons. It was still possible to gather with family and friends at indoor and outdoor public places, up to the gathering limit of 5 people. Children could also visit parents in a private residence. An exception was also made for people who live on their own to allow one person to visit.
>
> d) The PHOs did not close schools, maximizing learning and also permitting socializing among children.
>
> e) There was an attempt to accommodate religious services. Religious services could still be delivered remotely indoors, or outdoors in vehicles. As well, individual prayer and reflection was permitted. Places of worship could be used for the delivery of health care and social services (Order 15(4)). Religious

[75] Roussin, para. 98

officials could attend at one's private residence for counselling or educational instruction or tutoring (Order 1(2)). Bible studies could happen online.

f) Funerals, weddings, baptisms or similar religious ceremonies were permitted, subject to a gathering limit of 5 persons (in addition to the officiant).

g) The impugned PHOs were tailored to the nature of the risk. Places involving greater risk due to prolonged contact were subject to greater restrictions. Places of worship and gatherings in the home were treated much like restaurants, movie theatres, plays and concert halls, which had to remain closed during the circuit break. Some retail transactions were allowed in-store because this usually involved shorter, transitory contact between people. Even so, there was an attempt to minimize such transactions. People were only allowed to purchase "essential items" in-store. Otherwise, shopping had to be done remotely for pick up or delivery.

h) Despite the size limit on outdoor gatherings, this did not preclude many other means of expression to protest the PHOs or other important issues. This included petitions, emails, social media and letters to the media or politicians. In fact, the impugned PHOs did not preclude a protest involving many small groups as long as each group of five persons was discrete, sufficiently spread out and did not interact with other groups.

i) By the fall of 2020, it became clear that the previous measures in place up until then proved insufficient to stop the exponential spread of the virus. Despite earliercapacity limits and precautions, there was evidence of clusters associated with faith- based gatherings including one where several individuals carried on services despite being symptomatic.[76] Private home gatherings were another important source of transmission. Modelling suggested that more stringent limits on gatherings coupled with good public compliance were necessary to flatten the curve.

j) The Circuit Break was temporary. It was limited to a 13 week period when the pandemic was at its most dangerous point to date, cases were surging and our health care system was under enormous strain. Once the measures achieved the desired goal of flattening the curve, restrictions were gradually eased.[77] Currently, gatherings are limited to 5 people at indoor public places, 10 persons at an outdoor gathering on private property and 25 persons at outdoor public places. Religious services can holdup to 100 people or 25% of capacity. Weddings and funerals have increased to 25 persons. Private residences may allow up to 2 visitors or can create a "bubble" with another residence.

[76] Loeppky, para. 14
[77] Roussin, paras. 152-154

[304] The above reasons and the accompanying explanations represent "real time" considerations that implicitly or explicitly required the difficult balancing of a plethora of competing interests as the fast-moving pandemic continued to threaten lives and Manitoba's healthcare system. Needless to say, the menacing force and unpredictability of that pandemic did not provide public health officials with the "parlour-room luxury" of prolonged speculative debate nor the comfort of trial and error decision making, let alone the possibility of academic research projects that might confirm whether there existed "significantly less intrusive measures" that might be "equally effective".

[305] It is worth noting that as was hoped and as was predicted by the modelling, the circuit break implemented by Manitoba did indeed have its intended effect and it averted what the evidence suggests may have been a potential disaster. In the face of the applicants' suggestion that Manitoba could have imposed lesser restrictions on gatherings and places of worship (permitting for example, religious services of limited size as long as reasonable safety precautions were employed), Manitoba reminds the Court that such smaller gatherings had been allowed up until the point at which Manitoba was required to respond. As Manitoba realistically observes, it was not at that point possible to monitor hundreds of private places of worship or residences. There was no way to ensure that the precautions identified would always have been followed, properly or at all. As Manitoba consistently has argued, singing and communion are often integral parts of such services and those acts pose a higher risk, which in the dire context in which Manitoba was operating, constituted yet one more risk to the broader threat to public health.

[306] As part of its argument that the PHOs did not minimally impair the rights at issue, the applicants put forward a theory (through the evidence of Dr. Bhattacharya) that arises from the "*Great Barrington Declaration*". That theory suggests that Manitoba should have focussed its efforts only on protecting those who were vulnerable to death — the elderly and immunocompromised — rather than imposing broad restrictions aimed at slowing community spread. Based on this theory of "focused protection", young people (under 60) should be otherwise free to gather and circulate throughout society. The theory suggests that such an approach would more minimally impair fundamental freedoms and would cause less harm than that associated with "lockdowns" and at the same time, protect those who are truly at risk from COVID-19. The applicants submit that in addition to the other deficiencies in Manitoba's heavy-handed response, without a focused protection approach, Manitoba cannot argue for a favourable finding on minimal impairment.

[307] While I accept that the theory of focused protection emanating from the *Great Barrington Declaration* is part of what must be the rigorous ongoing and evolving "scientific conversation", it is not an approach that has been adopted or followed by most governments or their public health officials in Canada or elsewhere in the world. I will leave aside the international consensus to the contrary and the separate but very real question as to whether the specific theory arising from the *Great Barrington Declaration* could ever realistically be a valid and sustainable public health approach. I will nonetheless point out that based on the evidence before me, it is simply not accurate to suggest that Manitoba and Dr. Roussin do not themselves support a version of "focused

protection", however different it may be to the approach advocated by the applicants and Dr. Bhattacharya.

[308] As was explained, Manitoba did indeed focus its efforts on protecting vulnerable populations such as those living in personal care homes, congregate settings and First Nations. That said, it is Manitoba's position that such an effort at focused protection is not by itself sufficient.

[309] Manitoba argues that vulnerable people are integrated throughout society and that people over 60 are not confined to personal care homes. Further, severe outcomes (hospitalizations, ICU admissions, and deaths) can also occur in younger populations across a wide spectrum of ages. In other words, people of all ages are more susceptible to hospitalization and death if they have one of the many underlying medical conditions such heart disease, diabetes, kidney disease, high blood pressure, obesity or otherwise immunocompromised. I note from the evidence that in Manitoba, approximately 40 per cent of reported COVID-19 cases had an underlying condition. One-third or more of the serious cases of COVID-19 (resulting in death or hospitalization) occurred in people under the age of 60. Of those patients admitted to ICU, over 42 per cent were under the age of 60 (see the affidavits of Dr. Roussin, paragraphs 163-65; Dr. Carla Loeppky, Exhibit H).

[310] As it relates to Manitoba's Indigenous population, they too are more vulnerable to severe outcomes from COVID-19 owing to a variety of socioeconomic factors and underlying health conditions. As Dr. Roussin noted, First Nations have been disproportionately affected by COVID-19 and more than half of those cases are off reserve.

[311] It seems necessary to acknowledge that the reference point for identifying "the vulnerable" in the applicants' theory of focused protection, excludes many who in Manitoba, according to the evidence, have become infected and potentially infectious. The integration of these more vulnerable persons throughout society makes the applicants' theory based on the stark marker of age (60) seem insufficiently nuanced and unduly simplistic.

[312] When considering the efficacy of "focused protection" as envisioned by the *Great Barrington Declaration*, that decidedly more *laissez-faire* approach need be considered in relation to the potential long-term health effects of COVID-19 on those who are fatalistically left to become infected. In this regard, I note as Dr. Kindrachuk asserted in his evidence, that while much more research in this area is needed, there currently does exist troubling evidence of "long-haul symptoms" which persist, even in young people who become infected.

[313] The applicants' theory respecting focused protection (as a more minimally impairing approach) raises for the Court not only concerns about the practical effects flowing from the resigned acceptance of general community spread in the pursuit of an elusive herd immunity, it also raises significant ethical and moral questions connected to the risks of knowingly exposing any citizen, including some of those most vulnerable persons who are less identifiable because of their integration into the general population.

[314] In the context of considering the minimal impairment aspect of the proportionality inquiry, it is necessary to acknowledge and consider Manitoba's own approach to focused protection, which is no less concerned with the protection of the vulnerable. Manitoba's

position however, and the position adopted by most other jurisdictions, is that the protection of vulnerable populations cannot occur without also reducing the extent of community transmission overall. It is only through the reduction of community transmission generally, that the rate of SARS-CoV-2 can be slowed in a community and in so doing, assist in the goal of preventing the overwhelming of the healthcare system and its limited resources. In this regard, Manitoba is right to point out that Dr. Bhattacharya's evidence focusses almost exclusively on mortality with virtually no mention of the impact that widespread community transmission has on hospitals and ICUs.

[315] Based on the evidence, I find that Manitoba's approach is appropriately described as multi-faceted in that it focusses on the vulnerable, but at the same time, it focusses on locations and activities that pose the greatest risk for outbreaks and community transmission. In this way, the restrictions imposed are meant to keep the growth of community transmission of the virus within manageable levels so as to enable Manitoba's healthcare system to cope and in order to "flatten the curve".

[316] I have examined carefully the PHOs in question in the context of the evidence adduced. Whether through an approach best described as multi-faceted focussed protection or otherwise, I find that in examining the exponential growth in COVID-19, the uncontrolled community spread and rise in deaths and serious illness, not to mention the impending crisis facing the healthcare system, Dr. Roussin reasonably concluded that a quick and clear response was required. The difficult balancing that Dr. Roussin was required to perform left him to make a decision and tailor measures which I have

determined fell within a range of reasonable alternatives. I am far from convinced that in the context in which Dr. Roussin was operating, there was any basis to conclude that "a significantly less intrusive" measure or measures would have been "equally effective" in flattening the curve. The reality of Dr. Roussin's task in carrying out his duty as CPHO, is well reflected in the following excerpt from *Public Health Law and Policy in Canada*:[78]

> Clearly, in responding to novel public health threats, authorities will often lack scientific facts and must make judgement calls about restricting individual liberties for the sake of protecting the population as a whole. As Laskin C.J.C. observed in *Oakes*: "It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance".

[317] The impugned measures in the PHOs "minimally impair" the rights in issue as contemplated by the jurisprudence. Further, there is no convincing evidence that there existed significantly less intrusive measures that might have been equally as effective in responding to the real time emergency facing Manitoba and its healthcare system.

(iv) THERE IS AN APPROPRIATE PROPORTIONALITY BETWEEN THE BENEFICIAL AND DELETERIOUS EFFECTS OF THE IMPUGNED PHOS

[318] The last stage of the ***Oakes*** test as it is applied in the context of the s. 1 justificatory framework, considers the balance between the beneficial and deleterious effects of the limitation.

[319] At paragraph 289 of this judgment, I explained the range of what the applicants called the severely deleterious effects of the impugned restrictions which they say outweigh any salutary effect resulting from them. Apart from pointing to what they say

[78] Tracey Bailey, C. Tess Sheldon & Jacob J. Shelley, eds., *Public Health Law and Policy in Canada*, 4th ed. (Toronto: LexisNexis Canada Inc., 2019) at 25-26

is evidence establishing that lockdowns do not work (therefore there are no salutary effects) they also identify the significant deprivation occurring to those who are prevented from exercising in a communal and collective fashion, their religious rights and freedoms. They also point to the range of mental health problems flowing from unnecessary social isolation and the sharp rise in substance abuse issues. In short, the applicants insist that the deleterious effects of the PHOs far outweigh the salutary effects, which effects they say, have not prevented COVID-19 deaths or reduced stress on the healthcare system. As such, the applicants submit that the restrictions on gatherings are not "demonstrably justified in a free and democratic society" and are thus, unconstitutional.

[320] I have considered carefully the balance between the identifiable beneficial and deleterious effects of the limitation. I am persuaded that there exists the requisite proportionality as between the beneficial and deleterious effects such so as to conclude that Manitoba has discharged its onus on this prong of the ***Oakes*** test. The evidence in my view unquestionably demonstrates that the salutary effects of the limitation far outweigh those effects that may be characterized as deleterious.

[321] In considering and assessing the applicants' arguments at this third and final stage of the proportionality inquiry, it seems unavoidable but to conclude that much of what the applicants assert respecting the disproportionally negative impact of the limitations, is inextricably tied to their (the applicants) contention that the scientific evidence provides an insufficient justification for the unprecedented action taken by Manitoba. In other words, according to the applicants, the limitations and restrictions on rights based on

unconvincing science, do more harm than good given what the applicants say is Manitoba's misplaced and to some extent, unnecessary response.

[322] As earlier noted, amongst other objections, the applicants criticized the impugned PHOs on the basis of the following: that Manitoba had artificially inflated the number of deaths; that the PCR test was a flawed basis for decision making; that Manitoba's modelling was flawed; that Manitoba insufficiently assessed the collateral costs (economic effects and mental health) compared to the benefits; that there was no scientific evidence that the restrictions were necessary or that the virus spreads more easily at places of worship compared to retail outlets; and, that Manitoba ought to have focussed their protective measures only on the elderly and vulnerable and permitted everyone else to gather and circulate freely in society. The foregoing criticisms set up and constitute the basis for an argument whereby the applicants then proceed to insist that Manitoba's response, as exemplified by the restrictions in the PHOs, is based on misapprehension and misunderstanding all of which flows from generally questionable science. Not surprisingly, the applicants then say that the scope and nature of the accompanying measures are unnecessary and of a dubious utility and benefit, particularly given the disproportionate costs associated with the limiting of fundamental freedoms.

[323] The weakness in the applicants' position in making the arguments they do respecting the absence of salutary effects as compared to those they describe as egregiously deleterious, is that having carefully reviewed and assessed the evidentiary foundation in this case, I reject the applicants' criticisms of Manitoba's reliance upon the science Manitoba acknowledges it has in fact relied upon. As I have already suggested

and determined, Manitoba has persuaded me that there is nothing obviously flawed or deficient about the scientific evidence it has relied upon. As a consequence, for reasons already touched upon, I accept that Manitoba's response and the accompanying limitations on rights that they imposed, were both necessary and appropriate.

[324] Having determined as I have that the scientific evidence does support Manitoba's extraordinary response and the limitations and restrictions on rights they were required to implement, I can similarly say that the benefit from those limitations and restrictions in what was a dire and urgent situation, was neither disproportionately minimal nor insignificant. Notwithstanding what must be readily acknowledged are the hardships and inconvenience that flow from such limitations on rights, it was those very limitations found in the impugned PHOs, that — according to the evidence I accept — helped realize the pressing and substantial objectives of protecting public health, saving lives and stopping the expediential growth of the virus from overwhelming Manitoba hospitals and its acute healthcare system.

[325] Manitoba argues persuasively that it has long been recognized that the potential to harm one's neighbours provides a reasonable basis for limiting the freedom to manifest one's beliefs, opinions and conscience. In other words, freedom of religion for example, must be exercised with due respect for the rights of others and subject to such limitations as are necessary to protect public safety, order and health, and the fundamental rights and freedoms of others. As Manitoba has insisted, this approach does not repudiate religious freedom, but instead, it facilitates its exercise so as to take the general well-being of others into account (see ***Syndicat Northcrest v. Amselem***, 2004 SCC 47, at

paragraph 178). This proposition was also recognized in ***Multani v. Commission scolaire Marguerite-Bourgeoys***, 2006 SCC 6, wherein Charron J. noted as follows (at paragraph 26):

> This Court has clearly recognized that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others (see *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 337, and *Syndicat Northcrest v. Amselem,* [2004] 2 S.C.R. 551, 2004 SCC 47, at para. 62).

[326] Manitoba acknowledges that the impugned PHOs restrict the ability to worship in person, which Manitoba also acknowledges is of significance to the applicants. Although the orders also limit gatherings to small groups outside of one's private residence, they do not prevent gathering altogether. The PHOs still made it possible to meet with family and friends in small groups. In acknowledging the importance of gathering in person to worship and the deprivation that comes with the limits on gathering size, Manitoba nonetheless asserts persuasively, that in the context of the pandemic, while the identified deprivations are not easy, if they did not occur, the gatherings without limits could put the health and lives of others at risk. It is necessary for the Court when considering the limitations that have been imposed, to also consider the ***Charter*** rights of others (the right to life and security) which are also an important part of the consideration in balancing and weighing the effects of the limitation.

[327] Based on the evidence, it is not difficult to conclude that the PHOs do indeed achieve an important societal benefit: protecting the health and safety of others, especially the vulnerable. The present case is one of those cases where the obviously important freedom of religion and other ***Charter*** protections are, as Manitoba has

contended, outweighed by the greater good of protecting public health by preventing the spread of a highly-contagious virus in the context of an unprecedented global pandemic (see *Public Health Law and Policy in Canada*, at 27-29; ***Carter***, at paragraph 95).

[328] In addition to the broader societal benefits of the limitations, Manitoba submits that in assessing the proportionality of benefits and effects, it is also critical to remember that the impugned restrictions were of a limited duration. I agree that it is important to note that those restrictions were in effect for only as long as necessary so as to regain control over community transmission and alleviate the intense strain on the hospitals and ICUs.

[329] In underscoring the proportionality and significance of the benefits vis-à-vis the deleterious effects of the limitations, Manitoba maintains that despite the erroneous contentions of the applicants, the evidence suggests that the limitations were indeed required because: deaths from COVID-19 are real; positive PCR cases of COVID-19 are real; Manitoba's modelling projections were proven to be correct; and that in making the difficult and ultimately significant decisions required of them, public health officials properly balanced collateral effects. In my view, as I have already repeated, the evidence does indeed support all of those assertions.

[330] The task of properly balancing collateral effects is difficult because public health officials and government must balance a wide variety of competing rights and interests of all Manitobans. Manitoba concedes that the potential for negative collateral effects of public health restrictions and limitations, such as the impact on mental health or adverse economic consequences, must be taken seriously. That said, Manitoba resists any

suggestion that the CPHO failed to take into account the potential negative impacts of the impugned PHOs. In taking that position, Manitoba is on solid ground.

[331] At paragraphs 87 and 175 of his affidavit, Dr. Roussin affirms that collateral efforts were always part of the consideration and analysis for the public health officials. The potential harms were balanced against the benefits and the severity of the pandemic. Although there is no question that in the context of the considerable frustration, sickness, death, and fear, all of which have become to one extent or another, by-products of the pandemic, the restrictions flowing from the PHOs have caused further strain and hardship. Nonetheless, Dr. Roussin has noted that decisions were required to be made quickly and in real time and in the face of much uncertainty. Manitoba emphasizes that both the benefits and the burdens of the public health orders were constantly re-evaluated in a dynamic way as the pandemic progressed.

[332] The evaluation of precise harms caused by public health limitations and restrictions, is a complex subject that will be examined for many years. As Manitoba has argued, there may be general evidence that mental health has deteriorated during the pandemic and that there has been identifiable economic suffering. While that reality ought not to be minimized, it is not possible to attribute the cause of suicide or depression or increases in addiction or overdoses solely or directly to the public health restrictions — let alone the particular impugned PHOs. There is no convincing evidence that the 13-week closure of places of worship and the restrictions placed on public and private gatherings have caused suicides, or some version of irreparable economic harm such so as to require the Court to conclude that any real or potential harms outweigh the need

to address the urgency and the seriousness of the public health crisis as it was addressed during the period in question.

[333] In the final analysis, I am of the view that there is persuasive scientific evidence that justifies the restriction on gatherings and the temporary closure of religious services at places of worship. The evidence suggests that Manitoba's PHOs are indeed based on current scientific information and knowledge gathered from Canada and around the world, including from peer reviewed articles, recommendations from the WHO and the Pan-Canadian Public Health Network (PHN) advisory committees, and no less important, from the lessons learned from the experience in other jurisdictions.

[334] It should not be forgotten that decisions respecting the limitations on s. 2 rights were based in part on the shared knowledge, experience and best practices acquired from Manitoba working closely and collaboratively with the provincial and federal counterparts across Canada. This collaboration included public health experts who were epidemiologists, virologists, immunologists, and health care professionals from various other backgrounds. In the end, there is more than enough credible evidence before me to support the proposition that the restrictions on gatherings, including places of worship, were necessary. After those restrictions were put in place, the COVID-19 numbers began to decline, consistent with what the modelling predicted (see the affidavit of Dr. Roussin, at paragraph 87). The Level Red public health measures implemented during the fall of 2020, along with the public's cooperation and compliance with those PHOs, changed the trajectory of COVID-19 cases and improved the situation and burden on acute care resources. Manitobans had indeed flattened the curve and avoided a disastrous situation

(see the affidavits of Lanette Siragusa, at paragraph 21; Dr. Carla Loeppky, at paragraph 22).

[335] When examining the benefits of Manitoba's response in the face of the threat of such a deadly pandemic, it is reasonable and rational to conclude that despite the undeniable hardships caused by the limitations on fundamental freedoms, the salutary benefits far outweigh the deleterious effects. In making that statement, I am mindful that the Supreme Court of Canada has held that a s. 1 justification does not require scientific proof in an empirical sense. In this context, it is extremely difficult and perhaps impossible to empirically prove in advance that the potential economic and social costs of the impugned restrictions outweigh the benefits. Instead, as the Supreme Court of Canada has noted, "it is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has." In this sense, the Court looks for and Manitoba has provided, a "rational, reasoned defensibility" (see ***Sauvé v. Canada (Chief Electoral Officer)***, 2002 SCC 68, at paragraph 18; ***Harper v. Canada (Attorney General)***, 2004 SCC 33, at paragraphs 77-79). Even if and where the evolving scientific evidence and information is not definitive or completely determinative, I accept that Dr. Roussin relied on all of the available evidence, drew reasonable inferences and applied common sense to what was known. To repeat, the decision to temporarily close places of worship and otherwise limit the size of gatherings, was rational, reasoned and defensible in the circumstances of an undeniable public health crisis.

[336] Based on the above analysis, I have concluded that any restriction on the identified ***Charter*** rights flowing from the impugned PHOs, is justified as a reasonable limit and constitutionally defensible under s. 1 of the ***Charter***.

B. ADMINISTRATIVE LAW ISSUE

Issue #5: ***Were the impugned PHOs ultra vires because they failed to restrict rights or freedoms no greater than was reasonably necessary to respond to the COVID-19 public health emergency as required by s. 3 of The Public Health Act?***

[337] Section 3 of ***The Public Health Act*** states:

> **Limit on restricting rights and freedoms**
>
> If the exercise of a power under this Act restricts rights or freedoms, the restriction must be no greater than is reasonably necessary, in the circumstances, to respond to a health hazard, a communicable disease, a public health emergency or any other threat to public health.

[338] The applicants argue that the impugned PHOs restrict the identified rights and freedoms and that the restrictions are far greater than are reasonably necessary to respond to a public health emergency. As a result, they say the PHOs are *ultra vires* the act.

[339] The applicants submit that their argument on this administrative law issue is substantially similar to their s. 1 ***Charter*** argument and that they would rely on their analysis in respect of that section to argue the PHOs also do not comply with s. 3 of the act.

[340] Given that I have already made many of the relevant and connected determinations in my s. 1 analysis, my disposition of this issue need not be prolonged.

[341] This standard of review in respect of this question is one of reasonableness which need take into account, the due deference required respecting medical and scientific expertise.

[342] As my determinations made in the context of my s. 1 analysis would suggest, I have concluded that Dr. Roussin's assessment that the restrictions contained in the impugned PHOs represented restrictions that were no greater than reasonably necessary (to respond to the public health emergency) was a reasonable assessment. As already explained, the context for Dr. Roussin's decision and assessment was that the situation facing the province in November 2020 was grave and that the existing measures were insufficient to stem the tide of the growth of SARS-CoV-2. The resulting threat of hospitalizations and critical cases was undeniable. The spread of the virus was leading not only to increased deaths, but as well, an enormous pressure and burden on Manitoba's healthcare system.

[343] In that context, Manitoba was on the verge of exceeding its hospital and ICU capacity. In order to address the exponential growth of the virus and the potential disaster for the healthcare system, Dr. Roussin targeted those types of gatherings that posed a high risk of transmission. In acting as he did when he did, Dr. Roussin had little room for error and time was of the essence.

[344] Manitoba's explanation for Dr. Roussin's decisions were earlier explained in my s. 1 analysis, particularly in the context of my determinations with respect to minimal impairment. As will be noted, s. 3 of the act reflects much of the same analysis that need be conducted when considering the minimal impairment aspect of s. 1. Put simply, for

the reasons that I provided in determining that the restrictions in question were minimally impairing, I can similarly state that the CPHO acted reasonably in determining that the PHOs met the requirements of s. 3 of the act.

[345] As Manitoba has underscored, just as s. 1 of the ***Charter*** does not demand that a limit on rights be perfectly calibrated, neither can the CPHO's application of s. 3 of the act. In examining Dr. Roussin's decisions, I see them as decisions that were within the range of reasonable decisions supported by the scientific and epidemiological evidence. As such, the decisions are entitled to deference as those decisions are in my view, reasonable.

C. Division OF Powers Issue

Issue #6: *Were the impugned PHOs relating to places of worship inoperative under the doctrine of paramountcy because it conflicted with s. 176 of the Criminal Code?*

[346] Section 176 of the ***Criminal Code*** reads as follows:

> **Obstructing or violence to or arrest of officiating clergyman**
>
> 176(1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who
>
> (a) by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent an officiant from celebrating a religious or spiritual service or performing any other function in connection with their calling, or
>
> (b) knowing that an officiant is about to perform, is on their way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a)
>
> (i) assaults or offers any violence to them, or
>
> (ii) arrests them on a civil process, or under the pretence of executing a civil process.

> **Disturbing religious worship or certain meetings**
>
> (2) Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.
>
> **Idem**
>
> (3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on a summary conviction.

[347] The applicants argue that the impugned PHOs, as they pertain to religious services, are in direct contravention of s. 176 of the ***Criminal Code***. Manitoba for its part, contends that the impugned PHOs are intended to protect the population from a serious communicable disease and do not violate or otherwise conflict in any manner with s. 176 of the ***Criminal Code***.

[348] The applicant Tobias Tissen's evidence states that the enforcement of the PHOs has obstructed and diverted persons from entering their place worship and attending religious services, frustrating the purpose of the protections afforded by s. 176. Mr. Tissen submits that while attempting to hold a drive-in church service in November 2020, a police barricade and tow truck were present, obstructing church goers from attending.

[349] It is the position of the applicants that regardless of any stated public health motive, the effect of the PHOs and the enforcement of them, disturbs a person's meeting for religious worship, and goes further still by precluding them from meeting for religious worship altogether, in violation of s. 176 and the fundamental freedoms it is intended to protect.

[350] The applicants submit that even in the event that the PHOs are determined to be validly enacted, the PHOs are incompatible with the federal legislative purpose of s. 176 and must be declared inoperative to the extent of the inconsistency and insofar as any meeting for religious worship is obstructed.

The Doctrine of Paramountcy

[351] The doctrine of paramountcy provides that "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency" (see ***Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.***, 2015 SCC 53, at paragraph 15). When conducting a paramountcy analysis, the first step is to determine whether the federal and provincial laws are validly enacted. If both laws are validly enacted, the next step requires consideration of whether any overlap between the two laws constitutes a conflict sufficient to render the provincial law inoperative (see ***Lemare***, at paragraph 16).

[352] As the applicants have identified, there are two forms of conflict which the Supreme Court of Canada has described as follows (see ***Orphan Well Association v. Grant Thornton Ltd.***, 2019 SCC 5 (at paragraph 65)):

> . . . The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions".

[353] In order to establish that provincial legislation frustrates the purpose of a federal enactment, a party "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is compatible with this purpose" (see ***Orphan Well***, at paragraph 65; ***Lemare***, at paragraph 26).

[354] The purpose of s. 176 was addressed by the Supreme Court of Canada in ***Skoke-Graham v. The Queen***, [1985] 1 S.C.R. 106, at paragraphs 19-20. In that case, the Supreme Court of Canada was examining what was then s. 172, the identical section and precursor to what is now s. 176. The court noted as follows:

> 19. Subsection 172(3), much like subs. 172(2), is a prohibition which, by means of summary conviction penalty, protects people, who have gathered to pursue any kind of socially beneficial activity, from being purposefully disturbed or interrupted. The subsection is designed to safeguard the rights of groups of people to meet freely and to prevent the breaches of the peace which could result if these types of meetings were disrupted….
>
> 20. There is no difficulty in concluding that this prohibition, with its consequent penal sanctions, serves the needs of public morality by precluding conduct potentially injurious to the public interest.

[355] In its submissions, Manitoba directly explored the objects of s. 176. In that regard, it can be noted that s. 176 prohibits the criminal conduct of individuals who use threats or force or assault to willfully interfere with religious worship. Under s. 176(1)(a), it is a crime for a person to unlawfully obstruct or prevent officiants from celebrating a religious service by threats or force. Clearly, the impugned PHOs are legislative instruments. As Manitoba has argued, a legislative instrument or order made under a statute cannot be seen to (nor does it in the present case) use threats or force within the meaning of s. 176. Neither was it the intent of the impugned PHOs to obstruct or prevent officiants from performing religious services. Although public gatherings in a place of worship were

temporarily closed to limit the spread of COVID-19, Manitoba is well to remind the Court that officiants could continue to attend to perform services and offer them remotely. Even if the impugned PHOs had the effect of preventing officiants from performing in-person religious services at a place of worship, they did not unlawfully do so. Indeed, the PHOs were entirely lawful instruments made under ***The Public Health Act***.

[356] Section 176(1)(b) makes it a crime for a person to assault, be violent towards or arrest a religious officiant, knowing the officiant is about to perform or is returning from performing their religious duties. Clearly this is prescribed criminal conduct by individuals who knowingly interfere with an imminent religious function or one that has been performed. Nowhere in the impugned PHOs is it possible to see an authorization for anyone to assault or use violence against religious officiants. As Manitoba also clarifies, the PHOs did not authorize the arrest of a religious officiant on a civil process to prevent them from carrying out religious functions or because they just completed religious functions or duties. Instead, an officiant is allowed to carry on a religious service and deliver it remotely. In the event of any subsequent ticket that might be issued in relation to a violation of the order against gathering in a place of worship, such a ticket cannot be seen as an attempt to prevent a religious function by violence or assault.

[357] It must be noted that ss. 176(2) and (3) make it a crime for anyone to willfully disturb or interrupt an assembly of persons for religious worship. It is not however, a crime to issue a statutory order of general application intended to prevent prolonged gatherings indoors for a valid public health reason. In that sense, the impugned PHOs do not "wilfully disturb or interrupt" religious assemblies within the meaning of s. 176.

As Manitoba emphasizes, during the "circuit break", the impugned PHOs temporarily closed places of worship to prevent in-person gatherings in order to reduce the spread of a communicable disease. Nevertheless, religious assemblies were still permitted to continue by remote means.

[358] In ***Skoke-Graham v. The Queen***, the Supreme Court of Canada noted that ss. 172(2) and (3) protect people who have gathered from being purposefully disturbed or interrupted. They also noted that to be criminal, it is necessary for the conduct to be disorderly in itself or productive of disorder. As Manitoba as argued, these ***Criminal Code*** provisions are not intended to capture peaceful or orderly conduct. Given the above, I am not persuaded that issuing a public health order under ***The Public Health Act*** meets the *actus reus* of a s. 176 ***Criminal Code*** offence. With s. 176 of the ***Criminal Code***, it would appear that Parliament was contemplating and addressing a form of disorderly conduct or agitation which interferes with religious worship not the regulation that flows from a public health order.

[359] I am not in agreement with the applicants that the impugned PHOs conflict with the operation or frustrate the purpose of s. 176 of the ***Criminal Code***. As Manitoba has persuasively argued, if the applicants' argument were accepted, it would be impossible to restrict the number of people allowed in a place of worship or for that matter, to close a place of worship due to serious violations of building and fire codes. Such restriction or regulation would according to the logic of the applicants, be necessarily inoperative. Such a reading and application of s. 176, would be absurd.

[360] Accordingly, I have determined that those sections of the impugned PHOs relating to places of worship, are not inoperative under the doctrine of paramountcy.

XI. CONCLUSION

[361] My determinations can be summarized as follows:

a. Based on the position taken by Manitoba resulting in its appropriate concession, I have determined that the impugned PHOs do indeed limit and restrict the applicants' rights and freedoms as found in ss. 2(a), 2(b), and 2(c) of the ***Charter***.

b. In the circumstances of this case, it is necessary and just to address and decide the applicants' challenge respecting what they say were the alleged infringements to their ss. 7 and 15 rights under the ***Charter***. Having so considered the merits of the applicants' position in respect of those alleged breaches, I have nonetheless determined that the impugned PHOs did not infringe the applicants' ***Charter*** rights under ss. 7 and 15.

c. Insofar as Manitoba has conceded and I have found that the alleged limitations of ss. 2(a), 2(b), and 2(c) under the ***Charter***, I have also determined that the impugned restrictions in the PHOs are constitutionally justifiable as reasonable limits under s. 1 of the ***Charter***.

d. Respecting the applicants' administrative law ground of review, I have determined that the impugned PHOs were not *ultra vires* (in any administrative law sense) and they met the requirements of s. 3 of ***The Public Health Act*** insofar as they restricted rights and freedoms no

greater than was reasonably necessary in response to the COVID-19 public health emergency.

e. Respecting the applicants' division of powers ground, I have determined that the impugned PHOs do not conflict with the operation nor do they frustrate the purpose s. 176 of the ***Criminal Code*** and accordingly, they are not inoperative under the doctrine of paramountcy.

[362] In light of the determinations set out above, the application is dismissed.

"Original signed by Chief Justice Glenn D. Joyal"
_____C.J.Q.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beaudoin v. British Columbia,* 2021 BCSC 512

Date: 20210318
Docket: S210209
Registry: Vancouver

Between:

Alain Beaudoin, Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church, and Free Reformed Church of Chilliwack

Petitioners

And

Her Majesty the Queen in Right of the Province of British Columbia and Dr. Bonnie Henry in her Capacity as Provincial Health Officer for the Province of British Columbia

Respondents

Corrected Judgment: The text of the judgment was corrected at paras. 149 and 161 on March 19, 2021

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Petitioners:	P. Jaffe M. Moore
Counsel for the Respondents:	J. Hughes, Q.C. G. Morley E. Lapper
Counsel for the Intervenor Association for Reformed Political Action (ARPA) Canada:	G. Trotter A. Schutten
Place and Date of Hearing:	Vancouver, B.C. March 1-3, and 5, 2021
Place and Date of Judgment:	Vancouver, B.C. March 18, 2021

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I. Introduction

[1] Subject to s. 1 thereof, the rights of Canadians are guaranteed by the *Canadian Charter of Rights and Freedoms* [*Charter*].

[2] The preamble to the *Charter* invokes “the supremacy of God and the rule of law” as principles upon which Canada is founded.

[3] The petitioners in this case assert that certain of their *Charter* rights have been unlawfully infringed and seek declaratory and other relief with respect to certain orders made by the Provincial Health Officer (PHO) Dr. Bonnie Henry that affect the petitioners’ ability to meet in person.

II. The Parties

[4] The petitioner Alain Beaudoin has involved himself in advocacy for both what he sees as his own rights and those of others. He could fairly be called an activist.

[5] The petitioner Brent Smith is the Pastor of the Riverside Calvary Chapel, and the petitioner John Van Muyen is the Chair of the Council of Immanuel Covenant Reformed Church. The other petitioners are churches, whose congregations and adherents believe they have an obligation to meet in person based upon their religious beliefs. As their counsel did, I will refer to these petitioners as “the religious petitioners”.

[6] The respondents are Her Majesty the Queen in Right of the Province of British Columbia, represented by the Attorney General of British Columbia and Dr. Bonnie Henry, the PHO. Under s. 64 of the *Public Health Act*, S.B.C. 2008, c. 28 [*PHA*], Dr. Henry is the senior public health official in the province.

[7] The intervenor, the Association for Reformed Political Action Canada, is a non-profit organization representing Reformed Christians. I granted them leave to make limited submissions that augmented, but did not duplicate the submissions of the religious petitioners.

III. Background

[8] We are in the midst of a global pandemic that threatens the health and lives of people throughout the world, including our fellow citizens.

[9] The first diagnosed case of COVID-19 in B.C. was discovered on January 27, 2020. By early March, public health officials understood that the SARS-CoV-2 virus (the "Virus") was the infectious agent causing outbreaks of COVID-19 and that gatherings of people in close contact could cause transmission.

[10] The Virus can be spread by people who do not have symptoms. As long as the reproduction rate (the average number of people to whom an infected person is likely to transmit the Virus) is greater than 1, the Virus will spread exponentially, with the capacity to overwhelm the health system.

[11] Public health monitoring looks for clusters (two or more cases associated with the same location, group or event), since these can evolve into outbreaks wherein transmission becomes sustained.

[12] On March 18, 2020, the Minister of Public Safety issued a declaration of a state of emergency in B.C., which has been extended and consistently kept in place to date. The recitals for Ministerial Order M073, issued under the *Emergency Program Act,* R.S.B.C. 1996, c. 111*,* state:

> WHEREAS the COVID-19 pandemic poses a significant threat to the health, safety and welfare of the residents of British Columbia, and threatens to disproportionately impact the most vulnerable segments of society;
>
> AND WHEREAS prompt coordination of action and special regulation of persons or property is required to protect the health, safety and welfare of the residents of British Columbia, and to mitigate the social and economic impacts of the COVID-19 pandemic on residents, businesses, communities, organizations and institutions throughout the Province of British Columbia.
>
> NOW THEREFORE I declare that a state of emergency exists throughout the whole of the Province of British Columbia.

[13] Dr. Henry is an expert in public health and preventive medicine. Her responsibilities are outlined in the *PHA*. She is informed by the public health

component of B.C.'s health system, which includes the B.C. Centre for Disease Control ("BCCDC") and regional medical health officers.

[14] One of the goals of public health is to prevent and manage outbreaks of disease within the population. Dr. Henry bears the formidable responsibility of making the decisions that are intended to protect us from the COVID-19 pandemic. Against the serious risks that are associated with the pandemic, she is obliged to balance a wide variety of competing rights and interests of British Columbians and visitors to our province.

(a) The Incidence of Transmission of the Virus in Religious Settings

[15] The data from the Fraser Health Region showed that, from March 15, 2020 to January 15, 2021, 7 places of worship were affected by the Virus, with 59 associated COVID-19 cases. Of these cases, 24 were associated with a religious setting in Chilliwack in October 2020, 12 were linked to a religious setting in Burnaby in December 2020, eight were associated with a religious setting in Maple Ridge in November 2020, and six were associated with a religious setting in Langley in November 2020.

[16] The data from the Interior Health Region showed that, from March 15, 2020 to January 15, 2021, 11 places of worship were affected with 20 associated cases. Of these cases, 11 were associated with two religious settings in Kelowna in September and November respectively. The data showed that all of the cases in religious settings in Interior Health occurred between August 2020 and January 2021, with the majority of places of worship being affected in the fall (October and November 2020).

[17] In the Northern Health Region, from March 15, 2020 to January 15, 2021, five religious settings were affected with 40 associated cases. In November 2020 alone, nine cases were associated with staff in a religious setting, and four cases were associated with a different religious setting in Prince George. In addition, the region saw 27 cases associated with one funeral in August and five cases associated with three weddings (held in Surrey, Toronto and Vernon) in October 2020. This region

also has a number of recent exposures from funerals that were not included in the numbers above as they are still under investigation.

[18] The data from the Vancouver Coastal Health Region showed that, from September 15, 2020 to January 15, 2021, 25 places of worship were affected with 61 associated cases in the region. Twenty-eight cases and one death were associated with an outbreak at a religious setting in Vancouver in November 2020. It is likely that two index cases from that religious setting sparked a large outbreak at another facility. In addition, five cases were linked to a religious setting in Richmond in November 2020, and three cases were associated with another religious setting in Vancouver in November 2020. Vancouver Coastal Health did not implement a searchable information system until September 2020, so the data on the location of events prior to September is not available to the PHO.

(b) Dr. Henry's Authority

[19] Section 30 of the *PHA* provides that a health officer can issue an order if they reasonably believe that, inter alia, "a health hazard exists", or "a condition, a thing or an activity presents a significant risk of causing a health hazard".

[20] Section 31 of the *PHA* in turn provides that a health officer (or the PHO in an emergency) "may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes… (b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard".

[21] Section 32 of the *PHA* permits a health officer (or the PHO in an emergency) to make orders in respect of, inter alia, "a place", including that a person not enter a place. Section 39(3) permits an order to be made in respect of classes of persons.

[22] Part 5 of the *PHA* provides for "Emergency Powers". These powers can be exercised in an emergency. An "emergency" is defined as "a localized event or regional event that meets the conditions set out in section 51(1) or (2), respectively". "Regional event" is in turn defined to mean "an immediate and significant risk to public health throughout a region or the province".

[23] Section 52 of the *PHA* provides conditions to be met before the Part 5 emergency powers may be exercised. Section 52(2) states:

> (2) Subject to subsection (3), a person must not exercise powers under this Part in respect of a regional event unless the provincial health officer provides notice that the provincial health officer reasonably believes that at least 2 of the following criteria exist:
>
> (a) the regional event could have a serious impact on public health;
>
> (b) the regional event is unusual or unexpected;
>
> (c) there is a significant risk of the spread of an infectious agent or a hazardous agent;
>
> (d) there is a significant risk of travel or trade restrictions as a result of the regional event.
>
> (3) If the provincial health officer is not immediately available to give notice under subsection (2), a person may exercise powers under this Part until the provincial health officer becomes available.

[24] Section 67(2) of the *PHA* permits the PHO to exercise a power or perform a duty of a "health officer" during an emergency.

[25] One of the powers of a health officer that the PHO can exercise in an emergency is the power to issue orders respecting health hazards under Part 4 of the *PHA.* The term "health hazard" is defined in s. 1 to mean:

> (a) a condition, a thing or an activity that
>
> (i) endangers, or is likely to endanger, public health, or
>
> (ii) interferes, or is likely to interfere, with the suppression of infectious agents or hazardous agents, or
>
> (b) a prescribed condition, thing or activity, including a prescribed condition, thing or activity that
>
> (i) is associated with injury or illness, or
>
> (ii) fails to meet a prescribed standard in relation to health, injury or illness.

[26] Over the course of the past year, Gatherings and Events orders ("G&E Orders") were made by Dr. Henry pursuant to ss. 30, 31, 32 and 39(3) of Part 4 of the *PHA*.

(c) Dr. Henry's Progressive Orders

[27] Dr. Henry has used her powers under the *PHA* to restrict public gatherings and events in order to limit the risk of transmission of the Virus. On March 16, 2020, she issued the first G&E Order, prohibiting gatherings in excess of 50 people.

[28] On March 17, 2020, Dr. Henry declared the transmission of the Virus, to be a regional event, as defined by s. 51 of the *PHA*. In that notice, she indicated that, based on the information reported to her in her capacity as PHO, she believed the criteria in s. 52(2)(a), (b), (c) and (d) of the *PHA* were met.

[29] The issuance of the Notice of Regional Event triggered Dr. Henry's ability to exercise emergency powers under the Part 5 of the *PHA*, set out above.

[30] The BCCDC publishes COVID-19 Situation Repot bulletins on a weekly basis. These bulletins provide in-depth information about COVID-19 epidemiology, underscoring data and key trends in the province, including COVID-19 case counts, B.C.'s epidemic curve, test rates and percent positivity, hospitalization rates and deaths, and likely sources of infection.

[31] Dr. Henry and other public health officials have monitored surveillance data respecting the emergence and progression of the Virus in B.C. Reports summarizing that data are made available to the public on the BCCDC's website.

[32] The Situation Report bulletins started showing an increase in COVID-19 cases in September 2020.

[33] By mid-October 2020, diagnosed case numbers began to accelerate rapidly, rising from a seven-day moving average[1] of 130 cases on October 11, 2020 to 420 cases by November 6, 2020. Hospitalizations and admissions to intensive care units, which typically lag the increase in cases, had increased from 77 hospitalizations and

[1] The seven-day moving average represents the average number of cases per day, based on data from several days.

24 people in intensive care on October 11, 2020 to 104 people in hospital and 31 people in intensive care by November 6, 2020.

[34] On October 26, 2020, Dr. Henry stated:

> I'd like to remind everybody about our mass gathering order. That is, refers across the board to gatherings of no more than 50 people. But there are caveats to this order. It requires that every location must have sufficient space that people can maintain safe distancing between everyone. And we know that when these COVID safety plans are followed in settings like restaurants, event spaces, churches, temples, hotels, that we don't see transmission. But too often, over the last few weeks, we've been hearing stories where people are trying to put aside the safety plans, that feel it is okay to have a few additional people, or for people to mix and mingle. And, and unfortunately, we have seen spread in these environments.

[35] In a verbal report of November 7, 2020, Dr. Henry imposed further restrictions on gatherings in the Vancouver Coastal and Fraser Health regions. She provided reasons in the form of a media briefing when announcing the oral order, referring to "dangerously high and rapid increase" of COVID-19 cases and outbreaks in the two prior weeks, demonstrating exponential growth as opposed to what had previously been linear growth in the number of cases.

[36] At the same time, Dr. Henry stated that transmission of the Virus was not occurring in places like restaurants where COVID-19 safety plans were being followed, but the modelling available indicated exponential growth of COVID-19 incidence if social contacts were not reduced from the existing baseline, and that without more restrictive measures, the ability to continue contact tracing could be compromised.

[37] The November 7, 2020 verbal orders were region-specific because the data showed that transmission and serious adverse consequences were particularly substantial in Vancouver Coastal and Fraser regions, and public health systems in those health authorities were being significantly strained to keep up with the volume of cases and consequent large numbers of case contacts that needed follow up through contact tracing to break the chains of transmission.

[38] By November 19, 2020, the weekly COVID-19 Situation Reports showed that the surge of cases continued, with the data showing an average of 690 cases per day and 217 hospitalizations with 59 people in intensive care. That day, Dr. Henry extended the November 7, 2020 measures province-wide. She announced a temporary province-wide ban on all in-person gatherings, including religious services. The temporary ban continues, but does not apply to online religious services, drive-through services, individual meetings with religious leaders or to private prayer or contemplation.

[39] On that day, Dr. Henry explained that increased activity in terms of community transmission, outbreaks and effects on the health care system in every health authority in the province meant we “now need to do more” and to keep our essential services and our essential activities open and operating safely, including schools and workplaces.

[40] Dr. Henry also said that “we need to relieve stress on the health care system. If this does not occur, people with COVID-19 and with other urgent health issues will suffer”. She explained that measures would be reviewed every two weeks, given that that is the incubation period for a clear and notable difference and slowing of transmission, for “balance and control”.

[41] Dr. Henry stated that transactional gatherings were not prohibited, but masks were required. She said the information reported to her was that poorer ventilation and often loud music is where there was higher risk.

[42] Generally, the prohibited activities were narrowed down to those that were felt to be too high-risk, with all others required to adhere to new guidelines. Dr. Henry emphasized the importance of managing the pandemic by “flattening the curve” and keeping the economy functioning and schools open.

[43] In announcing her oral order of November 19, 2020, Dr. Henry stated the following:

> While places of worship are to have no in-person group services for this period of time - I've had the privilege of meeting with a number of faith leaders from around the province - and this is important and they understand we need our faith services more than ever right now but we need them to do them in a way that's safe. With the community transmission that we're seeing and the fact that we have seen transmission in some of our faith-based settings.
>
> We need to suspend those and support each other and find those ways to care for each other remotely.
>
> The exceptions will be those important events - funerals and weddings and ceremonies such as baptisms - which may proceed in a limited way with a maximum of ten people including the officiant.

[44] She also said that:

a) The Province was now facing 538 new cases of COVID-19 in a single day, compared with about 175 cases per day four weeks earlier. The Province was clearly in a "second wave";

b) Provincial hospitals and ICU capacity were "stretched";

c) With higher prevalence, the probability of a young person having severe illness or dying increased, illustrated by the fact that one person in his 30s had died recently from COVID-19;

d) Transmission at social events in communities had spilled over into long term care and hospitals, with British Columbia facing 50 active outbreaks in the health system;

e) Transmission of SARS-CoV-2 was increasing in every health authority;

f) While the health care system was still functioning, without intervention it would be overwhelmed and people with COVID-19 and with other urgent health issues would suffer;

g) There had been transmission in faith-based settings under the existing rules;

h) There had been notable levels of transmission and there were some activities that are higher risk;

i) Hair salons, spas and restaurants were not seeing transmission, except where it was clear rules were not being followed;

j) Transmission in schools had been low, but there had been more exposure events, and there was greater concern about the Lower Mainland;

k) The measures in the Lower Mainland since November 7, 2020 had resulted in a decrease in the number of people infected as a result of attending social gatherings, a category including religious-based events;

l) Rolling averages of daily cases was a particularly important indicator of whether the pandemic was under control, in conjunction with other

> indicators. Other important metrics were the percentage of cases that could not be linked to a known case or cluster;
>
> m) Despite best efforts to comply with the existing rules and despite limits of 50 people, transmission was happening at religious gatherings; and
>
> n) Services that were explicitly under the Gatherings and Event order, where people came together at specific times and it was up to 50 people in a space, depending on how large the space was, that we need those to be suspended for this short period of time, because we have seen that despite our best efforts, we have transmission happening in those events.

[45] On November 28, 2020, the Council of the Immanuel Covenant Reformed Church sent a letter to Premier John Horgan, Health Minister Adrian Dix and Dr. Henry explaining that their religious beliefs required that they gather in-person for worship, and requesting that the restriction on worship services be immediately rescinded. The letter advised that the church would continue to take safety precautions to limit the risk of COVID-19 transmission, stating:

> We will strongly encourage those who are feeling unwell not to attend, maintain social distancing, provide hand sanitizer at the entrance of the building, require masks to be worn at all times except while seated, and require all attendees to leave immediately after the service. We will also practice the Lord's Supper and the offering so that there is no communal touching of plates, cups, or bags.

[46] On November 30, 2020, Rev. Brent Smith sent a similar letter to Premier Horgan, Minister Dix and Dr. Henry requesting that the restriction on worship services be rescinded. In his letter, Rev. Smith agreed to continue to adhere to safety guidelines, including “specific protocols around the maximum number of worshippers at a service, the use of masks, the use of hand sanitizer, social distancing, contact tracing, the distribution of food and drink, and the use of shared items.”

[47] On December 2, 2020, Dr. Henry issued a written G&E Order that repealed and replaced her November 10, 2020 G&E Order and her November 13, 2020 order with respect to COVID-19 regional measures.

[48] The reasons given for the G&E Order issued on December 2, 2020, included:

> a) Social interactions are associated with significant increases in the transmission of SARS-CoV-2. These result from the gathering of people

and events, which therefore increase the risk of serious illness from COVID-19;

b) The opening of the schools and seasonal changes increased the risk of transmission of SARS-CoV-2 in the population and the incidence of serious illness from COVID-19;

c) Seasonal and other celebrations had resulted in transmission of SARS-CoV-2;

d) There had been a rapid and accelerating increase in COVID-19 cases in the province; and

e) There was an immediate and urgent need for more drastic ("focused") action to reduce the rate of transmission of COVID-19.

[49] On December 7, 2020, Dr. Henry extended her G&E Order on similar terms to January 7, 2021, stating:

a) While the new case count remained high, and had been increasing steeply, it was beginning to level off, especially in the Fraser Health and Vancouver Coastal Health regions;

b) Measures implemented a month earlier were "starting to have an effect and starting to work";

c) However, many other communities in the province, especially in the Interior and the North, showed increasing rates;

d) SARS-CoV-2 transmits especially through in-person interactions, especially indoors and especially in the colder months of the year;

e) There was not a large number of transmission events in schools;

f) The measures that had been in place for many months for religious gatherings and that were working earlier in 2020, "we are now seeing that those are not enough right now"; and

g) The risk of transmission at outside peaceful demonstrations is less than indoor meetings, even without a mask, but in December, it is more dangerous than it was earlier in the year.

[50] In relation to religious organizations objecting to the December 7, 2020, G&E Order, Dr. Henry stated:

> It is a challenge. I know. There are many faith groups. There are a few faith groups that are continuing to meet and that concerns me. It concerns me because it is a misunderstanding of why we are trying to put restrictions in place. These restrictions are about recognizing there are situations where this virus is spreading rapidly, and we have seen when we come together and congregate indoors, in particular, those are settings where the virus is transmitted, despite our best efforts, despite the measures that we have had in place for several months that were working for many months. We are now seeing that those are not enough right now.

[51] In a further G&E Order dated December 9, 2020, Dr. Henry noted that seasonal and other celebrations and social gatherings in private residences and other places had resulted in the transmission of the Virus and increases in the number of people who developed COVID-19 and became seriously ill.

[52] On December 18, 2020, Dr. Bonnie Henry sent letters to Rev. Brent Smith and Rev. John Koopman. In the letters, she told them they had the option to submit a request for a case-specific variance to the G&E Orders under s. 43 of the *PHA.* She also encouraged them and their churches to "accept the importance of compliance with this Order and the need to respect the difficult decisions of public health officials."

[53] On December 22, 2020, Rev. Koopman responded to Dr. Henry, informing her that he was aware that many case-specific requests had been made for her to reconsider her G&E Order under s. 43 of the *PHA* without success. Rev. Koopman urged Dr. Henry to allow in-person worship services, and advised, among other things, that her "offer to consider a request from our church to reconsider our Order sadly rings hollow."

[54] Following G&E Orders on December 9, 15 and 24, 2020 that extended the prohibitions on in-person gatherings, the COVID-19 case rate declined, but remained elevated. It then began to increase again between December 28 and January 4, 2021, at which time the downward trend continued to a seven-day moving average of 449 cases by January 31, 2021.

[55] The January 8, 2021 G&E Order maintained the prohibition on in-person religious services, but permitted drive-in events with more than 50 patrons present as long as those attending only do so in a vehicle, no more than 50 vehicles are present, attendees stay in their vehicles except to use washroom facilities and maintain a distance of two metres from other attendees when outside their vehicles, and that no food or drink is sold. The order also provided exceptions for weddings, baptisms and funerals (to a maximum of 10 people) and permitted private prayer/reflection in religious settings.

[56] On February 5, 2021, a new G&E Order was issued adding the following recitals by Dr. Henry:

> I recognize the societal effects, including the hardships, which the measures which I have and continue to put in place to protect the health of the population have on many aspects of life, and with this in mind continually engage in a process of reconsideration of these measures, based upon the information and evidence available to me, including infection rates, sources of transmission, the presence of clusters and outbreaks, the number of people in hospital and in intensive care, deaths, the emergence of and risks posed by virus variants of concern, vaccine availability, immunization rates, the vulnerability of particular populations and reports from the rest of Canada and other jurisdictions, with a view to balancing the interests of the public, including constitutionally-protected interests, in gatherings and events, against the risk of harm created by gatherings and events;
>
> I further recognize that constitutionally-protected interests include the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, including specifically freedom of religion and conscience, freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association. These freedoms, and the other rights protected by the *Charter,* are not, however, absolute and are subject to reasonable limits, prescribed by law as can be demonstrably justified in a free and democratic society. These limits include proportionate, precautionary and evidence-based restrictions to prevent loss of life, serious illness and disruption of our health system and society. When exercising my powers to protect the health of the public from the risks posed by COVID 19, I am aware of my obligation to choose measures that limit the *Charter* rights and freedoms of British Columbians less intrusively, where this is consistent with public health principles.

[57] A further G&E Order of February 10, 2021 repeated the above recitals, and included the following:

> In consequence, I am not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy, subject to my expectation that persons organizing or attending such an assembly will take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.

[58] On February 12, 2021, Dr. Henry was asked why safety protocols accepted in other circumstances, such as bars, restaurants and health clubs, were not sufficient for regular in-person religious services. She replied that the nature of the interaction, the social interaction within a faith group, was “fundamentally different than some of the transactional relationships we have if we’re going to a store or even an individual

working out in a gym, an individual going to a restaurant with your small group of people".

[59] Dr. Henry further explained that:

> … we engaged very early with faith leaders across the province. And they recognize the important role that they play. I just want to reiterate, we know how important - essential - faith services are for people and for communities across BC. And that is why we have been working with faith community leaders since March of last year.
>
> And we stopped all of those types of interactions when we were learning about this virus, and what was happening with this virus, and how it was transmitted, and in what situations it was being transmitted last March. And then when we reopened gatherings, and particularly faith gatherings, we did talk with the community about what were the things that made it safer.
>
> ...
>
> We also know that there is a demographic that goes to many faith services that is older and more at risk in some cases. So we needed to take that into account. And we were able to allow and to have active in-person services through most of the summer and into the fall.
>
> As with many other things, as we got into the respiratory [season], we saw the transmissibility of the virus increasing. And what we were seeing was that there was transmission in a number of faith settings despite having those measures in place. So that spoke to us about there was something about those interactions that meant that the measures that we thought were working were no longer good enough to prevent transmission in its highly transmissible state during the winter respiratory season.
>
> So it was because of that we put in additional measures to stop the in-person services starting at the end of November. It really was because we were seeing, despite people taking their best precautions, we were still seeing transmission. We were seeing people ending up in hospital, and sadly, we had some deaths in particularly older people who were exposed in their faith settings.

[60] On February 12, 2021, Dr. Henry also stated that:

a) At that point, there had been 46 confirmed cases of variants of concern in BC. 29 of the B117 variant originally discovered in the United Kingdom and 17 of the B1351 variant originally discovered in South Africa;

b) It was not yet clear whether these variants have increased transmissibility or cause more severe illness;

c) All but one of the B117 cases were travel related, but a majority of the B1351 cases were locally transmitted;

d) Both in the COVID pandemic and in other outbreaks, the nature of interactions at faith group gatherings is fundamentally different than in transactional relationships at the store or gym or at a restaurant;

e) The demographic of churchgoers skews older than the population in general and is at more risk;

f) In the "respiratory season", as the transmissibility of the virus increased, there was transmission in a number of faith settings despite having measures in place, so that measures previously thought to be good enough no longer were; and

g) Some deaths from COVID-19 were from people exposed in faith settings.

(d) Reconsideration under Section 43 of the PHA

[61] Section 43(1) of the *PHA* provides, in part, that:

> 43(1) A person affected by an order, or the variance of an order, may request the health officer who issued the order or made the variance to reconsider the order or variance if the person
>
> (a) has additional relevant information that was not reasonably available to the health officer when the order was issued or varied,
>
> (b) has a proposal that was not presented to the health officer when the order was issued or varied but, if implemented, would
>
> (i) meet the objective of the order, and
>
> (ii) be suitable as the basis of a written agreement under section 38, or
>
> (c) requires more time to comply with the order.

[62] Although Dr. Henry has the power under s. 54(1)(h) of the *PHA* to "not reconsider an order under section 43", she has not exercised that power. Instead, she has encouraged various groups to seek variances under s. 43. Each of her G&E Orders have specifically included reference to the availability of reconsideration.

[63] On January 29, 2021, after filing the petition in this case, counsel for the religious petitioners provided a letter to counsel to for the respondents in the form of a request for reconsideration under s. 43(1) of the *PHA.* They apparently submitted over 1000 pages of evidence with their application, including reports from two doctors which they now also seek to have admitted on this petition.

[64] On Thursday, February 25, 2021, Dr. Henry provided a response to the religious petitioners' s. 43 application. She advised counsel for the religious petitioners that she was prepared to give a conditional variance to the G&E Order to the religious petitioners allowing outdoor weekly worship services, subject to the adherence to extensive and specific conditions.

[65] Following media reports that certain Jewish Orthodox Synagogues were being permitted to hold regular service in person, counsel for the religious petitioners raised this permission with counsel for the respondents.

[66] The religious petitioners contend that immediately after their counsel advised the respondents that they intended to rely on the exemption granted to the synagogues in argument, the respondents revised the exemption granted to the synagogues, requiring them to again to meet outdoors rather than indoors.

IV. Relief Sought

[67] The religious petitioners assert that their s. 2(a), (b), (c), and (d), s. 7 and s. 15 *Charter* rights are infringed by Dr. Henry's G&E Orders. They contend that those orders disregard the need for minimal impairment of those *Charter* rights, and are overbroad, arbitrary and disproportionate.

[68] Dr. Henry's G&E Orders are the principal source of concern to the petitioners. Pursuant to s. 2(1) and (2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], they seek relief with respect to the orders of November 19, 2020, December 2, 9, 15 and 24, 2020 and such further orders as may be pronounced. In particular, in their written petition they seek the following relief:

> 1. A Declaration pursuant to sections 24(1) and 52(1) of the *Constitution Act, 1982,* that:
>
>> a. Ministerial Order No. M416 entitled "Food and Liquor Premises, Gatherings and Events (COVID-19) Order No. 2" issued by the Minister of Public Safety and Solicitor General of BC, dated November 13, 2020, under the authority of sections 10 of the *Emergency Program Act*, RSBC 1996, c. 111;

b. an order made under section 3 of the *Covid 19 Related Measures Act*, SBC 2020, c. 8, entitled "Food and Liquor Premises, Gatherings and Events", referred to as item 23.5 in Schedule 2 of that Act;

c. orders made by the Public Health Officer entitled "Gatherings and Events" and made pursuant to Sections 30, 31, 32 and 39(3) *Public Health Act*, SBC 2008, c. 28, including orders of November 19, 20202, December 2nd, 9th, 15th and 24th, 2020 and such further orders as may be pronounced which prohibit or unduly restrict gatherings for public protests and for worship and/or other religious gatherings including services, festivals, ceremonies, receptions, weddings, funerals, baptisms, celebrations of life and related activities associated with houses of worship and faith communities;

(collectively referred to herein as the "Orders") are of no force and effect as they unjustifiably infringe the rights and freedoms of the Petitioners guaranteed by the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11 (the "*Charter*"), specifically:

a) *Charter* section 2(a) (freedom of conscience and religion);

b) *Charter* section 2(b) (freedom of thought, belief, opinion and expression);

c) *Charter* section 2(c) (freedom of peaceful assembly);

d) *Charter* section 2(d) (freedom of association);

e) *Charter* section 7 (life, liberty and security of the person); and

f) *Charter* section 15(1) (equality rights).

2. In addition or in the alternative, an order under sections 2(2) and 7 of the *JRPA* in the nature of or certiorari quashing and setting aside the Orders as unreasonable;

3. A Declaration that the Orders be set aside as their scope and effect exceed statutory authority of the respondents to impose and are, therefore *ultra vires*;

4. Interim and final injunction and/or prohibition pursuant to section 2(2) of the *JRPA* and Rule 10-4 enjoining the respondents from further

enforcement action which prohibit or interfere with the subject activities herein;

5. An order that Violation Tickets numbers AJ19780619, AJ06525763, AJ13323225, AJ13323259, AJ16458508, AH96863545, AJ17179822 and AJ16958269 issued as described herein be dismissed and an order enjoining issuance of further such tickets relating to matters herein.

[69] Of the list of orders challenged in para. 1, Part 1 of their written petition, the petitioners only pursued the G&E Orders issued by Dr. Henry under the *PHA* during the petition hearing.

V. Impact of the Reconsideration Decision on this Petition

[70] The petitioners have invoked s. 2 of the *JRPA* as the basis for the relief they seek. That section provides:

> 2(1) An application for judicial review must be brought by way of a petition proceeding.
>
> (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> (a) relief in the nature of mandamus, prohibition or certiorari;
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[71] The *JRPA* includes the following defined the terms:

> "record of the proceeding" includes the following:
>
> (a) a document by which the proceeding is commenced;
>
> …
>
> (f) the decision of the tribunal and any reasons given by it;
>
> "statutory power" means a power or right conferred by an enactment:
>
> (a) to make a regulation, rule, bylaw or order,
>
> (b) to exercise a statutory power of decision,
>
> (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,

> (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
>
> (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability…
>
> "tribunal" means one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred.

[72] Dr. Henry issued the religious petitioners a partial variance to the G&E Orders a few days before the hearing of this petition. In light of this, the respondents raised a preliminary objection that the religious petitioners must amend their petition to challenge Dr. Henry's reconsideration decision, rather than continue to challenge the G&E Orders.

[73] On an application for relief under s. 2 of the *JRPA*, the basic principle of judicial review is that an applicant must first exhaust all adequate statutory remedies and that review must be of a final decision. Where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed: *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 [*Yellow Cab*] at para. 40; see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.

[74] The religious petitioners contend that in contrast to the present matter, none of these cases involved a constitutional challenge to a rule of general application to the entire population, which can be altered at any time by Dr. Henry.

[75] The religious petitioners contend that the respondents' reliance on *Yellow Cab* is untenable and unconstitutional, and a time-consuming distraction. They contend that s. 43 of the *PHA* was not intended to prevent constitutional challenges to overbroad public health orders that limit the *Charter* rights of the population at large, nor could it ever validly have such an effect.

[76] In response to this argument, the respondents say the rule in *Yellow Cab*—that judicial review must be of the reconsideration decision—is not a discretionary

one. They say it applies with equal force when the basis for review is an alleged failure of an administrative decision maker to proportionately balance their statutory mandate with *Charter* rights, including freedom of religion.

[77] The religious petitioners rely on the comment of Mr. Justice Groberman at para. 44 in *Yellow Cab* that a tribunal cannot be permitted "through procedural machinations, to oust the inherent, constitutionally-protected supervisory jurisdiction of the superior courts". That comment was made in the context of a discussion of a denial of leave for reconsideration:

> [43] In *Auyeung*, the applicant contended that the Board had failed to properly consider and apply its own jurisprudence. In denying leave for reconsideration, the Board rejected that assertion. This Court recognized that the Board, in denying leave, had effectively determined that the application was not meritorious. In the result, it held that any judicial review application had to challenge the denial of leave rather than the initial decision.
>
> [44] Where a denial of leave does not constitute a determination that the request for reconsideration lacks merit, it is my view that the initial administrative decision, and not the denial of leave, will be the appropriate target for judicial review. To hold otherwise would be to allow a tribunal, through procedural machinations, to oust the inherent, constitutionally-protected supervisory jurisdiction of the superior courts. In *Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174, this Court emphasized that a tribunal cannot, by blocking access to administrative review of a decision, bar the courts from passing on the merits of judicial review.

[78] Read in the context in which it was made, the statement does not support the religious petitioners' assertion that it entitles them to simply ignore the alternate remedy afforded by s. 43 of the *PHA*.

[79] Moreover, as the religious petitioners have chosen not to amend their petition to seek judicial review of Dr. Henry's reconsideration decision, the main evidence they seek to rely on, namely the affidavits of Dr. Warren and Dr. Kettner, is not admissible on this petition because that evidence was not before Dr. Henry when she made the G&E Orders. I turn to this issue now.

VI. Record of Proceedings

[80] In B.C., with limited exceptions, the evidence on an application for judicial review is confined to the record before the decision maker.

[81] The "record of proceeding" is defined in s. 1 of the *JRPA* and includes a "document produced in evidence before the tribunal" and "the decision of the tribunal and any reasons given by it".

[82] In *Dane Developments Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations),* 2015 BCSC 1663*,* Mr. Justice Bracken conveniently summarized three categories of exceptions to the rule that all evidence on judicial review must have been in the record before the decision maker:

> [46] The court adopts a supervisory role on judicial review. Among other things, this means that the reviewing court must conduct the proceedings based on the record that was before the administrative decision maker: *Albu v. University of British Columbia*, 2015 BCCA 41, at paras. 35-36. Thus, a general rule precludes the receipt of new evidence on a judicial review, subject to certain exceptions respecting materials which tend to facilitate or enhance the court's supervisory task. Those exceptions contemplate evidence which:
>
> - provides "general background" information which will assist the reviewing court in understanding the issues on the judicial review;
> - brings to the court's attention procedural defects that cannot be found in the evidentiary record of the administrative decision maker; or,
> - identifies or reconstructs the record that was before the administrative decision maker. This includes materials which demonstrate the "complete absence of evidence" before the administrative decision maker with respect to a particular finding.

[83] While these categories provide useful guidance, the court must ultimately take a principled approach in determining whether evidence not before the decision maker is admissible on judicial review: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 [*Air Canada*], at para. 38.

[84] Just what constitutes the "record of proceeding" in this case is a matter of dispute between the petitioners and the respondents. The petitioners contend that the impugned G&E Orders are in the nature of subordinate legislation, issued at the

discretion of a statutory decision maker, without a hearing, so there is no identifiable record.

[85] It is my view that in the case of a non-adjudicative tribunal such as this, the record of proceedings must of necessity be reconstructed. It is not necessarily "static", but still consists either of general, or uncontroversial background information that will assist me in understanding the issues or information that was before Dr. Henry.

[86] In *Twenty Ten Timber Products Ltd. v. British Columbia (Finance)*, 2018 BCSC 751, the Minister of Finance sought to adduce affidavit evidence concerning the filing of a certificate under the *Forest Act*, R.S.B.C. 1996, c. 157, Madam Justice Adair reasoned:

> 26 However, the process leading to the filing of the Certificate is not at all similar or comparable to the administrative processes involved in either *Sobeys* or *Stein*, both of which involved hearings at which evidence was submitted and a record was created. I agree with the submissions of the Minister that this was not an adjudicative hearing process in any sense, and it was not required to be under the *Forest Act*. The Affidavit No. 1 of Kristina Jacklin in particular shows what the Ministry knew about Twenty Ten's role in TSL A93113 before the November 16, 2017 letter was sent. In addition, the Minister's affidavits provide additional information to assist the court in understanding the issues on the judicial review.
>
> 27 In short, the affidavits filed by the Minister in response to the application for judicial review bear on the arguments that the Minister is entitled to make on this judicial review, and are relevant to the grounds raised on judicial review.

[87] In *Crowder v. British Columbia (Attorney General)*, 2019 BCSC 1824, amendments to the Supreme Court Civil Rules by the Attorney General, on the advice of a committee constituted by him, were challenged as unconstitutional. There, I accepted that the evidence that may be adduced in support of an application for judicial review of an administrative hearing process is limited to the record that was before the decision maker and that constitutional questions are ideally resolved on the basis of as extensive a factual record as is reasonable.

[88] I found that:

> 42 … as in *Twenty Ten Timber* and *462284 B.C. Ltd.*, the process that led to the creation of the impugned Rule was not an adjudicative hearing process and I will therefore adopt the approach taken by Adair J. and rely on the non-hearsay evidence proffered by the petitioners.

[89] The non-hearsay evidence that I admitted in *Crowder* was limited to what was contained in news releases from the Attorney General's office explaining the rule change. I declined to admit emails from ICBC representatives, newspaper reports of statements by the Attorney General and “sampling” evidence of cases in which expert evidence was relied on.

[90] The respondents contend that the record for this petition is all of the information available to Dr. Henry when she made the impugned G&E Orders. For this, they tendered the evidence of Dr. Brian Emerson, the Acting Deputy Provincial Health Officer.

[91] The respondents assert that Dr. Emerson’s first affidavit provides the general background information and evidence reconstructing what was before Dr. Henry at the time she made the impugned G&E Orders under the *PHA*. They contend that with respect to their impact on political and religious assembly at issue in this proceeding, the other impugned orders follow on from Dr. Henry’s decisions.

[92] The respondents also assert that from the initial verbal November 7, 2020 G&E Order to date, the restrictions on in-person religious services have been essentially the same through a series of sequential verbal and written orders as follows:

a. Written orders of November 10 and 11, 2020 (written form of November 7 verbal order);
b. Verbal order of November 19, 2020 (broadened the restrictions to apply province-wide, extended them to December 8, 2020, and provided exemptions for weddings, baptisms and funerals to a maximum of 10 people, and private prayer or reflection in religious settings);
c. December 2, 2020 written order (repealed and replaced November 10 written order, no change *vis a vis* religious services);
d. December 4, 2020 written order (repealed and replaced December 4 written order, no change *vis a vis* religious services);

e. December 9, 2020 written order (extended restriction on gatherings and events to January 8, 2021);

f. December 15, 2020 (religious service can be provided to a person in their home);

g. December 24, 2020 written order (repealed and replaced December 15 order – no change *vis a vis* religious gatherings);

h. January 8, 2021 written order (extended restrictions to February 5, 2021, permits drive-in events with up to 50 vehicles); and

i. February 10, 2021 written order (indefinite extension of restrictions).

[93] The respondents further assert that the February 10, 2021 G&E Order is the one currently in effect, and the only order properly before me on this judicial review.

[94] The respondents submit that the restriction of the evidence properly admissible on judicial review is not discretionary. The principle, and the basis for any exceptions, was set out authoritatively by the Court of Appeal in *Air Canada* at paras. 32-44. In those passages, Mr. Justice Groberman said the following:

> [34] The function of a court on judicial review is supervisory. The court must ensure that a tribunal has operated within legal norms. Courts are, in a very strict sense, reviewing what went on before the tribunal. They are not undertaking a fresh examination of the substantive issues. For that reason, judicial review normally concerns itself only with evidence that was before the tribunal [cites omitted].
>
> …
>
> [35] It is important, however, to recognize that we cannot use the narrow traditional concept of a "record" as the standard; rather, a court must be allowed to look at the material that was considered by the tribunal, whether or not that material would, historically, have formed part of the tribunal's "record" [cites omitted].
>
> …
>
> [39] In determining whether an affidavit is admissible on judicial review, the key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court…

[95] In addition to the record as put forth by the respondents, the religious petitioners seek to rely on various additional evidence, which I address below.

[96] The petitioners contend that the concept of a formal "record of the proceeding" is inapplicable to this case. They say the primary focus of this proceeding is on a constitutional challenge to what amount to laws—rules of general

application—binding on everyone in B.C. Thus, they argue, this review requires a sufficient factual foundation and is required by the Supreme Court of Canada not be addressed in a factual vacuum.

[97] I am unable to accept the petitioners' submission that when a decision is challenged on constitutional grounds, the principle that the evidence on judicial review is limited to the record before the decision maker does not apply. Evidence of constitutional issues that were not contested or that should have been put before the decision maker are not admissible if they were not put forward; see, for example, *Actton Transport Ltd. v. British Columbia (Employment Standards),* 2010 BCCA 272, where the underlying issue concerned division of powers and the Court of Appeal said that the record before the trial judge should have been confined to the record before the decision maker.

[98] In their oral submissions, the religious petitioners contend that it would be unfair for a person affected by an order not to be able to put in their own evidence if it has not been considered by the health officer.

[99] The respondents point out that s. 43(l)(a) of the *PHA* provides precisely such opportunity and requires the decision maker to give reasons if the information is not accepted.

[100] If I were to allow the evidence that the religious petitioners wish to rely on in this case, that would permit them to bypass the statutory decision maker and rely upon purportedly expert evidence, without affording deference to Dr. Henry's findings on the face of the record before her.

[101] The evidence of what was before Dr. Henry when she made the G&E Orders should not be conflated with the record that the religious petitioners wish to place before me in this petition hearing. That evidence includes information which can be relied on for determining standing or whether a petitioner has exhausted administrative remedies, but not for whether a decision (here the G&E Orders) is reasonable or compliant with the *Charter*.

[102] Had the religious petitioners amended their petition to seek judicial review of Dr. Henry's decision to grant them a variance to her G&E Orders, then the "record of proceeding" would include all of the information before Dr. Henry when she made her decision on the variance (but not before her when she issued the G&E Orders). But then the review would be of only her variance decision, not the G&E Orders.

[103] I am prepared to admit into evidence the communications between the religious petitioners and Dr. Henry or other representatives of the provincial government with respect to the impugned G&E Orders up to and including the date of the most recent order prior to the hearing of the petition herein, of February 10, 2021.

[104] As Dr. Emerson's second affidavit was relied upon only with respect to the respondents' injunction application, I will ignore it for the purposes of these reasons for judgment.

[105] The second affidavit of Valerie Christopherson made February 25, 2021, attaches Dr. Henry's variance decision on the religious petitioners' s. 43 application, to show the fact of the decision having been made. It is admissible for that purpose, but is irrelevant to the reasonableness of Dr. Henry's earlier G&E Orders.

[106] The first and third affidavits of Vanessa Lever, made February 2, 2021 and February 26, 2021 attach correspondence between counsel for the petitioners, Mr. Jaffe, and counsel for the respondents, Mr. Morley, regarding the religious petitioners' s. 43 application. That correspondence is also relevant to the respondents' preliminary objection that the petitioners should have sought judicial review of Dr. Henry's s. 43 decision, but is irrelevant to the reasonableness of Dr. Henry's earlier G&E Orders.

[107] At the request of the petitioners, the respondents submitted an affidavit attaching Dr. Henry's s. 43 *PHA* variance decision that was granted to Rabbi Meir Kaplan. Rabbi Kaplan submitted that request for reconsideration on behalf of Orthodox Jewish congregations, noting that his understanding of Jewish law

prohibited the use of electronic devices on the Sabbath. On February 23, 2021, Orthodox congregations in B.C. were granted a limited exemption to gather for the holiday of Purim in-doors, with specific safety conditions, including on the number of attendees. They were subsequently granted an exemption to hold weekly Sabbath services outdoors, with specific safety conditions.

[108] On March 1, 2021, Dr. Henry's advised Rabbi Kaplan that:

> Further to the variance granted I granted to the Orthodox Jewish congregations on February 23 to hold Purim and Sabbath services in-doors, this is to clarify that consistent with your original request, the variance only allowed indoor services for Sabbath of February 27, given that it followed immediately after the Purim gatherings on Thursday and Friday.
>
> We are noting that virus transmission remains elevated and there are indications of increased viral transmission in some areas of the province. In addition we are seeing increased reports of virus variants of concern (VOCs). Modelling suggests that if these VOCs were to become established or predominant in our province, case counts will rise quickly and significantly. The enclosed presentation from the Public Health Agency of Canada notes that "With spread of VOC, current public health measures will be insufficient, and epidemic resurgence is forecast" (see slide 12) and "In all provinces current controls may not be sufficient to fully control the variants of concern. The early lifting of public health measures could lead to a resurgence of the epidemic, including the community transmission of variants of concern" (slide 16).
>
> Furthermore, with the spring break season nearly upon us we anticipate that there will be additional people travelling, including people coming from other provinces where transmission is higher than in BC, in spite of our recommendation to limit travel to essential reasons. Also, with schools out of session we are concerned that additional socialization will also drive viral transmission to higher levels, potentially increasing hospitalizations, intensive care admissions and deaths.
>
> With respect to the risk of indoor services, the likelihood of transmission of SARS-CoV-2 is greater when people are interacting in communal settings, when people are close to each other, in crowded settings, in indoor settings due to less ventilation than outdoor settings; and when people speak, and especially when they sing, chant or speak at higher than conversational volume. These are all conditions that are exist [sic] when services are held indoors, which make them of particular concern.
>
> The likelihood of transmission also increases exponentially in a population when a number of people are simultaneously infected in a group setting, and subsequently infect their contacts, who infect their contacts and so on. This can, and has, quickly result in a scenario where local public health resources can be overwhelmed such that they are no longer able to trace all the contacts of such an exposure and require them to self-isolate. If this occurs, community spread can quickly become rampant, leading to increased case

> counts and, in time, has the potential to overwhelm our healthcare system as hospitalizations increase. As well, transmission in religious settings have led to introductions of the virus into vulnerable community settings such as long term care homes leading to serious outbreaks with resultant deaths.
>
> For these reasons I am revising the variance to the order to be clear that weekly Sabbath services at all Jewish Orthodox Synagogues must be held outdoors, according to the following conditions…

[109] In my view, the evidence of the variance granted to Jewish Orthodox synagogues does form part of the record before Dr. Henry. It is part of the monologue she engaged in to explain the G&E Orders. This evidence is relevant to my analysis under s. 1 of the *Charter,* in particular whether the orders minimally impair the rights in question.

[110] Notwithstanding these conclusions, I will address other additional evidence that the religious petitioners seek to rely upon.

[111] That evidence is from two doctors: Dr. Thomas A. Warren, a specialist in the diagnosis and treatment of infectious diseases, and Dr. Joel Kettner, an expert in public health, preventative medicine and general surgery, and former Chief Public Health Officer for the Province of Manitoba.

[112] Dr. Warren was asked to opine on the risk of transmission of the Virus at in-person worship services in B.C. relative to the transmission risk of other activities permitted under existing provincial health orders in B.C. Those other activities included in-person dining at restaurants and activities such as gyms, schools, public transit, pubs and the retail sector.

[113] Dr. Warren provided a number of estimates of risk, for example the risk of death in older individuals, the number of transmissions from social gatherings, office workplaces, recreational facilities, and religious meeting in the Canadian epidemiologic summary.

[114] Dr. Kettner was asked by the religious petitioners to respond to both of Dr. Emerson's affidavits sworn in these proceedings. He was also asked to provide his opinion as to the transmission risk of the religious petitioners' worship services

compared to other activities permitted under Dr. Henry's G&E Orders, including in-person dining at restaurants and pubs, and attendances in the retail sector, at gyms, and on public transportation.

[115] Dr. Kettner offered his opinions on the requirements of public health statutes in Canada, and how the standards and ethics of public health practice should be exercised.

[116] He queried whether Dr. Henry's G&E Orders were evidence-based, and deposed that based on the information provided in Dr. Emerson's first affidavit, 7/1,333, or .005 of all reported cases of COVID-19 in B.C. have been associated with places of worship.

[117] In comparing the risk of worship services compared to other permitted activities, Dr. Kettner extrapolated the frequency of church attendances in B.C. from a 2003 Statistics Canada report. In doing so, he incorrectly understood that one of the rules of the Free Reformed Church of Chilliwack was to exclude people over the age of 65 from attendance. He was also not apparently provided with, or alternatively chose not to comment on the practices of the other two religious petitioner churches.

[118] Dr. Henry did not have the reports of these two doctors available to her when she made the impugned G&E Orders. As I have indicated above, if I allowed the religious petitioners to rely upon this purportedly expert evidence, that would permit them to bypass the statutory decision maker without affording deference to Dr. Henry's findings on the face of the record before her.

VII. Standard of Review

[119] In *Trest v. British Columbia (Minister of Health)*, 2020 BCSC 1524, Mr. Justice Basran dealt with an application by parents of school-aged children who wanted mandatory mask or face-covering policy in classrooms during the pandemic. He wrote:

> [91] On the balance of convenience, in my view, the public interest is best served by continuing to rely on the PHO, her team of experts, and the Minister of Health to guide British Columbia's response to the ongoing COVID-19 pandemic. The evidence before me shows that their guidance, advice, and policies such as the Restart Plan are firmly rooted in current scientific knowledge and best practices. The fact that some of this advice is not universally accepted is insufficient to conclude that the government has clearly chosen the wrong approach in terms of the public interest. The petitioners have not adduced sufficient evidence to rebut the presumption that the Restart Plan serves the public interest. Therefore, they have not discharged their burden to show that the balance of convenience favours the granting of the injunctions they seek.

[120] In *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, at para. 31, Madam Justice L'Heureux-Dubé referred, with approval, to the view expressed by André Nadeau in "*La responsabilité médicale*" (1946), 6 R. du B. 153, at p. 155:

> [TRANSLATION] The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects...

[121] At para. 32, L'Heureux-Dubé J. continued:

> Or, as summarized by Brossard J. in *Nencioni v. Mailloux*, [1988] R.L. 532 (Sup. Ct.), at p. 548:
>
> > [TRANSLATION] ... it is not for the court to choose between two schools of scientific thought which seem to be equally reasonable and are founded on scientific writings and texts ...

[122] The petitioners contend that as their proceeding is primarily centered on what is in substance a *Charter* challenge to Dr. Henry's G&E Orders, as opposed to the judicial review of an administrative decision, no deference is owed to Dr. Henry in determining the constitutionality of her orders. They say that a standard of correctness should be applied.

[123] I am unable to accept this over-simplification. I accept that insofar as the *Charter* is concerned, Dr. Henry's orders must reflect and incorporate *Charter* values, but so long as they do, the impugned orders are in areas of science and medicine.

[124] In the areas of science and medicine, Dr. Henry is entitled to deference and the appropriate standard of review of such matters is that of reasonableness.

[125] Even if the opinions of Dr. Warren and Dr. Kettner were admissible, they represent, at best, an alternate view of the risks that have been considered and weighed by Dr. Henry. They do not persuade me that her conclusions and G&E Orders are unreasonable.

[126] I will discuss the standard of review necessary to consider s. 1 of the *Charter*, below, when I address dispute between the parties as to whether the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*] or that in *Doré v. Bureau du Quebec*, 2012 SCC 12 [*Doré*] should be applied.

VIII. Discussion

[127] The substance of the various G&E Orders in effect from November 7 to date have remained essentially the same in terms of restrictions on in-person gatherings and events, including religious services.

[128] The respondents contend that, in the result, the question for the Court on this judicial review is whether Dr. Henry reasonably balanced the restriction on religious freedom with protection of public health at the time she first imposed the regional restrictions and on an ongoing basis thereafter when extending them, thereby continuing the ban.

[129] Section 2 of the *Charter* states:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

[130] Section 7 of the *Charter* states:

> 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.

[131] Section 15 of the *Charter* states:

> 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.

[132] In the petition response, the respondents conceded that the impugned G&E Orders engage the religious petitioners' rights under ss. 2(a), 2(b), 2(c) and 2(d) of the *Charter*, but in their oral submissions resiled from the admission with respect to s. 2(d).

[133] The respondents also accept that restrictions on gatherings engage freedom of association under s. 2(d) of the *Charter*, which, at minimum, would protect the ability of individuals to meet to pursue collective goals.

[134] With respect to s. 7 of the *Charter*, the respondents do not dispute that there are mental health benefits of in-person religious and other gatherings. They argue, however, that the religious petitioners have not established that their "life", "liberty" or "security of person" interests have been infringed or that this was done contrary to the principles of fundamental justice. They say the right to a written hearing for individual exemptions has been specifically preserved, and say that the kind of serious state-caused psychological harm required to establish a breach of "security of the person" has not been established.

[135] With respect to s. 15 of the *Charter,* the respondents contend that the religious petitioners have not shown that any of the impugned G&E Orders make a distinction based on an enumerated or analogous ground or that such a distinction creates a disadvantage. They say that gatherings are defined neutrally, and exempted activities such as support groups or counselling are exempted whether delivered in a secular or religious way. Thus, they contend that there is no evidence

that the religious petitioners' right to the equal protection and equal benefit of the law without discrimination has been infringed.

[136] The respondents contend that the real issue is whether the impugned G&E Orders are "reasonable limits" on these freedoms under s. 1 of the *Charter*.

(a) Mr. Beaudoin

[137] Mr. Beaudoin organized public protests against what he contends to be an abuse of government power in the present COVID-19 pandemic by imposing unnecessary and "draconian" restrictions in the name of "safety," contradicting what is permissible in a free and democratic society.

[138] Those protests took place on December 1, 5, and 12, 2020. On December 15, 2020, an RCMP officer issued Mr. Beaudoin violation ticket no. AJ17179822 for contravening the G&E Order that was in place at the time.

[139] Mr. Beaudoin contends that the protests he participated in were peaceful political events that occurred outdoors and prioritized the safety of attendees, including their physical distancing, and involved cooperation with police.

[140] He initially addressed any safety concerns, informing everyone that they should maintain social distance, but gave evidence that trying to comply with the safety plan requirements of Dr. Henry's orders was impossible, as he was unable to control the number of people who attend an outdoor public protest or gather contact information from each of them.

[141] The RCMP required Mr. Beaudoin to record personal information of the protestors attending the protests. He says that the RCMP threatened him with penalties for noncompliance.

[142] Mr. Beaudoin explained it was impossible to collect such information from a large group coming and going in an open area. He also expressed reluctance to divulge particulars about the protestors to the government.

[143] As he had nothing to offer by way of additional relevant information that was not reasonably available to the health officer when the G&E Order was issued or varied, nor any proposal that was not presented to the health officer when the order was issued, Mr. Beaudoin did not apply for a s. 43 *PHA* exemption to the impugned orders, and thus had no alternate remedy available to him.

[144] In any case, those parts of the G&E Orders that infringed the *Charter* rights asserted by Mr. Beaudoin no longer form a part of the orders.

[145] In her G&E Order of February 10, 2021, Dr. Henry included the following in the preamble to the order:

> When exercising my powers to protect the health of the public from the risks posed by COVID-19, I am aware of my obligation to choose measures that limit the *Charter* rights and freedoms of British Columbians less intrusively, where this is consistent with public health principles. In consequence, I am not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy, subject to my expectation that persons organizing or attending such an assembly will take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.

[146] This leaves only Mr. Beaudoin's application for a declaration as to the infringement of his *Charter* rights between November 7, 2020 and February 10, 2021.

[147] In oral submissions, counsel for the respondents conceded that Dr. Henry's orders made between November 19, 2020 and February 10, 2021, prohibiting outdoor gatherings for public protests were of no force and effect during that time. I therefore make the declaration sought by Mr. Beaudoin that the orders extant between those dates did infringe his s. 2(c) and (d) *Charter* rights and are of no force and effect.

(b) The Religious Petitioners

[148] A law or other government action engages freedom of religion if it interferes with a practice connected with religion in a manner that is more than trivial or insubstantial. It is conceded that the restrictions on in-person religious gatherings

meet this threshold. The respondents accept that in-person gatherings are a practice connected with religion and that the November 19, 2020 G&E Order in particular interferes in a manner that is more than trivial or insubstantial with religious practice.

[149] It is apparent that the religious petitioners accept that public health measures against the spread of the Virus are necessary for secular reasons. Indeed, two of the three churches discontinued in-person services before they were under a legal obligation to do so.

[150] However, the religious petitioners allege that Dr. Henry's decisions were motivated by "administrative ease and convenience" and say there is "no evidence" that she considered measures that would have limited religious communities' *Charter* rights in a less drastic and severe fashion. The religious petitioners say that there is "simply nothing to illustrate" a causal link between restrictions on religious services and a corresponding reduction in COVID-19 transmission. They claim there is "no evidence" that COVID-19 transmission could be expected from worship services adhering to the safety steps prescribed in the October 30, 2020 G&E Order relative to other forms of in-person gathering permitted from November 2020 forward, such as in schools or retail establishments.

[151] The respondents argue that in the fall of 2020, it became clear that the measures so far taken until then were insufficient to avoid an exponential increase in the prevalence of the Virus. They contend that a number of the clusters were linked to religious events, notwithstanding the measures that were in place at that time.

[152] The respondents argue that the epidemiological situation in B.C. changed in Fall 2020 when the number of new cases, hospitalizations and the reproduction rate all climbed. They say there was evidence of cases and clusters associated with social gatherings in homes, bars and restaurants and religious gatherings.

[153] The respondents say that this surge in cases and hospitalizations in the fall of 2020 resulted in the PHO making an oral order imposing region-specific restrictions for the Vancouver Coastal and Fraser Health regions on November 7, 2020.

[154] The religious petitioners have given evidence that gathering in-person for worship provides benefits in addition to the fulfillment of the religious beliefs described above. These benefits include:

i) accommodating members who do not have the means to use technology;

ii) identifying specific needs of vulnerable persons in the church community;

iii) providing physical, mental and emotional care; and

iv) providing comfort and encouragement and reducing loneliness, depression, anxiety, and fear.

[155] The respondents accept that the religious petitioners' practice of in-person worship is fundamental to their religious beliefs.

[156] The religious petitioners have continued to gather for in-person religious services, despite the G&E Orders, and have attempted to exercise various precautions to reduce the risk of transmission of the Virus.

[157] For example, the evidence with respect to services at the Immanuel Covenant Reformed Church is that it has:

a) allowed one of the six 'districts' (groupings of persons in our Church) to meet per service in order to keep the numbers attending below 50 persons;

b) put up official COVID-19 safety signage all around the Church, established hand sanitizing stations and contact tracing lists of attendees, informed their congregation about social distancing and worked to diligently encourage people to stay two meters apart and urged anyone with any symptoms of Illness to stay home until they recovered;

c) cancelled their after-service times of fellowship and coffee, urging people to remain socially distanced and go home soon after the service ended.

d) added an afternoon service on June 7, 2020;

e) marked off rows of chairs designating some for morning use, some for afternoon use, and some "Do Not Use," in order to make sure there were two meters between people at ail times;

f) added an eight-foot high thick transparent vinyl curtain bisecting our sanctuary allowing us to have two groups of 50 persons in those two areas. The divided sanctuary is serviced by separate entrance and exit

doors minimizing the chances of contact between the 50 people on one side of the sanctuary and the 50 people on the other side of the sanctuary;

g) established another group of 50 persons who met in our Fellowship Room and a location at a member's nearby shop which allowed another 50 people to meet;

h) had volunteers present detailed plans for this stage of renewing worship services, with proposals for grouping by families and floor plans of how people would sit;

i) Established groups of 50 persons who would become a 'bubble' and would meet together in these spaces, rotating weekly from space to space to allow everyone to have as uniform an experience as possible.

j) closed the nursery;

k) made masks mandatory when entering, moving about in, and exiting the building;

l) urged everyone to leave the service immediately after it ends and to head straight to their vehicles; and

m) arranged seating in order to preserve the 'bubbles' from the worship groupings we had previously been using.

[158] The evidence on behalf of the Free Reformed Church of Chilliwack, B.C. is that it has:

a) hired a professional cleaner to ensure that a complete and thorough cleaning happened as needed;

b) immediately increased the ventilation of their facility by leaving doors open during our services, with the result that no one touches the doors, expect for the one person who is designated to open them at the beginning of each Sunday;

c) Before March 2020, would pass a collection plate through the pews to collect free will offerings but have not done so since;

d) cancelled “coffee time” after morning services encouraged their members to immediately go to their vehicles and home after the services, and many socialize via phone, text or zoom in lieu of this time;

e) Cancelled most Church classes resuming them when they considered it safe to do so;

f) Consistently provided hand sanitizer and masks - and encouraged their use by those attending;

g) regularly reminded the congregation that If they are feeling unwell with even one symptom of COVID-19, they are requested to not come to church for any reason and to stay home until they have recovered;

h) developed procedures whereby the congregation would be notified within hours if someone tested positive for COVID from within our congregation; and

> i) often reminded its congregation through letter and verbal reminders of the various protocols that we have in place for their protection.

[159] The Riverside Calvary Church stopped holding in-person gatherings around March 15, 2020 and provided online services for its members and the general public.

[160] This church resumed services on May 31, 2020 with 50 people, holding three services on Sunday mornings at 50 people each. The church members removed chairs from the sanctuary in order to maintain physical distancing, set up hand sanitizer stations throughout the church buildings. Their sanctuary was cleaned and wiped down between each service. Masks were also provided, and they added a reservation link on their website in order for people to reserve a seat. When reservations reached 50, no more were accepted. The evidence before me is that this church's members have committed themselves to meeting and exceeding the prior health guidelines including:

> a) holding three services on Sunday mornings capped at 50 people;
> b) maintaining a reservation link on our website in order for people to reserve a seat and provide contact information;
> c) ensuring seating was spaced out to maintain and exceed physical distancing requirements;
> d) having hand sanitizer stations were set up throughout the Church buildings;
> e) cleaning and wiping down the sanctuary between each service;
> f) ensuring that attendees were provided with clean masks;
> g) having elders direct orderly and socially distanced entry of persons to the sanctuary and also constantly sanitizing the entry door; and
> h) keeping services to an hour so as to maintain a timely flow of people in and out of the building.

[161] Notwithstanding these precautions, the churches have been discouraged in various ways from holding in-person services by members of the RCMP. They have been issued at least 11 tickets totalling $34,500 for allegedly contravening the G&E Orders issued by Dr. Henry.

[162] The respondents assert that the Province's publication "COVID-19 Ethical Decision-Making Framework", the "key ethical principles and values" that are

asserted to underpin the framework, include a consideration of *Charter* rights. The principles and values identified in this publication include: Respect, defined as "to whatever extent possible, individual autonomy, individual liberties, and cultural safety must be respected; Least Coercive and Restrictive Means defined as "any infringements on personal rights and freedoms must be carefully considered, and the least restrictive or coercive means must be sought"; Proportionality, defined as "measures implemented, especially restrictive ones, should be proportionate to and commensurate with the level of threat and risk"; and Reasonableness, defined as "meaning that decisions should be rational, non-arbitrary nor based on emotional reactivity and based on the appropriate evidence available at the time".

(i) Section 2(a) of the Charter

[163] In *R v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 [*Big M Drug Mart*], at para. 94, the Supreme Court of Canada identified the "essence" of freedom of religion as protected by the *Charter* as encompassing the rights "to entertain such religious beliefs as a person chooses", "to declare religious belief openly without fear of hindrance or reprisal", and "to manifest religious belief by worship and practice or by teaching and dissemination."

[164] It is the third of these features that are engaged on the hearing of the petition.

[165] In *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [*Trinity Western*], the majority confirmed both the individual and communal aspects of freedom of religion:

> 64 Although this Court's interpretation of freedom of religion reflects the notion of personal choice and individual autonomy and freedom, religion is about both religious beliefs and religious relationships (*Amselem*, at para. 40; *Loyola*, at para. 59, quoting Justice LeBel in *Hutterian Brethren*, at para. 182). The protection of individual religious rights under s. 2(a) must therefore account for the socially embedded nature of religious belief, as well as the "deep linkages between this belief and its manifestation through communal institutions and traditions" (*Loyola*, at para. 60). In other words, religious freedom is individual, but also "profoundly communitarian" (*Hutterian Brethren*, at para. 89). The ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(a).

[166] The religious petitioners contend that Dr. Henry's G&E Orders are an outright forbidding of all British Columbians from the free exercise of the fundamental right to engage in sacred religious practices in a communal and collective setting.

[167] In my view, this assertion is greatly overstated.

[168] As I have indicated above, without necessarily accepting all of the religious petitioners' s. 2(a) arguments, the respondents concede that those rights have been infringed by Dr. Henry's G&E Orders, and I so find.

(ii) Section 2(b) of the Charter

[169] Freedom of expression is understood in Canadian law as all non-violent activity intended to communicate a meaning. Any law or government action that has the purpose or effect of interfering with such an activity is a *prima facie* breach of freedom of expression. Although it is usually referred to simply as "freedom of expression", s. 2(b) of the *Charter* guarantees freedom of thought, belief, opinion and expression. While restrictions on gatherings do not have the purpose of restricting communication of meaning, they can have that effect.

[170] Section 2(b) also protects the right to receive expression. It protects listeners as well as speakers: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para 41.

[171] The religious petitioners contend that the prohibition of in-person worship services infringes freedom of expression, which they say extends even to physical acts, such as the sacrament of communion, intended to convey a religious meaning of profound significance.

[172] As I have indicated above, without necessarily accepting all of the religious petitioners' s. 2(b) arguments, the respondents concede that those rights have been infringed by Dr. Henry's G&E Orders, and I so find.

(iii) Section 2(c) of the Charter

[173] The right of peaceful assembly is, by definition a group activity incapable of individual performance: *Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1, at para 64 [*Mounted Police Association*].

[174] As I have indicated above, without necessarily accepting all of the religious petitioners' s. 2(c) arguments, the respondents concede that those rights have been infringed by Dr. Henry's G&E Orders, and I so find.

(iv) Section 2(d) of the Charter

[175] In *Mounted Police Association*, the Supreme Court of Canada considered the guarantee of freedom of association in s. 2(d) of the *Charter.* The majority stated that freedom of association protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.

[176] *Mounted Police Association* involved the exclusion of RCMP members from the federal public service labour relations regime. After reviewing the existing jurisprudence, the majority held:

> 46 In summary, after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(d): *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

[177] I accept the religious petitioners' submission that infringement of s. 2(d) occurs when the impugned government action constitutes "a substantial interference with freedom of association" in either its purpose or effect, and find that the restrictions on gatherings in the G&E Orders infringes the religious petitioners' right to freedom of association under s. 2(d) of the *Charter*.

(v) Section 7 of the Charter

[178] There are two stages to an analysis under s. 7. First, the applicant must establish that the impugned governmental act imposes limits on a “life”, “liberty” or “security of the person” interest, such that s. 7 is “engaged”. If the first step is met, the applicant must then establish that this “deprivation” is contrary to the “principles of fundamental justice”: *Canada (Attorney General) v. Bedford,* 2013 SCC 72 [*Bedford*] at para. 57.

[179] The principles of fundamental justice include the principles against arbitrariness, overbreadth and gross disproportionality. The deprivation of a right will be arbitrary and thus violate s. 7 if it bears no real connection to the law’s purpose (in this case, public health). The deprivation of a right will be overbroad if it goes too far and interferes with some conduct that bears no connection to its objective. Finally, the deprivation of a right will be grossly disproportionate if the seriousness of the deprivation is so totally out of sync with the objective that it cannot be rationally supported: *Bedford*.

[180] The religious petitioners assert that in *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter*], the Court determined that the phrase “right to life” might be described as a depreciation in the value of the lived experience. They say that where state action imposes an increased risk of anxiety, loneliness, domestic violence, stress, depression, substance abuse or other factors which could directly or indirectly lead to death, the right to life is engaged.

[181] At the onset of the COVID-19 pandemic in the spring of 2020, the Riverside Calvary Chapel stopped in-person worship services, being unsure of the severity of the risk posed. The church asserts that the stoppage of the services resulted in negative effects on church members from a lack of in-person meetings including extreme loneliness, depression, anxiety, a sense of not belonging, and not receiving in-person prayer.

[182] There is similar evidence of the effects of being unable to attend in-person worship services from the Free Reformed Church of Chilliwack and the Immanuel Covenant Reformed Church.

[183] The respondents accept that in-person meetings afford psychological health benefits to members of religious communities, but say that there is no evidence of the kind of serious psychological harm required by *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, if they are unable to attend in-person meetings.

[184] I agree that the "right to life" protected by s. 7 of the *Charter* does not extend as far as the religious petitioners suggest. The respondents quite properly point to para. 62 in *Carter*, where the Court clarified the meaning of the right:

> This Court has most recently invoked the right to life in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, where evidence showed that the lack of timely health care could result in death (paras. 38 and 50, per Deschamps J.; para. 123, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.), and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care (para. 91). In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights. We see no reason to alter that approach in this case.

[185] In my view, there is no evidence of a threat to life in this case.

[186] Moreover, given the concessions of the respondents and my findings with respect to the religious petitioners' s. 2 *Charter* rights, I find that it is unnecessary to expand the jurisprudence relating to s. 7 of the *Charter*, and will make no finding with respect to s. 7. In *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*], Chief Justice McLachlin, for the majority, concluded that:

> 105 The s. 15 claim was not considered at any length by the courts below and addressed only summarily by the parties in this Court. In my view, it is weaker than the s. 2(a) claim and can easily be dispensed with. To the extent that the s. 15(1) argument has any merit, many of my reasons for dismissing the s. 2(a) claim apply to it as well.

[187] Likewise, here the religious petitioners focussed their submissions on their s. 2 *Charter* rights, and addressed their claim pursuant to s. 7 of the *Charter* in only a summary way.

(vi) Section 15(1) of the Charter

[188] Section 15(1) of the *Charter* protects the equality rights of, inter alia, religious individuals. Establishing a violation of s. 15(1) requires the claimant to pass the following two-stage analysis:

> (a) Does the impugned law, on its face or in its impact, create a distinction on the basis of an enumerated or analogous ground?
>
> (b) If it does draw a distinction, does the impugned law fail to respond to the actual capacities and needs of the members of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage?

[189] The religious petitioners and the intervenor assert that the impugned G&E Orders make a distinction between assemblies that are religious in nature, and assemblies whose nature is variously economic (business meetings), athletic (gyms and swimming pools), educational (schools are open for in-person learning), social (restaurant gatherings), mental health oriented (support group meetings), or aesthetic (art gallery viewings, the film industry, bands playing at a restaurant).

[190] The religious petitioners and the intervenor also contend that if the COVID-19 transmission risk in these permitted but regulated activities is similar to the COVID-19 transmission risk in prohibited in-person religious assemblies (while following similar public health precautions such as social distancing, masking, and contact tracing), then they constitute an appropriate comparator group.

[191] There is no evidence before me that the G&E Orders only disadvantage a group of people based on their religious beliefs. The same activities are allowed and restricted for secular and religious people, and whether in a secular or religious

setting. The respondents point out that religious schools are as open as secular ones. Funerals can be conducted by any religious or secular community. Unless they are covered by a specific exemption, non-religious people have no more ability to gather than religious ones.

[192] The G&E Orders are also not an absolute prohibition on in-person religious gatherings. The current orders permit multiple forms of in-person religious gatherings:

a) Drive-in services of up to 50 vehicles;

b) Personal prayer or reflection; and

c) In-person baptisms, weddings and funerals with up to 10 people in attendance. (This is a less restrictive limitation than the original November 7th verbal order which limited funerals and weddings to immediate household members only.)

[193] In *Hutterian Brethren*, the Supreme Court of Canada dealt with the universal photo requirement to obtain a driver's licence in Alberta. Chief Justice McLachlin reasoned that:

> 108 Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(*a*). There is no breach of s. 15(1).

[194] The respondents contend that the same result should apply in this case, as the impugned G&E Orders are neutrally defined.

[195] In response, the intervenor commented that:

> Whereas the section 15(1) claim in *Hutterian Brethren* was based on a neutral policy choice concerning security measures, the impugned orders

> specifically ban all in-person worship gatherings on the basis of the religious purpose of the assembly, while permitting other non-religious gatherings to continue. This differential effect is imposed by the definition of "event" and the activities exempted from the impugned orders.

[196] The respondents contend that while s. 15 prohibits governments from disadvantaging a group of persons based on their religious beliefs, but should not be utilized to test neutrality among practices or beliefs, because that is addressed by s. 2(a) of the *Charter*.

[197] As with their s. 7 *Charter* submissions, the religious petitioners addressed their claim pursuant to s. 15 of the *Charter* in only a summary way. They focused their submissions on their s. 2 *Charter* rights. Given the concessions of the respondents and my findings with respect to the *Charter* rights in s. 2, I find that it is unnecessary to expand the jurisprudence relating to s. 15 of the *Charter*, and will make no finding with respect to s. 15.

(vii) Section 1 of the Charter

[198] Section 1 of the *Charter* constrains the ability of legislatures to enact laws that limit rights and freedoms guaranteed in the *Charter*:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[199] Religious bodies have a sphere of independent spiritual authority, at the core of which is the authority to determine their own membership, doctrines, and religious practices, including manner of worship.

[200] The intervenor observed that a church's ability to fulfil its responsibilities and religious duties may be legitimately inconvenienced by laws or regulations of general application, subject to the state's duty under the *Charter* to accommodate religious freedom under s. 2(a) and avoid adverse effect discrimination under s. 15. The intervenor argues, however, that by the same token, government's ability to fulfill its responsibilities may be legitimately 'inconvenienced' by its obligation to respect religious institutions and practices.

[201] The religious petitioners contend that this is not a case where “the contextual factors favour a deferential approach” in determining whether the infringements on fundamental rights and freedoms “are demonstrably justified in a free and democratic society.” They say that the risks and harms at issue are identifiable in the evidence before me, and that the impugned G&E Orders are of general application across the province amounting to subordinate legislation and that their enactment was not subject to debate or public scrutiny.

[202] As the G&E Orders infringe the religious petitioners’ s. 2(a), (b), (c), and (d) *Charter* rights, I must determine whether those infringements are justified under s. 1 of the *Charter*. The onus at this stage is on the respondents to prove that the infringements meet the requirements of s. 1.

[203] *Hutterian Brethren* is an example where an infringement of a s. 2 *Charter* right was found to be justified under s. 1 of the *Charter*. The Supreme Court of Canada considered whether the universal photo requirement for drivers’ licences in the Province of Alberta constituted a limit on the freedom of religion of Colony members who wished to obtain a driver's licence infringing their s. 2(a) *Charter* rights, and if so, whether that infringement was a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter.*

[204] At para. 101, Chief Justice McLachlin, for the majority, commented that the universal photo requirement addressed a pressing problem and would reduce the risk of identity-related fraud, when compared to a photo requirement that permits exceptions.

[205] At para. 102, McLachlin C.J.C. held, however, that that benefit had to be weighed against its impact on the limit on the Colony’s religious rights. She concluded that as the photo requirement did not deprive members of their ability to live in accordance with their beliefs, its deleterious effects, while not trivial, fell at the less serious end of the scale, and were justified under s. 1 of the *Charter*.

[206] The parties and the intervenor were unable to agree on the test to be applied in the application of s. 1 of the *Charter* itself in this case. The religious petitioners and the intervenor say the test established in *Oakes* should apply, because the G&E Orders are in substance laws of general application. The respondents say the test set out in *Doré* should apply*,* as it has been explained in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*], because the G&E Orders are an administrative decision.

[207] In *Oakes,* at paras. 69-71, Chief Justice Dickson set out the test to be applied on a s. 1 analysis. First, the objective which the measures responsible for a limit on a *Charter* right are designed to serve must be sufficiently important to warrant justifying limiting the right. Second, the party invoking s. 1 must establish that the means chosen are reasonable and demonstrably justified. This second requirement involves a form of proportionality test, where the court is required to "balance the interests of society with those of individuals and groups". There are three components to the proportionality inquiry. First, the measures adopted must be rationally connected to the objective. Second, the means chosen must impair as little as possible the right in question. Third, there must be proportionality between the effects of the measures and the objective.

[208] And at para. 71, Dickson C.J.C. elaborated on the third component:

> … Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[209] At paras. 66-68, Dickson C.J.C. discussed the onus and standard of proof on a section s. 1 analysis. The onus of proving that a limit on a right of freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and

democratic society rests upon the party seeking to uphold the limitation. The standard of proof is the civil standard, namely proof by a preponderance of probability.

[210] In *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario,* 2018 ONSC 579, the Ontario Divisional Court held that the *Oakes* test applied to the question of whether policies created by the Ontario College of Physicians and Surgeons that engaged the *Charter* rights of Ontario doctors were justified under s. 1.

[211] The *Oakes* test was also recently applied by the Supreme Court of Newfoundland and Labrador in *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125, in the context of a *Charter* challenge to orders of general application issued by that province's Chief Medical Officer of Health authorized by that jurisdiction's equivalent to the *PHA*. The impugned orders restricted entry into the province to prevent transmission of COVID-19.

[212] In *Doré*, Madam Justice Abella addressed whether the *Oakes* framework should be used when reviewing an administrative decision that is said to violate *Charter* rights. Writing for the Court, Abella J. wrote:

> 57 On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charte*r values against broader objectives.

[213] At para. 37, Abella J. referred to *Hutterian Brethren* to draw a distinction between the approach to be applied when "reviewing the constitutionality of a law" and that which should be applied when "reviewing an administrative decision that is said to violate the rights of a particular individual". In doing so, Abella J. effectively

affirmed the statement of McLachlin C.J.C. in *Hutterian Brethren* that "[w]here the validity of a law is at stake, the appropriate approach is a [s. 1] *Oakes* analysis."

[214] In *Loyola*, writing this time for the majority, Abella J. wrote at para. 3 that "the result in *Doré* was to eschew a literal s. 1 approach in favour of a robust proportionality analysis consistent with administrative law principles."

[215] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], the Court confirmed the applicability of the *Doré* framework when reviewing an administrative decision that is said to limit a *Charter* right:

> 57 Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

[216] Under the *Doré* analysis, the issue is not whether the exercise of administrative discretion that limits a *Charter* right is correct (i.e., whether the court would come to the same result), but whether it is reasonable (i.e., whether it is within the range of acceptable alternatives once appropriate curial deference is given). An administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* right with the objective of the measures that limit the right.

[217] In *Loyola,* Abella J. explained the "analytical harmony" between the proportionality analyses required by the *Oakes* and *Doré* frameworks:

> [40] A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing. Both [*Oakes*] and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-*

> *MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. As such, *Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oake*s test: *Doré*, at para. 5.

[218] In this case, I have determined that the G&E Orders are more akin to an administrative decision than a law of general application, and that the *Doré* test is the appropriate test to apply. Although the G&E Orders are not a classical administrative adjudicative decision, they were made through a delegation of discretionary decision-making authority under the *PHA.*

[219] In *Trinity Western*, at para. 36, the Court explained that on a reasonableness review of an administrative decision, a "reviewing court must consider whether there were other reasonable possibilities that would give effect to the *Charter* protections more fully in light of the objectives [….] If there was an option or avenue *reasonably* open to the decision maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant objectives, the decision would not fall within a range of reasonable outcomes [….] the question is whether the administrative decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right."

[220] In *Trinity Western,* the majority found that the Law Society of British Columbia's decision not to approve the University's proposed law school infringed s. 2(a) of the *Charter*, but was justified under s. 1 of the *Charter*. With respect to the infringement, the majority found:

> 75 By interpreting the public interest in a way that precludes the approval of TWU's law school governed by the mandatory Covenant, the LSBC has interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious practices. The effect is a limitation on the right of TWU's community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct. Accordingly, their religious rights were engaged by the decision.

[221] But, applying the *Doré* framework, the majority concluded that the Law Society's decision was reasonable as it represented a proportionate balance

between the limitation on the religious protections under s. 2(a) of the *Charter* and the statutory objectives the Law Society sought to pursue:

> 104 Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance. In other circumstances, a more serious limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.
>
> 105 In our view, the decision made by the LSBC "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Therefore, the decision amounted to a proportionate balancing and was reasonable.

[222] The religious petitioners concede that public health is a sufficiently important objective that it can justify limits on *Charter* rights. But they ask this Court to say that the measures Dr. Henry has taken are arbitrary, irrational and disproportionate, and therefore not reasonable limits demonstrably justified in a free and democratic society. They say that the Court does not owe deference to Dr. Henry in determining the constitutionality of her orders.

[223] The respondents disagree. They say, and I agree, that the question before this Court is not whether Dr. Henry reached the correct balance, but whether, on the information available to her, she acted within the reasonable range of alternatives. This assessment must be based on the record before Dr. Henry.

[224] Containing the spread of the Virus and the protection of public health is a legitimate objective that can support limits on *Charter* rights under s. 1. An outbreak of a communicable disease is an example of a crisis in which the state is obliged to take measures that affect the autonomy of individuals and of communities within civil society. The constitutional importance of combating the COVID-19 pandemic has been stated by courts across the country.

[225] The respondents concede that there is no question that restrictions on gatherings to avoid transmission of the Virus limit rights and freedoms guaranteed by the *Charter*, as well as personal liberty in a more generic sense. But they contend

that protection of the vulnerable from death or severe illness and protection of the healthcare system from being swamped by an out-of-control pandemic is also a matter of constitutional importance.

[226] The intervenor submits that the risks of in-person religious gatherings were "obviously identical risks" to those present in school, gymnasium, support group or restaurant settings. This simplistic analysis fails to account for the key distinguishing factors relied on by Dr. Henry in restricting religious gatherings including the ages of the participants, the intimate setting of religious gatherings, and the presence of communal singing or chanting in religious gatherings (and the religious petitioners' evidence shows that masks do not appear to be used throughout religious services and that singing is not prohibited).

[227] The religious petitioners ask me to find that the measures Dr. Henry has taken are arbitrary, irrational and disproportionate, and therefore not reasonable limits demonstrably justified in a free and democratic society.

[228] The deprivation of a right is arbitrary if it "bears no connection to" the law's purpose". As the religious petitioners concede that public health is a sufficiently important objective that it can justify limits on *Charter* rights, I see no basis upon which to find that the impugned G&E Orders are arbitrary in the broad sense.

[229] The fact that some religious activities are restricted and some secular activities are not is not necessarily evidence of arbitrariness. There needs to be a comparison of comparables and a demonstration that there is no rational basis for the distinction. That is not present here.

[230] Overbreadth allows the courts to recognize that a law is rational in some cases, but that it overreaches in its effect in others. The impugned G&E Orders are as broad in scope as one might conceive of. However, they are intended to address a pandemic that affects all of us. In the result, they are, of necessity, and by design, broad enough to affect all British Columbians and those visiting our province. The G&E Orders do not overreach.

[231] Gross disproportionality targets laws that may be rationally connected to their objective, but whose effects are so disproportionate that they cannot be supported. Gross disproportionality applies only in extreme cases where “the seriousness of the deprivation is totally out of sync with the objective of the measure”. In my view, for the reasons I have expressed in the paragraph preceding this one, I find that they are not disproportionate.

[232] The religious petitioners assert that the respondents have failed to demonstrate a disproportionate risk of COVID-19 resulting from the *Charter*-protected gathering activities at issue in this proceeding, and thus cannot meet the requirements of s. 1 of the *Charter*.

[233] I disagree. I have set out the series of G&E Orders made by Dr. Henry between November 7, 2020 and February 10, 2021, and the basis upon which they were made. I find that they were based upon a reasonable assessment of the risk of transmission of the Virus during religious and other types of gatherings.

[234] On the record in this case, I find that Dr. Henry turned her mind to the impact of her orders on religious practices and governed herself by the principle of proportionality. She consulted widely with faith leaders and individually asked for the input of the leaders of two of the churches making up the religious petitioners, while affirming the need for respect for the rule of law and public health.

[235] Under *Vavilov* at para. 101, there are two bases for holding a decision maker’s decisions to be unreasonable. One is a failure of rationality internal to the reasoning process. The second is where the decision is untenable in light of a factual or legal constraint.

[236] A decision has internal rationality if the reviewing court can trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and there is a line of analysis that could reasonably lead the decision maker from the evidence before it to the conclusion at which it arrived: *Vavilov* at para. 102.

[237] I accept that under either approach to reasonableness, a reasonableness review begins with the reasons of the decision maker and "prioritizes the decision maker's justifications for its decisions". What matters is not whether there are formal reasons but whether the reasoning process underlying the decision is opaque.

[238] I have concluded that Dr. Henry's reasons, both in the preambles to the orders and in the media events, do not exhibit a failure of internal rationality. Gatherings and events are a route of transmission. Whether measures less intrusive than prohibition are effective depends on the prevalence of the Virus in the community and behavioural factors. Dr. Henry responded to evidence of accelerating transmission when she made the orders, and she has explained her reasoning.

[239] I find that in making the impugned G&E Orders, Dr. Henry assessed available scientific evidence to determine COVID-19 risk for gatherings in B.C. including epidemiological data regarding transmission of the Virus associated with religious activities globally, nationally and in B.C., factors leading to elevated transmission risk in religious settings, and COVID-19 epidemiology in B.C.

[240] I also find that in making the impugned G&E Orders Dr. Henry was guided by the principles applicable to public health decision making, and in particular, that public health interventions be proportionate to the threat faced and that measures should not exceed those necessary to address the actual risk. Her orders are limited in duration and constantly revised and reassessed to respond to current scientific evidence and epidemiological conditions in B.C.

[241] Through the pandemic, Dr. Henry has consistently expressed her awareness of the impacts of her orders, of her mandate to protect public health, and of her duty to do so in a way that is proportionate to those impacts, but the religious petitioners assert that she did not account for their *Charter* rights adequately, or at all.

[242] While she made no specific reference to *Charter* rights and values prior to her G&E Orders of February 5 and 10, 2021, I am unable to accept that those rights and

values were not considered by Dr. Henry from the outset of her G&E Orders in November 2020.

[243] I find that Dr. Henry carefully considered the significant impacts of the impugned G&E Orders on freedom of religion, consulting with the inter-faith community to discuss and understand the impact of restrictions on gatherings and events on their congregations and religious practices.

[244] The dangers that Dr. Henry's G&E Orders were attempting to address were the risk of accelerated transmission of the Virus, protecting the vulnerable, and maintaining the integrity of the healthcare system. Her decision was made in the face of significant uncertainty and required highly specialized medical and scientific expertise. The respondents submit, and I agree, that this is the type of situation that calls for a considerable level of deference in applying the *Doré* test.

[245] The respondents point to a number of ways in which Dr. Henry's G&E Orders have attempted to minimize impacts on the rights in question. She waited until there was evidence of exponential increase in cases, first in the Vancouver Coastal and Fraser Health regions and then across the province, before tightening restrictions. She has also permitted individual prayer, reflection, and other forms of religious activity at places of worship, and individual meetings with religious leaders. And, perhaps most importantly, where appropriate, Dr. Henry has made exemptions for religious organizations under s. 43 of the *PHA*.

[246] I find that Dr. Henry's decision fell within a range of reasonable outcomes. There is a reasonable basis to conclude that there were no other reasonable possibilities that would give effect to the s. 2 *Charter* protections more fully, in light of the objectives of protecting health, and in light of the uncertainty presented by the Virus.

[247] Although the impacts of the G&E Orders on the religious petitioners' rights are significant, the benefits to the objectives of the orders are even more so. In my view, the orders represent a reasonable and proportionate balance.

[248] Thus, the respondents have proven that the limits the G&E Orders place on the religious petitioners' s. 2 *Charter* rights are justified under s. 1 of the *Charter*.

IX. Conclusion

[249] Mr. Beaudoin has persuaded me that his s. 2(c) and (d) *Charter* rights were infringed by the G&E Orders that predated February 10, 2021, and that the infringement of those rights by those orders cannot be demonstrably justified in a free and democratic society.

[250] The religious petitioners have not satisfied me that they are entitled to challenge the G&E Orders on their judicial review under s. 2 of the *JRPA*. Even if they could do so, the infringement of their s. 2 *Charter* rights by the impugned G&E Orders is justified under s. 1 of the *Charter*. This part of their petition is thus dismissed.

X. Remedy for Mr. Beaudoin

[251] Mr. Beaudoin is entitled to a part of the declaration he seeks, pursuant to ss. 24(1) and 52(1) of the *Constitution Act, 1982.* I declare that orders made by Dr. Henry entitled "Gatherings and Events" pursuant to ss. 30, 31, 32 and 39(3) of the *PHA*, including the orders of November 19, 2020, December 2, 9, 15 and 24, 2020 are of no force and effect as against Mr. Beaudoin as they unjustifiably infringe his rights and freedoms with respect to public protests pursuant to ss. 2(c) and (d) of the *Charter*.

[252] The respondents contend that neither they nor I have specific information about the violation ticket issued to Mr. Beaudoin, and that seeking judicial review of that ticket before it has been adjudicated would amount to a collateral attack, as the validity of the ticket does not necessarily depend upon the constitutionality of the impugned orders.

[253] I have therefore reluctantly come to the view that the respondents' submission with respect to the violation ticket issued to Mr. Beaudoin is correct, and

that I should not adjudicate on their validity without the factual background that resulted in their issuance.

"The Honourable Chief Justice Hinkson"

Lapointe *v*. Hôpital Le Gardeur, [1992] 1 S.C.R. 351

Dr. Maurice Chevrette *Appellant*

v.

Gabrielle Imbeault-Lapointe and Paul-Émile Lapointe, in his personal capacity and as tutor to his minor daughter Nancy Lapointe *Respondents*

Indexed as: Lapointe *v*. Hôpital Le Gardeur

File No.: 21697.

1991: October 3; 1992: February 13.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

on appeal from the court of appeal for quebec

Civil responsibility -- Medical malpractice -- Child severing artery and suffering extensive blood loss -- Doctor at general hospital arranging to transfer child to paediatric hospital -- Child later suffering cardio-respiratory arrest resulting in brain damage -- Trial judge finding doctor not negligent -- Court of Appeal reversing judgment -- Whether Court of Appeal erred in overturning findings of fact.

Physicians and surgeons -- Medical malpractice -- Child severing artery and suffering extensive blood loss -- Doctor at general hospital arranging to transfer child to paediatric hospital -- Child later suffering cardio-respiratory arrest resulting in brain damage -- Trial judge finding doctor not negligent -- Court of Appeal reversing judgment -- Whether Court of Appeal erred in overturning findings of fact.

Appeal -- Role of appellate court -- Trial judge finding doctor not liable for professional negligence -- Whether Court of Appeal erred in overturning findings of fact.

Respondents' five-year-old daughter suffered a severe cut to her elbow which severed an artery and caused an extensive haemorrhage and blood loss. Her mother bound the arm tightly and took her to a local general hospital. The child was put in the care of the appellant, a general practitioner who was on call at the emergency room. He performed a vein dissection so that fluids could be replaced in the patient's body through an intravenous drip. Realizing, however, that he would be unable to repair the artery, the appellant did not proceed with a blood transfusion but decided to send her to a hospital specializing in paediatric care. He telephoned the paediatric hospital and spoke to a doctor on call in the emergency room, to whom he described the severity of the patient's injury, the treatment administered and the possibility of the child going into shock. He then wrote a transfer order which indicated that the patient was in a state of pre-shock, and dispatched the patient in an ambulance. After she arrived at the paediatric hospital, the child was seized with a massive cardio-respiratory arrest. She suffered a deficiency of oxygen to the brain and sustained irreversible brain damage, resulting in complete and

permanent disability. Respondents brought an action against the appellant and the general hospital alleging malpractice. The trial judge found that the appellant had not been negligent and dismissed the action. The Court of Appeal, in a majority judgment, reversed the judgment. The issue before this Court was whether the Court of Appeal erred in overturning the trial judge's findings as regards (1) the appellant's decision to transfer the patient when he did; (2) his decision not to proceed with a blood analysis and transfusion before the transfer; and (3) the information he transmitted to the paediatric hospital regarding the patient's condition at the time of the transfer. In the companion case, *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 000, this Court dealt with the hospital's appeal.

Held: The appeal should be allowed.

An appellate court should not interfere with a trial judge's findings and conclusions of fact in the absence of a manifest error. The privileged position of the trial judge, who has had the benefit of seeing and hearing the witnesses, extends to the testimony of experts as well as ordinary witnesses. Findings of fact based on the credibility of witnesses should not be reversed unless the trial judge made some palpable and overriding error. In this case the trial judge made findings on the credibility of witnesses and gave reasons for his preference of the testimony of some over that of others. He found the appellant, unlike the doctor who first treated the child at the paediatric hospital, to be totally credible, as well as the medical experts who testified for the defence.

Professional liability is governed by the principles of ordinary civil liability. Generally, doctors have an obligation of means, and their conduct must be assessed against the conduct of a prudent and diligent doctor placed in the same circumstances. Medical professionals should not be held liable for mere errors of judgment which are distinguishable from professional fault.

The trial judge concluded that the appellant had exercised proper judgment in deciding to transfer the patient when he did. Sooner or later the child would have had to be sent to the better equipped paediatric hospital. He found that the appellant's decision to transfer the child immediately, without giving her a blood transfusion, was reasonable. The Court of Appeal's reversal of the findings on this point did not stem from a disagreement on the proper standard of liability, nor did the majority find a palpable and overriding error in law or in the trial judge's findings of fact. The appellate court simply disagreed with the lower court's appreciation of the facts and substituted its own opinion.

A majority of the Court of Appeal also concluded that the appellant had failed to convey the necessary information to the second hospital, since his telephone conversation did not alert the doctor on call to the severity of the patient's condition. The trial judge's conclusion that the appellant had acted diligently in the circumstances was based on the evidence, however, and so did not constitute a palpable error. The evidence also confirms that the staff at the paediatric hospital appreciated the incoming patient's medical state. The Court of Appeal was not entitled to substitute its opinion for that of the trial judge in these circumstances.

Cases Cited

Referred to: *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 000; *Dorval v. Bouvier*, [1968] S.C.R. 288; *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491; *Métivier v. Cadorette*, [1977] 1 S.C.R. 371; *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374; *X. v. Mellen*, [1957] Que. Q.B. 389; *Hôpital général de la région de l'Amiante Inc. v. Perron*, [1979] C.A. 567; *Tremblay v. Claveau*, [1990] R.R.A. 268; *Cloutier v. Hôpital le Centre hospitalier de l'Université Laval (CHUL)*, [1990] R.J.Q. 717; *Vigneault v. Mathieu*, [1991] R.J.Q. 1607; *Martel v. Hôtel-Dieu St-Vallier*, [1969] S.C.R. 745; *Nencioni v. Mailloux*, [1985] R.L. 532.

Statutes and Regulations Cited

Civil Code of Lower Canada, art. 1053.

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APPEAL from a judgment of the Quebec Court of Appeal, [1989] R.J.Q. 2619, 25 Q.A.C. 33, 2 C.C.L.T. (2d) 97, reversing a judgment of the Superior Court dismissing respondents' action against appellant. Appeal allowed.

Paul D. Leblanc and *Serge Gaudet*, for the appellant.

Jean-Pierre Pilon and *Yvan Major*, for the respondents.

The judgment of the Court was delivered by

//L'Heureux-Dubé J.//

L'HEUREUX-DUBÉ J. -- This appeal raises once again the important issue of the role of an appeal court as regards a trial judge's findings and conclusions of fact, here in the context of professional liability.

Summary Facts

Since this case implies in great part a review of disputed facts, I will discuss them in more detail later on. The basic series of events and their tragic consequences, however, are not controversial and can be summarized as follows.

On the afternoon of March 1, 1975, while she was playing at home, the five-year old respondent Nancy Lapointe seriously injured herself. A cut in one of her elbows substantially severed her muscles and nerves and the humeral artery, causing an extensive haemorrhage and blood loss. Her mother, the respondent Gabrielle Imbeault-Lapointe, bound Nancy's arm tightly with a cloth with the help of her brother-in-law, and they drove to Hôpital Le Gardeur, a small general hospital in Repentigny, Quebec. They arrived at the emergency room between 4:15 and 4:20 p.m.

At Le Gardeur, a nurse put a tourniquet on Nancy's arm and brought her to an examining room. She was put in the care of the appellant, Dr. Maurice Chevrette, a general practitioner who was on call at the emergency room that day. After examining the wound, Dr. Chevrette concluded that the first priority was the replacement of fluids in the child's body through an intravenous drip, since she had lost a significant amount of blood. When the two nurses assisting him, Nurse Hannah-Parr and Nurse Richard-Chagnon, were unable to find a place to insert a tube, Dr. Chevrette proceeded to a dissection of the vein. The intravenous drip was eventually put in place and 500 cc. of Rheomacrodex was administered. During the course of this treatment, Nancy was conscious and her vital signs remained normal.

Realizing that he would be unable to repair the artery, Dr. Chevrette phoned Hôpital Sainte-Justine, a paediatrics teaching hospital in Montreal. He spoke to a doctor on call in the emergency room, describing the severity of the patient's injury, the treatment administered at Le Gardeur, and the possibility of the child going into shock. He then

wrote a transfer order which indicated the emergency treatment the patient had received, that she had suffered a severe laceration in the right elbow and that she was in a state of pre-shock. Nancy was put into an ambulance at around 5:30 p.m. for the trip to Sainte-Justine about 30 kilometres away, accompanied by her mother and Nurse Parr.

The ambulance ride between Le Gardeur and Sainte-Justine took about twenty-five minutes, during which time Nancy remained conscious and talked to her mother. They arrived at their destination at around 6 p.m., where they were met by the surgeon on call, Dr. Yvan Dion. Nancy was taken to an examining room, where she was transferred from the ambulance stretcher to a hospital stretcher. Dr. Dion proceeded to a series of tests, including X-rays. He removed the elastic tourniquet placed on Nancy's arm at Le Gardeur, examined the wound, and installed an inflatable tourniquet.

At about 6:30 p.m., Nancy's condition began to deteriorate rapidly. Just after she had been taken to the emergency cardiac unit, she was seized with a massive cardio-respiratory arrest. Emergency measures were undertaken, but Nancy suffered a critical cerebral anoxia, or deficiency of oxygen to the brain. She fell into a coma which lasted a few weeks. When she awoke, it became apparent that she had sustained irreversible brain damage, resulting in complete and permanent disability.

The respondents, in their own names and in that of their daughter, took an action against Dr. Chevrette alleging malpractice, and against Hôpital Le Gardeur as his

employer (see *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 000, judgment also released today).

Judgments

Superior Court

During the fourteen-day hearing, the trial judge, Vallerand J. (now of the Court of Appeal) heard a number of witnesses, particularly expert witnesses. He made determinations with respect to the credibility of these witnesses and found the appellant, Dr. Chevrette, as well as experts who testified on his behalf, to be credible. Assessing the whole of the evidence against the standard test of liability for professional negligence, he found that Dr. Chevrette had not been negligent in the discharge of his duty toward his patient Nancy Lapointe. Accordingly, he dismissed the respondents' action in the following terms:

> [TRANSLATION] I therefore find that the defendant Chevrette exercised sound judgment after having competently assessed the situation and that he used all reasonable means at his disposal in caring for his patient. That being so, the inevitable conclusion is that he has discharged any burden of proof thrust upon him by the chain of events in question.

Given this conclusion, Vallerand J. also dismissed the respondents' action against Hôpital Le Gardeur.

Court of Appeal, [1989] R.J.Q. 2619

A majority of four judges in the Court of Appeal, each writing separate reasons, allowed the appeal on the ground that Dr. Chevrette was negligent on the occasion of the transfer of Nancy Lapointe to Hôpital Sainte-Justine. A majority also allowed the appeal against Hôpital Le Gardeur, holding the hospital liable for Dr. Chevrette's negligence. Beauregard J.A., dissenting, would have dismissed the appeal, finding no error in the trial judge's determinations and conclusions of fact in the context of the professional standard of liability to be met by Dr. Chevrette.

Issues and Arguments

The appellant takes issue before us with the Court of Appeal's reversal of the trial judge's findings and conclusions of fact, more particularly as regards the following points:

1. Dr. Chevrette's decision to transfer the patient from Hôpital Le Gardeur to Sainte-Justine at the time he did;

2. Dr. Chevrette's decision not to proceed to a blood analysis and transfusion before the transfer;

3. The information transmitted by Dr. Chevrette to Sainte-Justine with respect to the patient's condition at the time of the transfer.

In the appellant's view, the majority of the Court of Appeal purely and simply substituted its opinion for that of the trial judge since it failed to point out any error on his part.

The respondents maintain that the Court of Appeal was correct in allowing the appeal since, in their view, the trial judge misinterpreted the evidence with respect to the three points mentioned above.

The Role of an Appellate Court

That an appellate court should not interfere with the findings and conclusions of fact of a trial judge, failing a manifest error, is a well-established principle. As Fauteux J. wrote for the Court in *Dorval v. Bouvier*, [1968] S.C.R. 288, at p. 293:

> [TRANSLATION] Because of the privileged position of the judge who presides at the trial, who sees and hears the parties and witnesses and who assesses their evidence, it is an established principle that his opinion is to be treated with the utmost deference by the appellate court, whose duty is not to retry the case nor to interfere by substituting its assessment of the evidence for that of the trial judge, except in the case of a clear error on the face of the reasons or conclusions of the judgment appealed from.

The privileged position of the trier of fact extends not only to the testimony of ordinary witnesses, but of expert witnesses. In this respect, Spence J. wrote in *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491, at p. 504:

I am strongly of the view that it is not the function of an appellate court to reconsider that evidence whether it be upon facts or a matter of professional opinion and come to a different conclusion, unless it could be shown that the evidence reasonably could not result in justifying the conclusion made by the trial judge. [Emphasis added.]

This principle of non-intervention also applies where the only issue is the interpretation of the evidence as a whole; see *Métivier v. Cadorette*, [1977] 1 S.C.R. 371, at p. 382.

While an appellate court may review a trial judge's findings of fact, it is not its function to conduct a trial *de novo*. Laskin C.J. emphasized this point in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84:

> It would, of course, be open to an appellate court, where credibility of a witness was not in issue, to review findings of fact by a trial judge if they were based on a failure to consider relevant evidence or on a misapprehension of the evidence. An appeal, however, is not a complete rehearing.

If an appellate court interferes with findings of fact, it must be on the basis of errors made by the trial judge. The kinds of error which merit intervention on appeal were identified by Dickson C.J. in *Lensen v. Lensen*, [1987] 2 S.C.R. 672, at p. 683:

It is a well-established principle that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it can be established that the trial judge made some "palpable and overriding error which affected his assessment of the facts"....

More recently, in *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, this Court allowed an appeal from the Court of Appeal's reversal of the trial judge's findings of fact. After reviewing the authorities, the Court held at p. 794:

> When a trial judge is assessing facts in terms of the law, what matters is that his conclusions be based on the evidence, that is, consistent with the evidence, and that no evidence essential to the outcome of the case be ignored....
>
> As regards determination of the facts, which is the sovereign right of the trial judge, an appellate court, and *a fortiori* a second appellate court, will intervene only when it has been shown that there is a manifest or palpable error by the trial judge. It is now almost axiomatic to say that determining the facts is the province of the trial judge, who has seen and heard the witnesses and is in a position to assess the credibility that the testimony of each should be given.

Obviously, the task of an appellate court will be greatly simplified where the trial judge has carefully explained the reasons for his or her findings and conclusions. As the Court concluded in *Laurentide Motels, supra*, at p. 799:

> ... an appellate court which has neither seen nor heard the witnesses and as such is unable to assess their movements, glances, hesitations, trembling, blushing, surprise or bravado, is not in a position to substitute its opinion for that of the trial judge, who has the difficult task of separating the wheat from the chaff and looking into hearts and minds of witnesses in an attempt to discover the truth. If it happens that the trial judge neglects to indicate his findings in this respect or does not adequately support them, then it may be that an appellate court has to form its own conclusions. However, that is not the case here, where as we have seen the judge noted his impressions frequently and supported his findings. [Emphasis added.]

In the absence of an identifiable error by the trial judge, a Court of Appeal should not substitute its opinion. In the words of Lamer J. (now Chief Justice) in *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, at pp. 8-9:

> ... an appellate court should not intervene unless it is certain that its difference of opinion with the trial judge is the result of an error by the latter. As he had the benefit of seeing and hearing the witnesses, such certainty will only be possible if the appellate court can identify the reason for this difference of opinion, in order to be certain that it results from an error and not from his privileged position as the trier of fact. If the appellate court cannot thus identify the critical error it must refrain from intervening, unless of course the finding of fact cannot be attributed to this advantage enjoyed by the trial judge, because nothing could have justified the judge's conclusion whatever he saw or heard; this latter category will be identified by the unreasonableness of the trial judge's finding....

In the case at bar, the appellant urges us to apply these principles since, in his view, the Court of Appeal overstepped its authority in reversing the findings and conclusions of fact of the trial judge. Before turning to the case at bar, however, it is important to set out the legal framework of this case by briefly reviewing the principles governing professional liability.

Professional Liability

The principles which govern professional liability have a long jurisprudential history, but any review of the law must begin with art. 1053 of the *Civil Code of Lower Canada* and the notion of fault:

> **1053.** Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Professional liability imports the principles of ordinary civil liability. Generally, doctors have an obligation of means, and their conduct must be assessed against the conduct of a prudent and diligent doctor placed in the same circumstances. In the words of Professor Paul-André Crépeau in his seminal article entitled "La responsabilité civile du médecin" (1977), 8 *R.D.U.S.* 25, at pp. 28-29:

> [TRANSLATION] Unless otherwise expressly provided, a physician has, by virtue of a now generally accepted classification, an obligation of means, that is he must, as stated by the *Cour de Cassation* in the *Mercier* case in 1936, provide "care which is prudent, attentive, conscientious and, subject to exceptional circumstances, in accordance with what is known by science".
>
> The assessment of such an obligation is to be carried out not *in concreto* based on some subjective criterion such as whether the obligee has done his best, but rather *in abstracto* according to the objective criterion of what a prudent and diligent doctor would have done in similar circumstances.

Elaborating on the notion of fault as it applies to medical professionals, Alain Bernardot and Robert Kouri write in *La responsabilité civile médicale* (1980), at p. 12:

> [TRANSLATION] Hence the general rule must be the principle of assessment *in abstracto*. That principle requires that the attitude of a party being sued be evaluated in relation to that which a competent professional would have had at the same time and in the same place. But who is this competent professional?
>
> He is a prudent and diligent individual placed in the same situation as the party being sued before the courts. Thus, if a physician is being sued, the question is what a prudent and diligent physician would have done.

For a review of the authorities see the recent decision by this Court *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 393 *et seq*.

Courts in Quebec have consistently applied these principles. In *X. v. Mellen*, [1957] Que. Q.B. 389, the Quebec Court of Appeal held that doctors have an obligation of means. Similarly, in *Hôpital général de la région de l'Amiante Inc. v. Perron*, [1979] C.A. 567, Lajoie J.A. wrote at p. 574:

> [TRANSLATION] As a general rule, the obligation of a physician and a hospital toward a patient is not one of result but of means, that is an obligation of prudence and diligence whose violation is not to be assessed subjectively by inquiring whether the author of an act or omission has done his best, but rather according to an objective and abstract criterion under which the court asks what another doctor, another specialist, another nurse of ordinary and reasonable knowledge, competence and skill would have done in circumstances similar to those in which the person whose conduct is to be judged found himself or herself.

See also: *Tremblay v. Claveau*, [1990] R.R.A. 268 (C.A.), at p. 271; *Cloutier v. Hôpital le Centre hospitalier de l'Université Laval (CHUL)*, [1990] R.J.Q. 717 (C.A.), at p. 721; and *Vigneault v. Mathieu*, [1991] R.J.Q. 1607 (C.A.), at pp. 1614-15. As the judgment from *Hôpital général de la région de l'Amiante* indicates, courts should be careful not to rely upon the perfect vision afforded by hindsight. In order to evaluate a particular exercise of judgment fairly, the doctor's limited ability to foresee future events when determining a course of conduct must be borne in mind. Otherwise, the doctor will not be assessed according to the norms of the average doctor of reasonable ability in the same circumstances, but rather will be held accountable for mistakes that are apparent only after the fact.

Both doctrine and case law emphasise that medical professionals should not be held liable for mere errors of judgment which are distinguishable from professional fault. According to Hyde J. in *X. v. Mellen*, *supra*, at p. 406:

> The surgeon is, certainly, not to be judged by the result, nor is he to be condemned for a mere error in judgment. That error however must, as Rand J. says in *Wilson v. Swanson* [[1956] S.C.R. 804, at p. 812], be "distinguished from an act of unskilfulness or carelessness or due to lack of knowledge".

This approach was upheld by this Court in *Martel v. Hôtel-Dieu St-Vallier*, [1969] S.C.R. 745; see also *Cloutier*, *supra*, at p. 721.

Given the number of available methods of treatment from which medical professionals must at times choose, and the distinction between error and fault, a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of competing theories. As expressed more eloquently by André Nadeau in "La responsabilité médicale" (1946), 6 *R. du B.* 153, at p. 155:

> [TRANSLATION] The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects. They may only make a finding of fault where a violation of universally accepted rules of medicine has occurred. The courts should not involve themselves in controversial questions of assessment having to do with diagnosis or the treatment of preference.

Or, as summarized by Brossard J. in *Nencioni v. Mailloux*, [1985] R.L. 532 (Sup. Ct.), at p. 548:

[TRANSLATION] . . . it is not for the court to choose between two schools of scientific thought which seem to be equally reasonable and are founded on scientific writings and texts....

It is with these parameters in mind that this case must be reviewed and analyzed.

Analysis

Introduction

In the case at bar, the Court of Appeal had the benefit of a lucid, well-reasoned and detailed judgment by the trial judge. Vallerand J. carefully examined the evidence and expressed his views in great detail. More importantly, he made findings on the credibility of witnesses and gave reasons for his preference of some witnesses' testimony over others.

First, the trial judge found the appellant Chevrette totally credible. In accepting the doctor's account of the events which took place at Hôpital Le Gardeur, Vallerand J. wrote:

[TRANSLATION] The fact is that notwithstanding his interest in the case, Dr. Chevrette gave, without ever contradicting himself, testimony which was at once spontaneous, carefully considered and accurate, restrained, balanced and undogmatic, corroborated by auxiliaries whose credibility was equal to his own. This testimony has not been seriously controverted in any way.

He also made it clear that he fully accepted the testimony of Nurse Parr, who travelled in the ambulance with Nancy to Sainte-Justine. He noted:

> [TRANSLATION] What I have said concerning the testimony of Dr. Chevrette applies also to the conduct of Nurse Parr, particularly since, if she had wished to put herself beyond all blame and give her colleague and her employer the benefit of false testimony, she could easily and with virtually no risk of being found out have stated that she uncovered the wound during the journey and observed that there was no haemorrhage. She could likewise have denied the presence of blood on the stretcher.

In contrast, Vallerand J. found Dr. Dion, the doctor who first treated Nancy in the emergency room at Sainte-Justine, not to be a credible witness. With respect to his testimony regarding the alleged inadequacy of the tourniquet applied by Dr. Chevrette, the trial judge wrote:

> [TRANSLATION] The witness Dion is the only one to give evidence with regard to this fundamentally important observation [of blood on the stretcher]. Not the slightest mention was made of it by those -- the ambulance attendant, the resident doctor and the nurses -- who had been busily engaged around the stretcher (the ambulance stretcher and not that of the hospital where it would appear the child was placed upon admission). While it is true that Dr. Dion expressed very dramatically his sentiments to Dr. Taché, the plastic surgeon summoned to repair the wound, that occurred after the heart failure and is thus equally consistent with the truth as with an attempt to deflect possible blame.
>
> That having been said and given the significance of the blame, which, it will be seen, is in keeping with all other aspects of the case, it becomes essential to determine Dion's credibility as a witness. As to his conduct on the stand, it was, apart from a certain offhandedness not at all out of place within a context of amiable *bonhomie*, unexceptionable. More disturbing, however, is the discovery, upon examination of the exhibits and the testimony, that the witness Dion just as casually confused his recollection, his assessment and his understanding of the hospital record, relying on his own imagination, and

> that on numerous points he is clearly contradicted by the evidence as a whole and, in some instances, by witnesses whose credibility is beyond all doubt.

Vallerand J. also explained why he discounted the evidence of the experts who testified on behalf of the respondents. In his view, their opinions were based on the version of facts related in the discredited testimony of Dr. Dion. He stated:

> [TRANSLATION] If some doctors called by the plaintiffs saw fit to be very critical in this regard only in their assessment of Dr. Chevrette, I believe it is because they had been to a large degree set against him by the statements of their colleague Dr. Dion, which neither they nor the plaintiffs had any reason to disbelieve, and that as professionals they were outraged by what they perceived to have been the conduct of Dr. Chevrette. I am also of the opinion that based on the arrival of a child weltering in its own blood, they believed themselves duty-bound to pass upon all aspects of the case a judgment at once emotional, harsh and absolute. I do not think they should be open to serious criticism for that, their lack of objectivity being explicable in light of the facts as they believed them to be and the seriousness of the events. I must, however, without ascribing to them any bad faith, much less evil intent, be extremely careful in considering opinions and assessments more categorical and absolute than would appear to be warranted by the evidence, which, I might add, I accept.

On the other hand, Vallerand J. emphasised the credibility of the experts who testified in support of the appellant, Doctors Cossette and Laflèche, writing:

> [TRANSLATION] It now remains to examine the analyses of Cossette and Laflèche, the expert witnesses of the defence.
>
> I have already indicated that the conduct of both on the stand was exemplary in every way. Likewise their competence in the field of vascular medicine is undeniable, particularly that of Dr. Cossette, who has carried out extensive studies of shock. Their testimony is based on the evidence of Dr. Chevrette -- which evidence, as did the judge, they accept totally, both on the objective question of the events themselves and on the subject of his assessment of the situation, indeed on that of his feelings at the time, and it is for that reason all the stronger and more relevant. While it is true that the Court is not bound by expert opinion, in this instance I unhesitatingly endorse all the conclusions

> of Doctors Cossette and Laflèche with respect to the professional conduct of the defendant Chevrette. In fact, those are the very inferences which I myself would have drawn from the evidence as a whole by the application of simple ordinary common sense, without the benefit of the opinions or the teaching of the experts.

He noted specifically with respect to Dr. Laflèche's testimony:

> [TRANSLATION] I will not repeat here the demonstration of that point by Dr. Léo Laflèche, whose experience and qualifications in the field are unquestionable and whose testimony, while unsparing of Dr. Dion, revealed a careful examination of the record and a full understanding of the duties of an expert witness, unblemished by unwholesome professional solidarity.

Similarly, in discussing an opinion expressed by Dr. Cossette, he wrote that [TRANSLATION] "the knowledge, level-headedness and objectivity" of this expert were above reproach.

Finally, the trial judge made it clear that he was fully aware of the medical context of the case. For instance, he explained the nature of Nancy Lapointe's injury and cardiac arrest as it was related to him by the experts called to the stand, and the four-step treatment which a serious haemorrhage requires, as well as the danger of shock and the phenomenon of compensation. His reasoning regarding the respondents' specific allegations was equally meticulous. For example, with respect to the claim of massive blood loss in the ambulance due to an insufficient tourniquet (apparently a major focus at trial but not relied on by the Court of Appeal), Vallerand J. carefully reviewed all of the evidence and lack thereof, noting how and why he drew certain inferences and assessing the credibility of various witnesses.

The Court of Appeal could not ignore these findings, nor should we, in discussing the three issues which form the basis of this appeal and to which I now turn.

(a) The transfer to Sainte-Justine

In dealing with the allegation that the appellant Dr. Chevrette was at fault in deciding to transfer the patient to Sainte-Justine when he did, Vallerand J. first concluded that sooner or later Nancy would have had to be sent to the better-equipped paediatric hospital. He wrote:

> [TRANSLATION] All agree that in order to repair the wound a transfer to Sainte-Justine hospital had to be effected by early evening at the latest. Likewise I accept, without denying the capacity of Le Gardeur hospital in this regard, that Sainte-Justine hospital was in all respects much better able to follow the progression of the apprehended shock and to carry out all the tests required for this purpose and, if necessary, to intervene in the case of heart failure.
>
> A transfer was thus necessary in the medium term for surgical purposes and advisable in the short term in order to control the blood loss. All that remained to be decided was the time. Dr. Chevrette took into account the distance to be covered, the immediate availability of an ambulance, the duration of the journey, the clinical condition of the patient -- which, in the opinion of Dr. Cossette, whose knowledge, level-headedness and objectivity are beyond reproach, appeared less serious than feared by Dr. Chevrette himself -- and the advantages, the disadvantages and the risks of the transfer, and, having done so, saw fit to proceed with it.

The judge then reviewed the parties' arguments. Dr. Chevrette claimed that he had exercised sound medical judgment, and presented expert evidence in support,

while the respondents and their experts maintained that the decision to transfer the patient at that time was irresponsible and medically unsound.

Having previously found that respondents' experts had based their assessment of Dr. Chevrette's conduct on the erroneous information supplied by Dr. Dion, Vallerand J. ruled that their opinion with respect to whether Dr. Chevrette had acted properly in the circumstances was not to be retained. As he observed:

> [TRANSLATION] So according to the plaintiffs' expert witnesses, the transfer was ill-advised, while those of the defence opined that the defendant Chevrette had fully and judiciously assessed the situation and exercised his professional judgment while taking all necessary precautions.
>
> It is well established in the case law that, when confronted with two generally recognized schools of thought, the Court will not interfere with the reasonable choice of one or the other. Only at first blush, however, does the problem here seem to present itself in that light, for the plaintiffs submit that the defendant simply "got rid" of his patient -- an aspersion on the doctor's integrity, and not merely on his competence, which again, apart from the image of the unconscious child weltering in its own blood, was quite inconsistent with the evidence. The plaintiffs forcefully add in passing that whatever the case may be, there can never be any question of transferring a patient before his circulation has been stabilized, an assertion which the plaintiffs' witness Dr. Blanchard, when pressed a bit harder, found himself forced, with the help of an obvious example, to qualify by speaking of an exercise of judgment based on an assessment of the situation. Accepting as I do this qualification by the plaintiffs' expert and accepting the evidence of the defence experts on this point, I find that the advisability of a transfer at a given time is a matter of professional judgment. But by alleging that Dr. Chevrette "got rid" of his patient, thereby failing to assess the situation and to exercise his judgment, the plaintiffs are contributing only very incidentally to the Court's evaluation of Dr. Chevrette's exercise of judgment.

The trial judge then assessed the conduct of Dr. Chevrette in light of the circumstances of the treatment at Hôpital Le Gardeur as revealed by the evidence and, in particular, by the testimony of the medical experts Doctors Cossette and Laflèche.

Based on Dr. Chevrette's testimony and that of his experts, Vallerand J. found that Dr. Chevrette had exercised proper judgment. His conclusions bear repeating:

> [TRANSLATION] I therefore find that the defendant Chevrette exercised sound judgment after having competently assessed the situation and that he used all reasonable means at his disposal in caring for his patient. That being so, the inevitable conclusion is that he has discharged any burden of proof thrust upon him by the chain of events in question.

In the Court of Appeal, Jacques and LeBel JJ.A. overturned the trial judge on this specific point. While LeBel J.A. focused more specifically on the need for a blood transfusion before the transfer, Jacques J.A. wrote categorically at p. 2629:

> [TRANSLATION] The transfer was not absolutely necessary when it was carried out, nor was it one of the risks inherent in the emergency treatment. It was imposed without adequate justification -- the danger of cerebral anoxia -- when there existed no risk of immediate loss of the limb.
>
> This decision, unjustified in the circumstances, resulted in Nancy's losing any chance of being healed.

Neither Mailhot nor Beauregard JJ.A. agreed with their colleagues on this aspect of the appeal. They were of the view that the appreciation of expert testimony with regard to professional judgment is the province of the trial judge and that Vallerand J. had not erred in this regard (see pp. 2622 and 2645); Monet J.A. is silent on this issue.

In overturning the findings of the trial judge on this point, neither LeBel nor Jacques JJ.A. made any concrete reference to the expert opinions or to any other evidence presented at trial. With respect, in so doing, they purely and simply substituted their

opinion for that of the trial judge in the absence of a determination of any palpable error on his part. Moreover, according to my reading of the evidence, there was ample evidence upon which the trial judge could come to the conclusion that Dr. Chevrette's decision to transfer Nancy was justified. By way of example, the medical expert Dr. Cossette testified as follows (at p. 1221, C.O.A.):

> [TRANSLATION]
> Q.Dr. Cossette, do you think in retrospect that the record demonstrates a real justification for Dr. Chevrette's decision to transfer the patient?
>
> A.Yes.
>
> Q.Would you please elaborate?
>
> A.As I explained this morning, I think that considering the circumstances and the equipment available as well as Dr. Chevrette's experience, he believed that he had done all within his power and that he had no option but to transfer the child to a place where treatment could be continued and, in my view, that was the correct decision in those circumstances.

Doctors Provost, Laflèche and Laberge also testified that an immediate transfer was sound given the particular circumstances facing Dr. Chevrette at the time, testimony examined meticulously by the trial judge. I fail to see how the Court of Appeal could overturn those findings while not pointing out where the trial judge had misinterpreted the evidence.

(b) The blood transfusion

This issue is closely related to the issue of the transfer from Le Gardeur to Hôpital Sainte-Justine. The respondents contend that the Court of Appeal was right in

concluding that the transfusion was essential before Nancy was sent to Sainte-Justine, and that the failure of Dr. Chevrette to proceed to such a transfusion constituted a fault on his part.

In his judgment, Vallerand J. referred to the factors which Dr. Chevrette took into consideration in order to assess Nancy's condition and determine the priorities of treatment. He said:

> [TRANSLATION] On the evidence, the gravity of the case as it presented itself to Dr. Chevrette was indicated by the arterial and therefore probably significant haemorrhage together with the child's pallor, and led to fears, without necessarily demonstrating their existence, of the phenomena of compensation, of vasoconstriction and therefore of apprehended shock. On the other hand, all vital signs were positive. It was thus a question of stemming the haemorrhage, of replacing the lost fluids, of giving blood and, finally, of repairing the wound.

After assessing the evidence quoted above as to why a transfer to Sainte-Justine was required, the trial judge continued:

> [TRANSLATION] He nevertheless had to stop the haemorrhage and replace the volume of lost fluids, which he did. Of course, we now know that it took almost an hour to insert the intravenous tube. And it might be thought that if, during that same hour, the necessary tests had been carried out to identify a compatible blood type, the child could have been sent off with blood instead of intravenous solution and the outcome might have been better. But on the evidence, there was no indication that setting up the intravenous drip would be so difficult and that blood ordered on arrival might perhaps be available even before it could be used. It was reasonable to expect that it would not be available until after the patient's departure and would thus be useless unless the patient was held back, which was judged inadvisable.

In sum, Vallerand J. found that Dr. Chevrette's decision to transfer Nancy to Sainte-Justine immediately, without giving her a blood transfusion, was reasonable.

On appeal, Jacques and LeBel JJ.A. focused particularly on Dr. Chevrette's failure to account for the dynamic evolution of the child's condition, especially the risk of sudden shock, and his failure to discover, by asking either Nancy's parents or the nurses on staff, exactly how much blood she had lost. According to Jacques J.A. at p. 2629:

> [TRANSLATION] Dr. Chevrette's conclusion that he "could not assume a transfusion would later be necessary" is inconsistent with his own premises inasmuch as he did not even attempt to evaluate blood loss although he had observed the existence of a pre-shock condition. He was aware of the deceptiveness of the defence and compensation mechanisms in children and of the dynamic, constantly evolving, nature of shock. These medical facts are uncontroverted.
>
> It is an established fact that setting up a blood transfusion, that is from the moment a blood sample is taken until the patient actually begins receiving blood, takes from 30 to 45 minutes, whether at Le Gardeur or at Sainte-Justine. It is also established that the wound had to be repaired and circulation restored within no more than five to seven hours. It is also clear that mere compensation by means of fluid replacement had but limited value and was no more than a stopgap.
>
> In these circumstances, blood transfusion was of paramount importance and ought to have preceded repairing the wound in the sequence of emergency care.

Similarly, LeBel J.A. held at p. 2638:

> [TRANSLATION] . . . because of the instability characteristic of the pre-shock state and given that Dr. Chevrette did not really know the extent of the blood loss, although the circumstances should have led him to suspect its seriousness, the most appropriate measure would eventually have been a transfusion.

> The plaintiffs do not deny that as a preliminary mesure the injection of a solution such as Rheomacrodex helped replenish fluids in the bloodstream. This treatment did nothing, however, to remedy the pre-shock condition. To get the patient out of this state and to prevent the onset of shock or heart or brain trouble, there was ultimately nothing for it but to inject whole blood. That would, of course, have taken more time, perhaps an hour. The dissection of the vein turned out to be difficult and it was necessary to carry out blood typing. However, this sort of intervention, in which the attending physician could have been assisted by the duty surgeon if the difficulties encountered made it necessary, would have enabled Nancy Lapointe's condition to have been more effectively stabilized before her transfer to Sainte-Justine. The additional delay would have provided sufficient time to proceed with the repairing of the limb. The cardiac arrest at Sainte-Justine hospital and its consequences would thereby likely have been avoided.

And, although less unequivocal, Mailhot J.A. wrote at p. 2645:

> [TRANSLATION] ... because of the instability characteristic of the pre-shock state and given that Dr. Chevrette did not really know the extent of blood loss, although he could have guessed it to be considerable from the nature of the wound, he should have immediately carried out a blood analysis in order to determine the patient's blood group in anticipation of a possible blood transfusion.

It is clear that the reversal of the trial judge's findings on this point did not stem from a disagreement on the proper standard of liability, since none of the appellate court judges stated or even implied that Vallerand J. had misapprehended the legal test. Nor is it apparent that the majority found a palpable and overriding error in law or in the trial judge's findings and conclusions of fact. One must conclude, then, that the appellate court simply disagreed with the lower court's appreciation of the facts, and so substituted its own interpretation.

For example, Vallerand J. indicated that, according to the evidence he found credible, Dr. Chevrette could not have foreseen the time it would take to administer intravenous treatment at Le Gardeur, and hence he could not be blamed for not having ordered blood-typing in the interim. Yet LeBel J.A. held that Dr. Chevrette should have proceeded with blood tests once he realized how long the dissection would take, without indicating where the trial judge had made an error in his assessment of the evidence on this point nor why the Court of Appeal should be entitled to accept the evidence of expert witnesses which the trial judge had found not to be credible.

Similarly, Vallerand J. found as a fact that, in the opinion of credible medical experts, the defendant made a reasonable decision with respect to the transfusion. The majority of the Court of Appeal seems to have simply ignored this finding and, without referring to an error or a disregard by the trial judge of the relevant evidence, held that Dr. Chevrette made a completely irresponsible decision when he chose to order an immediate transfer rather than perform a transfusion at Hôpital Le Gardeur.

My own reading of the evidence indicates that, on this particular point, the trial judge neither ignored nor misapprehended the evidence. While the Court of Appeal focused on Dr. Chevrette's failure to ask Nancy's parents how much blood she had lost before arriving at Le Gardeur, the testimony of the experts found credible by Vallerand J. shows that Dr. Chevrette would have been able to estimate the blood loss based on the patient's vital signs and clinical status (see evidence of Dr. Cossette, at p. 1143 C.O.A.). As well, the child's vital signs, well within the normal range, her state of consciousness

and the lack of change in her condition from the time she left Le Gardeur to the time she arrived at Sainte-Justine indicate that her condition had stabilized even in the absence of a blood transfusion, vindicating Dr. Chevrette's decision to make the transfer to the better-equipped hospital right away (see testimony of Dr. Laflèche, at p. 1274 C.O.A.; testimony of Dr Cossette, at pp. 1167-68 C.O.A.).

In my view, the Court of Appeal had no grounds upon which to reverse the findings of the trial judge on this point.

(c) The information transmitted to Sainte-Justine

Although the issue of the information given by Dr. Chevrette to the Hôpital Sainte-Justine does not appear to have been central at trial, it became a focal point in the case before the Court of Appeal.

Vallerand J. disposed of this matter in the following terms:

> [TRANSLATION] That brings me to the second criticism: the defendant Chevrette's alleged failure to fulfil his duty to transmit when the patient was transferred all information required to ensure continuity of treatment. This criticism can be quickly disposed of.
>
> I find, for the preceding reasons, that it was Dr. Chikhany and not Dr. Dion whom Dr. Chevrette informed of his patient's arrival. I likewise find that he then attempted, albeit not without some difficulty, to provide all relevant information and to bring home to his interlocutor the seriousness of the case. The certificate sent with the patient was admittedly succinct. I adopt however without qualification the opinion of Dr. Laflèche that Dr. Chevrette scarcely had time to write out a certificate and that, as far as he was concerned, it seemed infinitely preferable to give the information orally so

> that the two physicians could communicate fully, rather than to scribble a few words on a sheet of paper.
>
> To conclude on the subject of this criticism, I note that, even supposing it to be valid, it could be directed at both interlocutors, since the obligation to request all necessary information was undoubtedly as important as the duty to provide it, once it is accepted, which it is, that Dr. Chevrette announced the arrival of a patient with a serious arterial haemorrhage.

All of the judges on appeal expressed concern on this point, the majority holding that Dr. Chevrette should have made further attempts to alert the staff at Sainte-Justine to the seriousness of the incoming case once he realized that his initial phone call might not have been effective. Monet J.A. emphasized that, given his doubts about the effectiveness of his phone call, Dr. Chevrette should have taken further steps (at p. 2625):

> [TRANSLATION] It is thus apparent that Dr. Chevrette himself believes that he failed to get the message across to his interlocutor, i.e. that it was a case of extreme urgency, almost of life or death. He hung up, frustrated. Though disappointed with the lack of response on the part of his interlocutor, whom he had not succeeded in making aware of the problem, he did nothing. He made no other call to a head of medical services, to a duty surgeon or even to the head nurse. There was nothing in the way of an S.O.S intended for the medical team at Sainte-Justine, which could have been given to the nurse accompanying the child in the ambulance. And yet that certainly was not the time to spare the feelings of an unknown and phlegmatic interlocutor. Indeed, had Sainte-Justine hospital been sued, it could probably have argued that it was justified in believing that the patient's condition had been stabilized at Le Gardeur hospital even though from the perspective of a non-specialist the case appeared serious.
>
> That, in my opinion, was a violation of the duty of care.

After reviewing the information which Dr. Chevrette could have sent, Mailhot J.A. concluded at p. 2646:

> [TRANSLATION] It can be imagined that in an emergency situation such as Nancy Lapointe's, the summary of relevant facts ought to have accompanied the child, and the transfer document, while terse, did not, in my view, contain the relevant information. Nothing could be further from my intention than to require a long and complex composition, since, according to the experts, the time factor is important in the case of a five-year-old child in a state of pre-shock, who has experienced considerable blood loss and whose physiological defence mechanisms may suddenly fail, but the relevant information should have appeared on the transfer document.
>
> Furthermore, I do not believe that I am imposing on Dr. Chevrette an obligation which did not exist in 1975. In my view, a physician whose services have been sought and who, in his professional judgment, decides to send his patient to another institution or another professional, must take the necessary steps to ensure that they are provided with the relevant information essential for the continuation of treatment. This obligation is all the more imperative in a case of emergency and where a child of tender years, having suffered considerable blood loss, is in the aforementioned state of pre-shock.
>
> Thus, with respect for the opinion of the trial judge, I cannot, as he did, summarily dismiss the criticism levelled against Dr. Chevrette that he failed to pass on all the information required to ensure *continuity* of treatment. [Emphasis in original.]

For his part, LeBel J.A. found a causal connection between Dr. Chevrette's conduct and the eventual deterioration in Nancy's condition (at p. 2638):

> [TRANSLATION] The conduct of the doctors at Sainte-Justine hospital on the patient's arrival at the outpatient clinic indicates clearly that the immediate urgency of Nancy Lapointe's case was not completely understood. A series of tests and checks, most notably X-rays, were carried out prior to treatment. If Dr. Chevrette had ensured, in his oral or written communications or those relayed by the nurse accompanying Nancy Lapointe, that the necessary information had been passed on and understood, a different approach would likely have been taken at Sainte-Justine hospital. Treatment would have been pursued with greater diligence and a greater sense of the real urgency of the patient's case.

Beauregard J.A., however, wrote on this point at p. 2624:

> [TRANSLATION] I am tempted to conclude that Dr. Chevrette was not particularly careful. But, again, even if that is true, I could not find him liable as the evidence does not establish on the balance of probabilities a causal nexus between the fault I ascribe to Dr. Chevrette for the purposes of this discussion and the fact that the child lapsed into a state of shock.
>
> Was the shock due to the fact that, at Sainte-Justine, the gravity of the case not being known, too much time was taken in treating the child, or did it stem rather from the fact that, at that hospital, even if the seriousness of the case was known, someone negligently allowed the child to lose much blood? We do not have the answer to this two-part question either and, in my view, the appellants ought to have provided that answer.
>
> Given our ignorance of the actual events, it is extremely dangerous to give judgment against Dr. Chevrette, with all that entails, when, from the steps taken by the medical authorities at Sainte-Justine upon the child's arrival there, one is inclined to conclude that the gravity of the situation was known. There is in fact serious evidence to suggest that at the very time these steps were being taken there was some inopportune fiddling with the tourniquet.

The majority of the Court of Appeal concluded, therefore, that since Dr. Chevrette's professional obligation included conveying the necessary information to the second hospital, he failed because the telephone conversation with Dr. Chikhany did not alert the latter to the severity of Nancy's condition. In particular, they expressed the view that a lengthier note would have been appropriate.

In reversing the holding of the trial judge on this point, one must assume that the court was well aware that Dr. Chevrette's obligation was one of means, since the court did not indicate that it proceeded from a different legal standard. Neither did the court imply that the trial judge had applied the wrong test. If the Court of Appeal found that the trial judge misread the evidence on this point, it did not indicate the evidence upon which it based its findings, nor the evidence the trial judge misapprehended. The Court

of Appeal instead focused uniquely on Dr. Chevrette's testimony, in which he related his doubts about his success in alerting Dr. Chikhany sufficiently to the gravity of the incoming case. The trial judge, however, discussed this point in the context of the whole of the evidence, particularly the expert evidence put before him by Dr. Laflèche, to the effect that a telephone call was a more effective means of communication than a lengthy note in the circumstances.

There is no indication that Vallerand J. had anything less than a full grasp of the evidence on this point, including Chevrette's own testimony, nor that he misapprehended such evidence. His conclusion that Dr. Chevrette had acted diligently in the circumstances is not open to criticism since it is based on such evidence which he found credible. Taken in isolation, Dr. Chevrette's frank discussion of his worries might have had some importance. When considered, however, in the context of all the other evidence, and in view of the findings of credibility by the trial judge, that particular testimony is not determinative. In my view, this finding did not constitute a palpable error since the trial judge based his conclusions on the evidence. The Court of Appeal was not entitled to substitute its opinion for that of the trial judge in such circumstances.

On this point, the evidence clearly shows that the staff at Sainte-Justine were sufficiently alerted to Nancy's condition that they knew it was serious, were expecting her and gave her immediate priority of treatment (see the trial judge's finding on this point). As well, the doctor who spoke on the phone with Dr. Chevrette, Dr. Chikhany, was alerted by the call to the severity of the case sufficiently that he wrote on the admission

sheet [TRANSLATION] "significant arterial haemorrhage", critical information that did not appear on the transfer note nor that could be discerned from Nancy's condition on arrival at Sainte-Justine (see p. 915 C.O.A.). The transfer note together with the admission sheet and other documents at Sainte-Justine confirm that the staff appreciated the incoming patient's medical state (see exhibits P-2, P-2A and P-1A). The information on exhibit P-2A, for instance, included the time of Nancy's accident, a detail which Mailhot J.A., with respect, mistakenly used as an example of the sort of information which Dr. Chevrette should have communicated, but failed to communicate, to Sainte-Justine. It must be borne in mind that the events at Sainte-Justine following Nancy's arrival were difficult to assess on the evidence given Vallerand J.'s finding that Dr. Dion, the doctor on call at emergency, was not a credible witness. Finally, expert evidence at trial revealed that the information, which the majority of the Court of Appeal reproached Dr. Chevrette for not sending, typically should have been double-checked by the staff at Sainte-Justine after Nancy's arrival (see the testimony of Dr. Provost at pp. 1051-52 C.O.A. and of Dr. Laflèche at p. 1295 C.O.A.).

In my view, there was no ground for the Court of Appeal to reverse the trial judge's findings on this point.

Conclusions

For the above reasons, I must conclude that the Court of Appeal was wrong in reversing the trial judge's findings and conclusions of fact in the absence of a palpable

error on the part of the trial judge. Accordingly, the appeal must be allowed, the motion by the respondents to modify the Court of Appeal's conclusions dismissed, the Court of Appeal judgment reversed and the judgment of Vallerand J. at trial restored.

I cannot leave this matter, however, without expressing great sympathy for Nancy's tragic fate as a result of this accident and for the pain and suffering imposed upon her parents since then. Guided by sympathy alone, my task here would have been much easier. As a judge, however, I must uphold the law and sympathy is a poor guide in such matters. Justice according to law is the only guide and justice must work for both parties engaged in litigation, plaintiffs as well as defendants.

It is also deeply regrettable that this case, arising from an accident which occurred in 1975, took so long to come to its final resolution through, I understand, no fault of the respondents nor, for that matter, of the appellant.

Under the circumstances of this case, I would order that the appeal be allowed without costs throughout.

Appeal allowed without costs.

Solicitors for the appellant: McCarthy Tétrault, Montréal.

Solicitors for the respondents: Pilon & Lagacé, Montréal.

Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada *Intervener*

INDEXED AS: R. *v.* MORGENTALER

File No.: 19556.

1986: October 7, 8, 9, 10; 1988: January 28.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Life, liberty and security of the person — Fundamental justice — Abortion — Criminal Code prohibiting abortion except where life or health of woman endangered — Whether or not abortion provisions infringe right to life, liberty and security of the person — If so, whether or not such infringement in accord with fundamental justice — Whether or not impugned legislation reasonable and demonstrably justified in a free and democratic society — Canadian Charter of Rights and Freedoms, ss. 1, 7 — Criminal Code, R.S.C. 1970, c. C-34, s. 251.

Constitutional law — Jurisdiction — Superior court powers and inter-delegation — Whether or not therapeutic abortion committees exercising s. 96 court functions — Whether or not abortion provisions improperly delegate criminal law powers — Constitution Act, 1867, ss. 91(27), 96.

Constitutional law — Charter of Rights — Whether or not Attorney General's right of appeal constitutional — Costs — Whether or not prohibition on costs constitutional — Criminal Code, R.S.C. 1970, c. C-34, ss. 605, 610(3).

Criminal law — Abortion — Criminal Code prohibiting abortion and procuring of abortion except where life or health of woman endangered — Whether or not abortion provisions ultra vires Parliament — Whether or not abortion provisions infringe right to life, liberty and security of the person — If so, whether or not such infringement in accord with fundamental justice —

Dr Henry Morgentaler, Dr Leslie Frank Smoling et Dr Robert Scott *Appelants*

c.

Sa Majesté La Reine *Intimée*

et

Le procureur général du Canada *Intervenant*

RÉPERTORIÉ: R. *c.* MORGENTALER

N° du greffe: 19556.

1986: 7, 8, 9, 10 octobre; 1988: 28 janvier.

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 L'ONTARIO

Droit constitutionnel — Charte des droits — Vie, liberté et sécurité de la personne — Justice fondamentale — Avortement — Le Code criminel interdit l'avortement, sauf si la vie ou la santé de la femme est en danger — Les dispositions sur l'avortement portent-elles atteinte au droit à la vie, à la liberté et à la sécurité de la personne? — Si oui, une telle atteinte est-elle en conformité avec la justice fondamentale? — La loi en cause est-elle raisonnable et peut-elle être justifiée dans une société libre et démocratique? — Charte canadienne des droits et libertés, art. 1, 7 — Code criminel, S.R.C. 1970, chap. C-34, art. 251.

Droit constitutionnel — Compétence — Pouvoirs des cours supérieures et délégation — Les comités de l'avortement thérapeutique exercent-ils les fonctions d'une cour créée en vertu de l'art. 96? — Les dispositions sur l'avortement constituent-elles une délégation irrégulière de la compétence en matière criminelle? — Loi constitutionnelle de 1867, art. 91(27), 96.

Droit constitutionnel — Charte des droits — Le droit d'appel du procureur général est-il constitutionnel? — Dépens — L'interdiction relative aux dépens est-elle constitutionnelle? — Code criminel, S.R.C. 1970, chap. C-34, art. 605, 610(3).

Droit criminel — Avortement — Le Code criminel interdit l'avortement et de procurer un avortement, sauf si la vie ou la santé de la femme est en danger — Les dispositions sur l'avortement excèdent-elles les pouvoirs du Parlement? — Les dispositions sur l'avortement portent-elles atteinte au droit à la vie, à la liberté et à la sécurité de la personne? — Si oui, une telle atteinte est-elle en conformité avec la justice fondamentale? — La loi en cause est-elle raisonnable et

Whether or not impugned legislation reasonable and demonstrably justified in a free and democratic society.

Criminal law — Juries — Address to jury advising them to ignore law as stated by judge — Counsel wrong.

Appellants, all duly qualified medical practitioners, set up a clinic to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s. 251(4) of the *Criminal Code*. The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances. Indictments were preferred against the appellants charging that they had conspired with each other with intent to procure abortions contrary to ss. 423(1)(*d*) and 251(1) of the *Criminal Code*.

Counsel for the appellants moved to quash the indictment or to stay the proceedings before pleas were entered on the grounds that s. 251 of the *Criminal Code* was *ultra vires* the Parliament of Canada, in that it infringed ss. 2(*a*), 7 and 12 of the *Charter*, and was inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. The trial judge dismissed the motion, and the Ontario Court of Appeal dismissed an appeal from that decision. The trial proceeded before a judge sitting with a jury, and the three accused were acquitted. The Crown appealed the acquittal and the appellants filed a cross-appeal. The Court of Appeal allowed the appeal, set aside the acquittal and ordered a new trial. The Court held that the cross-appeal related to issues already raised in the appeal, and the issues, therefore, were examined as part of the appeal.

The Court stated the following constitutional questions:

1. Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

2. If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

peut-elle être justifiée dans une société libre et démocratique?

Droit criminel — Jury — Exposé au jury lui conseillant d'ignorer les règles de droit énoncées par le juge — Erreur de l'avocat.

Les appelants sont tous docteurs en médecine; ensemble, ils ont ouvert une clinique pour pratiquer des avortements sur des femmes qui n'avaient pas obtenu le certificat du comité de l'avortement thérapeutique d'un hôpital accrédité ou approuvé requis par le par. 251(4) du *Code criminel*. Les médecins ont fait des déclarations publiques dans lesquelles ils ont mis en doute la sagesse de la législation canadienne sur l'avortement et ont affirmé qu'une femme a le droit souverain de décider si un avortement s'impose ou non dans sa situation personnelle. Des actes d'accusation ont été portés contre les appelants les inculpant de complot, les uns avec les autres, avec l'intention de procurer des avortements, infractions prévues à l'al. 423(1)*d*) et au par. 251(1) du *Code criminel*.

L'avocat des appelants a demandé l'annulation de l'acte d'accusation ou la suspension des poursuites avant d'inscrire les plaidoyers, pour le motif que l'art. 251 du *Code criminel* excéderait les pouvoirs du Parlement du Canada, enfreindrait l'al. 2*a*) et les art. 7 et 12 de la *Charte* et entrerait en conflit avec l'al. 1*b*) de la *Déclaration canadienne des droits*. Le juge de première instance a rejeté la requête et l'appel interjeté à la Cour d'appel de l'Ontario a aussi été rejeté. Le procès s'est poursuivi devant juge et jury et les trois accusés ont été acquittés. Le ministère public a interjeté appel de l'acquittement et les appelants ont formé un appel incident. La Cour d'appel a accueilli l'appel, annulé le verdict d'acquittement et ordonné un nouveau procès. La Cour a jugé que l'appel incident se rapportait à des points déjà soulevés dans l'appel principal et on les a donc étudiés dans le cadre de ce dernier.

La Cour a formulé les questions constitutionnelles suivantes:

1. L'article 251 du *Code criminel* du Canada porte-t-il atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*?

2. Si l'article 251 du *Code criminel* du Canada porte atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*, est-il justifié par l'article premier de la *Charte canadienne des droits et libertés* et donc compatible avec la *Loi constitutionnelle de 1982*?

3. Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?

4. Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?

5. Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

6. Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?

7. If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*) 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Held (McIntyre and La Forest JJ. dissenting): The appeal should be allowed and the acquittals restored. The first constitutional question should be answered in the affirmative as regards s. 7 and the second in the negative as regards s. 7. The third, fourth and fifth constitutional questions should be answered in the negative. The sixth constitutional question should be answered in the negative with respect to s. 605 of the *Criminal Code* and should not be answered as regards s. 610(3). The seventh constitutional question should not be answered.

Per Dickson C.J. and Lamer J.: Section 7 of the *Charter* requires that the courts review the substance of legislation once the legislation has been determined to infringe an individual's right to "life, liberty and security of the person". Those interests may only be impaired if the principles of fundamental justice are respected. It was sufficient here to investigate whether or not the impugned legislative provisions met the procedural standards of fundamental justice and the Court accordingly did not need to tread the fine line between substantive review and the adjudication of public policy.

State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person. Section 251 clearly interferes with a woman's physical and bodily integrity. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference

3. L'article 251 du *Code criminel* du Canada excède-t-il les pouvoirs du Parlement du Canada?

4. L'article 251 du *Code criminel* du Canada viole-t-il l'art. 96 de la *Loi constitutionnelle de 1867*?

5. L'article 251 du *Code criminel* du Canada délègue-t-il illégalement la compétence fédérale en matière criminelle aux ministres de la Santé provinciaux ou aux comités de l'avortement thérapeutique et, ce faisant, le gouvernement fédéral a-t-il abdiqué son autorité dans ce domaine?

6. L'article 605 et le par. 610(3) du *Code criminel* du Canada portent-ils atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*?

7. Si l'article 605 et le par. 610(3) du *Code criminel* du Canada portent atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*, sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

Arrêt (les juges McIntyre et La Forest sont dissidents): Le pourvoi est accueilli et les acquittements sont rétablis. La première question constitutionnelle reçoit une réponse affirmative en ce qui concerne l'art. 7 et la deuxième question une réponse négative en ce qui concerne l'art. 7. Les troisième, quatrième et cinquième questions reçoivent une réponse négative. La sixième question reçoit une réponse négative en ce qui concerne l'art. 605 du *Code criminel* et ne reçoit aucune réponse en ce qui concerne le par. 610(3). Il n'est pas nécessaire de répondre à la septième question.

Le juge en chef Dickson et le juge Lamer: L'article 7 de la *Charte* impose aux tribunaux le devoir d'examiner, au fond, les textes législatifs une fois qu'il a été jugé qu'ils enfreignent le droit de l'individu «à la vie, à la liberté et à la sécurité de sa personne». Il ne peut être porté atteinte à ces intérêts que si les principes de justice fondamentale sont respectés. Il suffit en l'espèce d'examiner si les dispositions législatives en cause sont conformes aux normes procédurales de justice fondamentale et il n'est donc pas nécessaire que la Cour touche à l'équilibre fragile entre examen du fond et décision de politiques générales.

L'atteinte que l'État porte à l'intégrité physique et la tension psychologique causée par l'État, du moins dans le contexte du droit criminel, constituent une violation de la sécurité de la personne. L'article 251 constitue clairement une atteinte à l'intégrité physique et émotionnelle d'une femme. Forcer une femme, sous la menace d'une sanction criminelle, à mener le fœtus à terme, à moins qu'elle ne remplisse certains critères indépendants

with a woman's body and thus an infringement of security of the person. A second breach of the right to security of the person occurs independently as a result of the delay in obtaining therapeutic abortions caused by the mandatory procedures of s. 251 which results in a higher probability of complications and greater risk. The harm to the psychological integrity of women seeking abortions was also clearly established.

Any infringement of the right to life, liberty and security of the person must comport with the principles of fundamental justice. These principles are to be found in the basic tenets of our legal system. One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory.

The procedure and restrictions stipulated in s. 251 for access to therapeutic abortions make the defence illusory resulting in a failure to comply with the principles of fundamental justice. A therapeutic abortion may be approved by a "therapeutic abortion committee" of an "accredited or approved hospital". The requirement of s. 251(4) that at least four physicians be available at that hospital to authorize and to perform an abortion in practice makes abortions unavailable in many hospitals. The restrictions attaching to the term "accredited" automatically disqualifies many Canadian hospitals from undertaking therapeutic abortions. The provincial approval of a hospital for the purpose of performing therapeutic abortions further restricts the number of hospitals offering this procedure. Even if a hospital is eligible to create a therapeutic abortion committee, there is no requirement in s. 251 that the hospital need do so. Provincial regulation as well can heavily restrict or even deny the practical availability of the exculpatory provisions of s. 251(4).

The administrative system established in s. 251(4) fails to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. The word "health" is vague and no adequate guidelines have been established for therapeutic abortion committees. It is typically impossible for women to know in advance what standard of health will be applied by any given committee.

The argument that women facing difficulties in obtaining abortions at home can simply travel elsewhere would not be especially troubling if those difficulties

de ses propres priorités et aspirations, est une ingérence profonde à l'égard de son corps et donc une atteinte à la sécurité de sa personne. Une deuxième violation du droit à la sécurité de la personne se produit indépendamment par suite du retard à obtenir un avortement thérapeutique en raison de la procédure imposée par l'art. 251 qui entraîne une augmentation de la probabilité de complications et accroît les risques. Il a été clairement établi que l'art. 251 porte atteinte à l'intégrité psychologique des femmes voulant un avortement.

Toute atteinte au droit à la vie, à la liberté et à la sécurité de la personne doit être en accord avec les principes de justice fondamentale. On trouve ces principes dans les préceptes fondamentaux de notre système juridique. L'un des préceptes fondamentaux de notre système de justice criminelle est que, lorsque le Parlement crée une défense à l'égard d'une accusation criminelle, celle-ci ne doit être ni illusoire ni à ce point difficile à faire valoir qu'elle soit pratiquement illusoire.

La procédure et les restrictions établies par l'art. 251 pour avoir droit à un avortement rendent la défense illusoire et reviennent au non-respect des principes de justice fondamentale. Un avortement thérapeutique doit être approuvé par un «comité de l'avortement thérapeutique» d'un hôpital «accrédité ou approuvé». L'obligation du par. 251(4) qu'au moins quatre médecins soient disponibles dans cet hôpital pour autoriser et pratiquer un avortement, signifie en pratique que beaucoup d'hôpitaux ne peuvent pas pratiquer des avortements. Les restrictions découlant du terme «accrédité» interdisent automatiquement à un grand nombre d'hôpitaux canadiens de pratiquer des avortements thérapeutiques. L'accréditation provinciale d'un hôpital aux fins de pratiquer des avortements thérapeutiques restreint encore plus le nombre d'hôpitaux où on peut les pratiquer. Même si un hôpital est autorisé à former un comité de l'avortement thérapeutique, rien dans l'art. 251 ne l'oblige à le faire. La réglementation provinciale peut fortement limiter et même supprimer le recours en pratique aux dispositions disculpatoires du par. 251(4).

Le système administratif établi par le par. 251(4) n'offre pas de norme adéquate à laquelle les comités de l'avortement thérapeutique doivent se référer lorsqu'ils ont à décider si un avortement thérapeutique devrait, en droit, être autorisé. Le terme «santé» est vague et aucunes directives adéquates n'ont été établies pour les comités de l'avortement thérapeutique. Il est, en général, impossible que les femmes sachent à l'avance quelle norme de santé un comité donné appliquera.

L'argument voulant que les femmes qui éprouvent des difficultés à se faire avorter au lieu de leur domicile n'ont qu'à se rendre ailleurs ne serait pas spécialement

were not in large measure created by the procedural requirements of s. 251. The evidence established convincingly that it is the law itself which in many ways prevents access to local therapeutic abortion facilities.

Section 251 cannot be saved under s. 1 of the *Charter*. The objective of s. 251 as a whole, namely to balance the competing interests identified by Parliament, is sufficiently important to pass the first stage of the s. 1 inquiry. The means chosen to advance its legislative objectives, however, are not reasonable or demonstrably justified in a free and democratic society. None of the three elements for assessing the proportionality of means to ends is met. Firstly, the procedures and administrative structures created by s. 251 are often unfair and arbitrary. Moreover, these procedures impair s. 7 rights far more than is necessary because they hold out an illusory defence to many women who would *prima facie* qualify under the exculpatory provisions of s. 251(4). Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved and may actually defeat the objective of protecting the life and health of women.

Per Beetz and Estey JJ.: Before the advent of the *Charter*, Parliament recognized, in adopting s. 251(4) of the *Criminal Code*, that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health". This standard in s. 251(4) became entrenched at least as a minimum when the "right to life, liberty and security of the person" was enshrined in the *Canadian Charter of Rights and Freedoms* at s. 7.

"Security of the person" within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated.

gênant si ces difficultés ne résultaient pas dans une large mesure des exigences de procédure de l'art. 251. La preuve établit de façon convaincante que c'est la loi elle-même qui, de bien des manières, empêche de s'adresser aux institutions locales offrant l'avortement thérapeutique.

L'article 251 ne peut être sauvé par l'article premier de la *Charte*. L'objectif de l'art. 251 dans son ensemble, soit d'équilibrer les intérêts en concurrence identifiés par le Parlement, est suffisamment important pour passer le premier stade de l'examen au regard de l'article premier. Les moyens choisis pour mettre en œuvre ces objectifs législatifs ne sont pas raisonnables et leur justification ne peut se démontrer dans une société libre et démocratique. On ne trouve aucun des trois éléments permettant d'évaluer la proportionnalité des moyens et de la fin. Premièrement, la procédure et les structures administratives instaurées par l'art. 251 sont souvent arbitraires et injustes. En outre, ces procédures portent atteinte aux droits garantis par l'art. 7 au-delà de ce qui est nécessaire, puisqu'elle ne fournit qu'une défense illusoire à nombre de femmes qui, *prima facie*, pourraient se prévaloir des dispositions disculpatoires du par. 251(4). Enfin, les effets de la limitation des droits garantis par l'art. 7, pour nombre de femmes enceintes, sont disproportionnés par rapport à l'objectif recherché et peuvent effectivement mettre en échec l'objectif de protection de la vie et de la santé des femmes.

Les juges Beetz et Estey: Avant l'avènement de la *Charte*, le Parlement a reconnu, en adoptant le par. 251(4) du *Code criminel*, que l'intérêt que représente la vie ou la santé de la femme enceinte l'emporte sur celui qu'il y a à interdire les avortements, y compris l'intérêt qu'a l'État dans la protection du fœtus, lorsque «la continuation de la grossesse de cette personne du sexe féminin mettrait ou mettrait probablement en danger la vie ou la santé de cette dernière». Ce critère du par. 251(4) a été consacré, au moins comme minimum, lorsque le «droit à la vie, à la liberté et à la sécurité de la personne» a été enchâssé dans la *Charte canadienne des droits et libertés*, à l'art. 7.

L'expression «sécurité de la personne», au sens de l'art. 7 de la *Charte*, doit inclure le droit au traitement médical d'un état dangereux pour la vie ou la santé, sans menace de répression pénale. Si une loi du Parlement force une femme enceinte dont la vie ou la santé est en danger à choisir entre, d'une part, la perpétration d'un crime pour obtenir un traitement médical efficace en temps opportun et, d'autre part, un traitement inadéquat, voire aucun traitement, son droit à la sécurité de sa personne a été violé.

According to the evidence, the procedural requirements of s. 251 of the *Criminal Code* significantly delay pregnant women's access to medical treatment resulting in an additional danger to their health, thereby depriving them of their right to security of the person. This deprivation does not accord with the principles of fundamental justice. While Parliament is justified in requiring a reliable, independent and medically sound opinion as to the "life or health" of the pregnant woman in order to protect the state interest in the foetus, and while any such statutory mechanism will inevitably result in some delay, certain of the procedural requirements of s. 251 of the *Criminal Code* are nevertheless manifestly unfair. These requirements are manifestly unfair in that they are unnecessary in respect of Parliament's objectives in establishing the administrative structure and in that they result in additional risks to the health of pregnant women.

The following statutory requirements contribute to the manifest unfairness of the administrative structure imposed by the *Criminal Code*: (1) the requirement that all therapeutic abortions must take place in an "accredited" or "approved" hospital as defined in s. 251(6); (2) the requirement that the committee come from the accredited or approved hospital in which the abortion is to be performed; (3) the provision that allows hospital boards to increase the number of members of a committee; (4) the requirement that all physicians who practise lawful therapeutic abortions be excluded from the committees.

The primary objective of s. 251 of the *Criminal Code* is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective. The primary objective does relate to concerns which are pressing and substantial in a free and democratic society and which, pursuant to s. 1 of the *Charter*, justify reasonable limits to be put on a woman's right. However, the means chosen in s. 251 are not reasonable and demonstrably justified. The rules unnecessary in respect of the primary and ancillary objectives which they are designed to serve, such as the above-mentioned rules contained in s. 251, cannot be said to be rationally connected to these objectives under s. 1 of the *Charter*. Consequently, s. 251 does not constitute a reasonable limit to the security of the person.

It is not necessary to answer the question concerning the circumstances in which there is a proportionality between the effects of s. 251 which limit the right of pregnant women to security of the person and the

D'après la preuve soumise, les exigences procédurales de l'art. 251 du *Code criminel* ont pour effet de retarder considérablement l'obtention par les femmes enceintes d'un traitement médical, ce qui cause un danger additionnel pour leur santé et porte atteinte, par le fait même, à leur droit à la sécurité de leur personne. Cette atteinte n'est pas compatible avec les principes de justice fondamentale. Quoique le Parlement soit justifié d'exiger une opinion médicale éclairée, indépendante et fiable relativement à la vie ou à la santé de la femme enceinte pour protéger l'intérêt qu'a l'État à l'égard du fœtus et quoiqu'un tel dispositif législatif entraîne inévitablement des délais, certaines des exigences procédurales de l'art. 251 du *Code criminel* sont néanmoins nettement injustes. Ces exigences sont nettement injustes en ce sens qu'elles sont inutiles au regard des objectifs poursuivis par le Parlement en établissant la structure administrative et qu'elles entraînent des risques additionnels pour la santé des femmes enceintes.

Les exigences législatives suivantes rendent nettement injuste la structure administrative imposée par le *Code criminel*: (1) l'obligation que tous les avortements thérapeutiques soient pratiqués dans des hôpitaux «accrédités» ou «approuvés» selon la définition du par. 251(6); (2) l'obligation que le comité provienne de l'hôpital accrédité ou approuvé où l'avortement doit être pratiqué; (3) la disposition qui autorise un conseil d'hôpital à augmenter le nombre de membres d'un comité; (4) l'exclusion du sein de ces comités de tous les médecins qui pratiquent des avortements thérapeutiques licites.

L'objectif premier de l'art. 251 du *Code criminel* est la protection du fœtus. La protection de la vie et de la santé de la femme enceinte est un objectif secondaire. L'objectif premier, celui de la protection du fœtus, touche effectivement à des questions qui sont urgentes et importantes dans une société libre et démocratique et qui, conformément à l'article premier de la *Charte*, justifient que des limites raisonnables soient imposées au droit d'une femme. Toutefois, les moyens choisis par l'art. 251 ne sont pas raisonnables et leur justification ne peut être démontrée. On ne peut dire que les règles inutiles aux fins des objectifs premier et secondaire qu'elles sont censées appuyer, comme les règles susmentionnées de l'art. 251, ont un lien rationnel avec ces objectifs aux termes de l'article premier de la *Charte*. Par conséquent, l'art. 251 ne constitue pas une limite raisonnable à la sécurité de la personne.

Il n'est pas nécessaire de répondre à la question relative aux circonstances dans lesquelles il y a proportionnalité entre les effets de l'art. 251 qui limite le droit des femmes enceintes à la sécurité de leur personne et

objective of the protection of the foetus. In any event, the objective of protecting the foetus would not justify the severity of the breach of pregnant women's right to security of the person which would result if the exculpatory provision of s. 251 was completely removed from the *Criminal Code*. However, it is possible that a future enactment by Parliament that would require a higher degree of danger to health in the latter months of pregnancy, as opposed to the early months, for an abortion to be lawful, could achieve a proportionality which would be acceptable under s. 1 of the *Charter*.

Given the conclusion that s. 251 contains rules unnecessary to the protection of the foetus, the question as to whether a foetus is included in the word "everyone" in s. 7, so as to have a right to "life, liberty and security of the person" under the *Charter*, need not be decided.

Section 251 is not colourable provincial legislation in relation to health but rather a proper exercise of Parliament's criminal law power pursuant to s. 91(27) of the *Constitution Act, 1867*. The section does not offend s. 96 of the *Constitution Act, 1867* because the therapeutic abortion committees are not given judicial powers which were exercised by county, district and superior courts at the time of Confederation. These committees exercise a medical judgment on a medical question. Finally, s. 251 does not constitute an unlawful delegation of federal legislative power nor does it represent an abdication of the criminal law power by Parliament.

There is no merit in the argument based on s. 605(1)(*a*) of the *Criminal Code*. It is unnecessary to decide whether or not s. 610(3) of the *Criminal Code* violates ss. 7, 11(*d*), (*f*), (*h*) and 15 of the *Charter* or whether this Court has the power to award costs on appeals under s. 24(1) of the *Charter*. Whatever this Court's power to award costs in appeals such as this one, costs should not be awarded in this case.

Per Wilson J.: Section 251 of the *Criminal Code*, which limits the pregnant woman's access to abortion, violates her right to life, liberty and security of the person within the meaning of s. 7 of the *Charter* in a way which does not accord with the principles of fundamental justice.

The right to "liberty" contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her pri-

l'objectif de la protection du fœtus. De toute façon, l'objectif de la protection du fœtus ne justifierait pas la gravité de la violation du droit des femmes enceintes à la sécurité de leur personne qui se produirait si la disposition disculpatoire de l'art. 251 était totalement exclue du *Code criminel*. Toutefois, il est possible qu'une loi éventuelle adoptée par le Parlement qui imposerait que la santé soit plus gravement menacée dans les derniers mois de la grossesse que dans les premiers mois pour qu'un avortement soit licite, pourrait atteindre un degré de proportionnalité acceptable aux termes de l'article premier de la *Charte*.

Vu la conclusion que l'art. 251 contient des règles inutiles pour la protection du fœtus, il n'est pas nécessaire de décider si un fœtus est visé par le mot «chacun» à l'art. 7 de la *Charte* de façon à avoir le droit «à la vie, à la liberté et à la sécurité de sa personne» en vertu de la *Charte*.

L'article 251 n'est pas un texte législatif provincial déguisé relatif à la santé, mais il constitue plutôt un exercice valide de la compétence du Parlement en matière de droit criminel conformément au par. 91(27) de la *Loi constitutionnelle de 1867*. L'article n'enfreint pas l'art. 96 de la *Loi constitutionnelle de 1867* parce qu'il ne donne pas aux comités de l'avortement thérapeutique les pouvoirs judiciaires que les cours de comté, de district et supérieures exerçaient au moment de la Confédération. Ces comités portent un jugement médical sur une question médicale. Enfin, l'art. 251 ne constitue pas une délégation illégale d'un pouvoir législatif fédéral et ne représente pas non plus une renonciation du Parlement à son pouvoir en matière de droit criminel.

L'argument fondé sur l'al. 605(1)*a*) du *Code criminel* est mal fondé. Il n'est pas nécessaire de décider si le par. 610(3) du *Code criminel* viole l'art. 7 et les al. 11*d*), *f*), *h*) et l'art. 15 de la *Charte* ni si cette Cour a le pouvoir d'accorder des dépens lors d'un pourvoi en vertu du par. 24(1) de la *Charte*. Quel que soit le pouvoir de cette Cour d'accorder des dépens dans des pourvois comme celui-ci, aucuns dépens ne devraient être accordés en l'espèce.

Le juge Wilson: L'article 251 du *Code criminel*, qui limite le recours d'une femme enceinte à l'avortement, viole son droit à la vie, à la liberté et à la sécurité de sa personne au sens de l'art. 7 de la *Charte* d'une façon qui n'est pas conforme avec les principes de justice fondamentale.

Le droit à la «liberté» énoncé à l'art. 7 garantit à chaque individu une marge d'autonomie personnelle sur les décisions importantes touchant intimement à sa vie

vate life. Liberty in a free and democratic society does not require the state to approve such decisions but it does require the state to respect them.

A woman's decision to terminate her pregnancy falls within this class of protected decisions. It is one that will have profound psychological, economic and social consequences for her. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well.

Section 251 of the *Criminal Code* takes a personal and private decision away from the woman and gives it to a committee which bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations".

Section 251 also deprives a pregnant woman of her right to security of the person under s. 7 of the *Charter*. This right protects both the physical and psychological integrity of the individual. Section 251 is more deeply flawed than just subjecting women to considerable emotional stress and unnecessary physical risk. It asserts that the woman's capacity to reproduce is to be subject, not to her own control, but to that of the state. This is a direct interference with the woman's physical "person".

This violation of s. 7 does not accord with either procedural fairness or with the fundamental rights and freedoms laid down elsewhere in the *Charter*. A deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles of fundamental justice.

The deprivation of the s. 7 right in this case offends freedom of conscience guaranteed in s. 2(*a*) of the *Charter*. The decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society the conscience of the individual must be paramount to that of the state. Indeed, s. 2(*a*) makes it clear that this freedom belongs to each of us individually. "Freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality and the terms "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning. The state here is endorsing one conscientiously-held view at the expense of another. It is denying freedom of conscience to some, treating them as means to an end, depriving them of their "essential humanity".

privée. La liberté, dans une société libre et démocratique, n'oblige pas l'État à approuver ces décisions, mais elle l'oblige cependant à les respecter.

La décision que prend une femme d'interrompre sa grossesse relève de cette catégorie de décisions protégées. Cette décision aura des conséquences psychologiques, économiques et sociales profondes pour la femme enceinte. C'est une décision qui reflète profondément l'opinion qu'une femme a d'elle-même, ses rapports avec les autres et avec la société en général. Ce n'est pas seulement une décision d'ordre médical; elle est aussi profondément d'ordre social et éthique.

L'article 251 du *Code criminel* enlève une décision personnelle et privée à la femme pour la confier à un comité qui fonde sa décision sur "des critères totalement sans rapport avec ses [celles de la femme enceinte] propres priorités et aspirations".

L'article 251 prive également une femme enceinte du droit à la «sécurité de sa personne» garanti par l'art. 7 de la *Charte*. Ce droit protège à la fois l'intégrité physique et psychologique de la personne. Le défaut de l'art. 251 est beaucoup plus profond qu'un simple assujettissement des femmes à une tension émotionnelle considérable et à un risque physique inutile. Il affirme que la capacité de reproduction de la femme ne doit pas être soumise à son propre contrôle, mais à celui de l'État. C'est aussi une atteinte directe à sa «personne» physique.

Cette violation du droit conféré par l'art. 7 n'est conforme ni à l'équité dans la procédure ni aux droits et libertés fondamentaux énoncés par ailleurs dans la *Charte*. Une atteinte au droit conféré par l'art. 7 qui a pour effet d'enfreindre un droit que garantit par ailleurs la *Charte* ne peut être conforme aux principes de justice fondamentale.

L'atteinte au droit conféré par l'art. 7 en l'espèce enfreint la liberté de conscience garantie par l'al. 2*a*) de la *Charte*. La décision d'interrompre ou non une grossesse est essentiellement une décision morale et, dans une société libre et démocratique, la conscience de l'individu doit primer sur celle de l'État. D'ailleurs l'al. 2*a*) dit clairement que cette liberté appartient à chacun de nous pris individuellement. La «liberté de conscience et de religion» devrait être interprétée largement et s'étendre aux croyances dictées par la conscience, qu'elles soient fondées sur la religion ou sur une morale laïque et les termes «conscience» et «religion» ne devraient pas être considérés comme tautologiques quand ils peuvent avoir un sens distinct, quoique relié. L'État épouse en l'espèce une opinion dictée par la conscience des uns aux dépens d'une autre. Il nie la liberté de conscience à certains, en les traitant comme un moyen pour une fin, en les privant de «l'essence de leur humanité».

The primary objective of the impugned legislation is the protection of the foetus. This is a perfectly valid legislative objective. It has other ancillary objectives, such as the protection of the life and health of the pregnant woman and the maintenance of proper medical standards.

The situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and some statutory control may be appropriate. Section 1 of the *Charter* authorizes reasonable limits to be put upon the woman's right having regard to the fact of the developing foetus within her body.

The value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place between these two extremes and it has a direct bearing on the value of the foetus as potential life. Accordingly, the foetus should be viewed in differential and developmental terms. This view of the foetus supports a permissive approach to abortion in the early stages where the woman's autonomy would be absolute and a restrictive approach in the later stages where the states's interest in protecting the foetus would justify its prescribing conditions. The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" should be left to the informed judgment of the legislature which is in a position to receive submissions on the subject from all the relevant disciplines.

Section 251 of the *Criminal Code* cannot be saved under s. 1 of the *Charter*. It takes the decision away from the woman at all stages of her pregnancy and completely denies, as opposed to limits, her right under s. 7. Section 251 cannot meet the proportionality test; it is not sufficiently tailored to the objective; it does not impair the woman's right "as little as possible". Accordingly, even if s. 251 were to be amended to remedy the procedural defects in the legislative scheme, it would still not be constitutionally valid.

The question whether a foetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section was not dealt with.

Per McIntyre and La Forest JJ. (dissenting): Save for the provisions of the *Criminal Code* permitting abortion where the life or health of the woman is at risk, no right of abortion can be found in Canadian law, custom or tradition and the *Charter*, including s. 7, does not create

L'objectif premier de la loi contestée est la protection du fœtus. C'est un objectif législatif parfaitement valide. Elle a d'autres objectifs secondaires, telle la protection de la vie et de la santé de la femme enceinte et le maintien de normes médicales appropriées.

La situation en ce qui a trait au droit d'une femme d'être maîtresse de sa propre personne se complique lorsqu'elle devient enceinte et qu'un certain contrôle de la loi peut être approprié. L'article premier de la *Charte* permet de fixer des limites raisonnables au droit de la femme compte tenu du fœtus qui se développe dans son corps.

La valeur attribuée au fœtus en tant que vie potentielle est directement reliée au stade de son développement au cours de la grossesse. Le fœtus au stade embryonnaire provient d'un ovule nouvellement fécondé; le fœtus totalement développé devient en définitive un nouveau-né. Le développement progresse entre ces deux extrêmes et il influe directement sur la valeur à attribuer au fœtus en tant que vie potentielle. On devrait donc considérer le fœtus en termes de développement et de phases. Cette conception du fœtus appuie une approche permissive de l'avortement dans les premiers stades de la grossesse, où l'autonomie de la femme serait absolue, et une approche restrictive dans les derniers stades, où l'intérêt qu'a l'État de protéger le fœtus justifierait l'imposition de conditions. Le point précis du développement du fœtus où l'intérêt qu'a l'État de le protéger devient "supérieur" relève du jugement éclairé du législateur, qui est en mesure de recevoir des avis à ce sujet de l'ensemble des disciplines pertinentes.

L'article 251 du *Code criminel* ne peut être sauvé par l'article premier de la *Charte*. Il enlève la décision à la femme à tous les stades de la grossesse et nie complètement au lieu de simplement limiter son droit garanti par l'art. 7. L'article 251 ne saurait répondre aux critères de la proportionnalité: il n'est pas suffisamment adapté à l'objectif et ne porte pas «le moins possible» atteinte au droit de la femme. Par conséquent, même si l'art. 251 devait être modifié pour remédier aux vices de procédure de la structure législative, il demeurerait inconstitutionnel.

La question de savoir si le terme «chacun», à l'art. 7, vise aussi le fœtus et lui confère un droit indépendant à la vie en vertu de cet article n'a pas été traitée.

Les juges McIntyre et La Forest (dissidents): À part les dispositions du *Code criminel* qui autorisent l'avortement lorsque la vie ou la santé de la femme est en danger, il n'existe aucun droit à l'avortement en droit canadien ou selon la coutume ou la tradition canadien-

such a right. Section 251 of the *Criminal Code* accordingly does not violate s. 7 of the *Charter*.

The power of judicial review of legislation, although given greater scope under the *Charter*, is not unlimited. The courts must confine themselves to such democratic values as are clearly expressed in the *Charter* and refrain from imposing or creating rights with no identifiable base in the *Charter*. The Court is not entitled to define a right in a manner unrelated to the interest that the right in question was meant to protect.

The infringement of a right such as the right to security of the person will occur only when legislation goes beyond interfering with priorities and aspirations and abridges rights included in or protected by the concept. The proposition that women enjoy a constitutional right to have an abortion is devoid of support in either the language, structure or history of the constitutional text, in constitutional tradition, or in the history, traditions or underlying philosophies of our society.

Historically, there has always been a clear recognition of a public interest in the protection of the unborn and there is no evidence or indication of general acceptance of the concept of abortion at will in our society. The interpretive approach to the *Charter* adopted by this Court affords no support for the entrenchment of a constitutional right of abortion.

As to the asserted right to be free from state interference with bodily integrity and serious state-imposed psychological stress, an invasion of the s. 7 right of security of the person, there would have to be more than state-imposed stress or strain. A breach of the right would have to be based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection. This would be limited to cases where the state-action complained of, in addition to imposing stress and strain, also infringed another right, freedom or interest which was deserving of protection under the concept of security of the person. Abortion is not such an interest. Even if a general right to have an abortion could be found under s. 7, the extent to which such right could be said to be infringed by the requirements of s. 251 of the *Code* was not clearly shown.

A defence created by Parliament could only be said to be illusory or practically so when the defence is not available in the circumstances in which it is held out as

nes, et la *Charte*, y compris l'art. 7, ne crée pas un tel droit. L'article 251 du *Code criminel* ne viole donc pas l'art. 7 de la *Charte*.

Le pouvoir d'exercer un contrôle judiciaire sur les lois, qui a pris de l'envergure aux termes de la *Charte*, n'est pas illimité. Les tribunaux doivent s'en tenir aux valeurs démocratiques qui sont clairement énoncées dans la *Charte* et s'abstenir d'imposer ou de créer des droits sans fondement identifiable dans la *Charte*. La Cour ne peut définir un droit d'une façon qui n'a aucun rapport avec l'intérêt que le droit en question est destiné à protéger.

L'atteinte à un droit comme le droit à la sécurité de la personne se produira seulement lorsque la loi va au-delà de l'ingérence dans les priorités et aspirations et restreint des droits compris et protégés par cette notion. La proposition selon laquelle les femmes jouissent d'un droit constitutionnel à l'avortement ne trouve aucun appui dans le texte, la structure ou l'historique du texte constitutionnel ni dans la tradition constitutionnelle ou l'histoire, les traditions et les philosophies sous-jacentes dans notre société.

Historiquement, l'existence d'un intérêt public dans la protection des enfants non encore nés a toujours été clairement reconnue et rien ne prouve ni n'indique que le concept de l'avortement à volonté soit généralement accepté dans notre société. La façon d'interpréter la *Charte* adoptée par cette Cour ne justifie aucunement l'enchâssement d'un droit constitutionnel à l'avortement.

Pour ce qui de la revendication d'un droit à la protection contre toute atteinte de l'État à l'intégrité physique et contre toute tension psychologique causée par l'État, une atteinte au droit à la sécurité de la personne garanti par l'art. 7 nécessite plus que des tensions ou de l'angoisse causées par l'État. Une violation de ce droit doit dépendre d'une atteinte à un intérêt dont la nature et l'importance justifieraient une protection constitutionnelle. Cette violation se limite aux cas où l'action de l'État dont on se plaint a, en plus d'engendrer des tensions et de l'angoisse, porté également atteinte à un autre droit, à une autre liberté ou à un autre intérêt qui mérite d'être protégé selon le concept de la sécurité de la personne. L'avortement ne constitue pas un tel intérêt. Même s'il était possible de conclure à l'existence d'un droit général à l'avortement en vertu de l'art. 7, on n'a pas démontré clairement la mesure dans laquelle on pourrait dire que les exigences de l'art. 251 du *Code* peuvent porter atteinte à ce droit.

Un moyen de défense créé par le Parlement n'est illusoire ou pratiquement illusoire que lorsqu'on ne peut pas y recourir dans les circonstances où l'on a dit qu'il

being available. The very nature of the test assumes that Parliament is to define the defence and, in so doing, designate the terms upon which it may be available. The allegation of procedural unfairness is not supported by the claim that many women wanting abortions have been unable to get them in Canada because the failure of s. 251(4) to respond to this need. This machinery was considered adequate to deal with the type of abortion Parliament had envisaged. Any inefficiency in the administrative scheme is caused principally by forces external to the statute — the general demand for abortion irrespective of the provisions of s. 251. A court cannot strike down a statutory provision on this basis.

Section 605(1)(*a*), which gives the Crown a right of appeal against an acquittal in a trial court on any ground involving a question of law alone, does not offend ss. 7, 11(*d*), (*f*) and (*h*) of the *Charter*. The words of s. 11(*h*), "if finally acquitted" and "if finally found guilty", must be construed to mean after the appellate procedures have been completed, otherwise there would be no point or meaning in the word "finally".

Section 251 did not infringe the equality rights of women, abridge freedom of religion, or inflict cruel or unusual punishment. The section was not in pith and substance legislation for the protection of health and therefore within provincial competence but rather was validly enacted under the federal criminal law power. There was no merit to the arguments that s. 251 purported to give powers to therapeutic abortion committees exercised by county, district, and superior courts at the time of Confederation or that it delegated powers relating to criminal law to the provinces generally. No evidence supported the defence of necessity.

Per Curiam: In a trial before judge and jury, the judge's role is to state the law and the jury's role is to apply that law to the facts of the case. To encourage a jury to ignore a law it does not like could not only lead to gross inequities but could also irresponsibly disturb the balance of the criminal law system. It was quite simply wrong to say to the jury that if they did not like the law they need not enforce it. Such practice, if commonly adopted, would undermine and place at risk the whole jury system.

était possible de le faire. De par sa nature même, ce critère sous-entend que c'est au Parlement qu'il incombe de définir le moyen de défense et, ce faisant, de préciser les conditions à remplir pour pouvoir l'invoquer. L'allégation de l'inéquité dans la procédure n'est pas justifiée par la prétention qu'un bon nombre de femmes désireuses d'obtenir un avortement n'ont pas pu l'obtenir au Canada parce que le par. 251(4) ne répond pas à ce besoin. Ce mécanisme a été considéré comme suffisant pour traiter le type d'avortement envisagé par le Parlement. L'inefficacité du régime administratif est principalement due à des facteurs étrangers à la loi, savoir la demande générale d'avortements en dépit des dispositions de l'art. 251. Un tribunal ne peut, pour ce motif, invalider une disposition législative.

L'alinéa 605(1)*a*), qui habilite le ministère public à interjeter appel contre un verdict d'acquittement prononcé en première instance pour tout motif comportant une question de droit seulement n'est pas contraire à l'art. 7 et aux al. 11*d*), *f*) et *h*) de la *Charte*. Les expressions «définitivement acquitté» et «définitivement déclaré coupable» employées à l'al. 11*h*) doivent s'interpréter comme signifiant après que toutes les procédures d'appel sont terminées, sinon le mot «définitivement» serait inutile ou dénué de tout sens.

L'article 251 du *Code criminel* ne porte pas atteinte aux droits des femmes à l'égalité, ni à la liberté de religion et n'inflige pas non plus une peine cruelle et inusitée. L'article ne vise pas, de par son caractère véritable, la santé, relèvent donc de la compétence provinciale, mais il a été validement adopté en vertu de la compétence fédérale en matière criminelle. Les arguments voulant que l'art. 251 ait pour effet d'investir les comités de l'avortement thérapeutique de pouvoirs exercés, à l'époque de la Confédération, par les cours de comté et de district et les cours supérieures et qu'il délègue aux provinces en général des pouvoirs en matière de droit criminel sont mal fondés. Aucun élément de preuve ne justifie le moyen de défense de nécessité.

La Cour: Au cours d'un procès devant juge et jury, le rôle du juge est d'énoncer les règles de droit, et le rôle du jury de l'appliquer aux faits de l'espèce. Encourager le jury à ignorer une règle de droit qu'il n'aime pas pourrait non seulement entraîner de graves inéquités, mais pourrait aussi perturber de façon irresponsable l'équilibre du système de justice criminelle. Il était absolument erroné de dire au jury que, s'il n'aime pas la règle de droit, il n'a pas besoin de l'appliquer. Une telle pratique, communément adoptée, minerait et mettrait en danger tout le système des procès par jury.

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Charte canadienne des droits et libertés, art. 1, 2*a*), *d*), 7, 11*b*), *d*), *f*), *h*), 12, 15, 24(1), 27, 28.
Code civil du Bas-Canada, art. 19.
Code criminel, S.R.C. 1970, chap. C-34, art. 251(1), (2), (3)*a*), *b*), *c*), (4)*a*), *b*), *c*), *d*), (5)*a*), *b*), (6), (7), 423(1)*d*), 605(1)*a*), 610(3).
Code de la santé publique, art. 162-1, 162-12 (France).
Code pénal, art. 317 (France).
Code pénal suisse, art. 120(1).
Constitution des États-Unis, 14e et 15e amendements.
Crimes Act 1961, modifiée par la *Crimes Amendment Act 1977* et la *Crimes Amendment Act 1978*, art. 187A(1)a), (4) (Nouvelle-Zélande).
Criminal Code, modifié par la *Fifteenth Criminal Law Amendment Act* (1976), art. 218a(1), 219 (République fédérale de l'Allemagne).
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Déclaration canadienne des droits, S.R.C. 1970, app. III, art. 1*a*), *b*).
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Loi de 1968-69 modifiant le droit pénal, S.C. 1968-69, chap. 38, art. 18.
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APPEAL from a judgment of the Ontario Court of Appeal (1985), 52 O.R. (2d) 353, 22 D.L.R. (4th) 641, 22 C.C.C. (3d) 353, 48 C.R. (3d) 1, 17 C.R.R. 223, setting aside an acquittal found by Parker A.C.J.H.C. sitting with jury (1984), 47 O.R. (2d) 353, 12 D.L.R. (4th) 502, 14 C.C.C. (3d) 258, 41 C.R. (3d) 193, 11 C.R.R. 116. Appeal allowed and acquittals restored, McIntyre and La Forest JJ. dissenting. The first constitutional question should be answered in the affirmative as regards s. 7 and the second in the negative as regards s. 7. The third, fourth and fifth constitutional questions should be answered in the negative. The sixth constitutional question should be answered in the negative with respect to s. 605 of the *Criminal Code* and should not be answered as regards s. 610(3). The seventh constitutional question should not be answered.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1985), 52 O.R. (2d) 353, 22 D.L.R. (4th) 641, 22 C.C.C. (3d) 353, 48 C.R. (3d) 1, 17 C.R.R. 223, qui a infirmé un acquittement prononcé par le juge en chef adjoint Parker de la Haute Cour siégeant avec jury (1984), 47 O.R. (2d) 353, 12 D.L.R. (4th) 502, 14 C.C.C. (3d) 258, 41 C.R. (3d) 193, 11 C.R.R. 116. Le pourvoi est accueilli et les acquittements sont rétablis; les juges McIntyre et La Forest sont dissidents. La première question constitutionnelle reçoit une réponse affirmative en ce qui concerne l'art. 7 et la deuxième question une réponse négative en ce qui concerne l'art. 7. Les troisième, quatrième et cinquième questions reçoivent une réponse négative. La sixième question reçoit une réponse négative en ce qui concerne l'art. 605 du *Code criminel* et aucune réponse en ce qui concerne l'art. 610(3). Il n'est pas nécessaire de répondre à la septième question.

Morris Manning, Q.C., and *Paul B. Schabas*, for the appellants.

Morris Manning, c.r., et *Paul B. Schabas*, pour les appelants.

Bonnie J. Wien and *W. James Blacklock*, for the respondent.

Bonnie J. Wien et *W. James Blacklock*, pour l'intimée.

Edward R. Sojonky, Q.C., and *Marilyn Doering Steffen*, for the intervener.

Edward R. Sojonky, c.r., et *Marilyn Doering Steffen*, pour l'intervenant.

The judgment of Dickson C.J. and Lamer J. was delivered by

THE CHIEF JUSTICE—The principal issue raised by this appeal is whether the abortion provisions of the *Criminal Code*, R.S.C. 1970, c. C-34, infringe 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" as formulated in s. 7 of the *Canadian Charter of Rights and Freedoms*. The appellants, Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott, have raised thirteen distinct grounds of appeal. During oral submissions, however, it became apparent that the primary focus of the case was upon the s. 7 argument. It is submitted by the appellants that s. 251 of the *Criminal Code* contravenes s. 7 of the *Canadian Charter of Rights and Freedoms* and that s. 251 should be struck down. Counsel for the Crown admitted during the course of her submissions that s. 7 of the *Charter* was indeed "the key" to the entire appeal. As for the remaining grounds of appeal, only a few brief comments are necessary. First of all, I agree with the disposition made by the Court of Appeal of the non-*Charter* issues, many of which have already been adequately dealt with in earlier cases by this Court. I am also of the view that the arguments concerning the alleged invalidity of s. 605 under ss. 7 and 11 of the *Charter* are unfounded. In view of my resolution of the s. 7 issue, it will not be necessary for me to address the appellants' other *Charter* arguments and I expressly refrain from commenting upon their merits.

During argument before this Court, counsel for the Crown emphasized repeatedly that it is not the role of the judiciary in Canada to evaluate the wisdom of legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 671, [hereinafter "*Morgentaler (1975)*"] I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains

Version française du jugement du juge en chef Dickson et du juge Lamer rendu par

LE JUGE EN CHEF—Ce pourvoi vise principalement à déterminer si les dispositions du *Code criminel*, S.R.C. 1970, chap. C-34, sur l'avortement enfreignent le «droit [de chacun] à la vie, à la liberté et à la sécurité de sa personne», vu qu'«il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale», selon la formulation de l'art. 7 de la *Charte canadienne des droits et libertés*. Les appelants, le Dr Henry Morgentaler, le Dr Leslie Frank Smoling et le Dr Robert Scott, font valoir treize moyens distincts de pourvoi. Au cours des plaidoiries cependant, il est devenu apparent que le litige portait surtout sur l'argument tiré de l'art. 7. Les appelants soutiennent que l'art. 251 du *Code criminel*, contrevient à l'art. 7 de la *Charte canadienne des droits et libertés* et qu'il doit être invalidé. Le substitut du procureur général a reconnu, au cours de sa plaidoirie, que l'art. 7 de la *Charte* était bel et bien «la clé» de tout le pourvoi. Quant aux moyens d'appel restant, il me suffit de faire un bref commentaire. Premièrement, je suis d'accord avec les solutions apportées par la Cour d'appel aux questions en litige ne relevant pas de la *Charte* dont plusieurs ont déjà fait l'objet de décisions de cette Cour. Je suis également d'avis que les arguments relatifs à la prétendue invalidité de l'art. 605 en vertu des art. 7 et 11 de la *Charte* sont mal fondés. Vu la solution que j'apporte à la question soulevée par l'art. 7, il ne me sera pas nécessaire de statuer sur les autres arguments des appelants relatifs à la *Charte* et je m'abstiens donc expressément de me prononcer sur leur fondement.

Au cours des plaidoiries devant nous, le substitut du procureur général a rappelé à plusieurs reprises que le pouvoir judiciaire au Canada n'a pas comme rôle d'évaluer la sagesse des lois édictées par nos députés élus démocratiquement, ni de réinterpréter les choix difficiles de politique auxquels tous les gouvernements sont confrontés. Dans l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, à la p. 671, [ci-après l'arrêt «*Morgentaler (1975)*»] j'ai souligné que la Cour "n'est pas appelée à trancher, ni même à aborder, le débat public animé et constant sur l'avortement". Onze

true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to the abortion question. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights); *The Abortion Decision of the Federal Constitutional Court — First Senate — of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c. 87 (U.K.)

But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler (1975)*, at p. 671, that:

> The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*. As Justice McIntyre states in his reasons for judgment, at p. 138, "the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*." It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

I

The Court stated the following constitutional questions:

ans plus tard, la controverse fait toujours rage et il est tout aussi vrai que la Cour ne saurait prétendre concilier toutes les allégations contradictoires avancées dans le vigoureux et sain débat public ainsi suscité. Tant les tribunaux que les législateurs, dans d'autres sociétés démocratiques, sont arrivés à des décisions entièrement contradictoires lorsqu'il leur a été demandé de soupeser les valeurs que la question de l'avortement oppose. Voir, p. ex., l'arrêt *Roe v. Wade*, 410 U.S. 113 (1973); l'arrêt *Paton c. Royaume-Uni* (1980), 3 E.H.R.R. (Cour européenne des droits de l'homme); *The Abortion Decision of the Federal Constitutional Court — First Senate — of the Federal Republic of Germany*, 25 février 1975, traduit en anglais et réédité dans (1976), 9 John Marshall J. Prac. and Proc. 605; et l'*Abortion Act, 1967*, 1967, chap. 87 (R.-U.)

Mais depuis 1975, et le premier arrêt *Morgentaler*, la Cour s'est vue confier des responsabilités additionnelles. Je disais dans l'arrêt *Morgentaler (1975)*, à la p. 671:

> Les valeurs que nous devons accepter aux fins du pourvoi sont celles qu'a proclamées le Parlement, qui s'en tient à l'opinion que le désir d'une femme d'être soulagée de sa grossesse ne justifie pas en soi l'avortement.

Quoiqu'on puisse toujours sans aucun doute affirmer que les tribunaux ne sont pas le lieu où doivent s'élaborer les politiques générales complexes et controversées, les tribunaux canadiens se voient néanmoins confier aujourd'hui l'obligation cruciale de veiller à ce que les initiatives législatives de notre Parlement et de nos législatures se conforment aux valeurs démocratiques qu'exprime la *Charte canadienne des droits et libertés*. Comme le dit le juge McIntyre dans ses motifs, à la p. 138 "notre tâche en l'espèce consiste non pas à résoudre ni à tenter de résoudre ce qu'on pourrait appeler la question de l'avortement, mais simplement à examiner le contenu de l'art. 251 en fonction de la *Charte*." C'est en ce dernier sens que le présent pourvoi diffère de celui dont nous étions saisis voici une décennie.

I

La Cour a formulé les questions constitutionnelles suivantes:

1. Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?
2. If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?
3. Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?
4. Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?
5. Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?
6. Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?
7. If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*) 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

The Attorney General of Canada intervened to support the respondent Crown.

II

Relevant Statutory and Constitutional Provisions

Criminal Code

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes

1. L'article 251 du *Code criminel* du Canada porte-t-il atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*?
2. Si l'article 251 du *Code criminel* du Canada porte atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*, est-il justifié par l'article premier de la *Charte canadienne des droits et libertés* et donc compatible avec la *Loi constitutionnelle de 1982*?
3. L'article 251 du *Code criminel* du Canada excède-t-il les pouvoirs du Parlement du Canada?
4. L'article 251 du *Code criminel* du Canada viole-t-il l'art. 96 de la *Loi constitutionnelle de 1867*?
5. L'article 251 du *Code criminel* du Canada délègue-t-il illégalement la compétence fédérale en matière criminelle aux ministres de la Santé provinciaux ou aux comités de l'avortement thérapeutique et, ce faisant, le gouvernement fédéral a-t-il abdiqué son autorité dans ce domaine?
6. L'article 605 et le par. 610(3) du *Code criminel* du Canada portent-ils atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*?
7. Si l'article 605 et le par. 610(3) du *Code criminel* du Canada portent atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*, sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

Le procureur général du Canada est intervenu en faveur du ministère public intimé.

II

Les dispositions législatives et constitutionnelles pertinentes

Code criminel

251. (1) Est coupable d'un acte criminel et passible de l'emprisonnement à perpétuité, quiconque, avec l'intention de procurer l'avortement d'une personne du sexe féminin, qu'elle soit enceinte ou non, emploie quelque moyen pour réaliser son intention.

(2) Est coupable d'un acte criminel et passible d'un emprisonnement de deux ans, toute personne du sexe féminin qui, étant enceinte, avec l'intention d'obtenir son propre avortement, emploie, ou permet que soit employé quelque moyen pour réaliser son intention.

(3) Au présent article, l'expression «moyen» comprend

(*a*) the administration of a drug or other noxious thing,

(*b*) the use of an instrument, and

(*c*) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

(*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (*a*) for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(*d*) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

(*a*) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(*c*) issued, by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(*b*) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(*c*), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation

a) l'administration d'une drogue ou autre substance délétère,

b) l'emploi d'un instrument, et

c) toute manipulation.

(4) Les paragraphes (1) et (2) ne s'appliquent pas

a) à un médecin qualifié, autre qu'un membre d'un comité de l'avortement thérapeutique de quelque hôpital, qui emploie de bonne foi, dans un hôpital accrédité ou approuvé, quelque moyen pour réaliser son intention de procurer l'avortement d'une personne du sexe féminin, ou

b) à une personne du sexe féminin qui, étant enceinte, permet à un médecin qualifié d'employer, dans un hôpital accrédité ou approuvé, quelque moyen mentionné à l'alinéa *a*) aux fins de réaliser son intention d'obtenir son propre avortement,

si, avant que ces moyens ne soient employés, le comité de l'avortement thérapeutique de cet hôpital accrédité ou approuvé, par décision de la majorité des membres du comité et lors d'une réunion du comité au cours de laquelle le cas de cette personne du sexe féminin a été examiné,

c) a déclaré par certificat qu'à son avis la continuation de la grossesse de cette personne du sexe féminin mettrait ou mettrait probablement en danger la vie ou la santé de cette dernière, et

d) a fait remettre une copie de ce certificat au médecin qualifié.

(5) Le ministre de la Santé d'une province peut, par ordonnance,

a) requérir un comité de l'avortement thérapeutique de quelque hôpital, dans cette province, ou un membre de ce comité, de lui fournir une copie d'un certificat mentionné à l'alinéa (4)*c*) émis par ce comité, ainsi que les autres renseignements qu'il peut exiger au sujet des circonstances entourant l'émission de ce certificat, ou

b) requérir un médecin qui, dans cette province, a procuré l'avortement d'une personne de sexe féminin nommée dans un certificat mentionné à l'alinéa (4)*c*), de lui fournir une copie de ce certificat, ainsi que les autres renseignements qu'il peut exiger au sujet de l'obtention de l'avortement.

(6) Aux fins des paragraphes (4) et (5) et du présent paragraphe,

«comité de l'avortement thérapeutique" d'un hôpital désigne un comité formé d'au moins trois membres qui sont tous des médecins qualifiés, nommé par le conseil de cet hôpital pour examiner et

in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(*a*) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,

(*a*.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,

(*b*) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(*c*) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(*d*) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

The Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject

décider les questions relatives aux arrêts de grossesse dans cet hôpital;

«conseil» désigne le conseil des gouverneurs, le conseil de direction ou le conseil d'administration ou les *trustees*, la commission ou une autre personne ou un autre groupe de personnes ayant le contrôle et la direction d'un hôpital accrédité ou approuvé;

«hôpital accrédité» désigne un hôpital accrédité par le Conseil canadien d'accréditation des hôpitaux, dans lequel sont fournis des services de diagnostic et des traitements médicaux, chirurgicaux et obstétricaux;

«hôpital approuvé» désigne un hôpital approuvé aux fins du présent article par le ministre de la Santé de la province où il se trouve;

«médecin qualifié» désigne une personne qui a le droit d'exercer la médecine en vertu des lois de la province dans laquelle est situé l'hôpital mentionné au paragraphe (4);

«ministre de la Santé» désigne

a) dans la province d'Ontario, de Québec, du Nouveau-Brunswick, du Manitoba, de Terre-Neuve et de l'Île-du-Prince-Édouard, le ministre de la Santé;

a.1) dans la province d'Alberta, le ministre de la Santé (hôpitaux et assurance-maladie);

b) dans la province de Colombie-Britannique, le ministre des Services de santé et de l'assurance-hospitalisation,

c) dans les provinces de Nouvelle-Écosse et de Saskatchewan, le ministre de la Santé publique, et,

d) dans le territoire du Yukon et les territoires du Nord-Ouest, le ministre de la Santé nationale et du Bien-être social.

(7) Rien au paragraphe (4) ne doit s'interpréter de manière à faire disparaître la nécessité d'obtenir une autorisation ou un consentement qui est ou peut être requis, autrement qu'en vertu de la présente loi, avant l'emploi de moyens destinés à réaliser une intention de procurer l'avortement d'une personne du sexe féminin.

La Charte canadienne des droits et libertés

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent

only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

. . .

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.

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.

. . .

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.

III

Procedural History

The three appellants are all duly qualified medical practitioners who together set up a clinic in Toronto to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s. 251(4). The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances.

Indictments were preferred against the appellants charging that they conspired with each other between November 1982 and July 1983 with intent to procure the miscarriage of female persons, using an induced suction technique to carry out that intent, contrary to s. 423(1)(*d*) and s. 251(1) of the *Criminal Code*.

Counsel for the appellants moved to quash the indictment or to stay the proceedings before pleas were entered on the grounds that s. 251 of the *Criminal Code* was *ultra vires* the Parliament of Canada, infringed ss. 2(*a*), 7 and 12 of the *Charter*, and was inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. The trial judge, Parker A.C.J.H.C., dismissed the motion, and an appeal to the Ontario Court of Appeal was dismissed. The trial proceeded before Parker A.C.J.H.C. and a jury, and the three accused were acquitted. The Crown appealed the acquittal to the Court of

III

La procédure

Les trois appelants sont des médecins dûment qualifiés; ensemble, ils ont ouvert une clinique, à Toronto, pour pratiquer des avortements sur des femmes qui n'avaient pas obtenu le certificat du comité de l'avortement thérapeutique d'un hôpital accrédité ou approuvé requis par le par. 251(4). Les médecins ont fait des déclarations publiques dans lesquelles ils ont mis en doute la sagesse de la législation canadienne sur l'avortement et ont affirmé qu'une femme a le droit souverain de décider si un avortement s'impose ou non dans sa situation personnelle.

Des actes d'accusation en bonne et due forme inculpent les appelants d'avoir comploté, les uns avec les autres, entre novembre 1982 et juillet 1983, avec l'intention de provoquer l'avortement de personnes du sexe féminin, en employant la technique de l'aspiration pour réaliser cette intention, infractions prévues à l'al. 423(1)*d*) et au par. 251(1) du *Code criminel*.

L'avocat des appelants a demandé l'annulation de l'acte d'accusation ou la suspension des poursuites avant même d'inscrire les plaidoyers, pour le motif que l'art. 251 du *Code criminel* excéderait les pouvoirs du Parlement du Canada, enfreindrait l'al. 2*a*) et les art. 7 et 12 de la *Charte* et entrerait en conflit avec l'al. 1*b*) de la *Déclaration canadienne des droits*. Le juge de première instance, le juge Parker, juge en chef adjoint de la Haute Cour, a rejeté la requête et l'appel interjeté à la Cour d'appel de l'Ontario a aussi été rejeté. Le procès s'est poursuivi devant le juge Parker et un

Appeal and the appellants filed a cross-appeal. The Court of Appeal allowed the appeal, set aside the verdict of acquittal and ordered a new trial. The Court held that the cross-appeal related to issues already raised in the appeal, and the issues were therefore examined as part of the appeal.

IV

Section 7 of the *Charter*

In his submissions, counsel for the appellants argued that the Court should recognize a very wide ambit for the rights protected under s. 7 of the *Charter*. Basing his argument largely on American constitutional theories and authorities, Mr. Manning submitted that the right to "life, liberty and security of the person" is a wide-ranging right to control one's own life and to promote one's individual autonomy. The right would therefore include a right to privacy and a right to make unfettered decisions about one's own life.

In my opinion, it is neither necessary nor wise in this appeal to explore the broadest implications of s. 7 as counsel would wish us to do. I prefer to rest my conclusions on a narrower analysis than that put forward on behalf of the appellants. I do not think it would be appropriate to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of *Charter* interpretation. The Court should be presented with a wide variety of claims and factual situations before articulating the full range of s. 7 rights. I will therefore limit my comments to some interpretive principles already set down by the Court and to an analysis of only two aspects of s. 7, the right to "security of the person" and "the principles of fundamental justice".

A. *Interpreting s. 7*

The goal of *Charter* interpretation is to secure for all people "the full benefit of the *Charter*'s protection": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. To attain that goal, this

jury et les trois accusés ont été acquittés. Le ministère public a interjeté appel de l'acquittement à la Cour d'appel et les appelants ont formé un appel incident. La Cour d'appel a accueilli l'appel, annulé le verdict d'acquittement et ordonné un nouveau procès. La Cour a jugé que l'appel incident se rapportait à des points déjà soulevés par l'appel principal, qui ont donc été étudiés dans le cadre de ce dernier.

IV

L'article 7 de la *Charte*

Selon la thèse de l'avocat des appelants, la Cour devrait accorder une portée très large aux droits garantis par l'art. 7 de la *Charte*. Se fondant largement sur la doctrine et la jurisprudence constitutionnelles américaines, Me Manning a fait valoir que le droit de chacun à «la vie, à la liberté et à la sécurité de sa personne» est un droit très large d'assumer sa destinée et de promouvoir son autonomie individuelle. Ce droit inclurait donc le droit à la vie privée et celui de décider souverainement de tout ce qui touche à sa vie personnelle.

À mon avis, il n'est ni nécessaire ni sage, dans le cadre de ce pourvoi, d'explorer les répercussions les plus larges que pourrait avoir l'art. 7, comme l'avocat le voudrait. Je préfère fonder mes conclusions sur une analyse plus étroite que celle avancée au nom des appelants. Je ne pense pas qu'il soit opportun de tenter d'arriver à une explication exhaustive d'une disposition aussi importante que l'art. 7 si tôt dans l'histoire de l'interprétation de la *Charte*. La Cour devra être saisie d'un large éventail d'espèces avant de pouvoir brosser un tableau complet des droits visés par l'art. 7. Je limiterai donc mes commentaires à certains principes interprétatifs déjà énoncés par la Cour et à une analyse de seulement deux aspects de l'art. 7, le droit de chacun à «la sécurité de sa personne» et «les principes de justice fondamentale».

A. *L'interprétation de l'art. 7*

L'interprétation de la *Charte* doit viser à faire en sorte que tous «bénéficient pleinement de la protection accordée par la *Charte*»: *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 344.

Court has held consistently that the proper technique for the interpretation of *Charter* provisions is to pursue a "purposive" analysis of the right guaranteed. A right recognized in the *Charter* is "to be understood, in other words, in the light of the interests it was meant to protect": *R. v. Big M Drug Mart Ltd.*, at p. 344. (See also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; and *R. v. Therens*, [1985] 1 S.C.R. 613.)

In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 204, Justice Wilson emphasized that there are three distinct elements to the s. 7 right, that "life, liberty, and security of the person" are independent interests, each of which must be given independent significance by the Court (p. 205). This interpretation was adopted by a majority of the Court, *per* Justice Lamer, in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500. It is therefore possible to treat only one aspect of the first part of s. 7 before determining whether any infringement of that interest accords with the principles of fundamental justice. (See *Singh*, *Re B.C. Motor Vehicle Act*, and *R. v. Jones*, [1986] 2 S.C.R. 284.)

With respect to the second part of s. 7, in early academic commentary one of the principal concerns was whether the reference to "principles of fundamental justice" enables the courts to review the substance of legislation. (See, e.g., Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983), 13 *Man. L.J.* 455, and Garant, "Fundamental Freedoms and Natural Justice" in W. S. Tarnopolsky and G.-A. Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (1982).) In *Re B.C. Motor Vehicle Act*, Lamer J. noted at p. 497 that any attempt to draw a sharp line between procedure and substance would be ill-conceived. He suggested further that it would not be beneficial in Canada to allow a debate which is rooted in United States constitutional dilemmas to shape our interpretation of s. 7 (p. 498):

Pour atteindre ce but, il faut recourir, selon la jurisprudence constante de la Cour, à la technique d'interprétation des dispositions de la *Charte* qui consiste à procéder à une analyse de «l'objet visé» par le droit garanti. Les droits reconnus par la *Charte* doivent "en d'autres termes . . . s'interpréter en fonction des intérêts qu'ils visent à protéger": l'arrêt *R. c. Big M Drug Mart Ltd.*, à la p. 344. (Voir aussi les arrêts *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145 et *R. c. Therens*, [1985] 1 R.C.S. 613.)

Dans l'arrêt *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, à la p. 204, le juge Wilson souligne que le droit conféré par l'art. 7 comporte trois éléments distincts, que «la vie, la liberté et la sécurité de sa personne» sont trois intérêts indépendants auxquels la Cour doit respectivement donner un sens indépendant (à la p. 205). La Cour, à la majorité, a adopté cette interprétation, voir le juge Lamer, dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, à la p. 500. Il est donc possible de ne traiter qu'un seul aspect du premier volet de l'art. 7 avant de rechercher si une violation de cet intérêt concorde avec les principes de justice fondamentale. (Voir les arrêts *Singh*, *Renvoi: Motor Vehicle Act de la C.-B.* et *R. c. Jones*, [1986] 2 R.C.S. 284.)

Quant à la seconde clause de l'art. 7, dans les premières analyses de doctrine, on s'est principalement intéressé à la question de savoir si la référence aux «principes de justice fondamentale» permet aux tribunaux d'examiner le fond de la législation. (Voir, par ex., Whyte, «Fundamental Justice: The Scope and Application of Section 7 of the Charter» (1983), 13 *Man. L.J.* 455, et Garant, «Libertés fondamentales et justice naturelle» dans W. S. Tarnopolsky et G.-A. Beaudoin, *Charte canadienne des droits et libertés* (1982).) Dans le *Renvoi: Motor Vehicle Act de la C.-B.*, le juge Lamer constate, à la p. 497, qu'il serait imprudent de tenter de confiner dans des limites précises la procédure, d'une part, et le fond, de l'autre. Il laisse aussi entendre qu'il n'y aurait pas avantage au Canada à laisser ce débat, dont la source réside dans les dilemmes constitutionnels des États-Unis, façonner notre interprétation de l'art. 7 (à la p. 498):

We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions.

Lamer J. went on to hold that the principles of fundamental justice referred to in s. 7 can relate both to procedure and to substance, depending upon the circumstances presented before the Court.

I have no doubt that s. 7 does impose upon courts the duty to review the substance of legislation once it has been determined that the legislation infringes an individual's right to "life, liberty and security of the person". The section states clearly that those interests may only be impaired if the principles of fundamental justice are respected. Lamer J. emphasized, however, that the courts should avoid "adjudication of the merits of public policy" (p. 499). In the present case, I do not believe that it is necessary for the Court to tread the fine line between substantive review and the adjudication of public policy. As in the *Singh* case, it will be sufficient to investigate whether or not the impugned legislative provisions meet the procedural standards of fundamental justice. First it is necessary to determine whether s. 251 of the *Criminal Code* impairs the security of the person.

B. *Security of the Person*

The law has long recognized that the human body ought to be protected from interference by others. At common law, for example, any medical procedure carried out on a person without that person's consent is an assault. Only in emergency circumstances does the law allow others to make decisions of this nature. Similarly, art. 19 of the *Civil Code of Lower Canada* provides that "The human person is inviolable" and that "No person may cause harm to the person of another without his consent or without being authorized by law to do so". "Security of the person", in other words, is not a value alien to our legal landscape. With the advent of the *Charter*, security of the person has been elevated to the status of a constitutional norm. This is not to say that the various forms of

À mon avis, nous rendrions un mauvais service à notre propre Constitution en permettant simplement que le débat américain définisse la question pour nous, tout en ignorant les différences de structure vraiment fondamentales entre les deux constitutions.

Le juge Lamer poursuit en disant que les principes de justice fondamentale mentionnés à l'art. 7 peuvent se rapporter tant à la procédure qu'au fond, selon les faits dont la Cour est saisie.

J'estime sans aucun doute que l'art. 7 impose aux tribunaux le devoir d'examiner, au fond, des textes législatifs une fois qu'il a été jugé qu'ils enfreignent le droit de l'individu à «la vie, à la liberté et à la sécurité de sa personne». L'article dit clairement qu'il ne peut être porté atteinte à ces intérêts que si les principes de justice fondamentale sont respectés. Le juge Lamer souligne néanmoins que les tribunaux devraient éviter «de se prononcer sur le bien-fondé de politiques générales» (à la p. 499). En l'espèce, je ne crois pas qu'il soit nécessaire que la Cour touche à l'équilibre fragile entre examen du fond et décision de politiques générales. Comme dans l'affaire *Singh*, il suffit de rechercher si oui ou non les dispositions législatives contestées répondent aux normes procédurales de la justice fondamentale. En premier lieu, il est nécessaire de rechercher si l'art. 251 du *Code criminel* porte atteinte à la sécurité de la personne.

B. *La sécurité de la personne*

Il est depuis longtemps admis en droit que le corps humain doit être protégé des ingérences de tiers. En *common law*, par exemple, une intervention médicale effectuée sans le consentement du patient constitue des voies de fait. C'est seulement en cas d'urgence que le droit autorise des tiers à prendre des décisions de cette nature. De même, l'art. 19 du *Code civil du Bas-Canada* déclare que «la personne humaine est inviolable» et que «Nul ne peut porter atteinte à la personne d'autrui sans son consentement ou sans y être autorisé par la loi». La «sécurité de la personne», en d'autres termes, n'est pas une valeur étrangère à notre régime juridique. Avec l'avènement de la *Charte*, la sécurité de la personne a été promue au rang de norme constitutionnelle. Cela ne veut pas dire que

protection accorded to the human body by the common and civil law occupy a similar status. "Security of the person" must be given content in a manner sensitive to its constitutional position. The above examples are simply illustrative of our respect for individual physical integrity. (See R. Macdonald, "Procedural Due Process in Canadian Constitutional Law", 39 *U. Fla. L. Rev.* 217 (1987), at p. 248.) Nor is it to say that the state can never impair personal security interests. There may well be valid reasons for interfering with security of the person. It is to say, however, that if the state does interfere with security of the person, the *Charter* requires such interference to conform with the principles of fundamental justice.

les différentes formes de protection accordées au corps humain par le droit civil et la *common law* occupent le même rang. Le contenu donné à «la sécurité de la personne» doit être sensible à sa situation constitutionnelle. Les exemples fournis ci-dessus ne sont que des illustrations de notre respect pour l'intégrité physique de chacun. (Voir R. Macdonald, «Procedural Due Process in Canadian Constitutional Law», 39 *U. Fla. L. Rev.* 217 (1987), à la p. 248.) Cela ne revient pas non plus à dire que l'État ne peut jamais porter atteinte aux intérêts en matière de sécurité personnelle. Il peut fort bien exister des motifs valides d'ingérence à l'égard de la sécurité de la personne. Cela veut cependant dire que si l'État touche effectivement à la sécurité de la personne, la *Charte* impose que cette ingérence soit conforme aux principes de justice fondamentale.

The appellants submitted that the "security of the person" protected by the *Charter* is an explicit right to control one's body and to make fundamental decisions about one's life. The Crown contended that "security of the person" is a more circumscribed interest and that, like all of the elements of s. 7, it at most relates to the concept of physical control, simply protecting the individual's interest in his or her bodily integrity.

Les appelants font valoir que la «sécurité de la personne» protégée par la *Charte* est un droit qui permet explicitement d'être maître de son propre corps et de prendre des décisions fondamentales au sujet de sa propre vie. Le ministère public soutient que «la sécurité de la personne» est en fait un intérêt plus circonscrit et que, comme tous les autres éléments de l'art. 7, elle est liée, au mieux, à la notion de contrôle physique, protégeant simplement l'intérêt de chacun à assurer son intégrité corporelle.

Canadian courts have already had occasion to address the scope of the interest protected under the rubric of "security of the person". In *R. v. Caddedu* (1982), 40 O.R. (2d) 128, at p. 139, the Ontario High Court emphasized that the right to security of the person, like each aspect of s. 7, is a basic right, the deprivation of which has severe consequences for an individual. This characterization was approved by this Court in *Re B.C. Motor Vehicle Act*, at p. 501. The Ontario Court of Appeal has held that the right to life, liberty and security of the person "would appear to relate to one's physical or mental integrity and one's control over these . . . " (*R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395, at p. 433.)

Les tribunaux canadiens ont déjà eu à statuer sur la portée de l'intérêt que protège la rubrique «la sécurité de sa personne». Dans l'affaire *R. v. Caddedu* (1982), 40 O.R. (2d) 128, à la p. 139, la Haute Cour de l'Ontario a rappelé que le droit à la sécurité de la personne, comme chacun des volets de l'art. 7, est un droit fondamental qui, lorsqu'on y porte atteinte, a des conséquences graves pour l'individu. La Cour a approuvé cette caractérisation dans le *Renvoi: Motor Vehicle Act de la C.-B.*, à la p. 501. La Cour d'appel de l'Ontario a jugé que le droit à la vie, à la liberté et à la sécurité de la personne [TRADUCTION] «semble se rapporter à l'intégrité physique ou mentale d'une personne et au contrôle qu'elle exerce à cet égard . . .» (*R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395, à la p. 433.)

That conclusion is consonant with the holding of Lamer J. in *Mills v. The Queen*, [1986] 1 S.C.R. 863. In *Mills*, Lamer J. was the only judge of this Court to treat the right to security of the person in any detail. Although the right arose in the context of s. 11(*b*) of the *Charter*, Lamer J. stressed the close connection between the specific rights in ss. 8 to 14 and the more generally applicable rights expressed in s. 7. Lamer J. held, at pp. 919-20, that even in the specific context of s. 11(*b*):

> ... 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.

If state-imposed psychological trauma infringes security of the person in the rather circumscribed case of s. 11(*b*), it should be relevant to the general case of s. 7 where the right is expressed in broader terms. (See Whyte, *supra*, p. 39).

I note also that the Court has held in other contexts that the psychological effect of state action is relevant in assessing whether or not a *Charter* right has been infringed. In *R. v. Therens*, at p. 644, Justice Le Dain held that "The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary" for the purposes of defining "detention" in s. 10 of the *Charter*. A majority of the Court accepted the conclusions of Le Dain J. on this issue.

It may well be that constitutional protection of the above interests is specific to, and is only triggered by, the invocation of our system of criminal justice. It must not be forgotten, however, that s. 251 of the *Code*, subject to subs. (4), makes it an indictable offence for a person to procure the

Cette conclusion est conforme à celle du juge Lamer dans l'arrêt *Mills c. La Reine*, [1986] 1 R.C.S. 863. Dans cet arrêt, le juge Lamer est le seul juge de la Cour qui ait approfondi le droit à la sécurité de la personne. Quoique ce droit fût mis en cause dans le cadre de l'al. 11*b*) de la *Charte*, le juge Lamer a souligné le rapport étroit qu'il y a entre les droits particuliers conférés par les art. 8 à 14 et les droits d'application plus générale que l'on retrouve à l'art. 7. Le juge Lamer a conclu, aux pp. 919 et 920, que même dans le cadre précis de l'al. 11*b*):

> ... [la] 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'angoisse 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.

Si le traumatisme psychologique infligé par l'État porte atteinte à la sécurité de la personne dans le cas plutôt limité de l'al. 11*b*), on doit en tenir compte dans le cadre général de l'art. 7, où ce droit est énoncé en termes plus larges. (Voir Whyte, précité, à la p. 39.)

Je rappelle aussi que la Cour a déjà jugé, dans d'autres contextes, que l'effet psychologique de l'action de l'État a de l'importance lorsqu'on recherche si un droit garanti par la *Charte* a ou non été enfreint. Dans l'arrêt *R. c. Therens*, à la p. 644, le juge Le Dain estime que «L'élément de contrainte psychologique, sous forme d'une perception raisonnable qu'on n'a vraiment pas le choix, suffit pour rendre involontaire la privation de liberté" quand il s'agit de définir le terme "détention" à l'art. 10 de la *Charte*. La Cour, à la majorité, a accepté les conclusions du juge Le Dain sur ce point.

Il est bien possible que la protection constitutionnelle des intérêts susmentionnés soit spécifique au recours à notre système de justice criminelle et seulement déclenchée par ce dernier. On ne doit toutefois pas oublier que l'art. 251 du *Code*, sous réserve du par. (4), érige en infraction criminelle le

miscarriage and provides a maximum sentence of two years in the case of the woman herself, and a maximum sentence of life imprisonment in the case of another person. Like Beetz J., I do not find it necessary to decide how s. 7 would apply in other cases.

The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.

I wish to reiterate that finding a violation of security of the person does not end the s. 7 inquiry. Parliament could choose to infringe security of the person if it did so in a manner consistent with the principles of fundamental justice. The present discussion should therefore be seen as a threshold inquiry and the conclusions do not dispose definitively of all the issues relevant to s. 7. With that caution, I have no difficulty in concluding that the encyclopedic factual submissions addressed to us by counsel in the present appeal establish beyond any doubt that s. 251 of the *Criminal Code* is *prima facie* a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not wish to continue with a pregnancy.

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless

fait pour une personne de procurer un avortement et prévoit une peine maximale de deux ans d'emprisonnement pour la femme elle-même et d'emprisonnement à perpétuité dans le cas d'une autre personne. Comme le juge Beetz, je juge inutile de décider si l'art. 7 devrait s'appliquer dans d'autres cas.

La jurisprudence m'amène à conclure que l'atteinte que l'État porte à l'intégrité corporelle et la tension psychologique grave causée par l'État, du moins dans le contexte du droit criminel, constituent une atteinte à la sécurité de la personne. Il n'est pas nécessaire en l'espèce de se demander si le droit va plus loin et protège les intérêts primordiaux de l'autonomie personnelle, tel le droit à la vie privée ou des intérêts sans lien avec la justice criminelle.

Je réitère que la constatation qu'il y a atteinte à la sécurité de la personne ne met pas fin à la recherche exigée par l'art. 7. Le Parlement peut choisir de porter atteinte à la sécurité de la personne, pourvu qu'il le fasse en conformité avec les principes de justice fondamentale. Il faut donc considérer la présente analyse comme la première étape de recherche dont les conclusions ne régleront pas définitivement tous les points intéressant l'art. 7. Cela dit, je n'éprouve aucune difficulté à conclure que la somme encyclopédique produite par les avocats en l'espèce établit hors de tout doute que l'art. 251 du *Code criminel* constitue *prima facie* une atteinte à la sécurité de la personne de milliers de Canadiennes qui ont eu à prendre la difficile décision de ne pas mener une grossesse à terme.

Au niveau physique et émotionnel le plus fondamental, chaque femme enceinte se fait dire par cet article qu'elle ne peut subir une intervention médicale, généralement sans danger, qui pourrait manifestement être à son avantage, à moins qu'elle ne satisfasse à des critères totalement sans rapport avec ses propres priorités et aspirations. Non seulement en privant les femmes du pouvoir de décision, on les menace physiquement; en outre, l'incertitude qui plane sur le point de savoir si l'avortement sera accordé inflige une tension émotionnelle. L'article 251 porte clairement atteinte à l'intégrité corporelle, tant physique qu'émotionnelle d'une

she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice.

Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s. 251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s. 251 creates additional glaring breaches of security of the person. The evidence indicates that s. 251 causes a certain amount of delay for women who are successful in meeting its criteria. In the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being.

More specifically, in 1977, the *Report of the Committee on the Operation of the Abortion Law* (the Badgley Report) revealed that the average delay between a pregnant woman's first contact with a physician and a subsequent therapeutic abortion was eight weeks (p. 146). Although the situation appears to have improved since 1977, the extent of the improvement is not clear. The intervener, the Attorney General of Canada, submitted that the average delay in Ontario between the first visit to a physician and a therapeutic abortion was now between one and three weeks. Yet the respondent Crown admitted in a supplementary factum filed on November 27, 1986 with the permission of the Court that (p. 3):

> ... the evidence discloses that some women may find it very difficult to obtain an abortion: by necessity, abortion services are limited, since hospitals have budgetary, time, space and staff constraints as well as many medical responsibilities. As a result of these problems a woman may have to apply to several hospitals.

If forced to apply to several different therapeutic abortion committees, there can be no doubt that a woman will experience serious delay in obtaining a

femme. Forcer une femme, sous la menace d'une sanction criminelle, à mener un fœtus à terme à moins qu'elle ne satisfasse à des critères sans rapport avec ses propres priorités et aspirations est une ingérence grave à l'égard de son corps et donc une violation de la sécurité de sa personne. La *Charte* exige donc que l'art. 251 soit conforme aux principes de justice fondamentale.

Quoique cette atteinte à l'intégrité physique et émotionnelle suffise en soi pour déclencher un examen de l'art. 251 en fonction des principes de justice fondamentale, le fonctionnement du mécanisme décisionnel établi par l'art. 251 crée d'autres violations flagrantes de la sécurité de la personne. La preuve indique que l'art. 251 est cause d'un certain retard pour les femmes qui satisfont à ses critères. Dans le contexte de l'avortement, tout retard inutile peut avoir de profondes répercussions sur le bien-être physique et émotionnel d'une femme.

Pour être plus précis, en 1977, le *Rapport du Comité sur l'application des dispositions législatives sur l'avortement* (le rapport Badgley) a révélé que le délai moyen entre la première consultation d'un médecin par une femme enceinte et l'avortement thérapeutique subséquent est de huit semaines (à la p. 146). Bien qu'il semble que la situation se soit améliorée depuis 1977, l'ampleur de cette amélioration n'est pas claire. L'intervenant, le procureur général du Canada, fait valoir que le délai moyen en Ontario entre une première visite chez le médecin et l'avortement thérapeutique est maintenant d'une à trois semaines. Pourtant, le ministère public intimé admet, dans un mémoire supplémentaire produit le 27 novembre 1986, avec l'autorisation de la Cour, que (à la p. 3):

> [TRADUCTION] ... la preuve révèle que certaines femmes peuvent éprouver de grandes difficultés à obtenir un avortement: les services d'avortement sont forcément limités, puisque les hôpitaux ont des contraintes de budget, de temps, d'espace et de personnel, outre leurs nombreuses responsabilités médicales. Il s'ensuit qu'une femme peut devoir s'adresser à plusieurs hôpitaux.

Si une femme est forcée de s'adresser à plusieurs comités de l'avortement thérapeutique différents, il ne peut y avoir de doute qu'elle a à faire face à un

therapeutic abortion. In her *Report on Therapeutic Abortion Services in Ontario* (the Powell Report), Dr. Marion Powell emphasized that (p. 7):

> The entire process [of obtaining an abortion] was found to be protracted with women requiring three to seven contacts with health professionals . . . .

Revealing the full extent of this problem, Dr. Augustin Roy, the President of the Corporation professionnelle des médecins du Québec, testified that studies showed that in Quebec the waiting time for a therapeutic abortion in hospital varied between one and six weeks.

These periods of delay may not seem unduly long, but in the case of abortion, the implications of any delay, according to the evidence, are potentially devastating. The first factor to consider is that different medical techniques are employed to perform abortions at different stages of pregnancy. The testimony of expert doctors at trial indicated that in the first twelve weeks of pregnancy, the relatively safe and simple suction dilation and curettage method of abortion is typically used in North America. From the thirteenth to the sixteenth week, the more dangerous dilation and evacuation procedure is performed, although much less often in Canada than in the United States. From the sixteenth week of pregnancy, the instillation method is commonly employed in Canada. This method requires the intra-amniotic introduction of prostaglandin, urea, or a saline solution, which causes a woman to go into labour, giving birth to a foetus which is usually dead, but not invariably so. The uncontroverted evidence showed that each method of abortion progressively increases risks to the woman. (See, e.g., Tyler, et al., "Second Trimester Induced Abortion in the United States", in Garry S. Berger, William Brenner and Louis Keith, eds., *Second-Trimester Abortion: Perspectives After a Decade of Experience.*)

délai considérable pour obtenir un avortement thérapeutique. Dans son *Report on Therapeutic Abortion Services in Ontario* (le rapport Powell), le Dr Marion Powell souligne (à la p. 7):

> [TRADUCTION] Il est apparu que tout le processus [d'obtention d'un avortement] traîne en longueur, les femmes étant obligées de rencontrer de trois à sept professionnels de la santé . . .

Révélant l'ampleur du problème, le Dr Augustin Roy, président de la Corporation professionnelle des médecins du Québec, a dit dans son témoignage que les études qu'il avait faites montraient qu'au Québec l'attente pour un avortement thérapeutique dans un hôpital variait d'une à six semaines.

Ces délais peuvent ne pas sembler très longs, mais, dans le cas d'un avortement, tout retard, d'après la preuve, peut avoir des conséquences dévastatrices. Le premier facteur dont il faut tenir compte est que différentes techniques médicales sont utilisées pour pratiquer les avortements à différents stades de la grossesse. Le témoignage des médecins au procès, à titre d'experts, a montré que, dans les douze premières semaines de la grossesse, la méthode d'avortement relativement sûre et simple de la dilatation et de l'aspiration, suivies d'un curetage, est normalement utilisée en Amérique du Nord. De la treizième à la seizième semaines, la méthode, plus dangereuse, de la dilatation cervicale et de l'évacuation utérine est pratiquée, moins souvent au Canada qu'aux États-Unis. À partir de la seizième semaine de grossesse, la méthode médicamenteuse est habituellement utilisée au Canada. Elle requiert l'introduction dans le liquide amniotique de prostaglandine, d'urée ou d'une solution saline qui provoque les contractions; la femme accouche d'un fœtus, habituellement mort-né, encore que ce ne soit pas toujours le cas. La preuve non contredite démontre que d'une méthode à l'autre, les risques courus par la femme s'accroissent. (Voir, par ex., Tyler, et al., «Second Trimester Induced Abortion in the United States», in Garry S. Berger, William Brenner and Louis Keith, eds., *Second-Trimester Abortion: Perspectives After a Decade of Experience.*)

The second consideration is that even within the periods appropriate to each method of abortion, the evidence indicated that the earlier the abortion was performed, the fewer the complications and the lower the risk of mortality. For example, a study emanating from the Centre for Disease Control in Atlanta confirmed that "D & E [dilation and evacuation] procedures performed at 13 to 15 weeks' gestation were nearly 3 times safer than those performed at 16 weeks or later". (Cates and Grimes, "Deaths from Second Trimester Abortion by Dilation and Evacuation: Causes, Prevention, Facilities" (1981), 58 *Obstetrics and Gynecology* 401, at p. 401. See also the Powell Report, at p. 36.) The Court was advised that because of their perceptions of risk, Canadian doctors often refuse to use the dilation and evacuation procedure from the thirteenth to sixteenth weeks and instead wait until they consider it appropriate to use the instillation technique. Even more revealing were the overall mortality statistics evaluated by Drs. Cates and Grimes. They concluded from their study of the relevant data that:

Anything that contributes to delay in performing abortions increases the complication rates by 15 to 30%, and the chance of dying by 50% for each week of delay.

These statistics indicate clearly that even if the average delay caused by s. 251 *per arguendo* is of only a couple of weeks' duration, the effects upon any particular woman can be serious and, occasionally, fatal.

It is no doubt true that the overall complication and mortality rates for women who undergo abortions are very low, but the increasing risks caused by delay are so clearly established that I have no difficulty in concluding that the delay in obtaining therapeutic abortions caused by the mandatory procedures of s. 251 is an infringement of the purely physical aspect of the individual's right to security of the person. I should stress that the marked contrast between the relative speed with which abortions can be obtained at the government-sponsored community clinics in Quebec and in hospitals under the s. 251 procedure was estab-

La seconde considération est que, même au cours des périodes où chaque méthode d'avortement peut être employée, la preuve indique que plus l'avortement a lieu tôt, moins il y a de complications et inférieur est le risque de décès. Par exemple, une étude du Centre for Disease Control d'Atlanta a confirmé que [TRADUCTION] «la méthode D & E [dilatation cervicale et évacuation utérine] utilisée de la treizième à la quinzième semaines de grossesse est presque trois fois plus sûre qu'après seize semaines ou plus». (Cates et Grimes, «Deaths from Second Trimester Abortion by Dilation and Evacuation: Causes, Prevention, Facilities» (1981), 58 *Obstetrics and Gynecology* 401, à la p. 401. Voir aussi le rapport Powell, à la p. 36.) Il a été porté à la connaissance de la Cour qu'à cause des risques possibles les médecins canadiens refusent souvent d'employer la méthode de la dilatation cervicale et de l'évacuation utérine entre la treizième et la seizième semaines, préférant attendre le moment où ils jugeront pouvoir avoir recours à la méthode médicamenteuse. Les statistiques globales de mortalité évaluées par les Dr Cates et Grimes sont encore plus révélatrices. Ils concluent, après une étude des données pertinentes:

[TRADUCTION] Tout retard à pratiquer l'avortement augmente le taux de complication de 15 à 30 % et les probabilités de décès de 50 % par semaine de retard.

Ces statistiques indiquent clairement que même si le retard moyen causé par l'art. 251 n'est, par hypothèse, que de quelque deux semaines, les effets pour une femme donnée peuvent être graves et parfois mortels.

Il est certainement vrai que les taux globaux de complication et de mortalité pour les femmes qui subissent un avortement sont très faibles, mais l'augmentation des risques causés par tout retard est si clairement établie que je n'ai aucune difficulté à conclure que tout retard à obtenir un avortement thérapeutique, en raison de la procédure imposée par l'art. 251, est une atteinte à l'aspect purement physique du droit de chacun à la sécurité de sa personne. Je dois souligner que le contraste marqué entre la relative rapidité avec laquelle des avortements peuvent être obtenus dans les Centres locaux de santé communautaire du

lished at trial. The evidence indicated that at the government-sponsored clinics in Quebec, the maximum delay was less than a week. One must conclude, and perhaps underline, that the delay experienced by many women seeking a therapeutic abortion, be it of one, two, four, or six weeks' duration, is caused in large measure by the requirements of s. 251 itself.

The above physical interference caused by the delays created by s. 251, involving a clear risk of damage to the physical well-being of a woman, is sufficient, in my view, to warrant inquiring whether s. 251 comports with the principles of fundamental justice. However, there is yet another infringement of security of the person. It is clear from the evidence that s. 251 harms the psychological integrity of women seeking abortions. A 1985 report of the Canadian Medical Association, discussed in the Powell Report, at p. 15, emphasized that the procedure involved in s. 251, with the concomitant delays, greatly increases the stress levels of patients and that this can lead to more physical complications associated with abortion. A specialist in fertility control, Dr. Henry David, was qualified as an expert witness at trial on the psychological impact upon women of delay in the process of obtaining an abortion. He testified that his own studies had demonstrated that there is increased psychological stress imposed upon women who are forced to wait for abortions, and that this stress is compounded by the uncertainty whether or not a therapeutic abortion committee will actually grant approval.

Perhaps the most powerful testimony regarding the psychological impact upon women caused by the delay inherent in s. 251 procedures was offered at trial by Dr. Jane Hodgson, the Medical Director of the Women's Health Center in Duluth, Minnesota. She was called to testify as to her experiences with Canadian women who had come to the Women's Health Center for abortions. Her testimony was extensive, but the flavour may be gleaned from the following short excerpts:

Québec, subventionnés par le gouvernement, et dans les hôpitaux en vertu de la procédure de l'art. 251 a été établi au procès. D'après la preuve, dans les CLSC du Québec, l'attente maximum est inférieure à une semaine. On doit conclure, et peut-être souligner, que l'attente que doivent subir de nombreuses femmes voulant un avortement thérapeutique, qu'il s'agisse d'une, de deux, de quatre ou de six semaines, est due dans une large mesure aux exigences de l'art. 251 lui-même.

L'ingérence physique exposée ci-dessus, imputable aux délais découlant de l'art. 251 et impliquant un risque clair de préjudice pour le bien-être physique d'une femme, suffit, à mon avis, pour justifier qu'on se demande si l'art. 251 est conforme avec les principes de justice fondamentale. Il y a toutefois une autre violation de la sécurité de la personne. Il ressort de la preuve que l'art. 251 porte atteinte à l'intégrité psychologique des femmes voulant un avortement. Un rapport de 1985 de l'Association médicale canadienne, étudié dans le rapport Powell, à la p. 15, souligne que la procédure qu'implique l'art. 251, avec les délais qui en découlent, accroît de beaucoup le niveau d'angoisse des patientes, ce qui peut accroître le nombre de complications somatiques liées à l'avortement. Un spécialiste en fertilité, le Dr Henry David, a témoigné à titre d'expert au procès au sujet de l'effet psychologique sur les femmes des délais d'obtention d'un avortement. D'après son témoignage, ses propres études ont démontré que la tension psychologique augmente chez les femmes forcées d'attendre pour se faire avorter, d'autant que cette tension est accrue par l'incertitude quant à savoir si un comité de l'avortement thérapeutique donnera ou non son approbation.

Le Dr Jane Hodgson, directrice médicale du Women's Health Center de Duluth, au Minnesota, a sans doute donné, au procès, le témoignage le plus impressionnant au sujet de l'effet psychologique sur les femmes des délais inhérents à la procédure de l'art. 251. Elle avait été assignée afin de faire part de son expérience avec les femmes canadiennes qui se rendent au Women's Health Center pour se faire avorter. Son témoignage est long, mais ces brefs extraits peuvent en transmettre l'idée:

May I add one other thing that I think is very vital, and that is that many of these [Canadian] women come down because they know they will be delayed in getting, first, permission, then delayed in getting a hospital bed, or getting into the hospital, and so they know they will have to have saline [instillation] procedures. And some of them have been through this, and others know what it is about, and they will do almost anything to avoid having a saline procedure.

And of course, that is — I consider that a very cruel type of medical care and will do anything to help them to avoid this type of treatment.

. . .

The cost, the time consumed, the medical risks, the mental anguish — all of this is cruelty, in this day and age, because it's [the instillation procedure] an obsolete procedure that is essentially disappearing in the United States.

I have already noted that the instillation procedure requires a woman actually to experience labour and to suffer through the birth of a foetus that is usually but not always dead. Statistics from 1982 indicated that 33.4 per cent of second trimester abortions in Ontario were done by instillation, and the Powell Report revealed, at p. 36, that even in 1986 there persisted a high incidence of second trimester abortions in Ontario. The psychological injury caused by delay in obtaining abortions, much of which must be attributed to the procedures set out in s. 251, constitutes an additional infringement of the right to security of the person.

In its supplementary factum and in oral submissions, the Crown argued that evidence of what could be termed "administrative inefficiency" is not relevant to the evaluation of legislation for the purposes of s. 7 of the *Charter*. The Crown argued that only evidence regarding the purpose of legislation is relevant. The assumption, of course, is that any impairment to the physical or psychological interests of individuals caused by s. 251 of the *Criminal Code* does not amount to an infringement of security of the person because the injury is caused by practical difficulties and is not intended by the legislator.

[TRADUCTION] Puis-je ajouter un autre point qui me paraît des plus vital: beaucoup de femmes [canadiennes] font le voyage parce qu'elles savent qu'elles devront attendre d'abord de recevoir l'autorisation, puis qu'un lit d'hôpital soit disponible, ou d'obtenir l'admission dans un hôpital, et qu'elles savent donc qu'il faudra qu'on leur administre la méthode médicamenteuse. Certaines d'entre elles sont déjà passées par là, d'autres savent ce que ça veut dire, aussi sont-elles prêtes à faire à peu près n'importe quoi pour l'éviter.

Et, bien entendu, c'est-à-dire [. . .] j'estime qu'il s'agit là d'une thérapeutique des plus cruelles, aussi suis-je prête à tout faire pour les aider à l'éviter.

. . .

Le coût, le temps perdu, les risques médicaux, l'angoisse mentale: tout cela c'est de la cruauté, aujourd'hui, à notre époque, parce qu'il s'agit d'une méthode [la méthode médicamenteuse] désuette, à peu près en voie de disparition aux États-Unis.

J'ai déjà dit que la méthode médicamenteuse oblige la femme à subir les contractions et à endurer l'accouchement d'un fœtus généralement mais pas toujours mort-né. Les statistiques de 1982 montrent que, dans 33,4 pour 100 des avortements en Ontario, on a utilisé la méthode médicamenteuse et le rapport Powell révèle, à la p. 36, que, même en 1986, il y avait toujours une haute incidence d'avortements pratiqués au second trimestre en Ontario. Le dommage psychologique causé par le délai d'obtention des avortements, dont une grande part doit être attribuée à la procédure prévue à l'art. 251, constitue une atteinte supplémentaire au droit à la sécurité de la personne.

Dans son mémoire supplémentaire et au cours des plaidoiries, le ministère public a soutenu que les éléments de preuve relatifs à ce qu'on pourrait qualifier de «lenteurs administratives» ne sauraient entrer en ligne de compte dans l'évaluation d'une loi aux fins de l'art. 7 de la *Charte*. Le ministère public fait valoir que seuls les éléments de preuve portant sur l'objet de la loi sont pertinents. Ceci présume donc que les atteintes aux intérêts physiques ou psychologiques des individus causées par l'art. 251 du *Code criminel* ne constituent pas une atteinte à la sécurité de la personne, car le dommage résulte de difficultés pratiques et n'est pas l'objectif du législateur.

The submission is faulty on two counts. First, as a practical matter it is not possible in the case of s. 251 to erect a rigid barrier between the purposes of the section and the administrative procedures established to carry those purposes into effect. For example, although it may be true that Parliament did not enact s. 251 intending to create delays in obtaining therapeutic abortions, the evidence demonstrates that the system established by the section for obtaining a therapeutic abortion certificate inevitably does create significant delays. It is not possible to say that delay results only from administrative constraints, such as limited budgets or a lack of qualified persons to sit on therapeutic abortion committees. Delay results from the cumbersome operating requirements of s. 251 itself. (See, by way of analogy, *R. v. Therens*, *per* Le Dain J., at p. 645.) Although the mandate given to the courts under the *Charter* does not, generally speaking, enable the judiciary to provide remedies for administrative inefficiencies, when denial of a right as basic as security of the person is infringed by the procedure and administrative structures created by the law itself, the courts are empowered to act.

Secondly, were it nevertheless possible in this case to dissociate purpose and administration, this Court has already held as a matter of law that purpose is not the only appropriate criterion in evaluating the constitutionality of legislation under the *Charter*. In *R. v. Big M Drug Mart Ltd.*, at p. 331, the Court stated that:

> . . . both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.

Even if the purpose of legislation is unobjectionable, the administrative procedures created by law to bring that purpose into operation may produce unconstitutional effects, and the legislation should then be struck down. It is important to note that, in speaking of the effects of legislation, the Court in *R. v. Big M Drug Mart Ltd.* was still referring to effects that can invalidate legislation under s. 52 of the *Constitution Act, 1982* and not to individual effects that might lead a court to provide a person-

L'argument est spécieux pour deux raisons. D'abord, en pratique, il n'est pas possible, dans le cas de l'art. 251, d'ériger une cloison étanche entre l'objet recherché par l'article et la procédure administrative établie pour l'atteindre. Par exemple, quoiqu'il puisse être vrai que le législateur n'a pas adopté l'art. 251 dans le but de retarder l'obtention des avortements thérapeutiques, la preuve démontre que le système établi par l'article pour obtenir un certificat d'avortement thérapeutique crée inévitablement des délais importants. Il n'est pas possible de dire que ces retards ne résultent que des contraintes administratives, tels les budgets restreints ou le manque de personnel qualifié apte à siéger aux comités de l'avortement thérapeutique. Les délais résultent de la lourdeur du mécanisme prévu à l'art. 251 lui-même. (Voir par analogie l'arrêt *R. c. Therens*, le juge Le Dain, à la p. 645.) Si le mandat conféré aux tribunaux par la *Charte* n'autorise pas, généralement parlant, le pouvoir judiciaire à accorder un recours contre les lenteurs administratives, néanmoins, lorsqu'un droit aussi fondamental que la sécurité de la personne est enfreint par la procédure et les structures administratives créées par la loi elle-même, les tribunaux ont le pouvoir d'agir.

En second lieu, même s'il était possible en l'espèce de dissocier objet et administration, la Cour a déjà statué en droit que l'objet n'est pas le seul critère valable d'évaluation de la constitutionnalité d'une loi en fonction de la *Charte*. Dans l'arrêt *R. c. Big M Drug Mart Ltd.*, à la p. 331, la Cour dit:

> . . . l'objet et l'effet d'une loi sont tous les deux importants pour déterminer sa constitutionnalité; un objet inconstitutionnel ou un effet inconstitutionnel peuvent l'un et l'autre rendre une loi invalide.

Même si l'objet d'une loi est inattaquable, la procédure administrative créée par la loi pour la mise en œuvre de cet objet peut produire des effets inconstitutionnels et la loi doit alors être invalidée. Il importe de rappeler qu'en parlant des effets d'une loi, la Cour, dans l'arrêt *R. c. Big M Drug Mart Ltd.*, se référait encore aux effets qui peuvent invalider une loi en vertu de l'art. 52 de la *Loi constitutionnelle de 1982* et non aux effets individuels, qui pourraient amener un tribunal à accor-

al remedy under s. 24(1) of the *Charter*. In the present case, the appellants are complaining of the general effects of s. 251. If section 251 of the *Criminal Code* does indeed breach s. 7 of the *Charter* through its general effects, that can be sufficient to invalidate the legislation under s. 52. As an aside, I should note that the appellants have standing to challenge an unconstitutional law if they are liable to conviction for an offence under that law even though the unconstitutional effects aré not directed at the appellants *per se*: *R. v. Big M Drug Mart Ltd.*, at p. 313. The standing of the appellants was not challenged by the Crown.

In summary, s. 251 is a law which forces women to carry a foetus to term contrary to their own priorities and aspirations and which imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria. It must, therefore, be determined whether that infringement is accomplished in accordance with the principles of fundamental justice, thereby saving s. 251 under the second part of s. 7.

C. *The Principles of Fundamental Justice*

Although the "principles of fundamental justice" referred to in s. 7 have both a substantive and a procedural component (*Re B.C. Motor Vehicle Act*, at p. 499), I have already indicated that it is not necessary in this appeal to evaluate the substantive content of s. 251 of the *Criminal Code*. My discussion will therefore be limited to various aspects of the administrative structure and procedure set down in s. 251 for access to therapeutic abortions.

In outline, s. 251 operates in the following manner. Subsection (1) creates an indictable offence for any person to use any means with the intent "to procure the miscarriage of a female person". Subsection (2) establishes a parallel indictable offence for any pregnant woman to use or to permit any means to be used with the intent "to procure her own miscarriage". The "means" referred to in subss. (1) and (2) are defined in subs. (3) as the administration of a drug or "other noxious thing", the use of an instrument, and

der une réparation à une personne en vertu du par. 24(1) de la *Charte*. En l'espèce, les appelants se plaignent des effets généraux de l'art. 251. Si l'article 251 du *Code criminel* viole effectivement l'art. 7 de la *Charte* par suite de ses effets généraux, cela peut suffir à invalider la loi en vertu de l'art. 52. Par ailleurs, je rappellerais que les appelants ont qualité pour contester une loi inconstitutionnelle s'ils risquent d'être déclarés coupables d'une infraction à cette loi, même s'ils n'ont pas directement à pâtir des effets inconstitutionnels: l'arrêt *R. c. Big M Drug Mart Ltd.*, à la p. 313. Le ministère public n'a d'ailleurs pas contesté leur qualité pour agir.

En résumé, l'art. 251 est un texte législatif qui oblige des femmes à mener un fœtus à terme à l'encontre de leurs propres priorités et aspirations et qui impose des délais considérables qui accroissent le traumatisme physique et psychologique des femmes qui satisfont à ses critères. Il faut donc déterminer si l'atteinte a eu lieu en conformité avec les principes de justice fondamentale, ce qui sauverait l'art. 251 en vertu de la seconde partie de l'art. 7.

C. *Les principes de justice fondamentale*

Bien que les «principes de justice fondamentale» mentionnés à l'art. 7 aient une composante de fond et une composante de procédure (*Renvoi: Motor Vehicule Act de la C.-B.*, à la p. 499), j'ai déjà dit qu'il n'est pas nécessaire en l'espèce de se prononcer sur le fond de l'art. 251 du *Code criminel*. Mon analyse se limitera donc aux divers aspects de la structure et de la procédure administratives établies par l'art. 251 pour l'obtention des avortements thérapeutiques.

En bref, l'art. 251 fonctionne de la manière suivante. Le paragraphe (1) fait un acte criminel de l'emploi, par qui que ce soit, de quelque moyen avec l'intention «de procurer l'avortement d'une personne du sexe féminin». Le paragraphe (2) prévoit, en parallèle, que se rend coupable d'un acte criminel toute femme enceinte qui emploie ou permet que soit employé quelque moyen avec l'intention «d'obtenir son propre avortement». Les «moyens» dont il est question aux par. (1) et (2) sont définis au par. (3) comme étant l'administra-

"manipulation of any kind". The crucial provision for the purposes of the present appeal is subs. (4) which states that the offences created in subss. (1) and (2) "do not apply" in certain circumstances. The Ontario Court of Appeal in the proceedings below characterized s. 251(4) as an "exculpatory provision" ((1985), 52 O.R. (2d) 353, at p. 365). In *Morgentaler (1975)*, at p. 673, a majority of this Court held that the effect of s. 251(4) was to afford "a complete answer and defence to those who respect its terms".

The procedure surrounding the defence is rather complex. A pregnant woman who desires to have an abortion must apply to the "therapeutic abortion committee" of an "accredited or approved hospital". Such a committee is empowered to issue a certificate in writing stating that in the opinion of a majority of the committee, the continuation of the pregnancy would be likely to endanger the pregnant woman's life or health. Once a copy of the certificate is given to a qualified medical practitioner who is not a member of the therapeutic abortion committee, he or she is permitted to perform an abortion on the pregnant woman and both the doctor and the woman are freed from any criminal liability.

A number of definitions are provided in subs. (6) which have a bearing on the disposition of this appeal. An "accredited hospital" is described as a hospital accredited by the Canadian Council on Hospital Accreditation "in which diagnostic services and medical, surgical and obstetrical treatment" are provided. An "approved hospital" is a hospital "approved for the purposes of this section by the Minister of Health" of a province. A "therapeutic abortion committee" must be "comprised of not less than three members each of whom is a qualified medical practitioner" who is appointed by a hospital's administrative board. Interestingly, the term "health" is not defined for the purposes of s. 251, so it would appear that the therapeutic abortion committees are free to develop their own theories as to when a potential impairment of a woman's "health" would justify the granting of a therapeutic abortion certificate.

tion d'une drogue ou «autre substance délétère», l'emploi d'un instrument et «toute manipulation». La disposition cruciale en l'espèce est le par. (4) selon lequel les infractions prévues aux par. (1) et (2) «ne s'appliquent pas» dans certaines circonstances. La Cour d'appel de l'Ontario, en l'espèce, a qualifié le par. 251(4) de [TRADUCTION] «disposition disculpatoire» ((1985), 52 O.R. (2d) 353, à la p. 365). Dans l'arrêt *Morgentaler (1975)*, à la p. 673, cette Cour, à la majorité, a jugé que le par. 251(4) avait pour effet d'offrir «à ceux qui satisfont à ses conditions, un moyen de défense complet».

La procédure entourant cette défense est plutôt complexe. Une femme enceinte qui désire un avortement doit s'adresser au «comité de l'avortement thérapeutique» d'un hôpital «accrédité ou approuvé». Ce comité a le pouvoir de délivrer un certificat écrit attestant que, par décision de la majorité des membres du comité, la continuation de la grossesse risque de mettre la vie ou la santé de la femme enceinte en danger. Sur remise d'une copie du certificat à un médecin qualifié qui n'est pas membre du comité de l'avortement thérapeutique, celui-ci est autorisé à procurer un avortement à la femme enceinte et tant le médecin que la femme échappent à toute responsabilité criminelle.

Le paragraphe (6) fournit plusieurs définitions qui ont des répercussions sur l'issue de ce pourvoi. Un «hôpital accrédité» désigne un hôpital accrédité par le Conseil canadien d'accréditation des hôpitaux «dans lequel sont fournis des services de diagnostic et des traitements médicaux, chirurgicaux et obstétricaux». Un «hôpital approuvé» est un hôpital «approuvé aux fins du présent article par le ministre de la Santé» d'une province. Un «comité de l'avortement thérapeutique» doit être «formé d'au moins trois membres qui sont tous des médecins qualifiés» nommés par le Conseil d'administration de l'hôpital. Curieusement, le terme «santé» n'est pas défini à l'art. 251, de sorte qu'il semble que les comités de l'avortement thérapeutique sont libres d'élaborer leur propre théorie pour déterminer quand une atteinte éventuelle à la «santé» d'une femme peut justifier l'octroi d'un certificat d'avortement thérapeutique.

As is so often the case in matters of interpretation, however, the straightforward reading of this statutory scheme is not fully revealing. In order to understand the true nature and scope of s. 251, it is necessary to investigate the practical operation of the provisions. The Court has been provided with a myriad of factual submissions in this area. One of the most useful sources of information is the Badgley Report. The Committee on the Operation of the Abortion Law was established by Orders-in-Council P.C. 1975-2305, -2306, and -2307 of September 29, 1975 and its terms of reference instructed it to "conduct a study to determine whether the procedure provided in the Criminal Code for obtaining therapeutic abortions is operating equitably across Canada". Statistics were provided to the Committee by Statistics Canada and the Committee conducted its own research, meeting with officials of the departments of the provincial attorneys general and of health, and visiting 140 hospitals throughout Canada. The Committee also commissioned national hospital, hospital staff, physician, and patient surveys. The overall conclusion of the Committee was that "The procedures set out for the operation of the Abortion Law are not working equitably across Canada" (p. 17). Of course, that conclusion does not lead to the necessary inference that s. 251 procedures violate the principles of fundamental justice. Unfair functioning of the law could be caused by external forces which do not relate to the law itself.

Cependant, comme c'est souvent le cas en matière d'interprétation, la simple lecture des dispositions législatives ne dit pas tout. Pour comprendre la nature et la portée véritables de l'art. 251, il est nécessaire d'examiner l'application pratique des dispositions. La Cour a reçu une myriade de mémoires sur les faits à cet égard. L'une des sources d'information les plus utiles est le rapport Badgley. Le comité sur l'application des dispositions législatives sur l'avortement a été créé par les décrets C.P. 1975-2305, -2306, -2307 du 29 septembre 1975 avec pour mandat «d'entreprendre une étude visant à déterminer si les dispositions prévues par le Code criminel relativement à la pratique d'avortements thérapeutiques sont appliquées de manière équitable dans tout le Canada». Statistique Canada a fourni des statistiques au comité et celui-ci a aussi procédé à ses propres recherches, rencontrant les fonctionnaires des ministères des procureurs généraux et des ministères provinciaux de la santé et procédant à la visite de 140 hôpitaux canadiens. Le comité a aussi fait procéder à des sondages, à l'échelle nationale, sur les hôpitaux, leur personnel, les médecins et les patients. Le comité a conclu en somme que: «Le recours prévu par la Loi sur l'avortement n'est pas appliqué de façon équitable à travers le Canada» (à la p. 19). Bien entendu, cette conclusion n'amène pas nécessairement à dire que la procédure prévue à l'art. 251 viole les principes de justice fondamentale. Une application injuste de la loi peut être imputable à des forces externes qui n'ont rien à voir avec la loi elle-même.

The Badgley Report contains a wealth of detailed information which demonstrates, however, that many of the most serious problems with the functioning of s. 251 are created by procedural and administrative requirements established in the law. For example, the Badgley Committee noted, at p. 84, that:

> ... the Abortion Law implicitly establishes a minimum requirement of three qualified physicians to serve on a therapeutic abortion committee, plus a qualified medical practitioner who is not a member of the therapeutic abortion committee, to perform the procedure.

The Committee went on to make the following observation at p. 102:

Le rapport Badgley est une mine de renseignements qui démontre cependant qu'un grand nombre des problèmes les plus graves dans l'application de l'art. 251 résultent des exigences administratives et de procédures établies par la loi. Par exemple, le comité Badgley note, à la p. 92:

> ... la Loi sur l'avortement exige implicitement un minimum de trois médecins qualifiés agissant comme membres du comité de l'avortement thérapeutique, plus un médecin qualifié qui n'est pas membre de ce comité, pour pratiquer l'intervention.

Le comité poursuit avec l'observation suivante (à la p. 113):

Of the 1,348 civilian hospitals in operation in 1976, at least 331 hospitals had less than four physicians on their medical staff. In terms of the distribution of physicians, 24.6 percent of hospitals in Canada did not have a medical staff which was large enough to establish a therapeutic abortion committee and to perform the abortion procedure.

In other words, the seemingly neutral requirement of s. 251(4) that at least four physicians be available to authorize and to perform an abortion meant in practice that abortions would be absolutely unavailable in almost one quarter of all hospitals in Canada.

Other administrative and procedural requirements of s. 251(4) reduce the availability of therapeutic abortions even further. For the purposes of s. 251, therapeutic abortions can only be performed in "accredited" or "approved" hospitals. As noted above, an "approved" hospital is one which a provincial minister of health has designated as such for the purpose of performing therapeutic abortions. The minister is under no obligation to grant any such approval. Furthermore, an "accredited" hospital must not only be accredited by the Canadian Council on Hospital Accreditation, it must also provide specified services. Many Canadian hospitals do not provide all of the required services, thereby being automatically disqualified from undertaking therapeutic abortions. The Badgley Report stressed the remarkable limitations created by these requirements, especially when linked with the four-physician rule discussed above (p. 105):

> Of the total of 1,348 non-military hospitals in Canada in 1976, 789 hospitals, or 58.5 percent, were ineligible in terms of their major treatment functions, the size of their medical staff, or their type of facility to establish therapeutic abortion committees.

Moreover, even if a hospital is eligible to create a therapeutic abortion committee, there is no requirement in s. 251 that the hospital need do so. The Badgley Committee discovered that in 1976, of the 559 general hospitals which met the proce-

Sur les 1,348 hôpitaux civils en service en 1976, au moins 331 hôpitaux comptaient moins de quatre médecins membres de leur personnel médical. En ce qui concerne la répartition des médecins, 24.6 pour cent des hôpitaux au Canada n'avaient pas un personnel médical suffisamment important pour pouvoir créer un comité de l'avortement thérapeutique et pratiquer l'avortement.

En d'autres termes, l'obligation du par. 251(4), neutre en apparence, qu'au moins quatre médecins soient disponibles pour autoriser et pratiquer un avortement, signifie en pratique qu'il serait absolument impossible d'obtenir un avortement dans près du quart de tous les hôpitaux au Canada.

D'autres exigences administratives et procédurales du par. 251(4) réduisent la possibilité d'obtenir des avortements thérapeutiques. Pour les fins de l'art. 251, les avortements thérapeutiques ne peuvent être pratiqués que dans des hôpitaux «accrédités» ou «approuvés». Comme il a été dit précédemment, un hôpital «approuvé» est un hôpital que le ministre de la Santé de la province désigne comme tel, afin de lui permettre de pratiquer des avortements thérapeutiques. Le ministre n'a aucune obligation d'octroyer cette approbation. En outre, un hôpital «accrédité» doit non seulement être accrédité par le Conseil canadien d'accréditation des hôpitaux, il doit aussi offrir certains services précis. Un grand nombre d'hôpitaux canadiens n'offrent pas tous les services requis, ce qui leur interdit automatiquement de pratiquer des avortements thérapeutiques. Le rapport Badgley souligne les limitations importantes que ces exigences imposent surtout lorsqu'on les lie avec la règle des quatre médecins mentionnée ci-dessus (à la p. 115):

> Sur les 1,348 hôpitaux civils que comptait le Canada en 1976, 789 hôpitaux, soit 58.5 pour cent, n'étaient pas aptes à établir un comité de l'avortement thérapeutique, soit en raison de la spécialisation des traitements fournis dans ces établissements, soit à cause d'un personnel médical insuffisant ou du genre d'installations dont ils disposaient.

De plus, même si un hôpital est autorisé à former un comité de l'avortement thérapeutique, rien dans l'art. 251 ne l'oblige à le faire. Le comité Badgley a découvert qu'en 1976, des 559 hôpitaux généraux qui répondaient aux exigences de procédure

dural requirements of s. 251, only 271 hospitals in Canada, or only 20.1 per cent of the total, had actually established a therapeutic abortion committee (p. 105).

Even though the Badgley Report was issued ten years ago, the relevant statistics do not appear to be out of date. Indeed, Statistics Canada reported that in 1982 the number of hospitals with therapeutic abortion committees had actually fallen to 261. (*Basic Facts on Therapeutic Abortions, Canada: 1982* (1983).) Even more recent data exists for Ontario. In the Powell Report, it was noted that in 1986 only 54 per cent of accredited acute care hospitals in the province had therapeutic abortion committees. In five counties there were no committees at all (p. 24). Of the 95 hospitals with committees, 12 did not do any abortions in 1986 (p. 24).

The Powell Report reveals another serious difficulty with s. 251 procedures. The requirement that therapeutic abortions be performed only in "accredited" or "approved" hospitals effectively means that the practical availability of the exculpatory provisions of subs. (4) may be heavily restricted, even denied, through provincial regulation. In Ontario, for example, the provincial government promulgated O. Reg. 248/70 under *The Public Hospitals Act*, R.S.O. 1960, c. 322, now R.R.O. 1980, Reg. 865. This regulation provides that therapeutic abortion committees can only be established where there are ten or more members on the active medical staff (Powell Report, at p. 13). A minister of health is not prevented from imposing harsher restrictions. During argument, it was noted that it would even be possible for a provincial government, exercising its legislative authority over public hospitals, to distribute funding for treatment facilities in such a way that no hospital would meet the procedural requirements of s. 251(4). Because of the administrative structure established in s. 251(4) and the related definitions, the "defence" created in the section could be completely wiped out.

de l'art. 251, 271 hôpitaux seulement, au Canada, soit seulement 20,1 pour 100 du total, avaient effectivement formé un comité de l'avortement thérapeutique (à la p. 116).

Même si le rapport Badgley remonte à dix ans, les statistiques en cause ne semblent pas périmées. D'ailleurs, Statistique Canada rapportait qu'en 1982 le nombre d'hôpitaux ayant des comités de l'avortement thérapeutique était en fait tombé à 261. (*Principales statistiques sur les avortements thérapeutiques, Canada: 1982* (1983).) Les statistiques pour l'Ontario sont encore plus récentes. Dans le rapport Powell, on mentionne qu'en 1986 seulement 54 pour 100 des hôpitaux accrédités dans la province ayant un département de soins intensifs avaient formé des comités de l'avortement thérapeutique. Dans cinq comtés, il n'y avait aucun comité (à la p. 24). Des 95 hôpitaux ayant des comités, 12 n'avaient pas pratiqué d'avortements en 1986 (à la p. 24).

Le rapport Powell révèle que la procédure de l'art. 251 suscite une autre difficulté grave. L'obligation que les avortements thérapeutiques soient seulement pratiqués dans des hôpitaux «accrédités» ou «approuvés» signifie que le recours en pratique aux dispositions disculpatoires du par. 4 peut être fortement limité et même supprimé par la réglementation provinciale. En Ontario, par exemple, le gouvernement provincial a promulgué le règlement 248/70 en application de *The Public Hospitals Act*, R.S.O. 1960, chap. 322, maintenant R.R.O. 1980, Reg. 865. Ce règlement porte que des comités de l'avortement thérapeutique ne peuvent être formés que si le personnel médical actif compte dix membres ou plus (rapport Powell, à la p. 13). Rien n'interdit au ministre de la Santé d'imposer des restrictions plus draconiennes. Au cours des plaidoiries, on a rappelé qu'il serait même possible pour un gouvernement provincial, dans l'exercice de son autorité législative sur les hôpitaux publics, de distribuer les fonds pour les soins de santé de façon à ce qu'aucun hôpital ne puisse satisfaire aux exigences procédurales du par. 251(4). À cause de la structure administrative établie par le par. 251(4) et des définitions qui s'y rapportent, la «défense» prévue par l'article pourrait disparaître complètement.

A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. Subsection (4) states simply that a therapeutic abortion committee may grant a certificate when it determines that a continuation of a pregnancy would be likely to endanger the "life or health" of the pregnant woman. It was noted above that "health" is not defined for the purposes of the section. The Crown admitted in its supplementary factum that the medical witnesses at trial testified uniformly that the "health" standard was ambiguous, but the Crown derives comfort from the fact that "the medical witnesses were unanimous in their approval of the broad World Health Organization definition of health". The World Health Organization defines "health" not merely as the absence of disease or infirmity, but as a state of physical, mental and social well-being.

I do not understand how the mere existence of a workable definition of "health" can make the use of the word in s. 251(4) any less ambiguous when that definition is nowhere referred to in the section. There is no evidence that therapeutic abortion committees are commonly applying the World Health Organization definition. Indeed, the Badgley Report indicates that the situation is quite the contrary (p. 20):

> There has been no sustained or firm effort in Canada to develop an explicit and operational definition of health, or to apply such a concept directly to the operation of induced abortion. In the absence of such a definition, each physician and each hospital reaches an individual decision on this matter. How the concept of health is variably defined leads to considerable inequity in the distribution and the accessibility of the abortion procedure.

Various expert doctors testified at trial that therapeutic abortion committees apply widely differing definitions of health. For some committees, psychological health is a justification for therapeutic abortion; for others it is not. Some committees routinely refuse abortions to married women

Le régime administratif établi par le par. 251(4) souffre d'une autre faiblesse: l'absence de norme adéquate à laquelle les comités de l'avortement thérapeutique doivent se référer lorsqu'ils ont à décider si un avortement thérapeutique devrait, en droit, être autorisé. Le paragraphe (4) dit simplement que le comité de l'avortement thérapeutique peut délivrer un certificat lorsqu'il estime que la poursuite de la grossesse pourrait mettre en danger la «vie ou la santé» de la femme enceinte. On a déjà signalé que le terme «santé» n'est pas défini aux fins de l'article. Le ministère public a reconnu dans son mémoire supplémentaire que, dans leurs dépositions au procès, les témoins médicaux ont tous dit que la norme de la "santé" était ambiguë, mais il trouve un certain réconfort dans le fait que [TRADUCTION] «les témoins médicaux ont unanimement approuvé la définition large du terme santé adoptée par l'Organisation mondiale de la santé». L'Organisation mondiale de la santé définit la «santé» non comme l'absence de maladie ou d'infirmité, mais plutôt comme un état physique, mental et social de bien-être.

Je ne comprends pas comment la simple existence d'une définition utilisable du terme «santé» peut rendre l'emploi de ce terme au par. 251(4) moins ambigu, alors que nulle part dans cet article on ne se réfère à cette définition. Il n'y a pas la moindre preuve que les comités de l'avortement thérapeutique appliquent généralement la définition de l'Organisation mondiale de la santé. En fait, le rapport Badgley révèle que c'est exactement le contraire (à la p. 22):

> Aucun effort sérieux et soutenu n'a été fait au Canada pour trouver une définition explicite et fonctionnelle de la santé ou pour appliquer un tel concept à l'avortement provoqué. En l'absence d'une telle définition, chaque médecin et chaque hôpital doit prendre une décision personnelle à ce sujet. Les différentes définitions de la santé ont conduit à des inégalités importantes dans la répartition et l'accessibilité du recours à l'avortement.

Plusieurs médecins sont venus témoigner au procès, à titre d'expert, pour dire que les comités de l'avortement thérapeutique appliquent des définitions fort différentes de la santé. Pour certains comités, la santé psychologique justifie un avortement thérapeutique; pour d'autres non. Certains

unless they are in physical danger, while for other committees it is possible for a married woman to show that she would suffer psychological harm if she continued with a pregnancy, thereby justifying an abortion. It is not typically possible for women to know in advance what standard of health will be applied by any given committee. Parker A.C.J.H.C., at p. 377, found clear evidence that s. 251(4) provided no adequate guidelines for therapeutic abortion committees charged with determining when an abortion should legally be available:

> The [Badgley] report, and other evidence adduced in support of this motion, indicates that each therapeutic abortion committee is free to establish its own guidelines and many committees apply arbitrary requirements. Some committees refuse to approve applications for second abortions unless the patient consents to sterilization, others require psychiatric assessment, and others do not grant approval to married women.

It is no answer to say that "health" is a medical term and that doctors who sit on therapeutic abortion committees must simply exercise their professional judgment. A therapeutic abortion committee is a strange hybrid, part medical committee and part legal committee. Again, in the words of Parker A.C.J.H.C., at p. 381:

> Given the consequences of the issuing or refusing to issue a certificate, I have some difficulty in reducing the committee's powers to merely that of stating its opinion as to the likelihood of the continuation of the pregnancy endangering the applicant's life or health. The decision of the committee has a very real effect on access to abortion for the pregnant female applicant, and the potential criminal liability of both the applicant and the physician who performs the operation.

When the decision of the therapeutic abortion committee is so directly laden with legal consequences, the absence of any clear legal standard to be applied by the committee in reaching its decision is a serious procedural flaw.

comités refusent habituellement un avortement aux femmes mariées, à moins qu'elles ne soient physiquement en danger, alors que, pour d'autres comités, il est possible à une femme mariée de démontrer qu'elle subirait un préjudice psychologique si la grossesse se poursuivait, et de justifier ainsi un avortement. Il n'est, en général, pas possible que les femmes sachent à l'avance quelle norme de santé un comité donné appliquera. Le juge en chef adjoint Parker, à la p. 377, a jugé que la preuve montrait clairement que le par. 251(4) ne fournit pas de directives adéquates aux comités de l'avortement thérapeutique chargés de décider quand, légalement, il peut y avoir avortement:

> [TRADUCTION] Le rapport [Badgley], et d'autres preuves présentées pour étayer cette requête montrent que chaque comité de l'avortement thérapeutique est libre de se doter de ses propres directives et que de nombreux comités ont des exigences arbitraires. Certains comités rejettent les demandes de deuxième avortement, à moins que la patiente ne consente à la stérilisation; d'autres exigent un examen psychiatrique et d'autres encore n'accordent pas d'approbation dans le cas des femmes mariées.

Il ne sert à rien de dire que le terme «santé» est un terme médical et que les médecins qui siègent aux comités de l'avortement thérapeutique ne font qu'exercer leur jugement professionnel. Un comité de l'avortement thérapeutique est un hybride étrange, en partie comité médical et en partie comité légal. Ici encore, pour reprendre les propos du juge en chef adjoint Parker, à la p. 381:

> [TRADUCTION] Étant donné les conséquences de la délivrance ou du refus de délivrer un certificat, il m'est difficile de réduire les pouvoirs du comité à une simple déclaration d'opinion sur les risques pour la vie ou la santé de la requérante s'il y a poursuite de la grossesse. La décision du comité a des effets très réels sur l'obtention d'un avortement par la femme enceinte requérante et sur l'éventuelle responsabilité criminelle que pourraient encourir tant la requérante que le médecin qui procède à l'intervention.

Lorsque la décision du comité de l'avortement thérapeutique a des conséquences juridiques aussi directes, l'absence de norme légale claire à appliquer par le comité pour arriver à sa décision constitue un vice de procédure grave.

The combined effect of all of these problems with the procedure stipulated in s. 251 for access to therapeutic abortions is a failure to comply with the principles of fundamental justice. In *Re B.C. Motor Vehicle Act*, Lamer J. held, at p. 503, that "the principles of fundamental justice are to be found in the basic tenets of our legal system". One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory. The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

L'effet combiné de tous ces problèmes et de la procédure établie par l'art. 251 pour l'obtention des avortements thérapeutiques constitue un manquement aux principes de justice fondamentale. Dans le *Renvoi: Motor Vehicle Act de la C.-B.*, le juge Lamer dit, à la p. 503: «les principes de justice fondamentale se trouvent dans les préceptes fondamentaux de notre système juridique». L'un des préceptes fondamentaux de notre système de justice criminelle est que, lorsque le Parlement crée une défense à l'égard d'une accusation criminelle, celle-ci ne doit être ni illusoire ni à ce point difficile à faire valoir qu'elle soit illusoire en pratique. Le droit criminel constitue une forme très spéciale de réglementation gouvernementale, car il cherche à exprimer la désapprobation collective de notre société pour certains actes ou omissions. Lorsqu'un moyen de défense est prévu, surtout lorsqu'il s'agit d'un moyen de défense conçu spécifiquement pour une accusation particulière, c'est parce que le législateur a jugé que la désapprobation de la société n'est pas justifiée lorsque les conditions de ce moyen de défense sont remplies.

Consider then the case of a pregnant married woman who wishes to apply for a therapeutic abortion certificate because she fears that her psychological health would be impaired seriously if she carried the foetus to term. The uncontroverted evidence reveals that there are many areas in Canada where such a woman would simply not have access to a therapeutic abortion. She may live in an area where no hospital has four doctors; no therapeutic abortion committee can be created. Equally, she may live in a place where the treatment functions of the nearby hospitals do not satisfy the definition of "accredited hospital" in s. 251(6). Or she may live in a province where the provincial government has imposed such stringent requirements on hospitals seeking to create therapeutic abortion committees that no hospital can qualify. Alternatively, our hypothetical woman may confront a therapeutic abortion committee in her local hospital which defines "health" in purely physical terms or which refuses to countenance abortions for married women. In each of these cases, it is the administrative structures and procedures established by s. 251 itself that would in

Prenons donc le cas d'une femme mariée enceinte qui désire demander un certificat d'avortement thérapeutique parce qu'elle craint que sa santé psychologique soit gravement atteinte si elle mène le fœtus à terme. D'après la preuve indiscutée, il existe de nombreuses régions au Canada où cette femme ne pourrait tout simplement pas obtenir un avortement thérapeutique. Il se peut qu'elle vive dans une région où il n'y a pas d'hôpitaux où exercent quatre médecins; aucun comité d'avortement thérapeutique ne peut être créé. De même, il se peut qu'elle vive dans une région où les traitements qu'assurent les hôpitaux alentour ne répondent pas à la définition d'«hôpital accrédité» du par. 251(6). Ou il se peut qu'elle habite dans une province où le gouvernement provincial a imposé aux hôpitaux désireux de former des comités de l'avortement thérapeutique des conditions si rigoureuses qu'aucun hôpital ne peut y satisfaire. Ou encore, notre femme hypothétique peut avoir affaire à un comité de l'avortement thérapeutique, à l'hôpital local, qui définit la «santé» en termes purement somatiques ou qui refuse d'approuver l'avortement pour les femmes mariées. Dans

practice prevent the woman from gaining the benefit of the defence held out to her in s. 251(4).

The facts indicate that many women do indeed confront these problems. Doctors from the Chedoke-McMaster Hospital in Hamilton testified that they received telephone calls from women throughout Ontario who had applied for therapeutic abortions at local hospitals and been refused. At one point, 80 per cent of abortion patients at Chedoke-McMaster were from outside Hamilton, and the hospital was forced to restrict access for women from outside its catchment area. The Powell Report revealed that in over 50 per cent of Ontario counties in 1986, the majority of women obtaining abortions had the procedure away from their place of residence (p. 7). Even more telling is the fact that "a minimum of 5000 Ontario women obtain abortions each year in free-standing clinics in Canada and the United States" (p. 7).

The Crown argues in its supplementary factum that women who face difficulties in obtaining abortions at home can simply travel elsewhere in Canada to procure a therapeutic abortion. That submission would not be especially troubling if the difficulties facing women were not in large measure created by the procedural requirements of s. 251 itself. If women were seeking anonymity outside their home town or were simply confronting the reality that it is often difficult to obtain medical services in rural areas, it might be appropriate to say "let them travel". But the evidence establishes convincingly that it is the law itself which in many ways prevents access to local therapeutic abortion facilities. The enormous emotional and financial burden placed upon women who must travel long distances from home to obtain an abortion is a burden created in many instances by Parliament. Moreover, it is not accurate to say to women who would seem to qualify under s. 251(4) that they can get a therapeutic abortion as long as

chacun de ces cas, ce sont les structures administratives et la procédure établie par l'art. 251 lui-même qui, en pratique, interdisent à cette femme de se prévaloir de la défense que lui accorde le par. 251(4).

Les faits démontrent qu'un grand nombre de femmes se trouvent dans une situation de ce genre. Les médecins de l'hôpital Chedoke-McMaster d'Hamilton ont témoigné avoir reçu des appels téléphoniques de femmes de toutes les régions de l'Ontario qui avaient fait sans succès une demande d'avortement thérapeutique aux hôpitaux locaux. À une certaine époque, 80 pour 100 des patientes admises à Chedoke-McMaster pour se faire avorter venaient de l'extérieur d'Hamilton, aussi l'hôpital a-t-il été forcé de limiter l'admission des femmes venant de l'extérieur de la zone qu'il dessert. Le rapport Powell révèle que, dans plus de 50 pour 100 des comtés de l'Ontario, en 1986, la majorité des femmes qui ont obtenu un avortement l'ont fait à l'extérieur de leur lieu de résidence (à la p. 7). Mais, fait plus révélateur encore, [TRADUCTION] «un minimum de cinq mille Ontariennes se font chaque année avorter dans des cliniques indépendantes, au Canada et aux États-Unis» (à la p. 7).

Le ministère public soutient, dans son mémoire additionnel, que les femmes qui éprouvent des difficultés à se faire avorter au lieu de leur domicile n'ont qu'à se déplacer pour obtenir un avortement thérapeutique ailleurs au Canada. Cet argument ne serait pas spécialement gênant si les difficultés auxquelles les femmes ont à faire face ne résultaient pas dans une large mesure des exigences procédurales de l'art. 251 lui-même. Si les femmes ne faisaient que rechercher l'anonymat en allant ailleurs ou se trouvaient simplement confrontées aux difficultés habituelles qu'il y a à obtenir des soins médicaux dans les régions rurales, il pourrait être approprié de dire «qu'elles aillent ailleurs». Mais la preuve établit de façon concluante que c'est la loi elle-même qui, de bien des manières, les empêche d'avoir accès aux institutions locales offrant l'avortement thérapeutique. L'énorme fardeau émotionnel et financier imposé aux femmes qui doivent se déplacer loin de chez elles pour obtenir un avortement est un fardeau

they are willing to travel. Ms. Carolyn Egan, administrative co-ordinator of the Birth Control and Venereal Disease Centre of Toronto, testified that many hospitals in Toronto had been forced to establish arbitrary abortion quotas, and that some Toronto hospitals restricted access to women inside the geographical area the hospitals were designated to serve. A woman from outside Toronto could run into serious difficulties attempting to procure a therapeutic abortion in that city. As noted above, the situation in Hamilton is now comparable to that in Toronto, because of the geographic restrictions imposed at the Chedoke-McMaster Hospital. Meanwhile, of course, days and weeks may pass and a woman may ultimately be forced to undergo a more dangerous abortion procedure. Or she may become desperate and choose to travel even further afield, to Quebec or to the United States, to obtain an abortion in a free-standing clinic.

créé dans bien des cas par le Parlement. En outre, il n'est pas exact de dire aux femmes qui, au départ, sembleraient admissibles en vertu du par. 251(4) qu'elles pourront obtenir un avortement thérapeutique pourvu qu'elles acceptent de se déplacer. Madame Carolyn Egan, coordonnatrice administrative du Birth Control and Venereal Disease Centre de Toronto, a déclaré dans son témoignage que de nombreux hôpitaux de Toronto avaient été forcés de contingenter arbitrairement les avortements et que certains hôpitaux torontois n'admettaient que les femmes résidant dans la zone géographique qu'ils devaient desservir. Une femme de l'extérieur de Toronto peut éprouver de sérieuses difficultés à obtenir un avortement thérapeutique dans cette ville. Comme on l'a dit précédemment, la situation à Hamilton se compare maintenant à celle de Toronto, vu les restrictions géographiques imposées à l'hôpital Chedoke-McMaster. Entre temps, bien entendu, les jours et les semaines passent et une femme peut être finalement obligée de subir un avortement selon une procédure plus dangereuse. Ou elle peut en désespoir de cause choisir d'aller plus loin encore, au Québec ou aux États-Unis, pour obtenir un avortement dans une clinique indépendante.

A majority of this Court held in *R. v. Jones*, at p. 304, *per* La Forest J., that:

> The provinces must be given room to make choices regarding the type of administrative structure that will suit their needs unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice. [Emphasis in original.]

La Cour, à la majorité, a déjà jugé dans l'arrêt *R. c. Jones*, à la p. 304 (le juge La Forest), que:

> Les provinces doivent avoir la possibilité de faire des choix quant au type de structure administrative qui répondra à leurs besoins, à moins que le recours à une telle structure ne soit en lui-même nettement injuste, compte tenu des décisions qu'elle est appelée à prendre, au point de violer les principes de justice fondamentale. [Souligné dans l'original.]

Similarly, Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability. But if that structure is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice", that structure must be struck down. In the present case, the structure — the system regulating access to therapeutic abortions — is manifestly unfair. It contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to women

De même, le Parlement doit avoir la latitude voulue pour concevoir une structure administrative et procédurale appropriée qui permette à une défense particulière de jouer, afin d'éviter une responsabilité criminelle. Mais, si cette structure est «nettement injuste, compte tenu des décisions qu'elle est appelée à prendre, au point de violer les principes de justice fondamentale», elle doit être invalidée. En l'espèce, la structure — le système régissant l'accès aux avortements thérapeutiques — est manifestement injuste. Elle comporte tellement de barrières potentielles à son propre fonctionnement que la défense qu'elle institue sera,

who would *prima facie* qualify for the defence, or at least would force such women to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available.

I conclude that the procedures created in s. 251 of the *Criminal Code* for obtaining a therapeutic abortion do not comport with the principles of fundamental justice. It is not necessary to determine whether s. 7 also contains a substantive content leading to the conclusion that, in some circumstances at least, the deprivation of a pregnant woman's right to security of the person can never comport with fundamental justice. Simply put, assuming Parliament can act, it must do so properly. For the reasons given earlier, the deprivation of security of the person caused by s. 251 as a whole is not in accordance with the second clause of s. 7. It remains to be seen whether s. 251 can be justified for the purposes of s. 1 of the *Charter*.

V

Section 1 Analysis

Section 1 of the *Charter* can potentially be used to "salvage" a legislative provision which breaches s. 7: *Re B.C. Motor Vehicle Act*, *per* Lamer J., at p. 520. The principles governing the necessary analysis under s. 1 were set down in *R. v. Big M Drug Mart Ltd.*, and, more precisely, in *R. v. Oakes*, [1986] 1 S.C.R. 103. A statutory provision which infringes any section of the *Charter* can only be saved under s. 1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M Drug Mart Ltd.*, at p. 352) and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society. This second aspect ensures that the legislative means are proportional to the legislative ends (*Oakes*, at pp. 139-40). In *Oakes*, at p. 139, the Court referred to three considerations which are typically useful in assessing the

dans de nombreuses circonstances, hors de portée en pratique des femmes qui, au départ, auraient pu s'en prévaloir ou, à tout le moins, forcera ces femmes à se déplacer sur de grandes distances et à subir de grands frais et inconvénients pour bénéficier d'une défense que l'on considère généralement ouverte à tous.

Je conclus que la procédure instituée par l'art. 251 du *Code criminel* pour obtenir un avortement thérapeutique n'est pas conforme aux principes de justice fondamentale. Il n'est pas nécessaire de déterminer si l'art. 7 a aussi un contenu de droit positif dont on peut conclure que, dans certaines circonstances au moins, l'atteinte au droit d'une femme enceinte à la sécurité de sa personne ne peut jamais s'accorder avec la justice fondamentale. En bref, si l'on présume que le Parlement peut agir, il doit le faire de la façon appropriée. Pour les motifs déjà exposés, l'atteinte à la sécurité de la personne causée par l'art. 251 dans son ensemble n'est pas conforme au second volet de l'art. 7. Il reste à voir si l'art. 251 peut être justifié en raison de l'article premier de la *Charte*.

V

Analyse de l'article premier

L'article premier de la *Charte* peut potentiellement servir à «sauvegarder» une disposition législative qui enfreint l'art. 7: *Renvoi: Motor Vehicle Act de la C.-B.*, le juge Lamer, à la p. 520. Les principes régissant l'analyse requise aux termes de l'article premier ont été énoncés dans l'arrêt *R. c. Big M Drug Mart Ltd.* et, de façon plus précise encore, dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. Une disposition législative qui enfreint un article de la *Charte* ne peut être sauvegardée en vertu de l'article premier que si la partie qui en soutient la validité peut démontrer, en premier lieu, que l'objectif de la disposition est «suffisamment important pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution» (arrêt *R. c. Big M Drug Mart Ltd.*, à la p. 352) et, en second lieu, que les moyens choisis pour l'emporter sur le droit ou la liberté sont raisonnables et que leur justification peut se démontrer dans une société libre et démocratique. Ce second aspect fait en sorte que les moyens législatifs soient propor-

proportionality of means to ends. First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as little as possible the right or freedom under consideration. Third, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

tionnels aux fins législatives (*Oakes*, aux pp. 139-140). Dans l'arrêt *Oakes*, à la p. 139, la Cour se réfère à trois facteurs particulièrement utiles à l'évaluation de la proportionnalité entre les moyens et les fins. En premier lieu, les moyens choisis pour atteindre un objectif important doivent être rationnels, justes et non arbitraires. En second lieu, les moyens législatifs doivent être de nature à porter le moins possible atteinte au droit ou à la liberté en cause. En troisième lieu, les effets de la restriction du droit ou de la liberté en cause ne doivent pas être disproportionnés par rapport à l'objectif recherché.

The appellants contended that the sole purpose of s. 251 of the *Criminal Code* is to protect the life and health of pregnant women. The respondent Crown submitted that s. 251 seeks to protect not only the life and health of pregnant women, but also the interests of the foetus. On the other hand, the Crown conceded that the Court is not called upon in this appeal to evaluate any claim to "foetal rights" or to assess the meaning of "the right to life". I expressly refrain from so doing. In my view, it is unnecessary for the purpose of deciding this appeal to evaluate or assess "foetal rights" as an independent constitutional value. Nor are we required to measure the full extent of the state's interest in establishing criteria unrelated to the pregnant woman's own priorities and aspirations. What we must do is evaluate the particular balance struck by Parliament in s. 251, as it relates to the priorities and aspirations of pregnant women and the government's interests in the protection of the foetus.

Les appelants soutiennent que l'art. 251 du *Code criminel* a pour seul but la protection de la vie et de la santé des femmes enceintes. Le ministère public intimé fait valoir que l'art. 251 cherche à protéger non seulement la vie et la santé des femmes enceintes, mais aussi les intérêts du fœtus. D'autre part, le ministère public a reconnu que la Cour n'est pas invitée en l'espèce à évaluer des arguments relatifs aux «droits du fœtus» ni à déterminer le sens du «droit à la vie». Je m'abstiens expressément de me prononcer à cet égard. À mon avis, il n'est pas nécessaire, pour les besoins de l'espèce, d'évaluer ou de déterminer les «droits du fœtus» en tant que valeur constitutionnelle indépendante. Il n'est pas non plus requis de prendre toute la mesure de l'intérêt qu'a l'État à établir des critères indépendants des propres priorités et aspirations d'une femme enceinte. Ce que nous devons faire, c'est évaluer l'équilibre particulier établi par le Parlement à l'art. 251, dans la mesure où il se rapporte aux priorités et aspirations des femmes enceintes et les intérêts qu'a le gouvernement à protéger le fœtus.

Section 251 provides that foetal interests are not to be protected where the "life or health" of the woman is threatened. Thus, Parliament itself has expressly stated in s. 251 that the "life or health" of pregnant women is paramount. The procedures of s. 251(4) are clearly related to the pregnant woman's "life or health" for that is the very phrase used by the subsection. As McIntyre J. states in his reasons (at p. 155), the aim of s. 251(4) is "to restrict abortion to cases where the continuation of the pregnancy would, or would likely, be injurious

L'article 251 prescrit que les intérêts du fœtus ne doivent pas être protégés lorsque "la vie ou la santé" de la femme est en danger. Le Parlement a donc lui-même expressément déclaré à l'art. 251 que "la vie ou la santé" des femmes enceintes l'emporte. Il est clair que la procédure prévue au par. 251(4) se rapporte à "la vie ou la santé" de la femme enceinte, car c'est l'expression même utilisée dans le paragraphe. Comme le juge McIntyre le dit dans ses motifs (à la p. 155), le but du par. 251(4) vise "à limiter l'avortement aux cas où la

to the life or health of the woman concerned, not to provide unrestricted access to abortion." I have no difficulty in concluding that the objective of s. 251 as a whole, namely, to balance the competing interests identified by Parliament, is sufficiently important to meet the requirements of the first step in the *Oakes* inquiry under s. 1. I think the protection of the interests of pregnant women is a valid governmental objective, where life and health can be jeopardized by criminal sanctions. Like Beetz and Wilson JJ., I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective. As the Court of Appeal stated at p. 366, "the contemporary view [is] that abortion is not always socially undesirable behavior."

I am equally convinced, however, that the means chosen to advance the legislative objectives of s. 251 do not satisfy any of the three elements of the proportionality component of *R. v. Oakes*. The evidence has led me to conclude that the infringement of the security of the person of pregnant women caused by s. 251 is not accomplished in accordance with the principles of fundamental justice. It has been demonstrated that the procedures and administrative structures created by s. 251 are often arbitrary and unfair. The procedures established to implement the policy of s. 251 impair s. 7 rights far more than is necessary because they hold out an illusory defence to many women who would *prima facie* qualify under the exculpatory provisions of s. 251(4). In other words, many women whom Parliament professes not to wish to subject to criminal liability will nevertheless be forced by the practical unavailability of the supposed defence to risk liability or to suffer other harm such as a traumatic late abortion caused by the delay inherent in the s. 251 system. Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved. Indeed, to the

continuation de la grossesse nuirait ou nuirait probablement à la vie ou à la santé de la femme en cause, et non pas à donner la possibilité illimitée de se faire avorter». Il ne m'est donc pas difficile de conclure que l'objectif de l'art. 251 dans son ensemble, soit d'équilibrer les intérêts en concurrence identifiés par le Parlement, est suffisamment important pour répondre aux exigences du premier volet de l'analyse, selon l'arrêt *Oakes*, au regard de l'article premier. Je pense que la protection des intérêts des femmes enceintes est un objectif gouvernemental valide, lorsque la vie et la santé peuvent être mises en danger par des sanctions criminelles. Comme les juges Beetz et Wilson, je suis d'accord pour dire que la protection des intérêts du fœtus par le Parlement constitue aussi un objectif gouvernemental valide. Il s'ensuit qu'équilibrer ces intérêts, la vie et la santé des femmes étant un facteur majeur, est clairement un objectif gouvernemental important. Comme la Cour d'appel l'a dit à la p. 366 [TRADUCTION] «le point de vue contemporain [est que] l'avortement n'est pas toujours une conduite socialement répréhensible».

Je suis également convaincu, néanmoins, que les moyens choisis pour atteindre les objectifs législatifs de l'art. 251 ne sont conformes à aucun des trois éléments de la proportionnalité énoncée par l'arrêt *R. c. Oakes*. La preuve m'a amené à conclure que l'atteinte à la sécurité de la personne des femmes enceintes causée par l'art. 251 n'est pas conforme avec les principes de justice fondamentale. Il a été démontré que la procédure et les structures administratives instaurées par l'art. 251 sont souvent arbitraires et injustes. La procédure établie pour mettre en œuvre la politique de l'art. 251 porte atteinte aux droits garantis par l'art. 7 au-delà de ce qui est nécessaire, puisqu'elle ne fournit qu'une défense illusoire à nombre de femmes qui, *prima facie*, pourraient se prévaloir des dispositions disculpatoires du par. 251(4). En d'autres termes, beaucoup de femmes que le Parlement prétend ne pas vouloir tenir criminellement responsables seront néanmoins forcées, par l'impossibilité pratique de se prévaloir de cette supposée défense, de prendre le risque d'être tenues responsables ou de s'exposer à un autre danger, tel un avortement tardif traumatisant, en raison des délais inhérents au système de l'art. 251. Enfin,

extent that s. 251(4) is designed to protect the life and health of women, the procedures it establishes may actually defeat that objective. The administrative structures of s. 251(4) are so cumbersome that women whose health is endangered by pregnancy may not be able to gain a therapeutic abortion, at least without great trauma, expense and inconvenience.

I conclude, therefore, that the cumbersome structure of subs. (4) not only unduly subordinates the s. 7 rights of pregnant women but may also defeat the value Parliament itself has established as paramount, namely, the life and health of the pregnant woman. As I have noted, counsel for the Crown did contend that one purpose of the procedures required by subs. (4) is to protect the interests of the foetus. State protection of foetal interests may well be deserving of constitutional recognition under s. 1. Still, there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion.

Section 251 of the *Criminal Code* cannot be saved, therefore, under s. 1 of the *Charter*.

VI

Defence Counsel's Address to the Jury

In his concluding remarks to the jury at the trial of the appellants, defence counsel asserted:

> The judge will tell you what the law is. He will tell you about the ingredients of the offence, what the Crown has to prove, what the defences may be or may not be, and you must take the law from him. But I submit to you that it is up to you and you alone to apply the law to this evidence and you have a right to say it shouldn't be applied.

pour nombre de femmes enceintes, les effets de la limitation des droits garantis par l'art. 7 sont disproportionnés par rapport à l'objectif recherché. D'ailleurs, dans la mesure où le par. 251(4) est conçu pour la protection de la vie et la santé des femmes, la procédure qu'il établit peut, en fait, mettre cet objectif en échec. Les structures administratives du par. 251(4) sont si lourdes que les femmes dont la santé est menacée par leur grossesse peuvent se trouver dans l'impossibilité d'obtenir un avortement thérapeutique, si ce n'est au prix de traumatismes, de dépenses et d'inconvénients majeurs.

Je conclus donc que la structure lourde du par. (4) non seulement assujettit indûment les droits des femmes enceintes en vertu de l'art. 7, mais peut aussi mettre en échec la valeur que le Parlement lui-même a établie comme la plus importante, soit la vie et la santé de la femme enceinte. Comme je l'ai noté, le substitut du procureur général a effectivement plaidé que l'un des buts de la procédure établie par le par. (4) est de protéger les intérêts du fœtus. La protection des intérêts du fœtus par l'État peut bien mériter une reconnaissance constitutionnelle en vertu de l'article premier. Cependant, on ne peut échapper au fait que le Parlement a omis d'établir soit une norme soit une procédure par laquelle de tels intérêts pourraient prévaloir sur ceux de la femme d'une façon juste et non arbitraire.

L'article 251 du *Code criminel* ne peut donc être sauvegardé en vertu de l'article premier de la *Charte*.

VI

La plaidoirie de l'avocat de la défense à l'intention du jury

En terminant sa plaidoirie au procès des appelants, l'avocat de la défense, s'adressant au jury, a déclaré:

> [TRADUCTION] Le juge va vous dire quel est le droit. Il vous dira quels éléments composent l'infraction, ce que le ministère public doit prouver, quelles défenses sont ou ne sont pas admissibles, et vous devez prendre son énoncé du droit. Mais moi je vous dis que c'est à vous, et à vous seul, d'appliquer le droit à ces éléments de preuve et vous avez le droit de dire qu'il ne devrait pas être appliqué.

The burden of his argument was that the jury should not apply s. 251 if they thought that it was a bad law, and that, in refusing to apply the law, they could send a signal to Parliament that the law should be changed. Although my disposition of the appeal makes it unnecessary, strictly speaking, to review Mr. Manning's argument before the jury, I find the argument so troubling that I feel compelled to comment.

It has long been settled in Anglo-Canadian criminal law that in a trial before judge and jury, the judge's role is to state the law and the jury's role is to apply that law to the facts of the case. In *Joshua v. The Queen*, [1955] A.C. 121 (P.C.), at p. 130, Lord Oaksey enunciated the principle succinctly:

> It is a general principle of British law that on a trial by jury it is for the judge to direct the jury on the law and in so far as he thinks necessary on the facts, but the jury, whilst they must take the law from the judge, are the sole judges on the facts.

The jury is one of the great protectors of the citizen because it is composed of twelve persons who collectively express the common sense of the community. But the jury members are not expert in the law, and for that reason they must be guided by the judge on questions of law.

The contrary principle contended for by Mr. Manning, that a jury may be encouraged to ignore a law it does not like, could lead to gross inequities. One accused could be convicted by a jury who supported the existing law, while another person indicted for the same offence could be acquitted by a jury who, with reformist zeal, wished to express disapproval of the same law. Moreover, a jury could decide that although the law pointed to a conviction, the jury would simply refuse to apply the law to an accused for whom it had sympathy. Alternatively, a jury who feels antipathy towards an accused might convict despite a law which points to acquittal. To give a harsh but I think telling example, a jury fueled by the passions of racism could be told that they need not apply the law against murder to a white man who had killed a black man. Such a possibility need only be stated to reveal the potentially frightening implications of

Essentiellement, cette plaidoirie soutient que le jury ne devrait pas appliquer l'art. 251 s'il pense qu'il s'agit d'une mauvaise loi et que, en refusant d'appliquer la loi, il signale au Parlement qu'il faut la changer. Quoique, vu la façon dont je me prononce en l'espèce, il ne me soit pas nécessaire, à strictement parler, d'examiner la plaidoirie de Me Manning devant le jury, l'argument m'a paru si troublant que je me sens obligé de le commenter.

Il est établi depuis longtemps en droit criminel anglo-canadien que, dans un procès devant un juge et un jury, le rôle du juge consiste à dire le droit et celui du jury à appliquer ce droit aux faits de l'espèce. Dans l'arrêt *Joshua v. The Queen*, [1955] A.C. 121 (C.P.), à la p. 130, Lord Oaksey énonce succinctement ce principe:

> [TRADUCTION] C'est un principe général du droit britannique qu'au cours d'un procès par jury, il appartient au juge d'instruire le jury sur le droit et, dans la mesure où il l'estime nécessaire, sur les faits, mais que le jury, s'il doit prendre le droit tel qu'il lui est dicté par le juge, reste seul juge des faits.

Le jury est l'un des grands protecteurs du citoyen puisqu'il est composé de douze personnes qui expriment collectivement le bon sens de la société. Mais les membres du jury ne sont pas des experts en droit et, pour cette raison, ils doivent être guidés par le juge sur les questions de droit.

Le principe contraire avancé par Me Manning selon lequel on peut encourager le jury à ignorer une règle de droit qu'il n'aime pas, pourrait conduire à de graves inéquités. Un jury pourrait appliquer le droit en vigueur et condamner un accusé alors qu'un autre jury, plein de zèle réformiste, acquitterait un autre inculpé de la même infraction pour exprimer sa désapprobation du même principe. En outre, le jury pourrait décider que, si la loi oblige à condamner, il refuse néanmoins d'appliquer la loi à un accusé sympathique. Au contraire, un jury auquel un accusé est antipathique pourrait le condamner, en dépit de la loi qui exige l'acquittement. Pour donner un exemple brutal mais, me semble-t-il, frappant, un jury entraîné par les passions du racisme pourrait se faire dire qu'il n'a pas à appliquer, à un blanc qui a tué un noir, la loi qui interdit le meurtre. Il suffit d'évoquer cette possibilité pour saisir les répercussions potentielle-

Mr. Manning's assertions. The dangerous argument that a jury may be encouraged to disregard the law was castigated as long ago as 1784 by Lord Mansfield in a criminal libel case, *R. v. Shipley* (1784), 4 Dougl. 73, 99 E.R. 774, at p. 824:

So the jury who usurp the judicature of law, though they happen to be right, are themselves wrong, because they are right by chance only, and have not taken the constitutional way of deciding the question. It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences.

To be free is to live under a government by law .... Miserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or, which is the same thing, no certain administration of law, to protect individuals, or to guard the State.

. . .

In opposition to this, what is contended for? — That the law shall be, in every particular cause, what any twelve men, who shall happen to be the jury, shall be inclined to think; liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town, where thousands, more or less, are concerned in the publication of newspapers, paragraphs, and pamphlets. Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.

I can only add my support to that eloquent statement of principle.

It is no doubt true that juries have a *de facto* power to disregard the law as stated to the jury by the judge. We cannot enter the jury room. The jury is never called upon to explain the reasons which lie behind a verdict. It may even be true that in some limited circumstances the private decision of a jury to refuse to apply the law will constitute, in the words of a Law Reform Commission of Canada working paper, "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law" (Law Reform Commission of Canada, Working Paper 27, *The Jury in Criminal Trials* (1980)). But recognizing this reality is a far cry from suggesting that coun-

ment effrayantes des assertions de Me Manning. Lord Mansfield critiquait déjà en 1784 ce dangereux argument qu'un jury peut être encouragé à ne pas tenir compte de la loi dans une affaire de libelle criminel dans l'arrêt *R. v. Shipley* (1784), 4 Dougl. 73, 99 E.R. 774, à la p. 824:

[TRADUCTION] Ainsi le jury qui usurpe le pouvoir de se prononcer sur la loi, même s'il se trouve à juger bien, a néanmoins tort, parce qu'il juge bien par pur hasard, sans emprunter la façon constitutionnelle de trancher la question. C'est le devoir du juge, dans toutes les affaires de droit commun, de dire aux jurés comment rendre justice, bien qu'il soit en leur pouvoir de ne pas la rendre, ce qui est une affaire entièrement entre Dieu et leur propre conscience.

Être libre, c'est vivre sous la tutelle de la loi [...] Misérable est la condition des individus, dangereuse est celle de l'État, si aucune loi n'est certaine ou, ce qui revient au même, s'il n'y a aucune certitude qu'elle sera appliquée pour protéger les individus ou garder l'État.

. . .

Contre cela que prétend-on? — Que la loi doit être, dans chaque cas particulier, ce que douze hommes, dont le hasard a voulu qu'ils forment le jury, sont enclins à penser; et cela sans qu'aucun appel ne soit possible, hors de tout contrôle, sous l'influence de tous les préjugés de la rumeur publique du jour et de la partialité engendrée par l'intérêt dans cette ville alors que des milliers, à peu de chose près, ont intérêt à ce que soient publiés journaux, brochures et dépliants. Selon une telle application de la loi, nul ne pourrait dire, aucun avocat ne pourrait donner pour avis qu'un article est ou non sujet à sanction.

Je ne puis que souscrire à cet énoncé éloquent du principe.

Certes, il est vrai que le jury jouit *de facto* du pouvoir de ne pas tenir compte des règles de droit que lui dicte le juge. Nous ne pouvons pénétrer dans la salle des délibérations du jury. Le jury n'a jamais à expliquer les raisons qui sous-tendent son verdict. Il se peut même que, dans certaines circonstances limitées, la décision secrète d'un jury de refuser d'appliquer la loi fasse de lui, pour reprendre les termes du document de travail de la Commission de réforme du droit du Canada: le "protecteur ultime des citoyens contre l'application arbitraire de la loi et contre l'oppression du gouvernement" (C.R.D.C., Document de travail 27, *Le jury en droit pénal* (1980)). Mais reconnaître

sel may encourage a jury to ignore a law they do not support or to tell a jury that it has a right to do so. The difference between accepting the reality of *de facto* discretion in applying the law and elevating such discretion to the level of a right was stated clearly by the United States Court of Appeals, District of Columbia Circuit, in *United States v. Dougherty*, 473 F.2d 1113 (1972), *per* Leventhal J., at p. 1134:

> The jury system has worked out reasonably well overall, providing "play in the joints" that imparts flexibility and avoid[s] undue rigidity. An equilibrium has evolved — an often marvelous balance — with the jury acting as a "safety valve" for exceptional cases, without being a wildcat or runaway institution. There is reason to believe that the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not expressly delineate a jury charter to carve out its own rules of law.

To accept Mr. Manning's argument that defence counsel should be able to encourage juries to ignore the law would be to disturb the "marvelous balance" of our system of criminal trials before a judge and jury. Such a disturbance would be irresponsible. I agree with the trial judge and with the Court of Appeal that Mr. Manning was quite simply wrong to say to the jury that if they did not like the law they need not enforce it. He should not have done so.

VII

Conclusion

Section 251 of the *Criminal Code* infringes the right to security of the person of many pregnant women. The procedures and administrative structures established in the section to provide for therapeutic abortions do not comply with the principles of fundamental justice. Section 7 of the *Charter* is infringed and that infringement cannot be saved under s. 1.

In oral argument, counsel for the Crown submitted that if the Court were to hold that procedural aspects of s. 251 infringed the *Charter*, only the procedures set out in the section should be struck

ce fait est très loin de suggérer qu'un avocat peut encourager un jury à méconnaître une loi qui ne lui plaît pas ou à lui dire qu'il a le droit de le faire. La différence entre l'acceptation du pouvoir discrétionnaire *de facto* d'appliquer la loi et l'élévation de ce pouvoir au niveau d'un droit a été exposée clairement par la United States Court of Appeals du district de Columbia, dans l'arrêt *United States v. Dougherty*, 473 F.2d 1113 (1972), le juge Leventhal, à la p. 1134:

> [TRADUCTION] Le système du jury fonctionne raisonnablement bien pourvu qu'il y ait «du jeu entre les joints» garantissant sa souplesse et évitant une trop grande rigidité. Un équilibre s'est établi — un équilibre souvent merveilleux — le jury servant de «soupape» dans des cas exceptionnels, sans aller jusqu'à se comporter comme un cheval fou ou comme une machine emballée. On aura raison de croire, pour que le jury arrive simultanément à faire modestement preuve d'équité et à éviter certains caprices intolérables, que cela dépend d'instructions formelles ne délimitant pas expressément une charte par laquelle le jury se doterait de ses propres règles de droit.

Accepter l'argument de Me Manning, qu'un avocat de la défense devrait pouvoir encourager le jury à méconnaître le droit, romprait le «merveilleux équilibre» de notre système de procès criminels par juge et jury. Un tel changement serait irresponsable. Je partage l'avis du juge du procès et de la Cour d'appel que Me Manning a tout simplement eu tort de dire au jury que si la loi ne lui plaisait pas, il pouvait ne pas l'appliquer. Il n'aurait pas dû le faire.

VII

Conclusion

L'article 251 du *Code criminel* porte atteinte au droit à la sécurité de la personne d'un grand nombre de femmes enceintes. La procédure et les structures administratives établies par l'article pour obtenir des avortements thérapeutiques ne sont pas conformes aux principes de justice fondamentale. Il y a atteinte à l'art. 7 de la *Charte*, atteinte que l'article premier ne saurait permettre.

Au cours des plaidoiries, l'avocat du ministère public a fait valoir que si la Cour devait juger que l'aspect procédural de l'art. 251 enfreignait la *Charte*, seule la procédure établie par l'article

down, that is subss. (4) and (5). After being pressed with questions from the bench, Ms. Wein conceded that the whole of s. 251 should fall if it infringed s. 7. Mr. Blacklock for the Attorney General of Canada took the same position. This was a wise approach, for in *Morgentaler (1975)*, at p. 676, the Court held that "s. 251 contains a comprehensive code on the subject of abortions, unitary and complete within itself". Having found that this "comprehensive code" infringes the *Charter*, it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section. The appeal should therefore be allowed and s. 251 as a whole struck down under s. 52(1) of the *Constitution Act, 1982*.

The first constitutional question is therefore answered in the affirmative as regards s. 7 of the *Charter* only. The second question, as regards s. 7 of the *Charter* only, is answered in the negative. Questions 3, 4 and 5 are answered in the negative. I answer question 6 in the manner proposed by Beetz J. It is not necessary to answer question 7.

The reasons of Beetz and Estey JJ. were delivered by

BEETZ J.—I have had the advantage of reading the reasons for judgment written by the Chief Justice, as well as the reasons written by Justice McIntyre and Justice Wilson.

I agree with the Chief Justice and Wilson J. that this case finds its resolution in the answers to the first two constitutional questions stated by the Chief Justice in so far as those questions relate to s. 7 and s. 1 of the *Canadian Charter of Rights and Freedoms*. Although the greatest part of my reasons is devoted to responding to the first two constitutional questions, I consider it necessary to answer the sixth constitutional question concerning the validity of s. 605(1)(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34, under the *Charter* in order to establish the Crown's right to appeal the verdict of acquittal in this case. Finally, I have decided that it is appropriate to address the appellants' arguments pertaining to s. 91(27) and s. 96 of the

devrait alors être annulée, soit les par. (4) et (5). Pressée de questions par la Cour, Me Wein a finalement concédé que tout l'art. 251 doit tomber s'il enfreint l'art. 7. Me Blacklock a pris la même position au nom du procureur général du Canada. C'était fort sage, car dans l'arrêt *Morgentaler (1975)*, à la p. 676, la Cour a jugé que: «l'art. 251 est un code sur l'avortement, un code entier et complet en lui-même». Ayant jugé que ce «code entier» enfreint la *Charte*, il n'appartient pas à la Cour de sélectionner divers aspects de l'art. 251 pour, en fait, réécrire l'article. Le pourvoi doit donc être accueilli et l'art. 251, en son entier, annulé en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*.

La première question constitutionnelle reçoit donc une réponse affirmative en ce qui concerne l'art. 7 de la *Charte* uniquement. La deuxième question reçoit une réponse négative en ce qui concerne l'art. 7 de la *Charte* uniquement. Les troisième, quatrième et cinquième questions reçoivent une réponse négative. Je réponds à la sixième question comme le propose le juge Beetz. Il n'est pas nécessaire de répondre à la septième question.

Version française des motifs des juges Beetz et Estey rendus par

LE JUGE BEETZ—J'ai eu l'avantage de prendre connaissance des motifs rédigés par le Juge en chef, ainsi que de ceux rédigés par le juge McIntyre et par le juge Wilson.

Je suis d'accord avec le Juge en chef et le juge Wilson pour dire que cette affaire trouve sa solution dans les réponses aux deux premières questions constitutionnelles formulées par le Juge en chef, dans la mesure où ces questions concernent l'art. 7 et l'article premier de la *Charte canadienne des droits et libertés*. Quoique la plus grande partie de mes motifs soit consacrée à répondre aux deux premières questions constitutionnelles, je considère qu'il est nécessaire de répondre à la sixième question constitutionnelle qui porte sur la validité de l'al. 605(1)*a*) du *Code criminel*, S.R.C. 1970, chap. C-34, aux termes de la *Charte* afin d'établir le droit de la poursuite d'en appeler du verdict d'acquittement en l'espèce. Enfin, j'ai décidé qu'il

Constitution Act, 1867, as well as the argument that s. 251 of the *Criminal Code* is in effect an unconstitutional delegation of legislative power.

Like the Chief Justice and Wilson J., I would allow the appeal and answer the first constitutional question in the affirmative and the second constitutional question in the negative. This however is a result which I reach for reasons which differ from those of the Chief Justice and those of Wilson J.

I find it convenient to outline at the outset the steps which lead me to this result:

I — Before the advent of the *Charter*, Parliament recognized, in adopting s. 251(4)(*c*) of the *Criminal Code*, that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health". In my view, this standard in s. 251(4) became entrenched at least as a minimum when the "right to life, liberty and security of the person" was enshrined in the *Canadian Charter of Rights and Freedoms* at s. 7.

II — "Security of the person" within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated.

III — According to the evidence, the procedural requirements of s. 251 of the *Criminal Code* significantly delay pregnant women's access to medical treatment resulting in an additional danger to their health, thereby depriving them of their right to security of the person.

était approprié d'analyser les arguments des appelants relativement au par. 91(27) et à l'art. 96 de la *Loi constitutionnelle de 1867*, de même que l'argument selon lequel l'art. 251 du *Code criminel* est en fait une délégation inconstitutionnelle du pouvoir législatif.

À l'instar du Juge en chef et du juge Wilson, je suis d'avis d'accueillir le pourvoi et de répondre à la première question constitutionnelle par l'affirmative et à la seconde par la négative. J'arrive cependant à ce résultat pour des motifs différents de ceux du Juge en chef et de ceux du juge Wilson.

Il me paraît utile d'exposer dès le départ la démarche qui m'a conduit à ce résultat:

I – Avant l'avènement de la *Charte*, le législateur fédéral a reconnu, en adoptant l'al. 251(4)*c*) du *Code criminel*, que l'intérêt que représente la vie ou la santé de la femme enceinte l'emporte sur celui qu'il y a à interdire les avortements, y compris l'intérêt qu'a l'État dans la protection du fœtus, lorsque «la continuation de la grossesse de cette personne du sexe féminin mettrait ou mettrait probablement en danger la vie ou la santé de cette dernière». À mon avis, ce critère du par. 251(4) a été consacré au moins comme un minimum lorsque le «droit à la vie, à la liberté et à la sécurité de la personne» a été enchâssé dans la *Charte canadienne des droits et libertés*, à l'art. 7.

II – L'expression «sécurité de la personne», au sens de l'art. 7 de la *Charte*, doit inclure le droit au traitement médical d'un état dangereux pour la vie ou la santé, sans menace de répression pénale. Si une loi du Parlement force une femme enceinte dont la vie ou la santé est en danger à choisir entre, d'une part, la perpétration d'un crime pour obtenir un traitement médical efficace en temps opportun et, d'autre part, un traitement inadéquat, voire aucun traitement, son droit à la sécurité de sa personne a été violé.

III – D'après la preuve soumise, les exigences que pose l'art. 251 du *Code criminel* en matière de procédure ont pour effet de retarder sensiblement l'obtention par les femmes enceintes d'un traitement médical, ce qui cause un danger additionnel pour leur santé et porte atteinte, par le fait même, à leur droit à la sécurité de leur personne.

IV — The deprivation referred to in the preceding proposition does not accord with the principles of fundamental justice. While Parliament is justified in requiring a reliable, independent and medically sound opinion as to the "life or health" of the pregnant woman in order to protect the state interest in the foetus, and while any such statutory mechanism will inevitably result in some delay, certain of the procedural requirements of s. 251 of the *Criminal Code* are nevertheless manifestly unfair. These requirements are manifestly unfair in that they are unnecessary in respect of Parliament's objectives in establishing the administrative structure and that they result in additional risks to the health of pregnant women.

V — The primary objective of s. 251 of the *Criminal Code* is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective. The primary objective does relate to concerns which are pressing and substantial in a free and democratic society and which, pursuant to s. 1 of the *Charter*, justify reasonable limits to be put on a woman's right. However, rules unnecessary in respect of the primary and ancillary objectives which they are designed to serve, such as some of the rules contained in s. 251, cannot be said to be rationally connected to these objectives under s. 1 of the *Charter*. Consequently, s. 251 does not constitute a reasonable limit to the security of the person.

It is not necessary to decide whether there is a proportionality between the effects of s. 251 and the objective of protecting the foetus, nor is it necessary to answer the question concerning the circumstances in which there is a proportionality between the effects of s. 251 which limit the right of pregnant women to security of the person and the objective of the protection of the foetus. But I feel bound to observe that the objective of protecting the foetus would not justify the severity of the breach of pregnant women's right to security of the person which would result if the exculpatory provision of s. 251 was completely removed from the *Criminal Code*. However, a rule that would require a higher degree of danger to health in the

IV – L'atteinte mentionnée dans la proposition précédente n'est pas conforme aux principes de justice fondamentale. Quoique le Parlement soit justifié d'exiger une opinion médicale éclairée, indépendante et fiable relativement à «la vie ou la santé» de la femme enceinte pour protéger l'intérêt qu'a l'État à l'égard du fœtus et quoiqu'un tel dispositif législatif entraîne inévitablement des délais, certaines des exigences en matière de procédure posées par l'art. 251 du *Code criminel* sont nettement injustes. Ces exigences sont nettement injustes en ce sens qu'elles sont inutiles au regard des objectifs poursuivis par le Parlement en établissant la structure administrative et qu'elles entraînent des risques additionnels pour la santé des femmes enceintes.

V – L'objectif premier de l'art. 251 du *Code criminel* est la protection du fœtus. La protection de la vie et de la santé de la femme enceinte est un objectif secondaire. L'objectif premier touche effectivement à des questions qui sont urgentes et importantes dans une société libre et démocratique et qui, conformément à l'article premier de la *Charte*, justifient que des limites raisonnables soient imposées au droit d'une femme. Toutefois, on ne peut dire que les règles inutiles aux fins des objectifs premier et secondaire qu'elles sont censées appuyer, comme certaines des règles de l'art. 251, ont un lien rationnel avec ces objectifs aux termes de l'article premier de la *Charte*. Par conséquent, l'art. 251 ne constitue pas une limite raisonnable à la sécurité de la personne.

Il n'est pas nécessaire de décider s'il existe une proportionnalité entre les effets de l'art. 251 et l'objectif de la protection du fœtus pas plus qu'il est nécessaire de répondre à la question relative aux circonstances dans lesquelles il y a proportionnalité entre les effets de l'art. 251 qui limite le droit des femmes enceintes à la sécurité de leur personne et l'objectif de la protection du fœtus. Mais je tiens à souligner que l'objectif de la protection du fœtus ne justifierait pas la gravité de la violation du droit des femmes enceintes à la sécurité de leur personne qui se produirait si la disposition disculpatoire de l'art. 251 était totalement exclue du *Code criminel*. Toutefois, une règle qui imposerait que la santé soit plus gravement mena-

latter months of pregnancy, as opposed to the early months, for an abortion to be lawful, could possibly achieve a proportionality which would be acceptable under s. 1 of the *Charter*.

I — Section 251 of the *Criminal Code*

Section 251 of the *Criminal Code* provides:

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes

(*a*) the administration of a drug or other noxious thing,

(*b*) the use of an instrument, and

(*c*) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

(*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (*a*) for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(*d*) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

cée dans les derniers mois de la grossesse que dans les premiers mois pour qu'un avortement soit licite, pourrait atteindre un degré de proportionnalité acceptable aux termes de l'article premier de la *Charte*.

I – L'article 251 du *Code criminel*

L'article 251 du *Code criminel* prévoit:

251. (1) Est coupable d'un acte criminel et passible de l'emprisonnement à perpétuité, quiconque, avec l'intention de procurer l'avortement d'une personne du sexe féminin, qu'elle soit enceinte ou non, emploie quelque moyen pour réaliser son intention.

(2) Est coupable d'un acte criminel et passible d'un emprisonnement de deux ans, toute personne du sexe féminin qui, étant enceinte, avec l'intention d'obtenir son propre avortement, emploie, ou permet que soit employé quelque moyen pour réaliser son intention.

(3) Au présent article, l'expression «moyen» comprend

a) l'administration d'une drogue ou autre substance délétère,

b) l'emploi d'un instrument, et

c) toute manipulation.

(4) Les paragraphes (1) et (2) ne s'appliquent pas

a) à un médecin qualifié, autre qu'un membre d'un comité de l'avortement thérapeutique de quelque hôpital, qui emploie de bonne foi dans un hôpital accrédité ou approuvé, quelque moyen pour réaliser son intention de procurer l'avortement d'une personne du sexe féminin, ou

b) à une personne du sexe féminin qui, étant enceinte, permet à un médecin qualifié d'employer, dans un hôpital accrédité ou approuvé, quelque moyen mentionné à l'alinéa *a*) aux fins de réaliser son intention d'obtenir son propre avortement,

si, avant que ces moyens ne soient employés, le comité de l'avortement thérapeutique de cet hôpital accrédité ou approuvé, par décision de la majorité des membres du comité et lors d'une réunion du comité au cours de laquelle le cas de cette personne du sexe féminin a été examiné,

c) a déclaré par certificat qu'à son avis la continuation de la grossesse de cette personne du sexe féminin mettrait ou mettrait probablement en danger la vie ou la santé de cette dernière, et

d)a fait remettre une copie de ce certificat au médecin qualifié.

(5) Le ministre de la Santé d'une province peut, par ordonnance,

(*a*) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(*c*) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(*b*) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(*c*), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(*a*) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,

(*a*.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,

(*b*) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(*c*) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(*d*) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

a) requérir un comité de l'avortement thérapeutique de quelque hôpital, dans cette province, ou un membre de ce comité, de lui fournir une copie d'un certificat mentionné à l'alinéa (4)*c*) émis par ce comité, ainsi que les autres renseignements qu'il peut exiger au sujet des circonstances entourant l'émission de ce certificat, ou

b) requérir un médecin qui, dans cette province, a procuré l'avortement d'une personne de sexe féminin nommée dans un certificat mentionné à l'alinéa (4)*c*), de lui fournir une copie de ce certificat, ainsi que les autres renseignements qu'il peut exiger au sujet de l'obtention de l'avortement.

(6) Aux fins des paragraphes (4) et (5) et du présent paragraphe,

«comité de l'avortement thérapeutique» d'un hôpital désigne un comité formé d'au moins trois membres qui sont tous des médecins qualifiés, nommé par le conseil de cet hôpital pour examiner et décider les questions relatives aux arrêts de grossesse dans cet hôpital;

«conseil» désigne le conseil des gouverneurs, le conseil de direction ou le conseil d'administration ou les *trustees*, la commission ou une autre personne ou un autre groupe de personnes ayant le contrôle et la direction d'un hôpital accrédité ou approuvé;

«hôpital accrédité» désigne un hôpital accrédité par le Conseil canadien d'accréditation des hôpitaux, dans lequel sont fournis des services de diagnostic et des traitements médicaux, chirurgicaux et obstétricaux;

«hôpital approuvé» désigne un hôpital approuvé aux fins du présent article par le ministre de la Santé de la province où il se trouve;

«médecin qualifié» désigne une personne qui a le droit d'exercer la médecine en vertu des lois de la province dans laquelle est situé l'hôpital mentionné au paragraphe (4);

«ministre de la Santé» désigne

a) dans la province d'Ontario, de Québec, du Nouveau-Brunswick, du Manitoba, de Terre-Neuve et de l'Île-du-Prince-Édouard, le ministre de la Santé;

a.1) dans la province d'Alberta, le ministre de la Santé (hôpitaux et assurance-maladie);

b) dans la province de Colombie-Britannique, le ministre des Services de santé et de l'assurance-hospitalisation,

c) dans les provinces de Nouvelle-Écosse et de Saskatchewan, le ministre de la Santé publique, et,

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

Subsection (1) defines the indictable offence committed when a person uses any means for the purpose of carrying out his or her intention of procuring the miscarriage of a female person. Subsection (2) states that a pregnant woman who uses any means or permits any means to be used for the purpose of procuring her own miscarriage is guilty of an indictable offence with a lesser maximum penalty. Subsection (3) defines the expression "means" for s. 251.

Subsection (4), when read in conjunction with subss. (5), (6) and (7), outlines the circumstances in which an abortion can be lawfully performed. For the purposes of this appeal in which the existence of a constitutional right of access to abortion and the extent of that right is in issue, it is of special importance to understand the circumstances in which Parliament decriminalized abortion and thereby rendered it available without criminal sanction under ordinary law. Indeed, before the advent of the *Charter*, Parliament recognized that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when the continuation of the pregnancy would or would be likely to endanger the pregnant woman's life or health. Access to lawful abortion under the *Criminal Code*, albeit in limited circumstances, exists independently of any right which may or may not be founded upon the *Charter*.

As its opening words make plain, subs. (4) is an exculpatory provision: subss. (1) and (2), which

d) dans le territoire du Yukon et les territoires du Nord-Ouest, le ministre de la Santé nationale et du Bien-être social.

(7) Rien au paragraphe (4) ne doit s'interpréter de manière à faire disparaître la nécessité d'obtenir une autorisation ou un consentement qui est ou peut être requis, autrement qu'en vertu de la présente loi, avant l'emploi de moyens destinés à réaliser une intention de procurer l'avortement d'une personne du sexe féminin.

Le paragraphe (1) définit l'acte criminel commis lorsqu'une personne recourt à un moyen quelconque pour réaliser son intention de procurer l'avortement d'une personne du sexe féminin. Le paragraphe (2) stipule qu'une femme enceinte qui emploie, ou permet que soit employé, un moyen quelconque pour réaliser son intention d'obtenir son propre avortement est coupable d'un acte criminel assorti d'une peine maximale moindre. Le paragraphe (3) définit ce que comprend l'expression «moyen» aux fins de l'art. 251.

Le paragraphe (4), conjugué aux par. (5), (6) et (7), décrit les circonstances dans lesquelles un avortement peut être légalement pratiqué. Pour les fins du présent pourvoi où l'existence d'un droit constitutionnel à l'avortement et l'étendue de ce droit sont en cause, il est particulièrement important de comprendre les circonstances dans lesquelles le Parlement a décriminalisé l'avortement et l'a ainsi rendu possible sans que l'on s'expose à des sanctions criminelles en vertu de la loi. Avant même l'avènement de la *Charte*, le Parlement a reconnu que l'intérêt que représente la vie ou la santé de la femme enceinte l'emporte sur celui qu'il y a à interdire les avortements, y compris l'intérêt qu'a l'État dans la protection du fœtus, lorsque la continuation de la grossesse mettrait ou mettrait probablement en danger la vie ou la santé de la femme enceinte. La possibilité d'obtenir un avortement licite en vertu du *Code criminel*, quoique dans des circonstances limitées, existe indépendamment de tout droit pouvant ou non être fondé sur la *Charte*.

Comme il ressort clairement de son exorde, le par. (4) est une disposition disculpatoire: les par.

indicate when conduct related to procuring a miscarriage is an indictable offence, "do not apply" when the terms of subs. (4) are respected. Until section 18 of the *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, added subss. (4), (5), (6) and (7), there was no statutory exception to the crime of abortion. In the case at bar, the Ontario Court of Appeal (1985), 52 O.R. (2d) 353, explained the historical significance of the adoption in 1969 of these exculpatory provisions in the following terms, at p. 366:

> By defining criminal conduct more narrowly, these amendments reflected the contemporary view that abortion is not always socially undesirable behaviour.

Access to abortion without risk of criminal penalty under the *Criminal Code* is expressed by Parliament in subss. (4), (5), (6) and (7) of s. 251 as relieving provisions in respect of the indictable offences defined at s. 251(1) and (2). According to Laskin C.J. (dissenting) in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 [hereinafter "*Morgentaler (1975)*"], these relieving provisions "simply permit a person to make conduct lawful which would otherwise be unlawful" (at p. 631). In the same case, Pigeon J. said that in 1969 "an explicit and specific definition was made of the circumstances under which an abortion could lawfully be performed" (at p. 660).

What is important, for our purposes, in considering subs. (4) is not, of course, the name we give to the exculpatory rule but the rule itself: Parliament has recognized that circumstances exist in which an abortion can be procured lawfully. The Court of Appeal observed, *supra*, at p. 378:

> A woman's only right to an abortion at the time the Charter came into force would accordingly appear to be that given to her by s-s. (4) of s. 251.

Given that it appears in a criminal law statute, s. 251(4) cannot be said to create a "right", much less a constitutional right, but it does represent an exception decreed by Parliament pursuant to what the Court of Appeal aptly called "the contempo-

(1) et (2), qui indiquent quand un comportement lié à une interruption de grossesse est un acte criminel, «ne s'appliquent pas» lorsque les conditions du par. (4) sont remplies. Jusqu'à ce que l'art. 18 de la *Loi de 1968-69 modifiant le droit pénal*, S.C. 1968-69, chap. 38, ajoute les par. (4), (5), (6) et (7), il n'y avait aucune exception légale au crime d'avortement. En l'espèce, la Cour d'appel de l'Ontario (1985), 52 O.R. (2d) 353, explique la signification historique de l'adoption, en 1969, de ces dispositions discupaltoires dans les termes suivants, à la p. 366:

> [TRADUCTION] En définissant la conduite criminelle plus étroitement, ces modifications reflétaient le point de vue contemporain selon lequel l'avortement n'est pas toujours une conduite socialement répréhensible.

La possibilité d'obtenir un avortement, sans s'exposer à une peine criminelle en vertu du *Code criminel*, est exprimée par le législateur aux par. 251(4), (5), (6) et (7), sous la forme de clauses d'exception relativement aux actes criminels définis aux par. 251(1) et (2). Selon le juge en chef Laskin (dissident) dans l'affaire *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616 [ci-après l'arrêt «*Morgentaler (1975)*»], ces clauses d'exception «permet[tent] simplement de poser légalement un geste qui autrement serait illégal» (à la p. 631). Dans la même affaire, le juge Pigeon affirme qu'en 1969 «les circonstances requises pour qu'un avortement puisse être légalement pratiqué ont été définies de façon explicite et spécifique» (à la p. 660).

Ce qui importe lors de l'étude du par. (4), ce n'est pas, bien entendu, l'appellation donnée à la règle disculpatoire mais la règle elle-même: le législateur a reconnu qu'il y a des circonstances dans lesquelles un avortement peut être pratiqué licitement. La Cour d'appel fait observer dans son arrêt, précité, à la p. 378:

> [TRADUCTION] Le seul droit à l'avortement que possédait une femme à l'époque où la Charte est entrée en vigueur, semblerait donc être celui que lui conférait le par. 251(4).

Étant donné qu'il se trouve dans une loi traitant de droit criminel, on ne saurait dire que le par. 251(4) crée un «droit», encore moins un droit constitutionnel; mais il représente néanmoins une exception, décrétée par le législateur conformément à ce que

rary view that abortion is not always socially undesirable behaviour". Examining the content of the rule by which Parliament decriminalizes abortion is the most appropriate first step in considering the validity of s. 251 as against the constitutional right to abortion alleged by the appellants in argument.

By enacting subss. (4), (5), (6) and (7) of s. 251 in 1969, Parliament endeavoured to decriminalize abortion in one circumstance, described in substantive terms in s. 251(4)(*c*): when the continuation of the pregnancy of the woman would or would be likely to endanger her life or health. This is the crux of the exception. This is the circumstance in which Parliament decided to allow women to procure a miscarriage without criminal sanction either for themselves or for their doctors. Laskin C.J. referred to this "would or would be likely to endanger her life or health" element in s. 251(4)(*c*) as the "standard in s. 251(4)" in *Morgentaler (1975)*, *supra*, at p. 629.

The remaining provisions of subss. (4), (5), (6) and (7) of s. 251 are designed to ascertain whether the standard has been met in a given case. To employ the expression of the Attorney General of Canada who intervened in this case in defence of s. 251, these provisions were designed, in part, "to allow relief from criminal sanction where there is a reliable, independent and medically sound judgment that the life or health of the mother would be or would likely be endangered ...." Section 251(4)(*a*) requires, for example, that a therapeutic abortion committee give its opinion in writing that the standard has been met. The committee is comprised of not less than three qualified medical practitioners appointed by the board of the hospital where the treatment would take place. The qualified medical practitioner who would perform the abortion may not be a member of a therapeutic abortion committee for any hospital. The opinion must be that of the majority of the members of the committee and must be made by certificate in writing and given to the practitioner who, accord-

la Cour d'appel a, à juste titre, appelé [TRADUCTION] «le point de vue contemporain selon lequel l'avortement n'est pas toujours une conduite socialement répréhensible». L'examen du contenu de la règle par laquelle le législateur décriminalise l'avortement est la démarche la plus appropriée qu'il convient d'adopter, dans un premier temps, lorsqu'il s'agit d'étudier la validité de l'art. 251 par rapport au droit constitutionnel à l'avortement allégué par les appelants au cours du débat.

En adoptant les par. 251(4), (5), (6) et (7) en 1969, le législateur a tenté de décriminaliser l'avortement dans un cas, décrit en substance à l'al. 251(4)*c*): lorsque la continuation de la grossesse de la femme mettrait ou mettrait probablement en danger sa vie ou sa santé. C'est là le cœur de l'exception. C'est là la circonstance dans laquelle le législateur a décidé d'autoriser les femmes à se faire avorter, sans que ni elles ni leurs médecins n'encourent de sanctions criminelles. Le juge en chef Laskin qualifie les mots «mettrait ou mettrait probablement en danger la vie ou la santé de cette dernière» de l'al. 251(4)*c*) de «critère du par. (4) de l'art. 251», dans l'arrêt *Morgentaler (1975)*, précité, à la p. 629.

Les autres dispositions des par. 251(4), (5), (6) et (7) ont été conçues afin d'assurer que le critère soit respecté dans un cas donné. Pour reprendre les termes du procureur général du Canada, qui est intervenu en l'espèce pour défendre l'art. 251, ces dispositions ont été conçues en partie [TRADUCTION] «pour permettre d'échapper aux sanctions criminelles en cas de jugement médical éclairé, fiable et indépendant que la vie ou la santé de la mère serait ou serait probablement en danger ...» L'alinéa 251(4)*a*) exige, par exemple, qu'un comité de l'avortement thérapeutique déclare par écrit qu'à son avis ce critère est respecté. Le comité se compose d'au moins trois médecins qualifiés, nommés par le conseil de l'hôpital où le traitement sera éventuellement donné. Le médecin qualifié qui, le cas échéant, pratiquera l'avortement ne peut être membre d'un comité de l'avortement thérapeutique de quelque hôpital que ce soit. L'avis du comité doit être celui de la majorité de ses membres et il doit être donné par certificat remis au médecin qui ne doit pas avoir de raison de

ing to s. 251(4)(*a*), must be in "good faith" and, consequently, have no reason to believe that the standard in s. 251(4)(*c*) has not been met. The Minister of Health of the province in which the certificate was issued may by order require the therapeutic abortion committee to furnish him with a copy of the certificate. Other aspects of s. 251(4) are designed to ensure the safety of the abortion itself after the standard has been met and after the certificate to this effect has been issued enabling the woman to have a lawful abortion. These include the requirements that the practitioner be properly qualified and that the abortion be carried out in an accredited or approved hospital.

Overall, the procedure set forth at s. 251(4) is in place to ensure that the standard of the exception — that the continuation of the pregnancy would or would be likely to endanger the pregnant woman's health — is met before Parliament will allow an abortion to be performed without punishment. Parliament will protect the life and health of the pregnant woman by allowing her access to an abortion when it has been established, through the means selected by Parliament, that her life or health would or would likely be in danger if her pregnancy continued. The other provisions in s. 251(4), though necessary for an abortion to be lawful, were enacted to ensure that the standard was met and that, once met, the lawful abortion would be performed safely. These other rules are a means to an end and not an end unto themselves. As a whole, subss. (4), (5), (6) and (7) of s. 251 seek to make therapeutic abortions lawful and available but also to ensure that the excuse of therapy will not be abused and that lawful abortions be safe.

That abortions are recognized as lawful by Parliament based on a specific standard under its ordinary laws is important, I think, to a proper understanding of the existence of a right of access to abortion founded on rights guaranteed by s. 7 of the *Charter*. The constitutional right does not have its source in the *Criminal Code*, but, in my view, the content of the standard in s. 251(4) that Parliament recognized in the *Criminal Law*

croire que le critère de l'al. 251(4)*c*) n'est pas respecté puisqu'il lui est demandé, en vertu de l'al. 251(4)*a*), d'agir de «bonne foi». Le ministre de la Santé de la province où a été délivré le certificat peut ordonner au comité de l'avortement thérapeutique de lui remettre une copie du certificat. D'autres aspects du par. 251(4) ont été conçus pour assurer que l'avortement lui-même soit pratiqué en toute sécurité une fois ce critère satisfait et une fois délivré le certificat en ce sens, autorisant la femme à subir un avortement licite. Ils incluent l'obligation que le praticien soit dûment qualifié et que l'avortement soit pratiqué dans un hôpital accrédité ou approuvé.

Dans l'ensemble, la procédure exposée au par. 251(4) a été mise en place pour assurer que le critère de l'exception, savoir que la continuation de la grossesse mettrait ou mettrait probablement en danger la santé de la femme enceinte, a été respecté avant que le législateur n'autorise de pratiquer un avortement en toute impunité. Le législateur protège la vie et la santé de la femme enceinte en lui permettant d'obtenir un avortement lorsqu'il a été établi, par les moyens choisis par le législateur, que sa vie ou sa santé serait ou serait probablement en danger si la grossesse se poursuivait. Les autres dispositions du par. 251(4), quoique nécessaires pour rendre l'avortement licite, ont été adoptées pour assurer que le critère soit respecté et qu'une fois qu'il l'a été l'avortement devenu licite soit pratiqué en toute sécurité. Les autres règles constituent des moyens d'atteindre une fin et non une fin en soi. Dans leur ensemble, les par. 251(4), (5), (6) et (7) ont pour but de rendre les avortements thérapeutiques licites et possibles, et aussi d'assurer qu'on n'abusera pas de l'excuse de la thérapie et, enfin, que les avortements licites ne comporteront aucun risque.

La reconnaissance par le législateur de la légalité des avortements, selon un critère spécifique précisé dans la loi, est importante, je pense, pour bien comprendre l'existence d'un droit à l'avortement fondé sur les droits garantis par l'art. 7 de la *Charte*. Ce droit constitutionnel ne prend pas sa source dans le *Code criminel* mais, à mon avis, le contenu du critère du par. 251(4) que le législateur a reconnu dans la *Loi de 1968-69 modifiant le*

Amendment Act, 1968-69 was for all intents and purposes entrenched at least as a minimum in 1982 when a distinct right in s. 7 became part of Canadian constitutional law.

II —The Right to Security of the Person in s. 7 of the *Charter*

Section 7 of the *Charter* provides:

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.

I share the view first expressed by Wilson J. in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 205, and confirmed by Lamer J. in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500, that "it is incumbent upon this Court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right' contained in s. 7." The full ambit of this constitutionally protected right will only be revealed over time. Consequently, the minimum content which I attribute to s. 7 does not preclude, or for that matter assure, the finding of a wider constitutional right when the courts will be faced with this or other issues in other contexts. As we shall see, the content of the "security of the person" element of the s. 7 right is sufficient in itself to invalidate s. 251 of the *Criminal Code* and consequently dispose of the appeal.

In discussing the content of the right protected by s. 7 of the *Charter* in the case at bar, the Ontario Court of Appeal wrote, at pp. 377-78, that "it would place too narrow an interpretation on s. 7 to limit it to protection against arbitrary arrest and detention". It will be seen from what follows that I agree with this view. Indeed the natural meaning of "life, liberty and security of the person" belies this limited view of the scope of s. 7. As Estey J. observed in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at p. 377, examining the "Legal Rights" heading which introduces ss. 7 to 14 of the *Charter* is at best one step in the constitutional interpretation process and is not necessarily of controlling importance. I

droit pénal, a été enchâssé à tous égards, au moins comme un minimum, lorsqu'un droit distinct, à l'art. 7, est devenu partie intégrante en 1982 du droit constitutionnel canadien.

II – Le droit à la sécurité de la personne garanti par l'art. 7 de la *Charte*

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.

Je partage l'opinion exprimée pour la première fois par le juge Wilson dans l'arrêt *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, à la p. 205, et confirmée par le juge Lamer dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, à la p. 500, qu'il «incombe à la Cour de préciser le sens de chacun des éléments, savoir la vie, la liberté et la sécurité de la personne, qui constituent le «droit» mentionné à l'art. 7». La portée complète de cette garantie constitutionnelle n'apparaîtra qu'avec le temps. Par conséquent, le contenu minimum que j'attribue à l'art. 7 n'interdit pas, non plus qu'il n'assure d'ailleurs, la conclusion à l'existence d'un droit constitutionnel plus large, lorsque les tribunaux seront confrontés à cette question, ou à d'autres, dans d'autres contextes. Comme nous le verrons, le contenu de l'élément «sécurité de sa personne» du droit prévu à l'art. 7 est suffisant en soi pour invalider l'art. 251 du *Code criminel* et, par conséquent, pour disposer du pourvoi.

En analysant le contenu du droit protégé par l'art. 7 de la *Charte* en l'espèce, la Cour d'appel de l'Ontario écrit, aux pp. 377 et 378, que [TRADUCTION] «ce serait donner une interprétation trop étroite à l'art. 7 que de le limiter à une protection contre les arrestations et détentions arbitraires». On verra dans ce qui suit que je partage cet avis. D'ailleurs, le sens ordinaire des termes «la vie, la liberté et la sécurité de sa personne» dément cette conception limitée de la portée de l'art. 7. Comme le juge Estey le fait observer dans l'arrêt *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357, à la p. 377, l'examen de la rubrique «Garanties juridiques» qui précède les art. 7 à 14 de la *Charte* ne constitue tout au plus qu'une étape

am mindful, however, that it is in the criminal law context that "security of the person" and the alleged violation of s. 7 arise in this case. Enjoying "security of the person" free from criminal sanction is central to understanding the violation of the *Charter* right which I describe herein. It is not necessary to decide whether s. 7 would apply in other circumstances.

A pregnant woman's person cannot be said to be secure if, when her life or health is in danger, she is faced with a rule of criminal law which precludes her from obtaining effective and timely medical treatment.

Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.

dans le processus d'interprétation constitutionnelle et ne revêt pas nécessairement une importance décisive. Je suis toutefois conscient que c'est dans un contexte de droit criminel que «la sécurité de la personne» et la violation prétendue de l'art. 7 sont en cause en l'espèce. La jouissance de «la sécurité de la personne», sans menace de répression pénale, est primordiale pour comprendre la violation du droit garanti par la *Charte* que je décris ici. Il n'est pas nécessaire de décider si l'art. 7 s'appliquerait dans d'autres circonstances.

On ne peut dire que la personne de la femme enceinte est en sécurité si, alors que sa vie ou sa santé est en danger, elle est confrontée à une règle de droit criminel qui l'empêche d'obtenir un traitement médical efficace en temps opportun.

En règle générale, le droit constitutionnel à la sécurité de la personne doit inclure une forme de protection contre l'intervention de l'État lorsque la vie ou la santé d'une personne est en danger. La *Charte*, cela va sans dire, ne protège pas les hommes et les femmes contre les infortunes, même les plus graves, dues à la nature. L'article 7 ne saurait être invoqué simplement parce que la vie ou la santé d'une personne est en danger. De toute évidence, on ne saurait dire que l'État a violé, par exemple, la sécurité de la personne d'une femme enceinte simplement parce que sa grossesse, en elle-même et par elle-même, représente un danger pour sa vie ou sa santé. Il doit y avoir intervention de l'État pour qu'il y ait violation de la «sécurité de la personne» visée à l'art. 7.

Si une règle de droit criminel empêche une personne d'obtenir un traitement médical approprié lorsque sa vie ou sa santé est en danger, l'État est alors intervenu et cette intervention constitue une violation de la sécurité de la personne de cet homme ou de cette femme. La «sécurité de la personne» doit inclure un droit au traitement médical d'un état dangereux pour la vie ou la santé, sans menace de répression pénale. Si une loi du Parlement force une personne dont la vie ou la santé est en danger à choisir entre, d'une part, la perpétration d'un crime pour obtenir un traitement médical efficace en temps opportun et, d'autre part, un traitement inadéquat ou pas de traitement du tout, le droit à la sécurité de la personne est violé.

This interpretation of s. 7 of the *Charter* is sufficient to measure the content of s. 251 of the *Criminal Code* against that of the *Charter* in order to dispose of this appeal. While I agree with McIntyre J. that a breach of a right to security must be "based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection", I am of the view that the protection of life or health is an interest of sufficient importance in this regard. Under the *Criminal Code*, the only way in which a pregnant woman can legally secure an abortion when the continuation of the pregnancy would or would be likely to endanger her life or health is to comply with the procedure set forth in s. 251(4). Where the continued pregnancy does constitute a danger to life or health, the pregnant woman faces a choice: (1) she can endeavour to follow the s. 251(4) procedure, which, as we shall see, creates an additional medical risk given its inherent delays and the possibility that the danger will not be recognized by the state-imposed therapeutic abortion committee; or (2) she can secure medical treatment without respecting s. 251(4) and subject herself to criminal sanction under s. 251(2).

Cette interprétation de l'art. 7 de la *Charte* suffit pour évaluer en fonction de la *Charte* le contenu de l'art. 251 du *Code criminel*, afin de statuer sur le pourvoi. Tout en convenant avec le juge McIntyre qu'une atteinte au droit à la sécurité doit «dépendre d'une atteinte à quelque intérêt dont la nature et l'importance justifieraient une protection constitutionnelle», j'estime que la protection de la vie ou de la santé est un intérêt d'une importance suffisante à cet égard. En vertu du *Code criminel*, la seule façon pour une femme enceinte d'obtenir légalement un avortement lorsque la continuation de la grossesse mettrait ou mettrait probablement en danger sa vie ou sa santé consiste à se conformer à la procédure énoncée au par. 251(4). Lorsque la continuation de la grossesse constitue effectivement un danger pour la vie ou la santé, la femme enceinte doit faire un choix: (1) elle peut essayer de suivre la procédure du par. 251(4) qui, comme nous allons le voir, crée un risque médical supplémentaire, étant donné l'attente qu'elle comporte inévitablement et la possibilité que le danger ne soit pas reconnu par le comité de l'avortement thérapeutique imposé par l'État; ou (2) elle peut obtenir un traitement médical sans respecter le par. 251(4) et s'exposer à des sanctions criminelles en vertu du par. 251(2).

III —Delays Caused by s. 251 Procedure in Violation of Security of the Person

III – Délais engendrés par la procédure de l'art. 251 en violation de la sécurité de la personne

This chapter requires a review of the evidence, part of which is to be found in two reports, the *Report of the Committee on the Operation of the Abortion Law* (the "Badgley Report"), and the *Report on Therapeutic Abortion Services in Ontario* (the "Powell Report").

Ce chapitre exige un examen de la preuve soumise, dont une partie se trouve dans deux rapports, le *Rapport du Comité sur l'application des dispositions législatives sur l'avortement* (le «rapport Badgley»), et le *Report on Therapeutic Abortion Services in Ontario* (le «rapport Powell»).

The Badgley Report (1977) was written by a committee appointed by the Privy Council with a mandate to conduct a study to determine whether the procedure provided in the *Criminal Code* for obtaining therapeutic abortions is operating equitably across Canada and to make findings on the operation of this law rather than recommendations on the underlying policy: Badgley Report, at p. 27.

Le rapport Badgley, 1977, est l'œuvre d'un comité nommé par le Conseil privé, dont le mandat était de mener une enquête afin de déterminer si la procédure prévue au *Code criminel* pour obtenir des avortements thérapeutiques est appliquée de façon équitable dans tout le Canada et de se prononcer sur la mise en œuvre de cette loi, plutôt que de faire des recommandations sur les principes qui la sous-tendent: rapport Badgley, à la p. 31.

The Powell Report (1987) is a study commissioned by the Ministry of Health with terms of

Le rapport Powell, 1987, inédit, est une étude commandée par le ministère de la Santé, dont le

reference limited to a review of access to therapeutic abortion services in Ontario. Like those for the Badgley Report, these terms did not include the mandate for an evaluation of the underlying policy of the *Criminal Code*: Powell Report, Appendix 1.

I propose to consider first the delays caused by the s. 251 procedure and then the consequences of the delays.

1. *Delays Caused by the s. 251 Procedure*

The evidence reveals that the actual workings of s. 251(4) are the source of certain delays which create an additional medical risk for many pregnant women whose medical condition already meets the standard of s. 251(4)(*c*). Stated simply, when pregnant women suffer from a condition which represents a danger to their life or health, their efforts to conform to the procedure set forth for obtaining lawful abortions in the *Criminal Code* often create an additional risk to their health. They may have to choose between bearing the burden of these risks by accepting delayed medical treatment, and committing a crime by seeking timely medical treatment outside s. 251(4). Given that the procedure in s. 251(4) is the source of this additional risk, it constitutes a violation of the pregnant woman's security of the person. I shall first endeavour to show that these delays have their origin in s. 251. I will then cite evidence that these procedural delays create an additional risk to the health of pregnant women.

While only administrative inefficiencies that are caused by the rules in s. 251 are relevant to the evaluation of the constitutionality of the legislation under s. 7 of the *Charter*, the evidence which relates to the availability of therapeutic abortions under the *Criminal Code* reveals three sorts of delay, all of which can be traced to the requirements of s. 251 itself: (1) the absence of hospitals with therapeutic abortion committees in many parts of Canada; (2) the quotas which some hospitals with committees impose on the number of

mandat était limité à un examen des services d'avortements thérapeutiques offerts en Ontario. Comme dans le rapport Badgley, ce mandat ne comportait pas l'évaluation de la politique sous-jacente du *Code criminel*: rapport Powell, appendice 1.

Je traiterai en premier lieu des délais engendrés par la procédure de l'art. 251, puis des conséquences qu'ils entraînent.

1. *Les délais engendrés par la procédure de l'art. 251*

Il ressort de la preuve que les rouages du par. 251(4) sont à l'origine de certains délais qui engendrent un risque médical additionnel pour beaucoup de femmes enceintes dont l'état médical satisfait déjà au critère de l'al. 251(4)*c*). En bref, quand l'état des femmes enceintes représente un danger pour leur vie ou leur santé, leurs efforts pour se conformer à la procédure énoncée par le *Code criminel* en ce qui concerne l'obtention d'avortements licites créent souvent un risque additionnel pour leur santé. Elles peuvent avoir à choisir entre assumer le fardeau de ces risques, en acceptant de retarder le traitement médical, et commettre un crime, en cherchant à obtenir en temps opportun un traitement médical qui ne relève pas du par. 251(4). Étant donné que la procédure du par. 251(4) est à la source de ce risque additionnel, cette règle constitue une violation de la sécurité de la personne de la femme enceinte. J'essaierai d'abord de montrer que l'art. 251 est à l'origine de ces délais. Je citerai ensuite des éléments de preuve étayant que ces délais en matière de procédure créent un risque additionnel pour la santé des femmes enceintes.

Quoique seule l'inefficacité administrative occasionnée par les exigences de l'art. 251 soit pertinente lors de la détermination de la constitutionnalité de la législation au regard de l'art. 7 de la *Charte*, la preuve soumise quant à la possibilité d'obtenir des avortements thérapeutiques conformes au *Code criminel* révèle l'existence de trois sortes de délais qui peuvent tous être reliés aux exigences de l'art. 251 lui-même: (1) l'absence, dans bien des régions du Canada, d'hôpitaux dotés de comités de l'avortement thérapeutique, (2) les

therapeutic abortions which they perform and (3) the committee requirement itself each create delays for pregnant women who seek timely and effective medical treatment.

(1) Lack of Hospitals with Therapeutic Abortion Committees

Hospitals with therapeutic abortion committees are completely lacking in many parts of Canada, forcing women to go elsewhere and suffer delays in order to gain access to hospitals in which they may obtain therapeutic abortions free from criminal sanction. The requirements which hospitals must meet under s. 251 are responsible for this absence of eligible hospitals. Often, the absence of hospitals can be traced to the prerequisites which hospitals must meet under s. 251(6). In other cases, the absence is caused by the refusal of certain hospital boards to appoint committees in hospitals which would otherwise qualify under the law, as is their prerogative under s. 251(6). I shall consider each of these in turn.

The effect of certain definitions in s. 251(6), when read in conjunction with s. 251(4), is to cause an absence of hospitals in which therapeutic abortions can legally be performed. A "therapeutic abortion committee" for any hospital means, according to s. 251(6), a committee comprised of not less than three physicians from which the physician who performs the abortion is excluded under s. 251(4). As the Chief Justice observed, the combined effect of these two provisions is to require at least four physicians at the hospital so that the therapeutic abortion can be lawfully authorized and performed. The four-physician requirement obviously precludes therapeutic abortions from being performed in hospitals where four doctors are not available.

Moreover, the requirement in s. 251(4) that lawful abortions can only be performed in "accredited" or "approved" hospitals also has the effect of

contingents que certains hôpitaux dotés de comités fixent au nombre d'avortements thérapeutiques qu'ils pratiqueront et (3) l'obligation même de recourir à un comité sont tous des causes de délai pour les femmes enceintes qui cherchent à obtenir un traitement médical efficace en temps opportun.

(1) L'absence d'hôpitaux dotés de comités de l'avortement thérapeutique

Les hôpitaux dotés de comités de l'avortement thérapeutique brillent par leur absence dans de nombreux endroits au Canada, ce qui force les femmes à s'adresser ailleurs et à attendre avant d'avoir accès aux hôpitaux où elles pourront obtenir des avortements thérapeutiques sans menace de répression pénale. Les exigences auxquelles doivent satisfaire les hôpitaux en vertu de l'art. 251 sont responsables de cette absence d'hôpitaux admissibles. Souvent, l'absence d'hôpitaux peut être reliée aux conditions préalables que les hôpitaux doivent remplir en vertu du par. 251(6). Dans d'autres cas, cette carence est due au refus de certains conseils d'hôpitaux, par ailleurs admissibles en vertu de la loi, de nommer des comités, comme c'est leur prérogative en vertu du par. 251(6). Je traiterai successivement de chacun de ces points.

Certaines définitions figurant au par. 251(6), lues conjointement avec le par. 251(4), ont pour effet de causer une absence d'hôpitaux où des avortements thérapeutiques peuvent être légalement pratiqués. Le «comité de l'avortement thérapeutique» d'un hôpital s'entend, d'après le par. 251(6), d'un comité formé d'au moins trois médecins et dont le médecin qui pratique l'avortement est exclu en vertu du par. 251(4). Comme le fait observer le Juge en chef, ces deux dispositions ont pour effet conjugué d'exiger qu'il y ait au moins quatre médecins à l'hôpital pour que l'avortement thérapeutique puisse être légalement autorisé et pratiqué. Le fait d'exiger qu'il y ait quatre médecins empêche manifestement de pratiquer des avortements thérapeutiques dans des hôpitaux qui ne comptent pas quatre médecins.

De plus, l'exigence du par. 251(4) portant que les avortements licites ne soient pratiqués que dans des hôpitaux «accrédités» ou «approuvés» a aussi

contributing to the absence of hospitals, in some parts of Canada, in which lawful abortions are available. Section 251(6) defines "accredited hospital" as a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided. Not only are some hospitals unable to qualify because they do not provide all these services, but some hospitals also fail to meet the Council's accreditation requirements.

Alternatively, therapeutic abortions may be performed in hospitals "approved" by the Ministers of Health in the province, and standards to be met for approval vary considerably from province to province. The Badgley Report, at pp. 91 *et seq.*, noted this variation in 1977. In Newfoundland, for example, the Department of Health guidelines required hospitals seeking approval to establish therapeutic abortion committees to have a minimum of six members of the medical staff willing to co-operate with or recognize the existence of a therapeutic abortion committee, the presence of a gynaecologist on the medical staff, and 100 beds or more in the hospital, even though many abortions are done on an out-patient basis. Thus, of 46 public general hospitals in the province in 1976, 35 were excluded by these provincial criteria, leaving only 11 hospitals qualified to establish therapeutic abortion committees, with no obligation to do so. In Saskatchewan, where provincial regulations included a requirement of a rated bed capacity of 50 beds or more, 110 of 133 general hospitals were ineligible to establish a therapeutic abortion committee. In Ontario, where the provincial regulations included a requirement of 10 or more members on a hospital's active medical staff, 51 of 205 general hospitals were ineligible to establish committees. The *Criminal Code*, under the "approved" hospital requirement, not only allows for an unequal distribution of hospitals across Canada, but also permits provincial authorities to set standards which appear at times largely irrelevant to the performance of therapeutic abortions.

pour effet de contribuer à l'absence, dans certaines régions du Canada, d'hôpitaux où il est possible d'obtenir des avortements licites. Le paragraphe 251(6) définit l'expression «hôpital accrédité» comme un hôpital accrédité par le Conseil canadien d'accréditation des hôpitaux, dans lequel sont fournis des services de diagnostic et des traitements médicaux, chirurgicaux et obstétricaux. Non seulement certains hôpitaux sont-ils inadmissibles parce qu'ils ne fournissent pas tous ces services, mais encore d'autres ne répondent pas aux exigences d'accréditation du Conseil.

Subsidiairement, des avortements thérapeutiques peuvent être pratiqués dans des hôpitaux «approuvés» par le ministre de la Santé d'une province et les critères d'approbation varient alors considérablement d'une province à l'autre. Le rapport Badgley a souligné cet écart en 1977, aux pp. 100 et suivantes. À Terre-Neuve, par exemple, les directives du ministère de la Santé exigent que les hôpitaux qui cherchent à obtenir l'autorisation d'établir des comités de l'avortement thérapeutique comptent au moins six membres de leur personnel médical qui soient disposés à coopérer avec un comité de l'avortement thérapeutique ou à en reconnaître l'existence, qu'il y ait un gynécologue parmi le personnel médical et que l'hôpital compte au moins 100 lits, même si de nombreux avortements sont pratiqués en consultation externe. Ainsi, sur les 46 hôpitaux généraux publics que comptait la province en 1976, 35 ont été exclus par ces critères provinciaux, de sorte qu'il ne restait que 11 hôpitaux qualifiés pour établir des comités de l'avortement thérapeutique, sans qu'ils soient tenus de le faire. En Saskatchewan, où la réglementation provinciale exigeait un taux de capacité de 50 lits ou plus, 110 des 133 hôpitaux généraux n'avaient pas les qualités requises pour établir un comité de l'avortement thérapeutique. En Ontario, où la réglementation provinciale exigeait que le personnel médical actif de l'hôpital comporte dix membres ou plus, 51 des 205 hôpitaux généraux étaient inaptes à établir de tels comités. Le *Code criminel*, en exigeant qu'un hôpital soit "approuvé", permet non seulement une répartition inégale des hôpitaux à travers le Canada, mais habilite aussi les autorités provinciales à fixer des normes qui semblent parfois n'avoir que fort peu de rapport avec la pratique d'avortements thérapeutiques.

Thus, the requirements of s. 251 seriously limit the number of hospitals which are eligible to perform lawful abortions, causing an absence or a serious lack of therapeutic abortion facilities in many parts of the country. The conclusions of the Badgley Report are startling (at p. 105):

> Of the total of 1,348 non-military hospitals in Canada in 1976, 789 hospitals, or 58.5 percent, were ineligible in terms of their major treatment functions, the size of their medial staff, or their type of facility to establish therapeutic abortion committees.

The rules in s. 251(4) limiting the number of eligible hospitals means that a significant proportion of Canada's population is not served by hospitals in which therapeutic abortions can lawfully be performed. The Badgley Report, at p. 109, concluded in 1977 that 39.3 per cent of the total female population of Canada was not served by eligible hospitals. As we have already seen, the absence of eligible hospitals in some parts of Canada compels many pregnant women to leave their own communities to seek medical treatment in a place where an eligible hospital is available to admit them as patients. A pregnant woman in these circumstances will inevitably incur a delay in obtaining a therapeutic abortion.

The lack of hospitals with therapeutic abortion committees is made more serious by the refusal of certain hospital boards to appoint therapeutic abortion committees in hospitals which would otherwise qualify under the *Criminal Code*. Given that therapeutic abortions can only be performed in eligible hospitals and that the committee certifying the abortion must come from that hospital, this effectively contributes to the inaccessibility of the treatment. Nothing in the *Criminal Code* obliges the board of an eligible hospital to appoint therapeutic abortion committees. Indeed, a board is entitled to refuse to appoint a therapeutic abortion committee in a hospital that would otherwise qualify to perform abortions and boards often do so in Canada. Given that the decision to appoint a committee is, in part, one of conscience and, in

Ainsi les exigences de l'art. 251 limitent sérieusement le nombre d'hôpitaux qui peuvent pratiquer des avortements licites, ce qui entraîne une absence ou un manque grave d'établissements où l'on pratique l'avortement thérapeutique dans de nombreuses régions du pays. Les conclusions du rapport Badgley sont saisissantes (à la p. 115):

> Sur les 1,348 hôpitaux civils que comptait le Canada en 1976, 789 hôpitaux, soit 58.5 pour cent, n'étaient pas aptes à établir un comité de l'avortement thérapeutique, soit en raison de la spécialisation des traitements fournis dans ces établissements, soit à cause d'un personnel médical insuffisant ou du genre d'installations dont ils disposaient.

Les règles du par. 251(4) qui limitent le nombre d'hôpitaux admissibles signifient qu'une proportion importante de la population canadienne n'est pas desservie par des hôpitaux où des avortements thérapeutiques peuvent être pratiqués licitement. Le rapport Badgley, à la p. 120, a conclu en 1977 que 39,3 pour 100 de la population féminine totale du Canada n'était pas desservie par des hôpitaux admissibles. Comme nous l'avons déjà vu, l'absence d'hôpitaux admissibles dans certaines régions du Canada force un grand nombre de femmes enceintes à quitter leur propre localité pour aller demander des soins médicaux là où un hôpital admissible peut les accueillir comme patientes. Une femme enceinte, dans ces circonstances, devra inévitablement attendre pour obtenir un avortement thérapeutique.

Le manque d'hôpitaux dotés d'un comité de l'avortement thérapeutique est aggravé par le refus de certains conseils d'hôpitaux, par ailleurs admissibles en vertu du *Code criminel*, de nommer des comités de l'avortement thérapeutique. Comme les avortements thérapeutiques ne peuvent être pratiqués que dans des hôpitaux admissibles et que le comité qui certifie l'avortement doit être formé par l'hôpital même, il en découle effectivement une impossibilité de se faire traiter. Rien dans le *Code criminel* n'oblige le conseil d'un hôpital admissible à nommer des comités de l'avortement thérapeutique. En fait, un conseil a le droit de refuser de nommer un comité de l'avortement thérapeutique dans un hôpital qui aurait, par ailleurs, les qualités requises pour pratiquer des avortements, et les conseils le font souvent au Canada. Comme la

some cases, one which affects religious beliefs, a law cannot force a board to appoint a committee any more than it could force a physician to perform an abortion. The defect in the law is not that it does not force boards to appoint committees, but that it grants exclusive authority to those boards to make such appointments.

In "Abortion and the Just Society" (1970), 5 *R.J.T.* 27, at p. 36, lawyer Natalie Fochs Isaacs correctly anticipated the effect of the exclusive authority of hospital boards in establishing committees:

> S. 237 [now s. 251] sets out the requirement of the certification of therapeutic abortion by a therapeutic abortion committee prior to its performance. But the section does not require any hospital to set up such a committee. Given the undesirability of forcing any hospital to do so, the restriction of legal abortions to this type of preliminary certification fails nevertheless to provide for alternative methods of prior medical consultation among those staff members of any hospital opposed to the creation of the committee required, who themselves approve of therapeutic abortions. The new legislation in this manner also places the prospective petitioner for the operation at the mercy of the institutional policy of what may be the only hospital available in her community. [Footnotes omitted.]

The Badgley Report, at p. 93, again documented the reduction of the number of hospitals with therapeutic abortion committees due to the refusal of boards of hospitals which would otherwise qualify under the law to appoint committees. In Newfoundland, 6 of the 11 hospitals which were otherwise qualified to perform therapeutic abortions did in fact appoint committees so that only 6 of a total of 46 general hospitals were eligible to perform therapeutic abortions under the *Criminal Code*. In Quebec, 31 of 128 general hospitals appointed therapeutic abortion committees. In Saskatchewan, 10 of 133 general hospitals appointed committees. In Manitoba, 8 of 78 general hospitals appointed committees. Overall, the Badgley Report, *supra*, at p. 105, concluded in the following terms:

décision de nommer un comité est, en partie, une décision de conscience et, dans certains cas, une décision qui touche aux croyances religieuses, une loi ne peut forcer un conseil à nommer un comité, pas plus qu'elle ne peut forcer un médecin à pratiquer un avortement. Le défaut de la loi réside non pas dans le fait qu'elle ne force pas les conseils à nommer des comités, mais dans celui qu'elle confère à ces conseils le pouvoir exclusif de les nommer.

Dans son article intitulé «Abortion and the Just Society» (1970), 5 *R.J.T.* 27, à la p. 36, Me Natalie Fochs Isaacs avait prévu avec justesse l'effet qu'aurait le pouvoir exclusif des conseils d'hôpitaux d'établir des comités:

> [TRADUCTION] L'article 237 [maintenant l'art. 251] énonce l'exigence de la certification d'un avortement thérapeutique par un comité de l'avortement thérapeutique avant qu'il ne soit pratiqué. Mais l'article n'oblige aucun hôpital à former un tel comité. Comme il n'est pas souhaitable de forcer un hôpital à le faire, la limitation des avortements légaux par ce genre de certification préliminaire ne fournit cependant aucun mode subsidiaire de consultation médicale préalable chez les membres du personnel de tout hôpital opposé à la création du comité requis qui sont eux-mêmes en faveur des avortements thérapeutiques. La nouvelle mesure législative fait également en sorte que la personne qui demandera éventuellement à subir l'intervention sera à la merci de la politique institutionnelle de ce qui est peut être l'unique hôpital existant dans sa localité. [Omission des notes en bas de page.]

Le rapport Badgley, à la p. 102, fournit aussi des données sur la réduction du nombre d'hôpitaux dotés d'un comité de l'avortement thérapeutique par suite du refus des conseils des hôpitaux par ailleurs admissibles en vertu de la loi de nommer des comités. À Terre-Neuve, 6 des 11 hôpitaux par ailleurs admissibles à pratiquer des avortements thérapeutiques ont effectivement nommé des comités, de sorte que seulement 6 hôpitaux généraux sur un total de 46 étaient aptes à pratiquer des avortements thérapeutiques en vertu du *Code criminel*. Au Québec, 31 des 128 hôpitaux généraux ont nommé des comités de l'avortement thérapeutique. En Saskatchewan, 10 des 133 hôpitaux généraux ont nommé de tels comités. Au Manitoba, 8 des 78 hôpitaux généraux ont nommé des comités. De manière générale, le rapport Badgley, précité, conclut ce qui suit, à la p. 116:

In terms of all civilian hospitals (1,348) in Canada in 1976, 20.1 percent had established a therapeutic abortion committee. If only those general hospitals which met hospital practices and provincial requirements and were not exempt in terms of their special treatment facilities are considered, then of these 559 hospitals, 271 hospitals, or 48.5 percent, had established therapeutic abortion committees, while 288 hospitals, or 51.5 percent, did not have these committees.

According to the Powell Report, a comparable fraction of hospitals had established therapeutic abortion committees in Ontario: "out of 176 accredited acute care hospitals, 95 (54%) had therapeutic abortion committees" (at p. 24). The figures reported by the Badgley Committee in 1977 were confirmed in a recent Statistics Canada report according to which the total number of hospitals with therapeutic abortion committees fell across the country from 271 in 1976 to 250 in 1985 (*Therapeutic abortions, 1985* (1986), at p. 12).

For the purposes of the case at bar, it is important to reiterate that the absence of hospitals with therapeutic abortion committees in many parts of Canada is caused by the following requirements of the law:

(a) that a total of four physicians in the hospital must participate in the authorization and performance of the therapeutic abortion;

(b) that the hospital must be "approved" or "accredited"; and

(c) that only the board of the hospital is entitled to appoint a therapeutic abortion committee.

Finally, it is worth noting that 18 per cent of the hospitals that did have therapeutic abortion committees in 1984 performed no therapeutic abortions (*Therapeutic abortions, 1985*, *supra*, at p. 38). Dr. Augustin Roy, the President of the Corporation professionnelle des médecins du Québec, testified at trial that of the 30 hospitals with therapeutic abortion committees in Quebec, "only about fourteen or fifteen of these hospitals are operational, because many of them, say half of

Si l'on considère l'ensemble des hôpitaux civils au Canada en 1976, soit 1,348 établissements, 20.1 pour cent d'entre eux avaient établi un comité de l'avortement thérapeutique. Si l'on considère uniquement les hôpitaux généraux qui satisfaisaient aux exigences provinciales et aux normes de la pratique hospitalière et qui n'étaient pas exclus du fait de leur spécialisation, sur ces 559 centres hospitaliers, 271 hôpitaux, soit 48.5 pour cent, avaient établi un comité de l'avortement thérapeutique tandis que 288 hôpitaux, soit 51.5 pour cent, n'en avaient pas formé.

D'après le rapport Powell, une proportion comparable d'hôpitaux avaient établi des comités de l'avortement thérapeutique en Ontario: [TRADUCTION] «des 176 hôpitaux à soins intensifs accrédités, 95 (54 %) avaient des comités de l'avortement thérapeutique» (à la p. 24). Les chiffres publiés par le comité Badgley en 1977 ont été confirmés dans un rapport récent de Statistique Canada selon lequel le nombre total d'hôpitaux pourvus d'un comité de l'avortement thérapeutique est passé, à l'échelle du pays, de 271 en 1976 à 250 en 1985 (*Avortements thérapeutiques, 1985* (1986), à la p. 12).

Pour les fins de l'espèce, il importe de réitérer que l'absence, dans de nombreuses régions du Canada, d'hôpitaux dotés d'un comité de l'avortement thérapeutique est due aux conditions suivantes de la loi, savoir:

a) qu'un nombre total de quatre médecins de l'hôpital doivent participer à l'autorisation et à la pratique de l'avortement thérapeutique;

b) que l'hôpital doit être "approuvé" ou "accrédité"; et

c) que seul le conseil de l'hôpital a le droit de nommer un comité de l'avortement thérapeutique.

Enfin, il vaut la peine de noter que 18 pour 100 des hôpitaux qui avaient des comités de l'avortement thérapeutique en 1984 n'ont pratiqué aucun avortement thérapeutique (*Avortements thérapeutiques, 1985*, précité, à la p. 38). Le Dr Augustin Roy, président de la Corporation professionnelle des médecins du Québec, a déclaré dans son témoignage au procès que sur les 30 hôpitaux pourvus de comités de l'avortement thérapeutique au Québec, [TRADUCTION] «seuls environ quatorze ou quinze de ces hôpitaux étaient opérationnels, parce

them, have a committee but they don't do any abortions. It is a committee on paper."

A hospital with a dormant committee is no more useful to a pregnant woman seeking a therapeutic abortion than a hospital without a committee or no hospital at all. The delay suffered by a pregnant woman because her local hospital has a dormant committee is perhaps more the result of internal hospital policy than of s. 251 of the *Criminal Code*, but s. 251 is at least indirectly the cause of the delay in requiring an opinion from the therapeutic abortion committee of that hospital before a lawful abortion can be performed there.

(2) Delays Caused by Quotas

Delays result not only from the absence or inactivity of therapeutic abortion committees. The evidence discloses that some hospitals with committees impose quotas on the number of therapeutic abortions which they perform while others place quotas on patients depending on their place of residence. The evidence at trial confirmed that these quotas, initially observed in the Badgley Report, at pp. 258 *et seq.*, have been retained in many Canadian hospitals and that they often delay timely medical treatment for pregnant women seeking therapeutic abortions. It is true, of course, that these quotas are set by internal hospital policy and not by the terms of the law itself. It is also true that quotas may be necessary given hospitals' limited resources and the significant demands placed on those resources by pregnant women seeking abortions, some of whom may not qualify for therapeutic abortions in respect of the standard of s. 251(4). There is evidence, however, of quotas in absolute numbers of abortions performed and quotas based on the place of residence which can affect women who otherwise qualify for lawful abortions under s. 251(4)(*c*). Indeed the Badgley Committee reported in 1977, at p. 259, that:

que beaucoup d'entre eux, disons la moitié, ont bel et bien un comité, mais ils ne pratiquent pas d'avortements. C'est un comité sur papier.»

Un hôpital dont le comité est inactif n'est pas plus utile à une femme enceinte qui veut un avortement thérapeutique qu'un hôpital sans comité ou que pas d'hôpital du tout. Le délai imposé à une femme enceinte parce que le comité de l'hôpital local est inactif résulte peut-être plus de la politique interne de l'hôpital que de l'art. 251 du *Code criminel*, mais l'art. 251 est à tout le moins indirectement la cause du délai du fait qu'il requiert l'opinion du comité de l'avortement thérapeutique de cet hôpital avant qu'un avortement licite puisse y être pratiqué.

(2) Les délais dus au contingentement

Les délais ne résultent pas uniquement de l'absence ou de l'inactivité des comités de l'avortement thérapeutique. Il ressort de la preuve que certains hôpitaux ayant des comités contingentent le nombre d'avortements thérapeutiques, alors que d'autres contingentent les patientes en fonction de leur lieu de résidence. La preuve soumise en première instance confirme que ces contingents, signalés initialement par le rapport Badgley, aux pp. 287 et suiv., existent toujours dans de nombreux hôpitaux canadiens et qu'ils ont souvent pour effet d'empêcher les femmes enceintes qui demandent des avortements thérapeutiques de recevoir un traitement médical en temps opportun. Il est vrai, bien sûr, que ces contingents résultent de la politique interne de l'hôpital et non des termes de la loi elle-même. Il est vrai également que ces contingents peuvent être nécessaires, compte tenu des ressources limitées des hôpitaux et de la demande importante dont font l'objet ces ressources de la part des femmes enceintes qui veulent se faire avorter et dont certaines peuvent ne pas avoir les qualités requises pour obtenir un avortement thérapeutique selon le critère du par. 251(4). Toutefois, on a soumis en preuve l'existence de contingents fixés en nombre absolu d'avortements pratiqués et de contingents fondés sur le lieu de résidence qui peuvent toucher des femmes par ailleurs aptes à obtenir un avortement licite en vertu de l'al. 251(4)*c*). D'ailleurs, le comité Badgley déclarait ceci en 1977, à la p. 288 de son rapport:

Two out of five hospitals (38.2 per cent) considered only applications from women who were considered to reside with the hospital's usual service catchment area. Residential requirements and patient quotas were more often adopted in the Maritimes (43.8 per cent) and Quebec (66.7 per cent) than among hospitals elsewhere where about a third followed this practice. Where the proportion of the hospitals with committees having these residency or quota requirements was higher in a province or a region, there were proportionately more women who went to the United States to obtain induced abortions.

These quotas are inevitable given that s. 251 requires that therapeutic abortions be performed only in eligible hospitals and that there is a lack of hospitals with committees in some parts of the country. The quotas cannot, therefore, be said to reflect simple administrative or budgetary constraints. In this respect, the s. 251 procedure is again the source of delays in medical treatment.

(3) Delays Caused by the Committee Requirement

The committee requirement itself contributes to a delay in securing treatment. The law requires the therapeutic abortion committee to certify that the standard of s. 251(4) has been met before a therapeutic abortion can proceed lawfully. As I shall endeavour to explain in my consideration of s. 251 and the principles of fundamental justice, I believe that the state interest in the protection of the foetus justifies the requirement that the standard of s. 251(4) be ascertained by independent medical opinion. This being the case, some delay will always be incurred whatever system is put in place to ensure that the standard has been met. However, at this stage of my analysis, I seek only to establish that a delay has in fact been caused by the present requirements of the *Criminal Code*.

The time needed to convene the committee in the hospital, for the pregnant woman's file to come before the committee, for her application to be evaluated by whatever means the committee may choose and for the certificate to be issued to the

Deux hôpitaux sur 5 (38.2 pour cent) n'étudiaient que les demandes des femmes résidant sur le territoire généralement desservi par l'hôpital. Des conditions de résidence et des quotas de patientes étaient plus fréquemment imposés dans les provinces maritimes (43.8 pour cent) et le Québec (66.7 pour cent) que dans les hôpitaux des autres provinces où seulement un tiers d'entre eux posait de telles conditions. Dans les provinces ou les régions où la proportion d'hôpitaux ayant un comité et ayant établi de telles conditions de résidence ou des quotas était plus élevée, il y avait proportionnellement plus de femmes qui allaient aux États-Unis pour obtenir un avortement provoqué.

Ces contingents sont inévitables si l'on tient compte du fait que l'art. 251 exige que les avortements thérapeutiques ne soient pratiqués que dans des hôpitaux admissibles et qu'il y a absence d'hôpitaux dotés de comités dans certaines régions du pays. On ne peut donc pas affirmer que les contingents sont simplement le reflet de contraintes administratives ou budgétaires. À cet égard, la procédure de l'art. 251 est ici encore à l'origine de délais dans les soins prodigués.

(3) Les délais dus à l'obligation de recourir à un comité

L'obligation d'avoir recours à un comité contribue elle-même à retarder le traitement. La loi oblige le comité de l'avortement thérapeutique à certifier que le critère du par. 251(4) est respecté pour que l'on puisse pratiquer licitement un avortement thérapeutique. Comme je tenterai de l'expliquer dans mon examen de l'art. 251 au regard des principes de justice fondamentale, je crois que l'intérêt qu'a l'État dans la protection du fœtus justifie l'exigence que le critère du par. 251(4) fasse l'objet d'une opinion médicale indépendante. Cela étant, il y aura toujours un certain délai quel que soit le système mis en place pour assurer que le critère est respecté. Toutefois, à ce stade de mon analyse, je ne cherche qu'à établir que les exigences actuelles du *Code criminel* sont effectivement à l'origine d'un délai.

Le temps qu'il faut pour réunir le comité de l'hôpital, pour que le dossier de la femme enceinte parvienne devant le comité, pour que sa demande soit évaluée quels que soient les moyens choisis par le comité, et pour que le certificat soit délivré au

qualified medical practitioner together create some delay for obtaining treatment. The Badgley Report, at p. 146, identified an average interval of 8.0 weeks until the induced abortion operation was done after the pregnant woman's initial visit to her physician. Some of this delay is attributable to the absence of committees and hospital quotas which I have outlined above. It is difficult to isolate with precision the fraction of the delay attributable to the committee requirement taken by itself. It is relevant as one part of the overall delay which pregnant women must endure to obtain a therapeutic abortion.

In spite of evidence that the overall delay has been reduced, as will be seen shortly, the committee requirement continues to add to the delay. In 1987, the Powell Report, at p. 27, identified as one problem the number of committee members who must certify that the s. 251(4) standard has been met:

> The number of members on the TAC [therapeutic abortion committee] ranges from three to five although up to seven members sit on some committees. When five or seven members have been appointed and no quorum is stated, a majority of the committee (three to five) must be present and three must approve each abortion. This has caused problems in several of the hospitals contacted, where it was not possible for an adequate number of members to be present and the meeting had to be rescheduled. Thus precious time was lost and the abortion delayed to a more advanced gestational age.

Furthermore, the delays caused by the committee requirements necessarily impact upon the pregnant woman who seeks to become a patient of the hospital for which the committee has been appointed. Section 251(4) states in part that it is "the therapeutic abortion committee for that accredited or approved hospital" which must issue the certificate [emphasis added]. This precludes a committee from one hospital from authorizing abortions which take place at other hospitals. Eliminating such a requirement would have the effect of shortening the delays without forcing reluctant hospital boards or hospital staff to participate.

médecin qualifié est globalement à l'origine d'un certain délai dans l'obtention du traitement. Le rapport Badgley, à la p. 163, constate qu'il s'écoule un intervalle moyen de 8 semaines avant qu'on ne provoque l'avortement, après la première visite de la femme enceinte chez son médecin. Une partie de ce délai est attribuable à l'absence de comité et aux contingents hospitaliers que j'ai mentionnés précédemment. Il est difficile d'identifier avec précision la fraction du délai attribuable à l'obligation même de recourir à un comité. Sa pertinence tient au fait qu'il s'agit d'une partie du délai global auquel les femmes enceintes doivent se plier pour obtenir un avortement thérapeutique.

En dépit de la preuve que le délai global a été réduit, comme on le verra bientôt, l'obligation de s'adresser à un comité accroît toujours ce délai. En 1987, le rapport Powell a constaté que l'un des problèmes était le nombre de membres du comité qui doivent certifier que le critère du par. 251(4) est respecté (à la p. 27):

> [TRADUCTION] Le nombre de membres du CAT (comité de l'avortement thérapeutique) varie de trois à cinq, mais il arrive que certains comités comptent jusqu'à sept membres. Lorsque cinq ou sept membres ont été nommés sans qu'aucun quorum ne soit fixé, une majorité du comité (de trois à cinq) doit être présente et il en faut trois pour approuver chaque avortement. C'était là une source d'ennuis dans plusieurs des hôpitaux rejoints, lorsqu'il était impossible d'obtenir la présence d'un nombre adéquat de membres et qu'il fallait reporter la réunion. Ainsi un temps précieux était perdu et l'avortement reporté à un stade de grossesse plus avancé.

De plus, les délais dus à l'obligation de recourir à un comité ont, par la force des choses, un effet sur la femme enceinte qui veut être admise à l'hôpital pour lequel le comité a été nommé. Le paragraphe 251(4) précise notamment que c'est "le comité de l'avortement thérapeutique de cet hôpital accrédité ou approuvé" qui doit délivrer le certificat [je souligne]. Cela empêche le comité d'un hôpital d'autoriser des avortements dans d'autres hôpitaux. L'élimination de cette exigence aurait pour effet de réduire les délais sans forcer les conseils d'hôpitaux ou le personnel de l'hôpital récalcitrants à participer.

2. *Consequences of the Delays*

The delays which a pregnant woman may have to suffer as a result of the requirements of s. 251(4) must undermine the security of her person in order that there be a violation of this element of s. 7 of the *Charter*. As I said earlier, s. 7 cannot be invoked simply because a woman's pregnancy amounts to a medically dangerous condition. If, however, the delays occasioned by s. 251(4) of the *Criminal Code* result in an additional danger to the pregnant woman's health, then the state has intervened and this intervention constitutes a violation of that woman's security of the person. By creating this additional risk, s. 251 prevents access to effective and timely medical treatment for the continued pregnancy which would or would be likely to endanger her life or health. If an effective and timely therapeutic abortion may only be obtained by committing a crime, then s. 251 violates the pregnant woman's right to security of the person.

The evidence reveals that the delays caused by s. 251(4) result in at least three broad types of additional medical risks. The risk of post-operative complications increases with delay. Secondly, there is a risk that the pregnant woman require a more dangerous means of procuring a miscarriage because of the delay. Finally, since a pregnant woman knows her life or health is in danger, the delay created by the s. 251(4) procedure may result in an additional psychological trauma. I shall explain each of the additional risks in turn.

The Chief Justice outlined the different techniques employed to perform abortions at different stages of pregnancy and the increasing risk attached to each method as gestational age advances. As he also noted, the evidence showed that within the periods appropriate to each method of abortion, the earlier the abortion was performed, the lower the risk of complication. Evidence introduced at trial confirms findings in the Badgley Report, at pp. 308 *et seq.*, and the Powell Report, at p. 23, that the earlier an abortion is performed, the less chance a woman has of

2. *Les conséquences des délais*

Les délais auxquels une femme enceinte peut avoir à se plier par suite des exigences du par. 251(4) doivent porter atteinte à la sécurité de sa personne pour qu'il y ait violation de cet élément de l'art. 7 de la *Charte*. Comme je l'ai dit précédemment, l'art. 7 ne saurait être invoqué simplement parce que la grossesse d'une femme constitue un état dangereux du point de vue médical. Si toutefois les délais causés par le par. 251(4) du *Code criminel* entraînent un danger additionnel pour la santé de la femme enceinte, alors l'État intervient et cette intervention constitue une violation de la sécurité de la personne de cette femme. En créant ce risque additionnel, l'art. 251 empêche l'obtention en temps opportun, du traitement médical efficace d'une femme dont la continuation de la grossesse mettrait ou mettrait probablement en danger sa vie ou sa santé. Si un avortement thérapeutique efficace ne peut être obtenu en temps opportun que par la perpétration d'un crime, l'art. 251 viole alors le droit de la femme enceinte à la sécurité de sa personne.

La preuve révèle que les délais causés par le par. 251(4) entraînent des risques médicaux additionnels d'au moins trois grandes catégories. Le risque de complications postopératoires croît avec le délai. Ensuite, il y a le risque qu'il faille recourir à une méthode d'avortement plus dangereuse à cause du délai. Enfin, comme la femme enceinte sait que sa vie ou sa santé est en danger, le délai engendré par la procédure du par. 251(4) est susceptible de causer un traumatisme psychologique additionnel. Je vais expliquer chacun de ces risques supplémentaires l'un après l'autre.

Le Juge en chef a exposé les différentes techniques employées pour pratiquer des avortements aux différents stades de la grossesse et a souligné le risque grandissant lié à chaque méthode, au fur et à mesure que la grossesse avance. Comme il l'a aussi noté, la preuve soumise démontrait que, à l'intérieur des périodes qui s'appliquent à chaque méthode d'avortement, plus l'avortement était pratiqué tôt, moins il y avait de risques de complications. Les éléments de preuve produits en première instance confirment les constatations du rapport Badgley, aux pp. 343 et suiv., et du rapport Powell,

experiencing a post-operative complication, whatever abortion technique is used. The respondent agrees with this proposition but cites the low complication rate across Canada and the negligible mortality rate reported since 1974 as evidence that abortion under the current system is very safe. According to *Therapeutic abortions, 1985*, *supra*, at p. 20, no Canadian women have died as a result of therapeutic abortion since 1979. One such death took place in 1974 and another in 1979.

It should be noted, however, that reported complication rates for any given abortion technique are generally limited to certain post-operative physical complications and do not include data on psychological complications inherent to those techniques. Furthermore, the psychological trauma that women suffer before the operation is not reflected in reported figures. This is equally true for any physical complications associated with the pregnant woman's initially dangerous condition which may arise during the delay before the therapeutic abortion.

However low the post-operative complication rate may appear, it increases as gestational age advances. In other words, with each passing week of pregnancy, even in the very early stages, the risk to health that an abortion represents increases. *Therapeutic abortions, 1982* confirms this. The complication rate for abortions performed under nine weeks was 0.7 per cent. This increased to 1.0 per cent in the 9 to 12 week gestation period. A complication rate of 8.5 per cent was reported for the 13 to 16 week gestation period. The complication rate for the 17 to 20 week gestation period was higher still, reported as 22 per cent (*Therapeutic abortions, 1982* (1984), at p. 111). Ontario statistics cited in the Powell Report confirm these national figures for that province. Data from 1976, 1981 and 1984 confirm the relation between abortion complications and gestational age in Ontario. In terms of absolute numbers, there were twice as many reported complications for women with gestational age 13 weeks and above compared to gestational age under 13 weeks. The rate expressed

à la p. 23, que plus l'avortement est pratiqué tôt, moins il y a de chances qu'une femme éprouve des complications postopératoires, quelle que soit la technique utilisée. L'intimée reconnaît cela, mais cite le faible taux de complications qui existe partout au Canada, et le taux négligeable de mortalité rapporté depuis 1974 comme preuve que l'avortement selon le système actuel est très sûr. D'après *Avortements thérapeutiques, 1985*, précité, à la p. 20, aucune Canadienne n'est morte des suites d'un avortement thérapeutique depuis 1979. Un tel décès a eu lieu en 1974 et un autre en 1979.

Il faut rappeler cependant que les taux de complications rapportés pour toute technique d'avortement donnée sont généralement limités à certaines complications postopératoires somatiques et ne comprennent pas les données sur les complications psychologiques inhérentes à ces techniques. De plus, les chiffres rapportés ne reflètent pas le traumatisme psychologique éprouvé par les femmes avant l'intervention. Il en va également de même pour toute complication somatique liée à la condition initialement dangereuse de la femme enceinte qui peut survenir au cours du délai précédant l'avortement thérapeutique.

Si faible que puisse paraître le taux de complications postopératoires, il croît au fur et à mesure que la grossesse avance. En d'autres termes, avec chaque semaine de grossesse qui passe, même dans les tout premiers stades, le danger qu'un avortement représente pour la santé croît. *Avortements thérapeutiques, 1982* le confirment. Le taux de complications pour les avortements pratiqués avant neuf semaines était de 0,7 pour 100. Il augmentait à 1 pour 100 pour la période comprise entre 9 et 12 semaines de grossesse. Un taux de complications de 8,5 pour 100 était rapporté pour celle comprise entre 13 et 16 semaines de grossesse. Le taux de complications pour la période comprise entre 17 et 20 semaines de grossesse était encore plus élevé, soit 22 pour 100 (*Avortements thérapeutiques, 1982* (1984), à la p. 111). Les statistiques ontariennes publiées dans le rapport Powell confirment que des chiffres analogues s'appliquent à cette province. Les données pour 1976, 1981 et 1984 confirment pour l'Ontario le rapport qui existe entre les complications dues aux avorte-

as a percentage of total reported therapeutic abortions performed ("per 100 gestational age specific abortions") was ten times higher for the group of women with gestational age 13 weeks and above (see Powell Report, at p. 23 and Table 4).

The procedure set forth in s. 251(4) of the *Criminal Code* often causes, as we have seen, significant delays in obtaining therapeutic abortions. Delay increases the risk of post-operative complications. Section 251(4) thereby violates a pregnant woman's security of the person.

As I have already observed, the evidence indicates that the different techniques employed to perform abortions in Canada at different stages of pregnancy progressively increase risks to the woman. Expert testimony established that the suction dilation and curettage method generally used in the first twelve weeks is the safest technique. The dilation and evacuation method used from the thirteenth to the sixteenth week is relatively more dangerous. From the sixteenth week of pregnancy, an even more dangerous instillation method may be used. This method involves the introduction of prostaglandin, urea or saline solution which causes the woman to go into labour, giving birth to a foetus which is usually dead but not invariably so. Although the number of abortions done by the instillation technique amounts to only 4.5 per cent of the total number of therapeutic abortions performed in Canada, saline, urea or prostaglandin instillation is nevertheless used for 85.6 per cent of therapeutic abortions for women at least 16 weeks pregnant (*Therapeutic abortions, 1985*, *supra*, at pp. 18-19). It has been shown that the complication rate increases dramatically with the use of the instillation procedure (ibid., at p. 50). In addition, psychological trauma resulting from induced labour and the birth of the foetus is a very real consideration which is not included in post-

ments et le stade de la grossesse. En nombres absolus, deux fois plus de complications sont rapportées dans le cas des femmes enceintes depuis 13 semaines et plus, comparativement aux femmes enceintes depuis moins de 13 semaines. Le taux, exprimé en pourcentage du nombre total d'avortements thérapeutiques pratiqués qui ont été rapportés ([TRADUCTION] «pour 100 avortements pratiqués à ce stade de la grossesse»), était dix fois supérieur dans le cas du groupe de femmes enceintes depuis treize semaines et plus (voir le rapport Powell, à la p. 23 et au tableau 4).

La procédure énoncée au par. 251(4) du *Code criminel* engendre souvent, comme nous l'avons vu, des délais importants dans l'obtention des avortements thérapeutiques. Les délais accroissent le risque de complications postopératoires. Le paragraphe 251(4) viole donc la sécurité de la personne d'une femme enceinte.

Comme je l'ai déjà fait observer, il ressort de la preuve que les différentes techniques employées pour pratiquer des avortements au Canada, à différents stades de la grossesse, accroissent progressivement les dangers pour la femme. Le témoignage des experts établit que la méthode de l'aspiration et de la dilatation, suivies d'un curetage, utilisée dans les douze premières semaines est la technique la plus sûre. La méthode de la dilatation cervicale et de l'évacuation utérine utilisée entre la treizième et la seizième semaines est relativement plus dangereuse. À partir de la seizième semaine de grossesse, on peut avoir recours à la méthode médicamenteuse qui est encore plus dangereuse. Cette méthode comporte l'introduction de prostaglandine, d'urée ou d'une solution saline qui provoque les contractions chez la femme, qui accouche alors d'un fœtus habituellement mort-né, encore que ce ne soit pas toujours le cas. Bien que le nombre d'avortements provoqués par la méthode médicamenteuse ne soit que de 4,5 pour 100 du nombre total d'avortements thérapeutiques pratiqués au Canada, la technique de l'introduction de la solution saline, d'urée ou de prostaglandine est néanmoins employée dans 85,6 pour 100 des avortements thérapeutiques des femmes enceintes depuis au moins 16 semaines (*Avortements thérapeutiques, 1985*, précité, aux pp. 18 et 19). Il a été

operative statistics. It is in the pregnant woman's utmost interest that the delay for obtaining a therapeutic abortion be as short as possible so that the risks associated with more dangerous abortion techniques can be avoided.

Women are aware of the increased risk associated with the later stage abortion techniques. They are also aware of the more traumatic circumstances in which these techniques, particularly the instillation methods, are carried out. It is thus not only the risk of post-operative complications that increases progressively with each method. Women are aware of the increased risk well before the operation is performed. Experts testified at trial that awareness of the increased post-operative risk and of the added trauma associated with the later-stage methods create an increased psychological risk to health distinct from the increased physical risk. There is a world of difference, from the psychological point of view of the patient, between a reputedly safe technique of abortion performed under local anaesthetic requiring only a few hours in a hospital and an abortion procedure with a substantially higher complication rate performed under general anaesthetic requiring a longer period of hospitalization, and involving the trauma of induced labour and the delivery of a dead foetus. When the delays caused by s. 251(4) require a woman to undergo a saline procedure abortion, for example, the psychological trauma associated with that procedure amounts to an additional risk to health attributable to the *Criminal Code*. More generally, the delay that a pregnant woman must endure before she receives treatment of any kind results in psychological trauma. To force a woman, under threat of criminal sanction, to wait for medical treatment when she knows that her pregnancy represents a danger to her life or health is a violation of her right to security of the person. As was stated in *Collin v. Lussier*, [1983] 1 F.C. 218, at p. 239 (later reversed on appeal,

démontré que le taux de complications croît dramatiquement avec le recours à la méthode médicamenteuse (*ibid.*, à la p. 50). En outre, le traumatisme psychologique résultant de la provocation des contractions et de l'accouchement d'un fœtus est un facteur fort réel que n'incluent pas les statistiques portant sur les complications postopératoires. Il est dans le plus grand intérêt de la femme enceinte que le délai d'obtention d'un avortement thérapeutique soit aussi court que possible, de façon que les risques liés aux techniques d'avortement les plus dangereuses puissent être évités.

Les femmes savent que des risques accrus sont liés aux techniques d'avortement du dernier stade. Elles savent aussi que ces techniques, particulièrement la méthode médicamenteuse, sont employées dans des circonstances plus traumatisantes. Ce n'est donc pas uniquement le risque de complications postopératoires qui croît progressivement avec chaque méthode. Les femmes savent qu'il y a croissance des risques bien avant que l'intervention ne soit pratiquée. Des experts ont témoigné lors du procès que la conscience de cette croissance des risques postopératoires et du traumatisme additionnel lié aux méthodes du dernier stade crée un plus grand danger psychologique pour la santé, distinct du risque somatique accru. Il y a un monde, du point de vue psychologique de la patiente, entre une technique d'avortement sous anesthésie locale, réputée sans danger et ne requérant qu'un séjour de quelques heures à l'hôpital, et une méthode d'avortement sous anesthésie générale qui comporte un taux de complications sensiblement plus élevé et qui requiert l'hospitalisation et comporte le traumatisme découlant de la provocation des contractions et de l'accouchement d'un fœtus mort-né. Lorsque les délais engendrés par le par. 251(4) exigent qu'une femme se fasse avorter selon la méthode de la solution saline, par exemple, le traumatisme psychologique lié à cette méthode équivaut à un danger additionnel pour la santé, attribuable au *Code criminel*. De manière plus générale, le délai auquel une femme enceinte doit se plier avant de recevoir un traitement quelconque provoque un traumatisme psychologique. Forcer une femme, sous menace de répression pénale, à attendre de subir un traitement médical alors qu'elle sait que sa grossesse représente un danger

[1985] 1 F.C. 124, but cited with approval on this point by Wilson J. in *Singh v. Minister of Employment and Immigration*, *supra*, at p. 208):

> . . . such detention, by increasing the applicant's anxiety as to his state of health, is likely to make his illness worse and, by depriving him of access to adequate medical care, it is in fact an impairment of the security of his person.

The psychological trauma that a pregnant woman suffers as a result of the delay shows that the procedure established by the *Criminal Code* violates the security of her person.

I have observed three instances in which s. 251 of the *Criminal Code* results in delays for women who qualify for therapeutic abortions in respect of the standard of s. 251(4)(*c*). This being said, the overall delay appears to have been reduced from the 8.0 weeks observed by the Badgley Committee in 1977. Evidence indicates that where a hospital with a committee is in place in a region, as in the case of Toronto, pregnant women can obtain therapeutic abortions within one to three weeks from their initial contact with a physician. Experts testified at trial that these delays are longer in some parts of the country, particularly in Quebec, but that overall delays have, on balance, been reduced. Furthermore, therapeutic abortion committees generally can speed up the certification process in an emergency situation, particularly when the pregnant woman's gestational age requires immediate medical attention. In spite of the reduction, however, these delays continue to result in an additional risk to the health of these women. The risk of post-operative complications increases with each passing week of delay. There is a heightened physical and psychological risk associated with later stage pregnancy techniques for abortion. Finally, psychological trauma increases with delay. The delays mean therefore that the state has intervened in such a manner as to create an additional risk to health, and conse-

pour sa vie ou sa santé, est une violation de son droit à la sécurité de sa personne. Comme il a été dit dans la décision *Collin c. Lussier*, [1983] 1 C.F. 218, à la p. 239 (ultérieurement infirmée en appel, [1985] 1 C.F. 124, mais citée et approuvée sur ce point par le juge Wilson dans l'arrêt *Singh c. Ministre de l'Emploi et de l'Immigration*, précité, à la p. 208):

> . . . cette détention, en augmentant l'anxiété du requérant due à son état de santé, risque d'aggraver sa maladie et en le privant d'accès à des soins médicaux adéquats, elle porte atteinte effectivement à la sécurité de sa personne.

Le traumatisme psychologique que le délai provoque chez une femme enceinte démontre que la procédure établie par le *Code criminel* viole la sécurité de sa personne.

J'ai remarqué trois cas où l'art. 251 du *Code criminel* entraîne des délais pour les femmes aptes à subir un avortement thérapeutique selon la norme de l'al. 251(4)*c*). Cela étant dit, le délai global de 8 semaines constaté par le comité Badgley en 1977 a vraisemblablement diminué. La preuve indique que lorsqu'il existe un hôpital doté d'un comité dans une région, comme celle de Toronto, les femmes enceintes peuvent obtenir des avortements thérapeutiques dans un délai d'une à trois semaines après leur première consultation d'un médecin. Des experts ont témoigné en première instance que ces délais sont plus longs dans certaines régions du pays, particulièrement au Québec, mais que, somme toute, les délais globaux ont été réduits. En outre, les comités de l'avortement thérapeutique peuvent, en général, accélérer la procédure de certification dans un cas d'urgence, particulièrement lorsque, en raison du stade où elle est rendue dans sa grossesse, une femme requiert une attention médicale immédiate. Malgré cette réduction, ces délais continuent toutefois d'engendrer un risque additionnel pour la santé de ces femmes. Le risque de complications postopératoires croît avec chaque semaine qui s'écoule. Un risque somatique et psychologique accru est lié aux techniques d'avortement utilisées au dernier stade de la grossesse. Enfin, le délai provoque un accroissement du traumatisme psychologique. Ces délais signifient donc que l'État est intervenu de manière à créer un risque addi-

quently this intervention constitutes a violation of the woman's security of the person.

IV — The Principles of Fundamental Justice

I turn now to a consideration of the manner in which pregnant women are deprived of their right to security of the person by s. 251. Section 7 of the *Charter* states that everyone has the right not to be deprived of security of the person except in accordance with the principles of fundamental justice. As I will endeavour to demonstrate, s. 251(4) does not accord with the principles of fundamental justice.

I am of the view, however, that certain elements of the procedure for obtaining a therapeutic abortion which counsel for the appellants argued could not be saved by the second part of s. 7 are in fact in accordance with the principles of fundamental justice. The expression of the standard in s. 251(4)(*c*), and the requirement for some independent medical opinion to ascertain that the standard has been met as well as the consequential necessity of some period of delay to ascertain the standard are not in breach of s. 7 of the *Charter*.

Counsel for the appellants argued that the expression of the standard in s. 251(4)(*c*) is so imprecise that it offends the principles of fundamental justice. He submits that pregnant women are arbitrarily deprived of their s. 7 right by reason of the different meanings that can be given to the word "health" in s. 251(4)(*c*) by therapeutic abortion committees.

I agree with McIntyre J. and the Ontario Court of Appeal that the expression "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health" found in s. 251(4)(*c*) does provide, as a matter of law, a sufficiently precise standard by which therapeutic abortion committees can determine when therapeutic abortions should be granted.

As the Court of Appeal said, *supra*, at p. 388:

tionnel pour la santé et, par conséquent, cette intervention constitue une violation de la sécurité de la personne de la femme.

IV – Les principes de justice fondamentale

J'en viens maintenant à l'examen de la manière dont l'art. 251 porte atteinte au droit des femmes enceintes à la sécurité de leur personne. L'article 7 de la *Charte* prévoit qu'il ne peut être porté atteinte au droit de chacun à la sécurité de sa personne qu'en conformité avec les principes de justice fondamentale. Comme je vais tenter de le démontrer, le par. 251(4) n'est pas conforme aux principes de justice fondamentale.

Cependant, je suis d'avis que certains éléments de la procédure d'obtention d'un avortement thérapeutique qui, selon l'avocat des appelants, ne peuvent être sauvegardés par la seconde partie de l'art. 7, sont en fait conformes aux principes de justice fondamentale. La formulation du critère à l'al. 251(4)*c*) et l'obligation d'obtenir une opinion médicale indépendante pour s'assurer qu'il est respecté ainsi que la nécessité, qui en découle, de disposer d'un certain délai pour le faire ne violent pas l'art. 7 de la *Charte*.

L'avocat des appelants a soutenu que la formulation du critère à l'al. 251(4)*c*) est tellement imprécise qu'il y a atteinte aux principes de justice fondamentale. Il fait valoir qu'il y a atteinte arbitraire au droit que l'art. 7 confère aux femmes enceintes, en raison des sens différents que les comités de l'avortement thérapeutique peuvent donner au terme «santé» qui figure à l'al. 251(4)*c*).

Je suis d'accord avec le juge McIntyre et avec la Cour d'appel de l'Ontario pour dire que l'expression «la continuation de la grossesse de cette personne du sexe féminin femme mettrait ou mettrait probablement en danger la vie ou la santé de cette dernière» que l'on trouve à l'al. 251(4)*c*) fournit, sur le plan du droit, un critère suffisamment précis pour permettre aux comités de l'avortement thérapeutique de décider quand il faut autoriser des avortements thérapeutiques.

Comme la Cour d'appel l'a dit, précité, à la p. 388:

In this case ... from a reading of s. 251 with its exceptions, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus, it is for the courts to say what meaning the statute will bear.

Laskin C.J. held in *Morgentaler (1975)*, at p. 634, that s. 251(4)(*c*) was not so vague so as to constitute a violation of "security of the person" without due process of law under s. 1(*a*) of the *Canadian Bill of Rights*:

It is enough to say that Parliament has fixed a manageable standard because it is addressed to a professional panel, the members of which would be expected to bring a practised judgment to the question whether "the continuation of the pregnancy ... would or would be likely to endanger ... life or health." Moreover, I am of the view that Parliament would assign such an exercise of judgment to a professional group without colliding with any imperatives called for by due process of law under s. 1 (*a*).

I agree with Laskin C.J. that the standard is manageable because it is addressed to a panel of doctors exercising medical judgment on a medical question. This being the case, the standard must necessarily be flexible. Flexibility and vagueness are not synonymous. Parliament has set a medical standard to be determined over a limited range of circumstances. With the greatest of respect, I cannot agree with the view that the therapeutic abortion committee is a "strange hybrid, part medical committee and part legal committee" as the Chief Justice characterizes it (at p. 69). In section 251(4) Parliament has only given the committee the authority to make a medical determination regarding the pregnant woman's life or health. The committee is not called upon to evaluate the sufficiency of the state interest in the foetus as against the woman's health. This evaluation of the state interest is a question of law already decided by Parliament in its formulation of s. 251(4). Evidence has been submitted that many committees fail to apply the standard set by Parliament by requiring the consent of the pregnant woman's spouse, by refusing to authorize second abortions or by refusing all abortions to married women. In

[TRADUCTION] Dans cette affaire [...] après lecture de l'art. 251 et de ses exceptions, il n'y a aucune difficulté à déterminer ce qui est interdit et ce qui est permis. On ne peut pas dire qu'aucun sens raisonnable ne peut être donné aux termes de cet article. Donc, il revient aux tribunaux de dire quel sens il faut donner à la loi.

Le juge en chef Laskin a conclu, dans l'arrêt *Morgentaler (1975)*, à la p. 634, que l'al. 251(4)*c*) n'est pas vague au point de constituer une violation de la «sécurité de la personne» sans que ce ne soit par l'application régulière de la loi comme le prévoit l'al. 1*a*) de la *Déclaration canadienne des droits*:

Qu'il suffise de dire que le Parlement a fixé un critère maniable parce qu'il s'adresse à un comité composé d'hommes de l'art, dont on peut s'attendre que les membres portent un jugement exercé sur la question de savoir si «la continuation de la grossesse ... mettrait ou mettrait probablement en danger la vie ou la santé ...» De plus, je suis d'avis que le Parlement peut confier à un groupe d'hommes de l'art l'exercice d'un tel jugement sans heurter d'impératif issu de l'exigence d'application régulière de la loi sous le régime de l'al. *a*) de l'art. 1.

Je conviens avec le juge en chef Laskin que le critère est maniable parce qu'il s'adresse à un comité de médecins qui portent un jugement médical sur une question médicale. Cela étant le cas, le critère doit nécessairement être souple. Souplesse n'est pas synonyme d'imprécision. Le législateur a établi un critère médical déterminable en fonction d'un nombre limité de circonstances. En toute déférence pour l'opinion contraire, je ne saurais admettre que le comité de l'avortement thérapeutique soit un «hybride étrange, en partie comité médical et en partie comité légal» comme le Juge en chef le qualifie (à la p. 69). Au paragraphe 251(4), le législateur n'a conféré au comité que le pouvoir de prendre une décision médicale concernant la vie ou la santé de la femme enceinte. On ne demande pas au comité d'évaluer si l'intérêt qu'a l'État dans la protection du fœtus par rapport à la santé de la femme est suffisant. L'évaluation de l'intérêt de l'État est une question de droit que le législateur a déjà tranchée quand il a formulé le par. 251(4). On a soumis en preuve que de nombreux comités n'appliquent pas le critère fixé par le législateur en exigeant le consentement du conjoint de la femme enceinte, en refusant d'autoriser

so far as these and other requirements fall outside s. 251(4)(*c*), they constitute an unfounded interpretation of the plain terms of the *Criminal Code*. These patent excesses of authority do not, however, mean that the standard of s. 251 is vague.

The wording of s. 251(4)(*c*) limits the authority of the committee. The word "health" is not vague but plainly refers to the physical or mental health of the pregnant woman. I note with interest the decision of the Supreme Court of the United States in *United States v. Vuitch*, 402 U.S. 62 (1971), in which a District of Columbia statute outlawing abortions except when they were "necessary for the preservation of the mother's life or health" was at issue. It was argued that the word "health" was so imprecise and had so uncertain a meaning that the statute offended the Due Process Clause of the United States Constitution. Mindful of the differences between the Due Process Clause and the principles of fundamental justice in s. 7 of the *Charter*, I nevertheless believe the following extract, at p. 72, of the majority opinion delivered by Black J. to be instructive:

> ... the general usage and modern understanding of the word "health" ... includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being ... sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.

The standard is further circumscribed by the word "endanger". Not only must the continuation of the pregnancy affect the woman's life or health, it must endanger life or health, so that a committee that authorizes an abortion when this element is not present or fails to authorize it when it is present exceeds its authority. Finally, the expression "would or would be likely" eliminates any requirement that the danger to life or health be

un second avortement ou en refusant tout avortement aux femmes mariées. Dans la mesure où de telles exigences ne relèvent pas de l'al. 251(4)*c*), elles constituent une interprétation injustifiée des termes clairs du *Code criminel*. Ces abus manifestes de pouvoir ne signifient pas toutefois que le critère de l'art. 251 est vague.

Le texte de l'al. 251(4)*c*) limite le pouvoir du comité. Le terme «santé», loin d'être vague, vise clairement la santé mentale ou physique de la femme enceinte. Je note avec intérêt l'arrêt de la Cour suprême des États-Unis dans l'affaire *United States v. Vuitch*, 402 U.S. 62 (1971), où une loi du district de Columbia, interdisant les avortements sauf lorsqu'ils sont [TRADUCTION] «nécessaires à la préservation de la vie ou de la santé de la mère» était en cause. On soutenait que le terme «santé» était tellement imprécis et avait un sens tellement incertain que la loi violait la clause de l'application régulière de la loi de la Constitution américaine. Tout en ayant à l'esprit les différences qui existent entre la clause de l'application régulière de la loi et les principes de justice fondamentale de l'art. 7 de la *Charte*, je crois néanmoins que l'extrait suivant de l'opinion de la majorité, dont l'auteur est le juge Black, est instructif (à la p. 72):

> [TRADUCTION] ... le sens moderne et courant du terme «santé» [. . .] inclut le bien-être psychologique autant que physique. D'ailleurs le dictionnaire Webster, en accord avec l'usage courant définit à juste titre la santé comme l'«[é]tat de bien-être physique [ou] mental.» Vu sous cet angle, le terme «santé» ne présente aucun problème d'imprécision. En fait, la question de savoir si une intervention particulière est nécessaire pour préserver la santé physique ou mentale d'un patient est une décision que les médecins ont, de toute évidence, à prendre tous les jours, chaque fois qu'une intervention chirurgicale est envisagée.

Le critère est en outre circonscrit par les termes «mettre en danger». Non seulement la continuation de la grossesse doit-elle nuire à la vie ou à la santé de la femme, elle doit encore mettre en danger sa vie ou sa santé, de sorte qu'un comité qui autorise un avortement en l'absence de cet élément ou qui refuse de l'autoriser alors qu'il est présent, abuse de son pouvoir. Enfin, l'expression «mettrait ou mettrait probablement» élimine toute condition

certain or immediate at the time the certificate is issued.

The presence of the exculpatory provision in the *Criminal Code* and the wording of the standard itself point to the parameters of s. 251(4). The required standard of threat to life or health must necessarily be lesser than that required under the common law defence of necessity, otherwise s. 251(4) would be superfluous. It is proper to infer, on the other hand, that s. 251(4) must be interpreted as relating solely to therapeutic grounds since only qualified medical practitioners are entitled to evaluate the threat to life or health.

Not only is the standard expressed in s. 251(4)(*c*) sufficiently precise to permit therapeutic abortion committees to determine when therapeutic abortions should be granted, but the crime of procuring a miscarriage is expressed with sufficient clarity for those subject to its terms so as not to offend the principles of fundamental justice. In this respect, counsel for the respondent correctly observed in his written argument that " . . . s. 251 presents no degree of uncertainty or vagueness as to potential criminal liability: anyone charged with an offence would know whether prohibited conduct was being undertaken and whether an exemption certificate had been received. Equally, any official entrusted with enforcing this section would know whether an offence had been committed." Police officers are not called upon by the section to define "health" but, in respect of the medical justification for a therapeutic abortion, they must ensure that a certificate in writing has been duly issued.

Just as the expression of the standard in s. 251(4)(*c*) does not offend the principles of fundamental justice, the requirement that an independent medical opinion be obtained for a therapeutic abortion to be lawful also cannot be said to constitute a violation of these principles when considered in the context of pregnant women's right to security of the person.

In *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 304, La Forest J. explained that the legislator must be

que le danger pour la vie ou la santé soit certain ou immédiat au moment où le certificat est délivré.

La présence de la disposition disculpatoire dans le *Code criminel* et la formulation du critère lui-même fixent les paramètres du par. 251(4). Le critère requis de menace à la vie ou à la santé doit obligatoirement être moindre que celui qu'exige le moyen de défense de *common law* de la nécessité, car autrement le par. 251(4) serait superflu. Par contre, on peut à bon droit conclure que le par. 251(4) doit être interprété comme portant seulement sur des motifs thérapeutiques puisque seuls des médecins qualifiés ont le droit d'évaluer la menace à la vie ou à la santé.

Non seulement le critère exprimé à l'al. 251(4)*c*) est-il suffisamment précis pour permettre au comité de l'avortement thérapeutique de décider quand il convient d'autoriser les avortements thérapeutiques, mais encore le crime consistant à procurer un avortement est exprimé avec suffisamment de clarté pour ceux qui sont assujettis à ces termes pour qu'il ne porte pas atteinte aux principes de justice fondamentale. À cet égard, l'avocat de l'intimée fait observer à juste titre dans son argumentation écrite que [TRADUCTION] «. . . l'art. 251 ne présente aucun degré d'incertitude ou d'imprécision quant à une éventuelle responsabilité criminelle: tout inculpé saurait s'il y avait conduite interdite et si un certificat d'exemption avait été reçu. Également, tout officier chargé de faire respecter cet article saurait si une infraction a été perpétrée.» L'article n'oblige pas les agents de police à définir ce qu'est «la santé» mais, au chapitre de la justification médicale d'un avortement thérapeutique, ils doivent s'assurer qu'un certificat écrit a dûment été délivré.

Tout comme le critère exprimé à l'al. 251(4)*c*) ne porte pas atteinte aux principes de justice fondamentale, on ne peut non plus dire que l'obligation d'obtenir une opinion médicale indépendante pour qu'un avortement thérapeutique soit licite constitue une violation de ces principes sous l'angle du droit des femmes enceintes à la sécurité de leur personne.

Dans l'arrêt *R. c. Jones*, [1986] 2 R.C.S. 284, à la p. 304, le juge La Forest explique que le législa-

accorded a certain latitude to make choices regarding the type of administrative structure that will suit its needs unless the use of such structure is in itself "so manifestly unfair, having regard to the decisions it is called upon to make [emphasis added], as to violate the principles of fundamental justice". An administrative structure made up of unnecessary rules, which result in an additional risk to the health of pregnant women, is manifestly unfair and does not conform to the principles of fundamental justice. Section 251(4), taken as a whole, does not accord with the principles of fundamental justice in that certain of the procedural requirements of s. 251 create unnecessary delays. As will be seen, some of these requirements are manifestly unfair because they have no connection whatsoever with Parliament's objectives in establishing the administrative structure in s. 251(4). Although connected to Parliament's objectives, other rules in s. 251(4) are manifestly unfair because they are not necessary to assure that the objectives are met.

teur doit jouir d'une certaine latitude pour choisir le genre de structure administrative qui répondra à ses besoins, à moins que le recours à une telle structure ne soit en lui-même «nettement injuste, compte tenu des décisions qu'elle [le législateur] est appelée à prendre [je souligne], au point de violer les principes de justice fondamentale». Une structure administrative comportant des règles inutiles, qui ont pour effet d'accroître le danger pour la santé des femmes enceintes, est nettement injuste et non conforme aux principes de justice fondamentale. Le paragraphe 251(4), pris dans son ensemble, n'est pas compatible avec les principes de justice fondamentale en raison des délais inutiles qu'engendrent certaines exigences en matière de procédure de l'art. 251. Comme nous le verrons, certaines de ces exigences sont manifestement injustes du fait qu'elles n'ont absolument aucun rapport avec les objectifs poursuivis par le législateur en établissant la structure administrative que l'on trouve au par. 251(4). Quoique liées aux objectifs du législateur, d'autres règles du par. 251(4) sont nettement injustes du fait qu'elles ne sont pas nécessaires pour assurer la réalisation des objectifs poursuivis.

As I noted in my analysis of s. 251(4), by requiring that a committee state that the medical standard has been met for the criminal sanction to be lifted, Parliament seeks to assure that there is a reliable, independent and medically sound opinion that the continuation of the pregnancy would or would be likely to endanger the woman's life or health. Whatever the failings of the current system, I believe that the purpose pursuant to which it was adopted does not offend the principles of fundamental justice. As I shall endeavour to explain, the current mechanism in the *Criminal Code* does not accord with the principles of fundamental justice. This does not preclude, in my view, Parliament from adopting another system, free of the failings of s. 251(4), in order to ascertain that the life or health of the pregnant woman is in danger, by way of a reliable, independent and medically sound opinion.

Comme je le souligne dans mon analyse du par. 251(4), en obligeant un comité à déclarer que le critère médical est rempli pour que la sanction criminelle soit levée, le législateur veut assurer qu'il y ait une opinion médicale éclairée, fiable et indépendante que la continuation de la grossesse mettrait ou mettrait probablement en danger la vie ou la santé de la femme. Quelles que soient les faiblesses du système actuel, je crois que l'objectif visé par son adoption ne porte pas atteinte aux principes de justice fondamentale. Comme je vais tenter de l'expliquer, le mécanisme actuel du *Code criminel* n'est pas compatible avec les principes de justice fondamentale. Cela n'empêche pas, à mon avis, le législateur d'adopter un autre système, exempt des faiblesses du par. 251(4), pour vérifier si la vie ou la santé de la femme enceinte est en danger, au moyen d'une opinion médicale éclairée, fiable et indépendante.

Parliament is justified in requiring a reliable, independent and medically sound opinion in order to protect the state interest in the foetus. This is

Le législateur est justifié d'exiger une opinion médicale éclairée, fiable et indépendante, afin de préserver l'intérêt qu'a l'État dans la protection du

undoubtedly the objective of a rule which requires an independent verification of the practising physician's opinion that the life or health of the pregnant woman is in danger. It cannot be said to be simply a mechanism designed to protect the health of the pregnant woman. While this latter objective clearly explains the requirement that the practising physician be a "qualified medical practitioner" and that the abortion take place in a safe place, it cannot explain the necessary intercession of an in-hospital committee of three physicians from which is excluded the practising physician.

While a second medical opinion is very often seen as necessary in medical circles when difficult questions as to a patient's life or health are at issue, the independent opinion called for by the *Criminal Code* has a different purpose. Parliament requires this independent opinion because it is not only the woman's interest that is at stake in a decision to authorize an abortion. The Ontario Court of Appeal alluded to this at p. 378 when it stated that "One cannot overlook the fact that the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate". The presence of the foetus accounts for this complexity. By requiring an independent medical opinion that the pregnant woman's life or health is in fact endangered, Parliament seeks to ensure that, in any given case, only therapeutic reasons will justify the decision to abort. The amendments to the *Criminal Code* in 1969 amounted to a recognition by Parliament, as I have said, that the interest in the life or health of the pregnant woman takes precedence over the interest of the state in the protection of the foetus when the continuation of the pregnancy would or would be likely to endanger the pregnant woman's life or health. Parliament decided that it was necessary to ascertain this from a medical point of view before the law would allow the interest of the pregnant woman to indeed take precedence over that of the foetus and permit an abortion to be performed without criminal sanction.

fœtus. C'est forcément l'objet de la règle qui exige une vérification indépendante de l'opinion du médecin traitant que la vie ou la santé de la femme enceinte est en danger. On ne saurait dire qu'il s'agit simplement d'un mécanisme conçu pour protéger la santé de la femme enceinte. Bien que ce dernier objectif explique manifestement l'obligation pour le médecin traitant d'être un «médecin qualifié» et celle que l'avortement ait lieu dans un endroit sûr, il ne peut expliquer la nécessité de l'intervention d'un comité interne de l'hôpital, composé de trois médecins, dont est exclu le médecin traitant.

Certes, une seconde opinion médicale est souvent considérée comme nécessaire dans les milieux médicaux lorsque de difficiles questions de vie ou de santé du patient sont en cause, mais l'opinion indépendante qu'exige le *Code criminel* vise un objet différent. Le législateur exige cette opinion indépendante parce que ce n'est pas seulement l'intérêt de la femme qui est en jeu dans la décision d'autoriser un avortement. La Cour d'appel de l'Ontario fait allusion à cela à p. 378, lorsqu'elle dit que [TRADUCTION] «[o]n ne saurait oublier que la situation du droit de la femme à être maîtresse de sa propre personne se complique lorsqu'elle devient enceinte et qu'un certain contrôle de la loi peut se révéler approprié». La présence du fœtus est responsable de cette complexité. En exigeant une opinion médicale indépendante portant que la vie ou la santé de la femme enceinte est réellement en danger, le législateur veut s'assurer que, dans un cas donné, seules des raisons thérapeutiques justifieront la décision d'avorter. Comme je l'ai dit, les modifications apportées au *Code criminel* en 1969 équivalent à la reconnaissance par le législateur que l'intérêt que présente la vie ou la santé des femmes enceintes l'emporte sur l'intérêt qu'a l'État dans la protection du fœtus, lorsque la continuation de la grossesse mettrait ou mettrait probablement en danger la vie ou la santé de la femme enceinte. Le législateur a décidé qu'il était nécessaire de vérifier cela du point de vue médical, avant que la loi ne laisse l'intérêt de la femme enceinte l'emporter effectivement sur celui du fœtus et qu'elle ne permette qu'un avortement soit pratiqué sans qu'il y ait de sanction criminelle.

I do not believe it to be unreasonable to seek independent medical confirmation of the threat to the woman's life or health when such an important and distinct interest hangs in the balance. I note with interest that in a number of foreign jurisdictions, laws which decriminalize abortions require an opinion as to the state of health of the woman independent from the opinion of her own physician. The Crown, in its book of authorities, cited the following statutes which included such a mechanism: United Kingdom, *Abortion Act, 1967*, 1967, c. 87, s. 1(1)(*a*); Australian Northern Territory, *Criminal Law Consolidation Act and Ordinance*, s. 79 A(3)(a); South Australia, *Criminal Law Consolidation Act*, 1935-1975, s. 82a(1)(*a*); Federal Republic of Germany, *Criminal Code*, as amended by the *Fifteenth Criminal Law Amendment Act* (1976), s. 219; Israel, *Penal Law*, 5737-1977 (as amended), s. 315; New Zealand, *Crimes Act 1961*, as amended by the *Crimes Amendment Act 1977* and the *Crimes Amendment Act 1978*, s. 187A(4); *Code pénal suisse*, art. 120(1). This said, the practising physician must, according to s. 251(4)(*a*), be in "good faith" and, consequently, have no reason to believe that the standard in s. 251(4)(*c*) has not been met. The practising physician is, however, properly excluded from the body giving the independent opinion. I believe that Parliament is justified in requiring what is no doubt an extraordinary medical practice in its regulation of the criminal law of abortion in accordance with the various interests at stake.

The assertion that an independent medical opinion, distinct from that of the pregnant woman and her practising physician, does not offend the principles of fundamental justice would need to be reevaluated if a right of access to abortion is founded upon the right to "liberty" in s. 7 of the *Charter*. I am of the view that there would still be circumstances in which the state interest in the protection of the foetus would require an independent medical opinion as to the danger to the life or health of the pregnant woman. Assuming without deciding that a right of access to abortion can be founded upon the right to "liber-

Je ne crois pas qu'il soit déraisonnable de demander une confirmation médicale indépendante au sujet de la menace pour la vie ou la santé de la femme lorsqu'un intérêt aussi important et marqué pèse dans la balance. Je constate avec intérêt que, dans de nombreux ressorts étrangers, les lois qui décriminalisent l'avortement requièrent un avis concernant l'état de santé de la femme indépendant de celui de son propre médecin. Le ministère public, dans son dossier de sources législative, jurisprudentielle et doctrinale, cite les lois suivantes qui comportent un mécanisme de ce genre: Royaume-Uni, *Abortion Act, 1967*, 1967, chap. 87, al. 1(1)*a*); Territoire du Nord de l'Australie, *Criminal Law Consolidation Act and Ordinance*, sous-al. 79 A(3)a); Australie-Méridionale, *Criminal Law Consolidation Act*, 1935-1975, al. 82a(1)*a*); République fédérale de l'Allemagne, *Criminal Code*, modifié par la *Fifteenth Criminal Law Amendment Act* (1976), art. 219; Israël, *Penal Law*, 5737-1977 (modifiée), art. 315; Nouvelle-Zélande, *Crimes Act 1961*, modifiée par la *Crimes Amendment Act 1977* et la *Crimes Amendment Act 1978*, par. 187A(4); *Code pénal suisse*, par. 120(1). Cela dit, le médecin traitant doit, d'après l'al. 251(4)*a*), être «de bonne foi» et, par conséquent, n'avoir aucune raison de croire que le critère de l'al. 251(4)*c*) n'est pas rempli. Le médecin traitant est toutefois exclu à juste titre de l'organisme qui donne une opinion indépendante. Je crois que le législateur a raison d'exiger ce qui, sans aucun doute, est une pratique médicale extraordinaire dans sa réglementation du droit criminel en matière d'avortement, conformément aux divers intérêts en jeu.

L'affirmation selon laquelle une opinion médicale indépendante, distincte de celle de la femme enceinte et de son médecin traitant, ne porte pas atteinte aux principes de justice fondamentale, devrait être réévaluée si le droit à l'avortement était fondé sur le droit à la «liberté» de l'art. 7 de la *Charte*. Je suis d'avis qu'il y aurait encore des circonstances dans lesquelles l'intérêt qu'a l'État dans la protection du fœtus exigerait une opinion médicale indépendante concernant le danger pour la vie ou la santé de la femme enceinte. Même en présumant, sans le décider, que le droit à l'avortement peut se fonder sur le droit à la «liberté», il y

ty", there would be a point in time at which the state interest in the foetus would become compelling. From this point in time, Parliament would be entitled to limit abortions to those required for therapeutic reasons and therefore require an independent opinion as to the health exception. The case law reveals a substantial difference of opinion as to the state interest in the protection of the foetus as against the pregnant woman's right to liberty. Wilson J., for example, in her discussion of s. 1 of the *Charter* in the case at bar, notes the following, at p. 183:

The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester.

This view as to when the state interest becomes compelling may be compared with that of O'Connor J. of the United States Supreme Court in her dissenting opinion in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), at pp. 460-61:

In *Roe* [*Roe* v. *Wade* 410 U.S. 113 (1973)], the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," *id.*, at 159, the Court chose the point of viability — when the foetus is *capable* of life independent of its mother — to permit the complete proscription of abortion. The choice of viability as the point at which state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.

As I indicated at the outset of my reasons, it is nevertheless possible to resolve this appeal without attempting to delineate the right to "liberty" in s.

aurait un moment où l'intérêt qu'a l'État dans la protection du fœtus deviendrait supérieur. Dès ce moment-là, le législateur serait en droit de limiter les avortements à ceux qui sont nécessaires pour des motifs thérapeutiques et donc d'exiger une opinion indépendante concernant l'exception pour cause de santé. La jurisprudence est fort partagée sur la question de l'intérêt qu'a l'État dans la protection du fœtus face au droit de la femme enceinte à la liberté. Le juge Wilson, par exemple, dans l'analyse qu'elle fait en l'espèce de l'article premier de la *Charte*, souligne ceci (à la p. 183):

Quant au point précis du développement du fœtus où l'intérêt qu'a l'État de le protéger devient "supérieur", je laisse le soin de le fixer au jugement éclairé du législateur, qui est en mesure de recevoir des avis à ce sujet de l'ensemble des disciplines pertinentes. Il me semble cependant que ce point pourrait se situer quelque part au cours du second trimestre.

Ce point de vue quant au moment où l'intérêt de l'État devient supérieur peut être comparé à celui exprimé en dissidence par le juge O'Connor de la Cour suprême des États-Unis, dans l'affaire *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), aux pp. 460 et 461:

[TRADUCTION] Dans l'arrêt *Roe* [*Roe* v. *Wade* 410 U.S. 113 (1973)], la Cour a jugé que si l'État avait un intérêt important et légitime à protéger la vie potentielle, cet intérêt ne pouvait devenir supérieur qu'au moment où le fœtus devenait viable. La difficulté que pose ce genre d'analyse est claire: la vie *potentielle* n'est pas moins potentielle au cours des premières semaines de grossesse qu'elle ne l'est au point de viabilité ou ultérieurement. À tout stade de la grossesse, il y a une vie humaine en puissance. Bien qu'elle ait refusé de «résoudre la difficile question du moment où la vie commence», *id.*, à la p. 159, la Cour a choisi le point de viabilité, c'est-à-dire lorsque le fœtus est *capable* de vivre indépendamment de sa mère, pour interdire complètement l'avortement. Le choix de la viabilité comme point où l'intérêt de l'État dans la vie *potentielle* devient supérieur n'est pas moins arbitraire que le choix de tout autre point avant la viabilité ou de tout autre point ultérieur. Par conséquent, je crois que l'intérêt qu'a l'État à protéger la vie humaine potentielle existe tout au long de la grossesse.

Comme je l'ai indiqué au début de mes motifs, il est néanmoins possible de résoudre le pourvoi sans tenter de délimiter le droit à «la liberté» de l'art. 7

7 of the *Charter*. The violation of the right to "security of the person" and the relevant principles of fundamental justice are sufficient to invalidate s. 251 of the *Criminal Code*.

Some delay is inevitable in connection with any system which purports to limit to therapeutic reasons the grounds upon which an abortion can be performed lawfully. Any statutory mechanism for ensuring an independent confirmation as to the state of the woman's life or health, adopted pursuant to the objective of assuring the protection of the foetus, will inevitably result in a delay which would exceed whatever delay would be encountered if an independent opinion was not required. Furthermore, rules promoting the safety of abortions designed to protect the interest of the pregnant woman will also cause some unavoidable delay. It is only in so far as the administrative structure creates delays which are unnecessary that the structure can be considered to violate the principles of fundamental justice. Indeed, an examination of the delays caused by certain of the procedural requirements in s. 251(4) reveals that they are unnecessary, given Parliament's objectives in establishing the administrative structure. I note parenthetically that it is not sufficient to argue that the structure would operate in a fair manner but for the applications from women who do not qualify in respect of the standard in s. 251(4)(*c*). A fair structure, put in place to decide between those women who qualify for a therapeutic abortion and those who do not, should be designed with a view to efficiently meeting the demands which it must necessarily serve.

One such example of a rule which is unnecessary is the requirement in s. 251(4) that therapeutic abortions must take place in an eligible hospital to be lawful. I have observed that s. 251(4) directs that therapeutic abortions take place in accredited or approved hospitals, with at least four physicians, and that, because of the lack of such hospitals in many parts of Canada, this often causes delay for women seeking treatment. As I noted earlier, this requirement was plainly adopted to assure the safety of the abortion procedure generde la *Charte*. La violation du droit à «la sécurité de la personne» et les principes pertinents de justice fondamentale sont suffisants pour invalider l'art. 251 du *Code criminel*.

Un certain délai est inévitable pour tout système qui prétend limiter à des raisons thérapeutiques les motifs qui permettent de pratiquer un avortement licitement. Tout mécanisme légal qui vise à obtenir une confirmation indépendante de l'état de santé de la femme ou du danger pour sa vie, adopté conformément à l'objectif d'assurer la protection du fœtus, engendre inévitablement un délai supérieur à tout autre délai auquel on pourrait avoir à se plier si une opinion indépendante n'était pas exigée. En outre, les règles qui visent à assurer des avortements sans danger et qui sont conçues pour la protection de la femme enceinte sont elles aussi, inévitablement, sources d'un certain délai. C'est uniquement dans la mesure où la structure administrative crée des délais qui ne sont pas nécessaires qu'on peut considérer qu'elle viole les principes de justice fondamentale. Un examen des délais occasionnés par certaines exigences en matière de procédure du par. 251(4) révèle effectivement qu'ils ne sont pas nécessaires, compte tenu des objectifs que poursuivait le législateur en établissant cette structure administrative. Je souligne, entre parenthèses, qu'il ne suffit pas de soutenir que la structure fonctionnerait équitablement n'étaient-ce les demandes de femmes inadmissibles au regard du critère de l'al. 251(4)*c*). Une structure équitable mise en place pour départager les femmes admissibles à un avortement thérapeutique de celles qui ne le sont pas devrait être conçue de manière à satisfaire efficacement aux demandes auxquelles elle doit nécessairement répondre.

Un exemple de règle inutile, c'est l'exigence du par. 251(4) que les avortements thérapeutiques aient lieu dans un hôpital admissible pour être licites. J'ai fait observer que le par. 251(4) exige que les avortements thérapeutiques soient pratiqués dans des hôpitaux accrédités ou approuvés, comptant au moins quatre médecins, et que l'absence de tels hôpitaux dans bien des régions du Canada est souvent à la source de délais pour les femmes qui veulent être traitées. Comme je l'ai noté précédemment, cette exigence a manifeste-

ally, and particularly the safety of the pregnant woman, after the standard of s. 251(4) has been met and after the certificate to this effect has been issued enabling the woman to have a lawful abortion. The objective in respect of which the in-hospital rule was adopted is safety and not the state interest in the protection of the foetus. As the rule stands in s. 251(4), however, no exception is currently possible. The evidence discloses that there is no justification for the requirement that all therapeutic abortions take place in hospitals eligible under the *Criminal Code*. In this sense, the delays which result from the hospital requirement are unnecessary and, consequently, in this respect, the administrative structure for therapeutic abortions is manifestly unfair and offends the principles of fundamental justice.

ment été adoptée pour assurer, de manière générale, que les avortements soient pratiqués en toute sécurité et, plus particulièrement, pour assurer la sécurité de la femme enceinte, une fois satisfait le critère du par. 251(4) et une fois délivré le certificat en ce sens, autorisant la femme à subir un avortement licite. L'objectif pour lequel la règle de l'avortement à l'hôpital a été adoptée était la sécurité et non l'intérêt qu'a l'État dans la protection du fœtus. Mais la règle, que l'on trouve au par. 251(4), ne permet actuellement aucune exception. Il ressort de la preuve que l'obligation que tous les avortements aient lieu dans des hôpitaux admissibles en vertu du *Code criminel* n'est pas justifiée. En ce sens, les délais qui résultent de l'exigence relative aux hôpitaux ne sont pas nécessaires et, par conséquent, à cet égard, la structure administrative concernant les avortements thérapeutiques est nettement injuste et viole les principes de justice fondamentale.

Experts testified at trial that the principal justification for the in-hospital rule is the problem of post-operative complications. There are of course instances in which the danger to life or health observed by the therapeutic abortion committee will constitute sufficient grounds for the procedure to take place in a hospital. There are other instances in which the circumstances of the procedure itself requires that it be performed in hospital, such as certain abortions performed at an advanced gestational age or cases in which the patient is particularly vulnerable to what might otherwise be a simple procedure.

Des experts sont venus témoigner en première instance que la principale justification de la règle de l'avortement à l'hôpital réside dans le problème des complications postopératoires. Il y a bien sûr des cas où le danger pour la vie ou la santé constaté par le comité de l'avortement thérapeutique constituera un motif suffisant pour que l'intervention ait lieu à l'hôpital. Il y a d'autres cas où les circonstances entourant l'intervention elle-même exigent qu'elle soit pratiquée à l'hôpital; il en va ainsi notamment de certains avortements pratiqués à un stade avancé de la grossesse ou des cas où la patiente est particulièrement vulnérable à ce qui autrement pourrait constituer une intervention simple.

In many cases, however, there is no medical justification that the therapeutic abortion take place in a hospital. Experts testified at trial, that many first trimester therapeutic abortions may be safely performed in specialized clinics outside of hospitals because the possible complications can be handled, and in some cases better handled, by the facilities of a specialized clinic. The parties submitted statistics comparing complication rates for in-hospital abortions and those performed in non-hospital facilities. These statistics are of limited value for our purposes because, not surprisingly,

Dans bien des cas cependant, il n'y a aucune justification médicale à ce que l'avortement thérapeutique soit pratiqué à l'hôpital. D'après les témoignages des experts en première instance, un grand nombre d'avortements thérapeutiques du premier trimestre peuvent être pratiqués en toute sécurité à l'extérieur de l'hôpital dans des cliniques spécialisées du fait que celles-ci sont équipées, et dans certains cas mieux équipées, pour faire face aux éventuelles complications. Les parties ont produit des statistiques comparant les taux de complications des avortements à l'hôpital et des avorte-

the higher reported rates in hospitals are due in part to the fact that the more dangerous cases are treated in hospital. What is more revealing, however, are statistics which show that a high percentage of therapeutic abortions performed in Canada are performed on an out-patient basis:

> The average length of stay in hospitals per therapeutic abortion case was less than a day in 1985. This average includes 46,567 cases or 76.9 per cent of 60,518 therapeutic abortion cases for women, for whom the pregnancy terminations took place on an outpatient (day care) basis. The per cent of outpatient therapeutic abortions increased to 76.9% in 1985 from 59.7% in 1981 and 34.9% in 1975. [*Therapeutic abortions, 1985*, *supra*, at p. 20.]

The substantial increase in the percentage of abortions performed on an out-patient basis since 1975 underscores the view that the in-hospital requirement, which may have been justified when it was first adopted, has become exorbitant. One suspects that the number of out-patient abortions would be even higher if the *Criminal Code* did not prevent women in many parts of Canada from obtaining timely and effective treatment by requiring them to travel to places where eligible hospital facilities were available. Furthermore, these figures do not include out-patient abortions which may have qualified as therapeutic under the standard in s. 251(4)(*c*) which were performed on Canadian women in the United States and in clinics currently operating in Canada outside the s. 251(4) exception. Citing the Canadian abortion law's in-hospital requirement as a legislative standard which is difficult to satisfy, Rebecca J. Cook and Bernard M. Dickens observe that "Rigid statutory formulae may not improve ... distribution of services but may obstruct appropriate response to health needs": *Abortion Laws in Commonwealth Countries* (1979), at p. 28.

ments pratiqués en dehors du milieu hospitalier. Ces statistiques n'ont qu'une valeur limitée pour nos fins car, cela ne surprend guère, les taux plus élevés donnés pour les hôpitaux sont dus en partie au fait que les cas les plus dangereux sont traités à l'hôpital. Sont toutefois plus révélatrices les statistiques qui démontrent qu'un fort pourcentage d'avortements thérapeutiques au Canada sont pratiqués en consultation externe:

> La durée moyenne d'hospitalisation des femmes ayant subi un avortement thérapeutique a été de moins d'une journée en 1985. Cette moyenne tient compte des 46,567 cas d'avortements thérapeutiques pratiqués en consultation externe, soit 76.9% des 60,518 avortements thérapeutiques déclarés. Le pourcentage des avortements thérapeutiques pratiqués en consultation externe est passé de 34.9% en 1975, puis 59.7% en 1981 et à 76.9% en 1985. [*Avortements thérapeutiques, 1985*, précité, à la p. 20.]

La croissance importante du pourcentage des avortements pratiqués en consultation externe depuis 1975 confirme que l'exigence relative aux hôpitaux, peut-être justifiée lorsqu'elle a été adoptée, est devenue exorbitante. Il y a lieu de croire que le nombre d'avortements pratiqués en consultation externe serait encore plus élevé si le *Code criminel* n'empêchait pas les femmes, dans de nombreuses régions du Canada, d'obtenir un traitement efficace, au moment opportun, en les obligeant à se déplacer et à se rendre là où se trouve un établissement hospitalier admissible. De plus, ces chiffres n'incluent pas les avortements pratiqués en consultation externe, qui auraient pu être admissibles à titre d'avortements thérapeutiques d'après le critère de l'al. 251(4)*c*), sur des Canadiennes aux États-Unis et dans des cliniques canadiennes agissant en dehors de l'exception du par. 251(4). Décrivant l'obligation de l'avortement à l'hôpital imposée par le droit canadien comme un critère législatif difficile à respecter, Rebecca J. Cook et Bernard M. Dickens font observer que [TRADUCTION] «[u]ne formulation législative rigide pourrait fort bien ne pas améliorer la distribution des services et constituer un obstacle à toute réponse appropriée aux besoins de santé»: *La législation de l'avortement dans les pays du Commonwealth* (1979), à la p. 31.

In the Powell Report, several recommendations were made as to options for abortion service delivery in Ontario. In support of these recommendations, the Report included the following, at pp. 21 and 35:

When many countries legalized abortion, hospitals were viewed as the appropriate providers of safe abortion services. Since then, studies have demonstrated that abortions can be performed safely in other types of facilities, (Tietze & Henshaw, 1986). The complication rate for all abortions performed in nonhospital facilities, is no higher than for those which take place in hospitals (Grimes et al., 1981).

. . .

Hospitals are often hard pressed to find time in the busy operating room schedules to fit in abortion procedures. In most hospitals, abortions are not viewed as a priority for scheduling. Gynaecologists must fit abortions into their allotted time in operating rooms. Although abortions can be performed in minor procedure rooms with no jeopardy to the patient, this is an unusual practice.

The presence of legislation in other jurisdictions permitting certain abortions to be performed outside of hospitals is especially revealing as to the safety of the procedure in those circumstances and of the necessity to provide alternative means given the limited resources of hospitals. In the Powell Report, it was observed, at p. 21, that:

In a number of European countries, including the Netherlands, Poland and West Germany, approximately half of the abortions are performed in non-hospital facilities. In France in 1982, 53 percent of abortions were performed in 90 "centres d'interruption volontaire de grossesse" which were administered by hospitals but were in practice separate abortion clinics. The French government ordered all public hospitals that could not meet the demand for abortions to provide such clinics.

Particularly striking is the United States experience in respect of the in-hospital rule. The Powell Report noted that 82 per cent of abortions performed in the United States in 1982 were done outside of hospitals (at p. 22). Experts confirmed

Dans le rapport Powell, plusieurs recommandations portent sur les options envisageables en matière de services d'avortement en Ontario. À l'appui de ces recommandations, le rapport contient ce qui suit, aux pp. 21 et 35:

[TRADUCTION] Lorsque de nombreux pays ont légalisé l'avortement, les hôpitaux étaient considérés comme les fournisseurs tout indiqués de services d'avortements sans danger. Depuis lors, des études ont démontré que les avortements peuvent être pratiqués en toute sécurité dans d'autres genres d'institutions (Tietze & Henshaw, 1986). Le taux de complications de tous les avortements pratiqués ailleurs que dans des établissements hospitaliers n'est pas plus élevé que celui des avortements pratiqués à l'hôpital (Grimes et al., 1981).

. . .

Les hôpitaux éprouvent beaucoup de difficultés à trouver du temps, dans l'horaire surchargé des salles d'opération, pour pratiquer les interruptions de grossesse. Dans la plupart des hôpitaux, les avortements ne sont pas considérés comme une priorité sur leur liste. Les gynécologues doivent caser les avortements à l'intérieur du temps de salle d'opération qui leur est alloué. Bien que les avortements puissent être pratiqués dans des salles d'interventions mineures, sans risque pour la patiente, il s'agit bien là d'une pratique inhabituelle.

L'existence de lois dans d'autres pays autorisant la pratique de certains avortements à l'extérieur de l'hôpital est particulièrement révélatrice de la sûreté de l'intervention dans ces circonstances et de la nécessité de prévoir d'autres moyens étant donné les ressources limitées des hôpitaux. Dans le rapport Powell, on fait observer, à la p. 21, que:

[TRADUCTION] Dans de nombreux pays européens, y compris les Pays-Bas, la Pologne et l'Allemagne de l'Ouest, approximativement la moitié des avortements sont pratiqués ailleurs que dans des établissements hospitaliers. En France, en 1982, 53 pour 100 des avortements ont été pratiqués dans 90 «centres d'interruption volontaire de grossesse» administrés par les hôpitaux, mais constituant en pratique des cliniques d'avortement distinctes. Le gouvernement français a ordonné que tous les hôpitaux publics qui ne pouvaient répondre à la demande d'avortements offrent de telles cliniques.

L'expérience américaine est particulièrement saisissante au sujet de la règle de l'avortement à l'hôpital. Le rapport Powell a souligné que 82 pour 100 des avortements pratiqués aux États-Unis en 1982 l'avaient été en dehors du milieu hospitalier

this finding at trial. Dr. Christopher Tietze, a recognized expert on abortion, explained at trial that in 1981 all out-of-hospital abortion clinics in the United States performed abortions up to 10 weeks gestational age, 90 per cent of clinics performed abortions up to 12 weeks, 50 per cent of clinics up to 14 weeks and 20 per cent accepted patients up to 16 weeks. Although the legal basis upon which women assert a constitutional right of access to abortion is different in the United States than that which I find in the case at bar, the American experience as to the inappropriateness of a universal in-hospital requirement remains relevant.

The Powell Report proposed a number of projects as alternatives to the in-hospital rule for therapeutic abortions. Each proposal is designed to be "under the jurisdiction of a hospital board or several hospital boards with approval for abortion services provided through hospital therapeutic abortion committee mechanisms" (at p. 37). One such proposal is for the establishment of comprehensive women's health care clinics which would provide first trimester abortions, referrals to hospitals for second trimester abortions and post-abortion counselling. Regional centres for therapeutic abortion clinics affiliated with but not necessarily located in a hospital are also proposed in the Report, which goes on to emphasize that first trimester ambulatory abortions are those most appropriate for a non-hospital setting.

The Badgley Committee also made a series of proposals designed to reduce the number and type of complications associated with therapeutic abortions. These included a proposal, at p. 322, for "concentrating the performance of the abortion procedure into specialized units with a full range of the required equipment and facilities and staffed by experienced and specially trained nurses and medical personnel".

(à la p. 22). Les experts ont confirmé cette constatation en première instance. Le Dr Christopher Tietze, un expert reconnu en matière d'avortements, a expliqué en première instance qu'en 1981 toutes les cliniques d'avortements à l'extérieur des hôpitaux, aux États-Unis, avaient pratiqué des avortements jusqu'au stade de dix semaines de grossesse, 90 pour 100 des cliniques en avaient pratiqué jusqu'au stade de 12 semaines, 50 pour 100 jusqu'au stade de 14 semaines et 20 pour 100 acceptaient des patientes jusqu'à 16 semaines. Quoique le fondement juridique en vertu duquel les femmes revendiquent un droit constitutionnel à l'avortement diffère aux États-Unis de celui que je constate en l'espèce, l'expérience américaine concernant l'inopportunité d'une obligation universelle de pratiquer l'avortement à l'hôpital demeure pertinente.

Le rapport Powell a proposé un certain nombre de solutions de rechange à la règle de l'hôpital applicable aux avortements thérapeutiques. Chaque proposition est conçue de façon à [TRADUCTION] «relever de la compétence d'un conseil d'hôpital ou de plusieurs conseils d'hôpitaux, avec approbation des avortements par le biais des comités de l'avortement thérapeutique de l'hôpital» (à la p. 37). L'une de ces propositions est d'établir des cliniques générales de santé pour les femmes qui offriraient des avortements du premier trimestre et l'assistance postavortement, et renverraient aux hôpitaux pour les avortements du second trimestre. Des centres régionaux de clinique d'avortements thérapeutiques affiliés à un hôpital, sans nécessairement y être localisés, sont aussi proposés dans le rapport, qui souligne également que les avortements ambulatoires du premier trimestre sont les plus appropriés en dehors du cadre hospitalier.

Le comité Badgley a fait lui aussi une série de propositions conçues pour réduire le nombre et le genre de complications liées aux avortements thérapeutiques. Il a proposé notamment le "regroupement de la pratique des avortements dans des services spécialisés munis de tout l'équipement et de toutes les installations nécessaires et dotés d'un personnel médical et infirmier expérimenté et ayant reçu une formation spéciale à cet égard", à la p. 358.

Whatever the eventual solution may be, it is plain that the in-hospital requirement is not justified in all cases. Although the protection of health of the woman is the objective which the in-hospital rule is intended to serve, the requirement that all therapeutic abortions be performed in eligible hospitals is unnecessary to meet that objective in all cases. In this sense, the rule is manifestly unfair and offends the principles of fundamental justice. I appreciate that the precise nature of the administrative solution may be complicated by the constitutional division of powers between Parliament and the provinces. There is no doubt that Parliament could allow the criminal law exception to operate in all hospitals, for example, though the provinces retain the power to establish these hospitals under s. 92(7) of the *Constitution Act, 1867*. On the other hand, if Parliament decided to allow therapeutic abortions to be performed in provincially licensed clinics, it is possible that both Parliament and the provinces would be called upon to collaborate in the implementation of the plan.

Quelle que soit la solution adoptée, il est clair que l'obligation de pratiquer l'avortement dans un hôpital n'est pas justifiée dans tous les cas. Si la protection de la santé de la femme est l'objectif visé par la règle de l'hôpital, l'exigence que tous les avortements thérapeutiques soient pratiqués dans des hôpitaux admissibles n'est pas nécessaire pour l'atteindre dans tous les cas. En ce sens, la règle est nettement injuste et viole les principes de justice fondamentale. Je sais que la nature précise de la solution administrative peut se trouver compliquée par le partage constitutionnel des compétences entre le Parlement et les provinces. Il ne fait pas de doute que le Parlement pourrait permettre que l'exception du droit criminel s'applique dans tous les hôpitaux, par exemple, bien que les provinces conservent le pouvoir d'établir ces hôpitaux en vertu du par. 92(7) de la *Loi constitutionnelle de 1867*. D'autre part, si le Parlement décidait d'autoriser de pratiquer des avortements thérapeutiques dans des cliniques autorisées par une province, il se peut que le Parlement et les provinces soient amenés à collaborer à la mise en œuvre du plan.

An objection can also be raised in respect of the requirement that the committee come from the accredited or approved hospital in which the abortion is to be performed. It is difficult to see a connection between this requirement and any of the practical purposes for which s. 251(4) was enacted. It cannot be said to have been adopted in order to promote the safety of therapeutic abortions or the safety of the pregnant woman. Nor is the rule designed to preserve the state interest in the foetus. The integrity of the independent medical opinion is no better served by a committee within the hospital than a committee from outside the hospital as long as the practising physician remains excluded in both circumstances as part of a proper state participation in the choice of the procedure necessary to secure an independent opinion.

Une objection peut également être soulevée à l'égard de l'obligation que le comité provienne de l'hôpital accrédité ou approuvé où l'avortement doit être pratiqué. Il est difficile de voir un lien entre cette exigence et l'une ou l'autre des raisons pratiques pour lesquelles le par. 251(4) a été adopté. On ne peut pas dire qu'elle a été adoptée pour promouvoir la sécurité des avortements thérapeutiques ni celle de la femme enceinte. La règle n'est pas non plus conçue pour préserver l'intérêt qu'a l'État dans le fœtus. L'intégrité de l'opinion médicale indépendante n'est pas mieux garantie par un comité interne de l'hôpital que par un comité externe, à la condition que le médecin traitant demeure exclu dans les deux cas comme élément de la participation appropriée de l'État au choix de la procédure nécessaire pour assurer l'obtention d'une opinion indépendante.

In a recent unpublished paper entitled *Options for Abortion Policy Reform: A Consultation Document* (1986), at p. 74, the Fetal Status Working Group, (Edward W. Keyserlingk, Director), Protection of Life Project of the Law Reform

Dans un document récent inédit, intitulé *La réforme en matière d'avortement: les solutions possibles* (1986), à la p. 74, le groupe de travail sur le statut juridique du fœtus, section de recherche sur la protection de la vie (Edward W. Keyser-

Commission of Canada confirmed the view that the requirement that abortion committees be limited to hospitals is unnecessary:

> Restricting the existence of these committees to hospitals appears to be one of the reasons for delays and inequitable access. There appears to be no compelling medical reason why committees should not be attached to clinics which are equipped and licensed to provide this procedure.

The Law Reform Commission's Working Group raises the possibility of regional abortion committees to replace the current rule (*supra*, at p. 76). The Powell Report proposals include a model whereby a central therapeutic abortion committee could serve several hospitals (*supra*, at p. 38).

Whatever solution is finally retained, it is plain that the requirement that the therapeutic abortion committee come from the hospital in which the abortion will be performed serves no real purpose. The risk resulting from the delay caused by s. 251(4) in this respect is unnecessary. Consequently, this requirement violates the principles of fundamental justice.

Other aspects of the committee requirement in s. 251(4) add to the manifest unfairness of the administrative structure. These include requirements which are at best only tenuously connected to the purpose of obtaining independent confirmation that the standard in s. 251(4)(*c*) has been met and which do not usefully contribute to the realization of that purpose. Hospital boards are entitled to appoint committees made up of three or more qualified medical practitioners. As I observed earlier, if more than three members are appointed, precious time can be lost when quorum cannot be established because members are absent. Whatever the number of members necessary to arrive at an independent appreciation of the state of the woman's life or health may in fact be, this number should be kept to a minimum to avoid unnecessary delays which, as I have explained, result in increased risk to women. Allowing a board to increase the number of members above a statutory

lingk, directeur), Commission de réforme du droit du Canada, confirme l'opinion qu'il n'est pas nécessaire d'exiger que les comités de l'avortement soient limités aux hôpitaux:

> Les lenteurs du système actuel et les inégalités d'accès sont en partie imputables au fait que les comités ne peuvent être établis que dans des hôpitaux. Or, il ne semble exister, sur le plan médical, aucune raison contraignante pour empêcher de constituer un comité dans une clinique qui dispose du matériel et des permis nécessaires.

Le groupe de travail de la Commission de réforme du droit soulève la possibilité d'avoir des comités d'avortement régionaux pour remplacer la règle actuelle (précitée, à la p. 76). Les propositions du rapport Powell comportent un modèle selon lequel un comité central de l'avortement thérapeutique desservirait plusieurs hôpitaux (précité, à la p. 38).

Quelle que soit la solution finalement retenue, il est clair que l'obligation que le comité de l'avortement thérapeutique provienne de l'hôpital où l'avortement sera pratiqué ne sert aucune fin véritable. Le risque résultant du délai engendré par le par. 251(4) à cet égard est inutile. Par conséquent, cette exigence viole les principes de justice fondamentale.

D'autres aspects de l'obligation d'avoir un comité, imposée par le par. 251(4), ajoutent à l'inéquité manifeste de la structure administrative. Ils comportent des exigences qui, au mieux, n'ont qu'un rapport ténu avec l'objectif d'obtenir une confirmation indépendante que le critère de l'al. 251(4)*c*) a été respecté et qui n'apportent aucune contribution utile à la réalisation de cet objectif. Les conseils d'hôpitaux ont le droit de nommer des comités formés de trois médecins qualifiés ou plus. Comme je l'ai déjà fait observer, si l'on nomme plus de trois membres, un temps précieux peut être perdu lorsqu'il est impossible d'atteindre le quorum en raison de l'absence de certains membres. Quel que soit le nombre de membres du comité nécessaire pour avoir une appréciation indépendante de l'état de santé de la femme ou du danger pour sa vie, il faudrait s'en tenir à un nombre minimum afin d'éviter les délais inutiles qui, comme je l'ai expliqué, accroissent les risques

minimum of three members does not add to the integrity of the independent opinion. This aspect of the current rule is unnecessary and, since it can result in increased risks, offends the principles of fundamental justice.

Similarly, the exclusion of all physicians who practise therapeutic abortions from the committees is exorbitant. This rule was no doubt included in s. 251(4) to promote the independence of the therapeutic abortion committees' appreciation of the standard. As I have said, the exclusion of the practising physician, although it diverges from usual medical practice, is appropriate in the criminal context to ensure the independent opinion with respect to the life or health of that physician's patient. The exclusion of all physicians who perform therapeutic abortions from committees, even when they have no connection with the patient in question, is not only unnecessary but potentially counterproductive. There are no reasonable grounds to suspect bias from a physician who has no connection with the patient simply because, in the course of his or her medical practice, he or she performs lawful abortions. Furthermore, physicians who perform therapeutic abortions have useful expertise which would add to the precision and the integrity of the independent opinion itself. Some state control is appropriate to ensure the independence of the opinion. However, this rule as it now stands is excessive and can increase the risk of delay because fewer physicians are qualified to serve on the committees.

The foregoing analysis of the administrative structure of s. 251(4) is by no means a complete catalogue of all the current systems' strengths and failings. It demonstrates, however, that the administrative structure put in place by Parliament has enough shortcomings so that s. 251(4), when considered as a whole, violates the principles of fundamental justice. These shortcomings stem from rules which are not necessary to the purposes for which s. 251(4) was established. These un-

pour les femmes. Autoriser un conseil à augmenter le nombre de ses membres au-dessus du minimum légal de trois n'ajoute rien à l'intégrité de l'opinion indépendante. Cet aspect de la règle actuelle n'est pas nécessaire et, comme il peut en résulter des risques accrus, il viole les principes de justice fondamentale.

De même, l'exclusion au sein de ces comités de tous les médecins qui pratiquent des avortements thérapeutiques est exorbitante. Cette règle a sans doute été incluse dans le par. 251(4) pour favoriser le caractère indépendant de l'appréciation du critère par les comités de l'avortement thérapeutique. Comme je l'ai dit, l'exclusion du médecin traitant, bien qu'elle s'écarte de la pratique médicale habituelle, est appropriée dans un contexte criminel pour assurer une opinion indépendante sur le danger pour la vie ou la santé de la patiente du médecin. L'exclusion au sein des comités de tous les médecins qui pratiquent des avortements thérapeutiques, même lorsqu'ils n'ont aucun lien avec la patiente en cause, est non seulement inutile mais potentiellement nuisible. Il n'y a pas de motifs raisonnables de soupçonner qu'un médecin qui n'a aucun lien avec la patiente est partial simplement parce que, dans le cours de son exercice de la médecine, il pratique des avortements licites. De plus, les médecins qui pratiquent des avortements thérapeutiques possèdent des compétences utiles qui peuvent accroître la précision et l'intégrité de l'opinion indépendante elle-même. Un certain contrôle de l'État s'impose si l'on veut assurer le caractère indépendant de l'opinion. Toutefois, la règle dans son état actuel est excessive et susceptible d'accroître le risque de délai du fait que moins de médecins sont admissibles à siéger à ces comités.

L'analyse qui précède de la structure administrative du par. 251(4) ne se veut nullement un tableau complet de tous les points forts et de toutes les faiblesses du système actuel. Elle démontre néanmoins que la structure administrative mise en place par le législateur fédéral comporte suffisamment de lacunes pour que le par. 251(4), pris dans son ensemble, viole les principes de justice fondamentale. Ces lacunes résultent de règles qui ne sont pas nécessaires pour atteindre les objectifs

necessary rules, because they impose delays which result in an additional risk to women's health, are manifestly unfair.

V — Section 1 of the *Charter*

I agree with the view that s. 1 of the *Charter* can be used to save a legislative provision which breaches s. 7 in the manner which s. 251 of the *Criminal Code* violates s. 7 in this case. Section 1 states:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Chief Justice provided an analysis of s. 1 in *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39, which is appropriate for the purposes of addressing s. 1 in the case at bar. Those seeking to uphold s. 251 of the *Criminal Code* must demonstrate the following:

(1) the objective which s. 251 is designed to serve must "relate to concerns which are pressing and substantial"; and

(2) "once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves a 'form of proportionality test'."

I shall consider each of these two criteria which must be met if the limit on the s. 7 right is to be found reasonable.

(1) *The Objective of s. 251*

I agree with Wilson J.'s characterization of s. 251, explained in the following terms, at p. 181:

> In my view, the primary objective of the impugned legislation must be seen as the protection of the foetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman's s. 7 right is the protection of the foetus.

pour lesquels le par. 251(4) a été édicté. Ces règles inutiles, du fait qu'elles imposent des délais qui entraînent un risque additionnel pour la santé des femmes, sont nettement injustes.

V – L'article premier de la *Charte*

Je partage l'avis qu'on peut avoir recours à l'article premier de la *Charte* pour sauvegarder une disposition législative qui enfreint l'art. 7 de la manière dont l'art. 251 du *Code criminel* viole celui-ci en l'espèce. L'article premier porte:

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

Le Juge en chef fournit, dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, aux pp. 138 et 139, une analyse de l'article premier qui est pertinente aux fins d'aborder ce même article en l'espèce. Ceux qui veulent soutenir la validité de l'art. 251 du *Code criminel* doivent démontrer ce qui suit:

(1) l'objectif que l'art. 251 vise à servir doit «se rapporte[r] à des préoccupations urgentes et réelles»; et

(2) «dès qu'il est reconnu qu'un objectif est suffisamment important, la partie qui invoque l'article premier doit alors démontrer que les moyens choisis sont raisonnables et que leur justification peut se démontrer. Cela nécessite l'application d'«une sorte de critère de proportionnalité»».

Je vais examiner chacun de ces deux critères auxquels il faut satisfaire pour que la restriction du droit conféré par l'art. 7 soit jugée raisonnable.

(1) *L'objectif de l'art. 251*

Je souscris à la façon dont le juge Wilson qualifie l'art. 251, à la p. 181:

> À mon avis, il faut voir dans l'objectif premier de la loi contestée la protection du fœtus. Elle a sans doute d'autres objectifs secondaires, telle la protection de la vie et de la santé de la femme enceinte, mais je crois que l'objectif principal invoqué pour justifier la restriction du droit de la femme enceinte garanti par l'art. 7 est la protection du fœtus.

The primary objective of the protection of the foetus is the main objective relevant to the analysis of s. 251 under the first test of *Oakes*. With the greatest respect, I believe the Chief Justice incorrectly identifies (at p. 75) the objective of balancing foetal interests and those of pregnant women, "with the lives and health of women a major factor", as "sufficiently important to meet the requirements of the first step in the *Oakes* inquiry under s. 1".

The focus in *Oakes* is the objective "which the measures responsible for a limit on a *Charter* right or freedom are designed to serve" (*supra*, at p. 138). In the context of the criminal law of abortion, the objective, which the measures in s. 251 responsible for a limit on the s. 7 *Charter* right are designed to serve, is the protection of the foetus. The narrow aim of s. 251(4) should not be confused with the primary objective of s. 251 as a whole. Given that s. 251 is a "comprehensive code", to use the expression of the Chief Justice, it is inappropriate, in my view, to focus on the exculpatory provision alone as the statement of Parliament's objective in establishing the crime. (See *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 751, in which the Court unanimously held that an exemption must be read in light of the affirmative provision to which it relates.) The ancillary objective of protecting the life or health of the pregnant woman, whether viewed alone or balanced against the protection of the foetus, is not the primary objective which the measures responsible for a limit on the constitutional right to security of the person were put in place to achieve.

This balance cannot be considered as Parliament's objective in establishing the crime nor in maintaining this activity as a crime following the amendments to the *Criminal Code* in 1969. Section 251(4) only applies in specified circumstances. When the life or health of a pregnant woman is not in danger and she seeks an abortion on the basis of her own non-medical "priorities and aspirations", it is plain that the rules in s. 251 preclud-

L'objectif premier, celui de la protection du fœtus, est le principal objectif pertinent pour l'analyse de l'art. 251 selon le premier critère de l'arrêt *Oakes*. Je crois, en toute déférence, que le Juge en chef a mal identifié (à la p. 75) l'objectif d'équilibrer les intérêts du fœtus et ceux des femmes enceintes — "la vie et la santé des femmes étant un facteur majeur" — comme étant "suffisamment important pour répondre aux exigences du premier volet de l'analyse, selon l'arrêt *Oakes*, au regard de l'article premier".

Le point central en vertu de l'arrêt *Oakes* est l'objectif «que visent à servir les mesures qui apportent une restriction à un droit ou à une liberté garantis par la *Charte*» (précité, à la p. 138). Dans le contexte du droit criminel en matière d'avortement, l'objectif que visent à servir les mesures prévues à l'art. 251, qui sont à l'origine de la restriction du droit conféré par l'art. 7 de la *Charte*, est la protection du fœtus. On ne doit pas confondre le but limité du par. 251(4) et l'objectif premier de l'art. 251 pris dans son ensemble. Étant donné que l'art. 251 constitue un «code complet», pour reprendre l'expression du Juge en chef, on ne peut à bon droit, à mon sens, se concentrer sur la disposition disculpatoire seule comme étant l'énoncé de l'objectif du Parlement en créant le crime. (Voir l'arrêt *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, à la p. 751, où cette Cour a reconnu unanimement qu'une exemption doit s'interpréter en fonction de la disposition affirmative à laquelle elle se rapporte.) L'objectif secondaire, savoir la protection de la vie ou de la santé de la femme enceinte, considéré seul ou par rapport à la protection du fœtus, n'est pas l'objectif premier pour lequel les mesures à l'origine de la restriction du droit constitutionnel à la sécurité de la personne ont été instaurées.

Cet équilibre ne peut pas être considéré comme l'objectif ayant conduit le Parlement à créer ce crime ni à conserver cette activité dans la catégorie des crimes suite aux modifications apportées au *Code criminel* en 1969. Le paragraphe 251(4) ne s'applique que dans des cas délimités. Lorsque la vie ou la santé d'une femme enceinte n'est pas en danger et qu'elle recherche un avortement en raison de ses propres «priorités et aspirations» non

ing her from obtaining a lawful abortion have as their sole objective the protection of the foetus.

Furthermore, as federal legislation in respect of Parliament's jurisdiction over the criminal law in s. 91(27) of the *Constitution Act, 1867*, s. 251 cannot be said to have as its sole or principal objective, as the appellants argue, the protection of the life or health of pregnant women. Legislation which in its pith and substance is related to the life or health of pregnant women, depending of course on its precise terms, would be characterized as in relation to one of the provincial heads of power (see *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 137, *per* Dickson J., as he then was). The exculpatory provision in s. 251(4) cannot stand on its own as a valid exercise of Parliament's criminal law power.

Does the objective of protecting the foetus in s. 251 relate to concerns which are pressing and substantial in a free and democratic society? The answer to the first step of the *Oakes* test is yes. I am of the view that the protection of the foetus is and, as the Court of Appeal observed, always has been, a valid objective in Canadian criminal law. I have already elaborated on this objective in my discussion of the principles of fundamental justice. I think s. 1 of the *Charter* authorizes reasonable limits to be put on a woman's right having regard to the state interest in the protection of the foetus.

(2) *Proportionality*

I turn now to the second test in *Oakes*. The Crown must show that the means chosen in s. 251 are reasonable and demonstrably justified. In *Oakes*, *supra*, at p. 139, the Chief Justice outlined three components of the proportionality test:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little

médicales, il est manifeste que les règles de l'art. 251 qui l'empêchent d'obtenir un avortement licite ont comme seul objectif la protection du fœtus.

En outre, comme il s'agit d'un texte législatif fédéral relevant de la compétence du Parlement en matière de droit criminel, selon le par. 91(27) de la *Loi constitutionnelle de 1867*, on ne peut dire de l'art. 251 qu'il a pour unique ou principal objectif, comme les appelants le soutiennent, la protection de la vie ou de la santé des femmes enceintes. Une mesure législative qui, de par son caractère véritable, se rapporte à la vie ou à la santé des femmes enceintes, en fonction naturellement de ses termes précis, serait qualifiée de relative à l'un des chefs de compétence provinciale (voir *Schneider c. La Reine*, [1982] 2 R.C.S. 112, à la p. 137, le juge Dickson, maintenant Juge en chef). La disposition disculpatoire du par. 251(4) ne saurait subsister d'elle-même à titre d'exercice valide de la compétence fédérale en matière de droit criminel.

La protection du fœtus à titre d'objectif de l'art. 251 se rapporte-t-elle à des préoccupations urgentes et réelles dans une société libre et démocratique? La réponse au premier volet du critère de l'arrêt *Oakes* est affirmative. Je suis d'avis que la protection du fœtus est et, comme l'a fait observer la Cour d'appel, a toujours été un objectif valide du droit criminel canadien. J'ai déjà examiné en détail cet objectif dans mon analyse des principes de justice fondamentale. Je pense que l'article premier de la *Charte* permet de limiter raisonnablement le droit d'une femme compte tenu de l'intérêt qu'a l'État dans la protection du fœtus.

(2) *Le critère de proportionnalité*

J'en viens maintenant au second critère de l'arrêt *Oakes*. Le ministère public doit démontrer que les moyens choisis à l'art. 251 sont raisonnables et que leur justification peut se démontrer. Dans l'arrêt *Oakes*, précité, à la p. 139, le Juge en chef expose les trois composantes du critère de la proportionnalité:

Premièrement, les mesures adoptées doivent être soigneusement conçues pour atteindre l'objectif en question. Elles ne doivent être ni arbitraires, ni inéquitables, ni fondées sur des considérations irrationnelles. Bref, elles doivent avoir un lien rationnel avec l'objectif en question. Deuxièmement, même à supposer qu'il y ait un

as possible" the right or freedom in question: *R. v. Big M. Drug Mart Ltd.*, ... at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

For the purposes of the first component of proportionality, I observe that it was necessary, in my discussion of s. 251(4) and the principles of fundamental justice, to explain my view that certain of the rules governing access to therapeutic abortions free from criminal sanction are unnecessary in respect of the objectives which s. 251 is designed to serve. A rule which is unnecessary in respect of Parliament's objectives cannot be said to be "rationally connected" thereto or to be "carefully designed to achieve the objective in question". Furthermore, not only are some of the rules in s. 251 unnecessary to the primary objective of the protection of the foetus and the ancillary objective of the protection of the pregnant woman's life or health, but their practical effect is to undermine the health of the woman which Parliament purports to consider so important. Consequently, s. 251 does not meet the proportionality test in *Oakes*.

There is no saving s. 251 by simply severing the offending portions of s. 251(4). The current rule expressed in s. 251, which articulates both Parliament's principal and ancillary objectives, cannot stand without the exception in s. 251(4). The violation of pregnant women's security of the person would be greater, not lesser, if s. 251(4) was severed leaving the remaining subsections of s. 251 as they are in the *Criminal Code*.

Given my conclusion in respect of the first component of the proportionality test, it is not necessary to address the questions as to whether the means in s. 251 "impair as little as possible" the s. 7 *Charter* right and whether there is a proportionality between the effects of s. 251 and the objective of protecting the foetus. Thus, I am not required to answer the difficult question concerning the cir-

tel lien rationnel, le moyen choisi doit être de nature à porter «le moins possible» atteinte au droit ou à la liberté en question: *R. c. Big M Drug Mart Ltd.*, [...] à la p. 352. Troisièmement, il doit y avoir proportionnalité entre les effets des mesures restreignant un droit ou une liberté garantis par la *Charte* et l'objectif reconnu comme «suffisamment important».

Pour les fins de la première composante de la proportionnalité, j'ai fait observer, dans mon analyse du par. 251(4) et des principes de justice fondamentale, qu'il était nécessaire d'expliquer mon opinion que certaines des règles régissant la possibilité d'obtenir un avortement thérapeutique, sans menace de répression pénale, ne sont pas nécessaires pour atteindre les objectifs pour lesquels l'art. 251 a été conçu. On ne saurait dire d'une règle qui n'est pas nécessaire pour atteindre les objectifs du législateur qu'elle a un «lien rationnel» avec ceux-ci ni qu'elle a été «soigneusement conçue pour atteindre l'objectif en question». De plus, non seulement certaines des règles de l'art. 251 ne sont-elles pas nécessaires à l'objectif premier, soit la protection du fœtus, et à l'objectif secondaire, soit la protection de la vie ou de la santé de la femme enceinte, mais encore elles ont pour effet pratique de miner la santé de la femme que le législateur prétend considérer si importante. Par conséquent, l'art. 251 ne satisfait pas au critère de proportionnalité de l'arrêt *Oakes*.

L'article 251 ne saurait être sauvegardé par le simple retranchement des parties fautives du par. 251(4). La règle actuellement exprimée à l'art. 251, qui traduit à la fois les objectifs principaux et secondaires du législateur, ne saurait subsister sans l'exception du par. 251(4). La violation de la sécurité de la personne des femmes enceintes serait plus grande, et non moindre, si le par. 251(4) devait être retranché, laissant tels quels dans le *Code criminel* les autres paragraphes de l'art. 251.

Étant donné ma conclusion relative à la première composante du critère de la proportionnalité, il n'est pas nécessaire d'aborder les questions de savoir si les moyens choisis à l'art. 251 «porte[nt] le moins possible atteinte» au droit conféré par l'art. 7 de la *Charte* et s'il y a proportionnalité entre les effets de l'art. 251 et l'objectif consistant à protéger le fœtus. Ainsi, je n'ai pas à répondre à

cumstances in which there is a proportionality between the effects of s. 251 which limit the right of pregnant women to security of the person and the objective of the protection of the foetus. I do feel bound, however, to comment upon the balance which Parliament sought to achieve between the interest in the protection of the foetus and the interest in the life or health of the pregnant woman in adopting the amendments to the *Criminal Code* in 1969.

In *Oakes*, *supra*, at p. 140, the Chief Justice further explained the third component of the proportionality test in the following terms:

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [Emphasis added.]

The objective of protecting the foetus would not justify, in my view, the severity of the breach of pregnant women's right to security which would result if the exculpatory provision was completely removed from the *Criminal Code*.

The gist of s. 251(4) is, as I have said, that the objective of protecting the foetus is not of sufficient importance to defeat the interest in protecting pregnant women from pregnancies which represent a danger to life or health. I take this parliamentary enactment in 1969 as an indication that, in a free and democratic society, it would be unreasonable to limit the pregnant woman's right to security of the person by a rule prohibiting abortions in all circumstances when her life or health would or would likely be in danger. This decision of the Canadian Parliament to the effect that the life or health of the pregnant woman takes precedence over the state interest in the foetus is also reflected in legislation in other free and democratic societies.

la difficile question des circonstances dans lesquelles il y aurait proportionnalité entre les effets de l'art. 251, qui limitent le droit des femmes enceintes à la sécurité de leur personne, et la protection du fœtus en tant qu'objectif. J'estime devoir néanmoins commenter l'équilibre que le législateur a cherché à établir entre l'intérêt qu'il y a dans la protection du fœtus et celui qu'il y a dans la vie ou la santé de la femme enceinte, en adoptant les modifications apportées au *Code criminel* en 1969.

Dans l'arrêt *Oakes*, précité, à la p. 140, le Juge en chef poursuit son explication de la troisième composante du critère de la proportionnalité dans les termes suivants:

> Même si un objectif est suffisamment important et même si on a satisfait aux deux premiers éléments du critère de proportionnalité, il se peut encore qu'en raison de la gravité de ses effets préjudiciables sur des particuliers ou sur des groupes, la mesure ne soit pas justifiée par les objectifs qu'elle est destinée à servir. Plus les effets préjudiciables d'une mesure sont graves, plus l'objectif doit être important pour que la mesure soit raisonnable et que sa justification puisse se démontrer dans le cadre d'une société libre et démocratique. [Je souligne.]

L'objectif consistant à protéger le fœtus ne justifierait pas, à mon avis, une atteinte au droit à la sécurité des femmes enceintes aussi grave que celle qui résulterait si la disposition disculpatoire était complètement supprimée du *Code criminel*.

Le paragraphe 251(4) porte essentiellement, comme je l'ai dit, que l'objectif de protection du fœtus n'est pas suffisamment important pour repousser l'intérêt qu'il y a à protéger les femmes enceintes contre des grossesses qui représentent un danger pour leur vie ou leur santé. Je considère que le texte adopté par le législateur en 1969 constitue une indication que, dans une société libre et démocratique, il serait déraisonnable de limiter le droit de la femme enceinte à la sécurité de sa personne par une règle interdisant les avortements dans toutes les circonstances lorsque sa vie ou sa santé serait ou serait probablement en danger. Cette décision du Parlement du Canada que la vie ou la santé de la femme enceinte a préséance sur l'intérêt qu'a l'État dans la protection du fœtus trouve aussi son pendant dans les lois d'autres sociétés libres et démocratiques.

In *Emerging Issues in Commonwealth Abortion Laws, 1982* (1983), *passim*, submitted as an exhibit at trial, Rebecca J. Cook and Bernard M. Dickens report that, on the basis of the law in force as of November 1, 1982, the United Kingdom, New Zealand and Australia Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, and Victoria, among other Commonwealth jurisdictions, include risk to the pregnant woman's life, physical health and mental health as legal grounds for abortion. The Crown and the Attorney General of Canada, in their books of authorities, cited statutes from these and other jurisdictions which indicate that a danger to the life or health of the pregnant woman takes precedence over the state interest in the foetus: the United Kingdom, *Abortion Act, 1967*, 1967, c. 87, s. 1(1)(*a*); Australian Northern Territory, *Criminal Law Consolidation Act and Ordinance*, s. 79 A(3)(a); South Australia, *Criminal Law Consolidation Act*, 1935-1975, s. 82a(1)(*a*)(*i*); Federal Republic of Germany, *Criminal Code*, as amended by the *Fifteenth Criminal Law Amendment Act* (1976), s. 218a(1); Israel, *Penal Law*, 5737-1977 (as amended), art. 316(*a*)(4); New Zealand, *Crimes Act 1961*, as amended by the *Crimes Amendment Act 1977* and the *Crimes Amendment Act 1978*, s. 187A(1)(a); and France, *Code pénal*, art. 317 and *Code de la santé publique*, art. 162-1 and 162-12. This substantiates the view that the legislative decision in Canada that the life or health of the woman takes precedence over the state interest in the foetus is in accordance with s. 1 of the *Charter*.

I note that the laws in some of these foreign jurisdictions, unlike s. 251 of the *Criminal Code*, require a higher standard of danger to health in the latter months of pregnancy, as opposed to the early months, for an abortion to be lawful. Would such a rule, if it was adopted in Canada, constitute a reasonable limit on the right to security of the person under s. 1 of the *Charter*? As I have said, given the actual wording of s. 251, pursuant to which the standard necessary for a lawful abortion does not vary according to the stage of pregnancy,

Dans l'ouvrage intitulé *Emerging Issues in Commonwealth Abortion Laws, 1982* (1983), *passim*, une pièce produite en première instance, Rebecca J. Cook et Bernard M. Dickens rapportent que, selon le droit en vigueur au 1er novembre 1982, le Royaume-Uni, la Nouvelle-Zélande et le Territoire de la capitale de l'Australie, la Nouvelle-Galles du Sud, le Territoire du Nord, le Queensland, l'Australie-Méridionale et Victoria, parmi d'autres ressorts du Commonwealth, incluent le risque pour la vie ou la santé physique et mentale de la femme enceinte comme motifs légaux d'avortement. Le ministère public et le procureur général du Canada, dans leurs dossiers de sources législative, jurisprudentielle et doctrinale, citent des lois de ces ressorts notamment, qui indiquent qu'un danger pour la vie ou la santé de la femme enceinte l'emporte sur l'intérêt qu'a l'État dans la protection du fœtus: Royaume-Uni, *Abortion Act, 1967*, 1967, chap. 87, al. 1(1)*a*); Territoire du Nord de l'Australie, *Criminal Law Consolidation Act and Ordinance*, al. 79 A(3)a); Australie-Méridionale, *Criminal Law Consolidation Act*, 1935-1975, sous-al. 82a(1)*a*)(*i*); République fédérale de l'Allemagne, *Criminal Code*, modifié par *la Fifteenth Criminal Law Amendment Act* (1976), al. 218a(1); Israël, *Penal Law*, 5737-1977 (modifiée), al. 316*a*)(4); Nouvelle-Zélande, *Crimes Act 1961*, modifiée par la *Crimes Amendment Act 1977* et la *Crimes Amendment Act 1978*, al. 187A(1)a) et France, *Code pénal*, art. 317 et *Code de la santé publique*, art. 162-1 et 162-12. Cela corrobore le point de vue selon lequel la décision du législateur canadien que la vie ou la santé de la femme a préséance sur l'intérêt qu'a l'État dans la protection du fœtus est conforme à l'article premier de la *Charte*.

Je souligne que les lois de certains de ces ressorts étrangers exigent, à la différence de l'art. 251 du *Code criminel*, que la santé soit plus gravement menacée dans les derniers mois de la grossesse que dans les premiers pour que l'avortement soit légal. Si une telle règle était adoptée au Canada, constituerait-elle une limite raisonnable du droit à la sécurité de la personne au sens de l'article premier de la *Charte*? Comme je l'ai dit, vu le texte actuel de l'art. 251 selon lequel le critère requis pour qu'un avortement soit licite ne varie pas selon le

this Court is not required to consider this question under s. 1 of the *Charter*. It is possible that a future enactment by Parliament along the lines of the laws adopted in these jurisdictions could achieve a proportionality which is acceptable under s. 1. As I have stated, however, I am of the view that the objective of protecting the foetus would not justify the complete removal of the exculpatory provisions from the *Criminal Code*.

Finally, I wish to stress that we have not been asked to decide nor is it necessary, given my own conclusion that s. 251 contains rules unnecessary to the protection of the foetus, to decide whether a foetus is included in the word "everyone" in s. 7 so as to have a right to "life, liberty and security of the person" under the *Charter*.

VI — Other Grounds for Appeal

Counsel for the appellants raised several other grounds for appeal before this Court. The argument concerning the alleged invalidity of s. 605(1)(*a*) of the *Criminal Code* is the only *Charter* argument, apart from that pertaining to s. 7, which must be addressed. If the Crown had no right of appeal, the appellants would necessarily succeed on this sole ground as this Court would be required to quash the decision of the Court of Appeal. Although, as a result of my answers to the first and second constitutional questions, I am not required to respond to the other arguments to dispose of this appeal, I believe that it is appropriate to answer the non-*Charter* issues.

Section 91(27) of the *Constitution Act, 1867*

I agree with McIntyre J. and the Court of Appeal that there is no merit in the argument that s. 251 is *ultra vires* of Parliament. In *Morgentaler (1975)*, *supra*, this Court unanimously held that s. 251 is not colourable provincial legislation in relation to health but that it constitutes a proper exercise of Parliament's criminal law power pursuant to s. 91(27) of the *Constitution Act, 1867*. I agree. Indeed, as I have decided, s. 251 cannot be said to be simply a mechanism designed to protect

stade de la grossesse, cette Cour n'est pas obligée d'examiner cette question aux termes de l'article premier de la *Charte*. Il est possible que le législateur puisse adopter à l'avenir une modification dans la veine des lois adoptées par ces ressorts qui créerait une proportionnalité acceptable aux termes de l'article premier. Toutefois, comme je l'ai dit, je suis d'avis que l'objectif de la protection du fœtus ne justifierait pas l'exclusion totale des dispositions disculpatoires du *Code criminel*.

Enfin, je tiens à souligner qu'on ne nous a pas demandé, pas plus qu'il n'est nécessaire de le faire, étant donné ma propre conclusion que l'art. 251 comporte des règles qui ne sont pas nécessaires pour la protection du fœtus, de décider si ce dernier est inclus dans le terme «chacun» de l'art. 7, de manière à être titulaire du droit «à la vie, à la liberté et la sécurité de sa personne» au sens de la *Charte*.

VI – Les autres moyens d'appel

L'avocat des appelants a soulevé plusieurs autres moyens d'appel devant nous. Le seul autre argument relatif à la *Charte*, à part celui concernant l'art. 7, que l'on doive examiner est celui qui a trait à l'invalidité de l'al. 605(1)*a*) du *Code criminel*. Si le ministère public n'avait aucun droit d'appel, les appelants auraient nécessairement gain de cause pour ce seul motif et nous serions tenus de casser la décision de la Cour d'appel. Quoique je ne sois pas obligé de répondre aux autres arguments pour trancher ce pourvoi vu mes réponses à la première et à la deuxième questions constitutionnelles, je crois qu'il est justifié de résoudre les questions qui ne mettent pas la *Charte* en cause.

Le paragraphe 91(27) de la *Loi constitutionnelle de 1867*

Comme le juge McIntyre et la Cour d'appel, je suis d'avis que l'allégation que l'art. 251 excède les pouvoirs du Parlement n'est pas fondée. Dans l'arrêt *Morgentaler (1975)*, précité, cette Cour a décidé à l'unanimité que l'art. 251 n'était pas un texte législatif provincial déguisé relatif à la santé, mais qu'il constituait un exercice valide du pouvoir du Parlement en matière de droit criminel conformément au par. 91(27) de la *Loi constitutionnelle de 1867*. Je suis d'accord. De fait, comme je

the life or health of the pregnant woman. While this ancillary objective explains, in part, certain of the requirements of the exculpatory provision in s. 251(4), it does not represent the principal objective of s. 251 as a whole, which is to protect the state interest in the foetus. Parliament established the indictable offence of procuring a miscarriage, defined in s. 251(1) and s. 251(2), pursuant to this primary objective. I consider this a valid exercise of the criminal law power.

Section 96 of the *Constitution Act, 1867*

I agree with McIntyre J. that s. 251 does not give judicial powers to therapeutic abortion committees which were exercised by county, district and superior courts at the time of Confederation. As I have observed, in s. 251(4) Parliament has only given the committee the authority to make a medical determination regarding the pregnant woman's life or health. The panel of doctors exercises medical judgment on a medical question and performs no s. 96 judicial function. There is no merit in this argument.

Unlawful Delegation and Abdication of the Criminal Law Power

For the reasons given by McIntyre J., I agree that s. 251 does not constitute an unlawful delegation of federal legislative power nor does it represent an abdication of the criminal law power by Parliament.

Section 605(1)(*a*) of the *Criminal Code*

For the reasons given by McIntyre J., I agree that there is no merit in this argument.

Section 610(3) of the *Criminal Code*

Counsel for the appellants argued that s. 610(3) of the *Criminal Code*, which prohibits the awarding of costs in appeals involving indictable offences, violates ss. 7, 11(*d*), (*f*), (*h*) and 15 of the *Charter*. He also argued that this Court had the power to award costs on appeals under s. 24(1) of the *Charter*. It is unnecessary to decide whether or

l'ai décidé, on ne peut pas considérer l'art. 251 comme étant simplement un mécanisme visant la protection de la vie ou de la santé d'une femme enceinte. Quoique l'objectif secondaire explique en partie certaines des exigences de la disposition disculpatoire du par. 251(4), ce n'est pas l'objectif principal de l'art. 251 pris dans son ensemble, qui vise à protéger l'intérêt qu'a l'État dans le fœtus. Le Parlement a créé l'infraction criminelle de procurer un avortement comme le définissent les par. 251(1) et (2), conformément à cet objectif premier. Je considère qu'il s'agit d'un exercice valide du pouvoir en matière de droit criminel.

L'article 96 de la *Loi constitutionnelle de 1867*

Comme le juge McIntyre, je suis d'avis que l'art. 251 ne donne pas aux comités de l'avortement thérapeutique les pouvoirs judiciaires que les cours de comté, de district et supérieures exerçaient au moment de la Confédération. Comme je l'ai souligné, à l'art. 251(4), le Parlement a seulement donné au comité le pouvoir de prendre une décision médicale relativement à la vie ou à la santé de la femme enceinte. Les médecins portent un jugement médical sur une question médicale et n'exercent aucune fonction judiciaire au sens de l'art. 96. Cet argument est mal fondé.

Délégation illégale du pouvoir en matière de droit criminel ou renonciation à ce pouvoir

Pour les motifs donnés par le juge McIntyre, je suis d'avis que l'art. 251 ne constitue pas une délégation illégale d'un pouvoir législatif fédéral et ne représente pas non plus une renonciation du Parlement au pouvoir en matière de droit criminel.

L'alinéa 605(1)*a*) du *Code criminel*

Pour les motifs exposés par le juge McIntyre, je suis d'avis que cet argument est mal fondé.

Le paragraphe 610(3) du *Code criminel*

L'avocat des appelants a soutenu que le par. 610(3) du *Code criminel*, qui interdit d'accorder des frais lors d'un appel relatif à un acte criminel, va à l'encontre de l'art. 7, des al. 11*d*), *f*), *h*) et de l'art. 15 de la *Charte*. Il a aussi allégué que cette Cour dispose du pouvoir d'accorder, lors d'un pourvoi, des frais en vertu du par. 24(1) de la

not s. 610(3) of the *Criminal Code* violates a *Charter* right. I agree with the Court of Appeal that, whatever this Court's power to award costs in appeals such as this one, costs should not be awarded in this case.

* * *

With regard to defence counsel's address to the jury at trial, I associate myself completely with the comments made by the Chief Justice. In his address, Mr. Manning wrongly chose not to respect the very distinct roles the trial judge and the jury play in our system of criminal justice. In *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at p. 836, McIntyre J., in a different context, stated:

> No authority need be cited for the proposition that in a jury trial all questions of law are for the judge alone and, of equal importance, all questions of fact are for the jury alone. The distinction is of fundamental importance. It should be preserved so long as it is considered right to continue the use of the jury in criminal law.

The defence submission was, as the Court of Appeal stated, "a direct attack on the role and authority of the trial judge and a serious misstatement to the jury as to its duty and right in carrying out its oath" (*supra*, at p. 434). I am of the view that these strongly-stated observations are required for the benefit of counsel who in other proceedings may be tempted to follow this unacceptable practice.

Conclusion

The constitutional questions should be answered as follows:

1. Question:

> Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

Charte. Il n'est pas nécessaire de déterminer si le par. 610(3) du *Code criminel* viole un droit conféré par la *Charte*. J'estime, tout comme la Cour d'appel, que quel que soit le pouvoir de cette Cour d'accorder des dépens dans des pourvois comme celui-ci, aucuns dépens ne devraient être accordés en l'espèce.

* * *

Pour ce qui est de la plaidoirie que l'avocat de la défense a adressée au jury en première instance, je partage totalement l'avis du Juge en chef. Dans sa plaidoirie, Me Manning a choisi à tort de ne pas respecter les rôles très distincts que jouent le juge du procès et le jury dans notre système de justice criminelle. Dans l'arrêt *Mezzo c. La Reine*, [1986] 1 R.C.S. 802, à la p. 836, le juge McIntyre a dit, dans un autre contexte:

> Aucun précédent n'a à être cité pour justifier la proposition selon laquelle, dans un procès par jury, toutes les questions de droit relèvent exclusivement du juge et que, ce qui est tout aussi important, toutes les questions de fait relèvent exclusivement du jury. Cette distinction est d'une importance fondamentale. Elle doit être maintenue tant qu'on jugera bon de continuer d'avoir recours au jury en droit criminel.

La plaidoirie de la défense était, comme l'a dit la Cour d'appel, [TRADUCTION] «une attaque directe du rôle et du pouvoir du juge du procès et une déclaration sérieusement erronée quant aux obligations et aux droits du juré dans l'exécution de son engagement sous serment» (précité, à la p. 434). J'estime que ces observations fermes sont nécessaires pour la gouverne des avocats qui, dans d'autres affaires, peuvent être tentés de suivre cette pratique inacceptable.

Conclusion

Les questions constitutionnelles doivent recevoir les réponses suivantes:

1. Question:

> L'article 251 du *Code criminel* du Canada porte-t-il atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*?

Answer:

The first constitutional question is answered in the affirmative in respect of the right of a pregnant woman to "security of the person" in s. 7 of the *Charter*.

2. Question:

If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:

In respect of the violation of the right of a pregnant woman to "security of the person" in s. 7 caused by s. 251 of the *Criminal Code*, s. 251 is not justified by s. 1 of the *Charter*.

3. Question:

Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?

Answer:

No, in the sense that s. 251 is within the proper jurisdiction of Parliament on the basis of s. 91(27) of the *Constitution Act, 1867*.

4. Question:

Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?

Answer:

No.

5. Question:

Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

Answer:

No.

Réponse:

La première question constitutionnelle doit recevoir une réponse affirmative en ce qui concerne le droit d'une femme enceinte à la «sécurité de sa personne» prévu par l'art. 7 de la *Charte*.

2. Question:

Si l'article 251 du *Code criminel* du Canada porte atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*, est-il justifié par l'article premier de la *Charte canadienne des droits et libertés* et donc compatible avec la *Loi constitutionnelle de 1982*?

Réponse:

En ce qui concerne la violation du droit d'une femme enceinte à la «sécurité de sa personne» prévu à l'art. 7 que cause l'art. 251 du *Code criminel*, l'art. 251 n'est pas justifié par l'article premier de la *Charte*.

3. Question:

L'article 251 du *Code criminel* du Canada excède-t-il les pouvoirs du Parlement du Canada?

Réponse:

Non, en ce que l'art. 251 est un exercice valide du pouvoir du Parlement en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*.

4. Question:

L'article 251 du *Code criminel* du Canada viole-t-il l'art. 96 de la *Loi constitutionnelle de 1867*?

Réponse:

Non.

5. Question:

L'article 251 du *Code criminel* du Canada délègue-t-il illégalement la compétence fédérale en matière criminelle aux ministres de la Santé provinciaux ou aux comités de l'avortement thérapeutique et, ce faisant, le gouvernement fédéral a-t-il abdiqué son autorité dans ce domaine?

Réponse:

Non.

6. Question:

Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?

Answer:

With respect to s. 605, the answer is no. Whether or not s. 610(3) of the *Criminal Code* violates a *Charter* right, I agree with the Court of Appeal that, whatever this Court's power to award costs in appeals such as this one, costs should not be awarded in this case.

7. Question:

If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:

Given the answer to question 6, this question does not call for an answer.

On the basis of my answers to the first two constitutional questions, I would allow the appeal.

The reasons of McIntyre and La Forest JJ. were delivered by

MCINTYRE J. (dissenting)—I have read the reasons for judgment prepared by my colleagues, the Chief Justice and Justices Beetz and Wilson. I agree that the principal issue which arises is whether s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, contravenes s. 7 of the *Canadian Charter of Rights and Freedoms*. I will make some comments later on other issues put forward by the appellants. The Chief Justice has set out the constitutional questions and the relevant statutory provisions, as well as the facts and procedural history. He has considered the scope of s. 7 of the *Charter* and, having found that it has been offended, he would allow the appeal. I am unable to

6. Question:

L'article 605 et le par. 610(3) du *Code criminel* du Canada portent-ils atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*?

Réponse:

En ce qui concerne l'art. 605, la réponse est non. Indépendamment de savoir si le par. 610(3) du *Code criminel* viole un droit conféré par la *Charte*, j'estime, tout comme la Cour d'appel, que quel que soit le pouvoir de cette Cour d'accorder des dépens dans des pourvois comme celui-ci, aucuns dépens ne devrait être accordé en l'espèce.

7. Question:

Si l'article 605 et le par. 610(3) du *Code criminel* du Canada portent atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*, sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

Réponse:

Vu la réponse à la question 6, aucune réponse n'a à être donnée à cette question-ci.

Compte tenu de mes réponses aux deux premières questions constitutionnelles, je suis d'avis d'accueillir le pourvoi.

Version française des motifs des juges McIntyre et La Forest rendus par

LE JUGE MCINTYRE (dissident)—J'ai lu les motifs de jugement rédigés par mes collègues le Juge en chef et les juges Beetz et Wilson. Je suis d'accord pour dire que la question principale qui se pose est de savoir si l'art. 251 du *Code criminel*, S.R.C. 1970, chap. C-34, viole l'art. 7 de la *Charte canadienne des droits et libertés*. Pour ce qui est de certaines autres questions soulevées par les appelants, j'y viendrai plus loin. Le Juge en chef a énoncé les questions constitutionnelles ainsi que les dispositions législatives pertinentes et il a présenté un exposé des faits et des procédures. Il a examiné la portée de l'art. 7 de la *Charte* et, après avoir conclu qu'il avait été enfreint, il s'est dit d'avis

agree with his reasons or his disposition of the appeal. I find myself in broad general agreement with the reasons of the Court of Appeal, and I would dismiss the appeal on that basis and for reasons that I will endeavour to set forth.

Section 251 of the *Criminal Code*

I would say at the outset that it may be thought that this case does not raise the *Charter* issues which were argued and which have been addressed in the reasons of my colleagues. The charge here is one of conspiracy to breach the provisions of s. 251 of the *Criminal Code*. There is no doubt, and it has never been questioned, that the appellants adopted a course which was clearly in defiance of the provisions of the *Code* and it is difficult to see where any infringement of their rights, under s. 7 of the *Charter*, could have occurred. There is no female person involved in the case who has been denied a therapeutic abortion and, as a result, the whole argument on the right to security of the person, under s. 7 of the *Charter*, has been on a hypothetical basis. The case, however, was addressed by all the parties on that basis and the Court has accepted that position.

Section 251(1) and (2) of the *Criminal Code* make it an indictable offence for a person to use any means to procure the miscarriage of a female person and prescribe on conviction a maximum sentence of two years' imprisonment, in the case of the woman herself, and a maximum sentence of life imprisonment in the case of another person. Parliament has decreed that procuring a non-therapeutic abortion is a crime deserving of severe punishment. Subsection (4) provides that subss. (1) and (2) shall not apply where an abortion is performed in accordance with paras. (*a*), (*b*), (*c*) and (*d*) of subs. (4). These paragraphs provide that a qualified medical practitioner may perform an abortion, and a pregnant woman may permit an abortion, in an accredited or an approved hospital where the therapeutic abortion committee for the hospital (defined in subs. (6)) has given its certificate in writing, stating that in its opinion the continuation of the woman's pregnancy would or

d'accueillir le pourvoi. Pour ma part, je ne puis accepter ni ses motifs ni sa façon de trancher le pourvoi. Je souscris d'une manière générale aux motifs de la Cour d'appel et, pour cette raison et pour d'autres que j'essayerai d'exposer, je suis d'avis de rejeter le pourvoi.

L'article 251 du *Code criminel*

Je dirais au départ qu'on pourrait penser que le présent pourvoi ne soulève pas les questions liées à la *Charte* sur lesquelles ont porté les débats et que mes collègues ont traitées dans leurs motifs de jugement. Il s'agit, en l'espèce, d'une accusation de complot en vue d'enfreindre les dispositions de l'art. 251 du *Code criminel*. Il ne fait pas de doute et on n'a jamais nié que les appelants ont adopté une ligne de conduite qui allait nettement à l'encontre des dispositions du *Code*, et on voit mal en quoi ils ont pu subir une atteinte aux droits dont ils jouissent en vertu de l'art. 7 de la *Charte*. Il n'est nullement question ici d'une personne du sexe féminin qui s'est vu refuser l'avortement thérapeutique et, par conséquent, toute l'argumentation relative au droit à la sécurité de la personne garanti par l'art. 7 de la *Charte* repose sur une hypothèse. C'est toutefois sur ce fondement que toutes les parties ont plaidé et la Cour a accepté cette façon de procéder.

Les paragraphes 251(1) et (2) du *Code criminel* disposent que quiconque emploie quelque moyen pour procurer l'avortement d'une personne du sexe féminin se rend coupable d'un acte criminel et prescrivent sur déclaration de culpabilité une peine maximale de deux ans d'emprisonnement dans le cas de la femme elle-même et une peine maximale d'emprisonnement à perpétuité dans le cas de toute autre personne. Le Parlement a décrété que pratiquer un avortement non thérapeutique constitue un crime qui mérite d'être puni sévèrement. Aux termes du par. (4), les par. (1) et (2) ne s'appliquent pas lorsqu'un avortement est pratiqué en conformité avec les al. (4)*a*), *b*), *c*) et *d*). Suivant ces alinéas, un médecin qualifié peut pratiquer un avortement, et une femme enceinte peut permettre qu'on la fasse avorter, dans un hôpital accrédité ou approuvé dont le comité de l'avortement thérapeutique (expression définie au par. (6)) a délivré un certificat attestant qu'à son avis la continuation de

would be likely to endanger her life or health. The certificate may be given to a qualified medical practitioner only after the committee, by a majority of its members and at a meeting where the woman's case has been reviewed, has authorized the giving of the certificate. Subsection (5) empowers the Minister of Health of a province to require a therapeutic abortion committee to furnish copies of certificates issued by the committee and such other information relating to the issuing of the certificate as he may require, and gives the Minister power to require similar information from a medical practitioner who has procured an abortion. Subsection (6) is the definitional section. It is clear from the foregoing that abortion is prohibited and that subs. (4) provides relieving provisions allowing an abortion in certain limited circumstances. It cannot be said that s. 251 of the *Criminal Code* confers any general right to have or to procure an abortion. On the contrary, the provision is aimed at protecting the interests of the unborn child and only lifts the criminal sanction where an abortion is necessary to protect the life or health of the mother.

la grossesse de cette personne du sexe féminin mettrait ou mettrait probablement en danger la vie ou la santé de cette dernière. Ce certificat ne peut être remis à un médecin qualifié qu'une fois que le comité, par décision de la majorité de ses membres et lors d'une réunion au cours de laquelle le cas de la femme a été examiné, a autorisé la délivrance du certificat. Le paragraphe (5) habilite le ministre de la Santé d'une province à requérir un comité de l'avortement thérapeutique de lui fournir des copies des certificats délivrés par le comité ainsi que les autres renseignements qu'il peut exiger relativement à la délivrance du certificat. Le même paragraphe investit ce ministre du pouvoir d'exiger que le médecin qui a pratiqué un avortement lui fournisse des renseignements similaires. Le paragraphe (6) est consacré à des définitions. Or, il ressort clairement de ce qui précède que l'avortement est interdit, mais que le par. (4) prévoit des exceptions en vertu desquelles l'avortement est permis dans certaines circonstances limitées. On ne saurait affirmer que l'art. 251 du *Code criminel* confère un droit général de subir ou de procurer un avortement. Au contraire, la disposition vise à protéger les intérêts de l'enfant qui n'est pas encore né et ne lève la sanction criminelle que si l'avortement s'impose pour protéger la vie ou la santé de la mère.

In considering the constitutionality of s. 251 of the *Criminal Code*, it is first necessary to understand the background of this litigation and some of the problems which it raises. Section 251 of the *Code* has been denounced as ill-conceived and inadequate by those at one extreme of the abortion debate and as immoral and unacceptable by those at the opposite extreme. There are those, like the appellants, who assert that on moral and ethical grounds there is a simple solution to the problem: the inherent "right of women to control their own bodies" requires the repeal of s. 251 in favour of the principle of "abortion on demand". Opposing this view are those who contend with equal vigour, and also on moral and ethical grounds, for a clear and simple solution: the inherent "right to life of the unborn child" requires the repeal of s. 251(4), (5), (6) and (7) in order to leave an absolute ban on abortions. The battle lines so drawn are firmly held and the attitudes of the opposing parties

En examinant la question de la constitutionnalité de l'art. 251 du *Code criminel*, il est d'abord nécessaire de saisir le contexte dans lequel le présent litige a pris naissance ainsi que quelques-uns des problèmes qu'il pose. L'article 251 du *Code* a été taxé de mal conçu et d'insuffisant par certains dans le débat sur l'avortement, alors que d'autres, qui se situent à l'extrême opposé, l'ont qualifié d'immoral et d'inacceptable. D'aucuns, comme c'est le cas des appelants, prétendent en invoquant la morale et l'éthique qu'il y a une solution simple au problème: «le droit des femmes d'être maîtresse de leur propre corps» commande l'abrogation de l'art. 251 en faveur du principe de «l'avortement libre». S'opposent à cette thèse ceux qui affirment, tout aussi énergiquement et également pour des raisons d'ordre moral et d'éthique, que la solution est claire et simple: «le droit à la vie qu'a l'enfant qui n'est pas encore né» exige l'abrogation des par. 251(4), (5), (6) et (7) de sorte que l'avortement

admit of no compromise. From the submission of the Attorney General of Canada (set out in his factum at paragraph 6), however, it may appear that a majority in Canada do not see the issue in such black and white terms. Paragraph 6 is in these words:

The evidence of opinion surveys indicates that there is a surprising consistency over the years and in different survey groups in the spectrum of opinions on the issue of abortion. Roughly 21 to 23% of people at one end of the spectrum are of the view, on the one hand, that abortion is a matter solely for the decision of the pregnant woman and that any legislation on this subject is an unwarranted interference with a woman's right to deal with her own body, while about 19 to 20% are of the view, on the other hand, that destruction of the living fetus is the killing of human life and tantamount to murder. The remainder of the population (about 60%) are of the view that abortion should be prohibited in some circumstances.

Parliament has heeded neither extreme. Instead, an attempt has been made to balance the competing interests of the unborn child and the pregnant woman. Where the provisions of s. 251(4) are met, the abortion may be performed without legal sanction. Where they are not, abortion is deemed to be socially undesirable and is punished as a crime. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 [hereinafter *Morgentaler (1975)*], Laskin C.J. said (in dissent, but not on this point), at p. 627:

What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial. I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation.

soit frappé d'une interdiction totale. De chaque côté, on maintient fermement sa position et on n'admet aucun compromis. Cependant, l'argument avancé par le procureur général du Canada (au paragraphe 6 de son mémoire) peut porter à croire que la majorité des Canadiens ne considèrent pas que la question est aussi claire et nette. Le paragraphe 6 est ainsi conçu:

[TRADUCTION] Les sondages d'opinion révèlent qu'il y a eu au cours des années et pour les différents groupes cibles une constance surprenante dans la gamme des opinions exprimées sur la question de l'avortement. D'une part, environ 21 % à 23 % des gens estiment qu'il appartient uniquement à la femme enceinte de décider si elle se fera avorter et que toute loi dans ce domaine représente une atteinte injustifiée au droit de la femme de disposer, comme elle l'entend, de son propre corps, alors que, d'autre part, à peu près 19 % à 20 % jugent que détruire un fœtus vivant c'est enlever la vie à un être humain et ainsi commettre un meurtre. Le reste de la population (environ 60 %) est d'avis que l'avortement devrait être interdit dans certaines circonstances.

Le législateur n'a retenu ni l'un ni l'autre de ces points de vue extrêmes. Il a plutôt tenté d'équilibrer les intérêts de l'enfant qui n'est pas encore né et ceux opposés de la femme enceinte. Du moment que sont respectées les dispositions du par. 251(4), l'avortement peut être accompli sans que cela n'entraîne de sanction légale. Dans l'hypothèse contraire, l'avortement est considéré comme un acte socialement répréhensible, réprimé comme un crime. Dans l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, [ci-après l'arrêt *Morgentaler (1975)*] le juge en chef Laskin (dissident, mais non sur ce point) affirme, à la p. 627:

Ce qui est évident à la lecture de la partie de l'art. 251 qui porte interdiction, c'est que le Parlement, exerçant son jugement, a décrété que l'intervention d'une autre personne, voire de la mère elle-même, dans le cours ordinaire de la conception constitue une conduite socialement indésirable et passible de sanctions. C'est là un jugement que le Parlement pouvait porter dans l'exercice de son pouvoir législatif plénier en matière criminelle, et le fait qu'il puisse exister des moyens sûrs d'interrompre une grossesse ou qu'une ou plusieurs femmes prétendent à un droit individuel de poser ce geste, n'est aucunement pertinent. Je n'ai pas besoin de citer de précédents pour affirmer que le Parlement peut déterminer ce qui n'est pas criminel aussi bien que ce qui l'est, et qu'il peut par conséquent introduire dans ses lois pénales des dispenses ou des immunités.

Parliament's view that abortion is, in its nature, "socially undesirable conduct" is not new. Parliament's policy, as expressed by s. 251 of the *Code*, is consistent with that which has governed Canadian criminal law since Confederation and before: see Dickson J. (as he then was) in *Morgentaler (1975), supra*, at p. 672, and the reasons of the Ontario Court of Appeal in this case: (1985), 52 O.R. (2d) 353, at pp. 364-66. It is against this background that I turn to the question of judicial review in light of the *Charter*.

L'opinion du législateur portant que l'avortement constitue, de par sa nature même, une «conduite socialement indésirable» ou répréhensible n'a rien de nouveau. La politique du législateur, énoncée à l'art. 251 du *Code*, concorde avec celle qui a régi le droit criminel canadien depuis la Confédération et même avant: voir les motifs du juge Dickson (alors juge puîné) dans l'arrêt *Morgentaler (1975)*, précité, à la p. 672, ainsi que ceux de la Cour d'appel de l'Ontario dans la présente affaire, (1985), 52 O.R. (2d) 353, aux pp. 364 à 366. C'est dans ce contexte que j'aborde la question du contrôle judiciaire en fonction de la *Charte*.

Scope of Judicial Review under the *Charter*

Before the adoption of the *Charter*, there was little question of the limits of judicial review of the criminal law. For all practical purposes it was limited to a determination of whether the impugned enactment dealt with a subject which could fall within the criminal law power in s. 91(27) of the *Constitution Act, 1867*. There was no doubt of the power of Parliament to say what was and what was not criminal and to prohibit criminal conduct with penal sanctions, although from 1960 onwards legislation was subject to review under the *Canadian Bill of Rights*: see *Morgentaler (1975), supra*. The adoption of the *Charter* brought a significant change. The power of judicial review of legislation acquired greater scope but, in my view, that scope is not unlimited and should be carefully confined to that which is ordained by the *Charter*. I am well aware that there will be disagreement about what was ordained by the *Charter* and, of course, a measure of interpretation of the *Charter* will be required in order to give substance and reality to its provisions. But the courts must not, in the guise of interpretation, postulate rights and freedoms which do not have a firm and a reasonably identifiable base in the *Charter*. In his reasons, the Chief Justice refers to the problem. He says, at pp. 45-46:

Portée du contrôle judiciaire fondé sur la *Charte*

Avant l'adoption de la *Charte*, il n'était guère question des limites du contrôle judiciaire du droit criminel. À toutes fins pratiques, ce contrôle consistait uniquement à déterminer si le texte attaqué portait sur un sujet pouvant relever de la compétence en matière de droit criminel que conférait le par. 91(27) de la *Loi constitutionnelle de 1867*. Personne ne doutait que le Parlement était autorisé à décider ce qui constituait et ce qui ne constituait pas une conduite criminelle et à réprimer cette conduite au moyen de sanctions pénales, quoique, à partir de 1960, toute loi pouvait faire l'objet d'un contrôle en vertu de la *Déclaration canadienne des droits*: voir l'arrêt *Morgentaler (1975)*, précité. Or, un changement important a résulté de l'adoption de la *Charte*. Le pouvoir d'exercer un contrôle judiciaire sur des mesures législatives a pris de l'envergure mais, à mon avis, sa portée n'en demeure pas moins restreinte et elle devrait soigneusement être limitée à celle prescrite par la *Charte*. Je sais très bien qu'on ne s'entendra pas sur ce que prescrit la *Charte* et il va sans dire qu'il faudra une certaine mesure d'interprétation pour conférer substance et réalité à ses dispositions. Les tribunaux ne doivent pas cependant, sous prétexte d'interpréter, supposer l'existence de droits et de libertés qui ne reposent pas de manière solide et raisonnablement identifiable sur la *Charte*. Le Juge en chef évoque ce problème dans ses motifs de jugement, où il dit, aux pp. 45 et 46:

During argument before this Court, counsel for the Crown emphasized repeatedly that it is not the role of the judiciary in Canada to evaluate the wisdom of

Au cours des plaidoiries devant nous, le substitut du procureur général a rappelé à plusieurs reprises que le pouvoir judiciaire au Canada n'a pas comme rôle d'éva-

legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 671, (hereinafter "*Morgentaler (1975)*") I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to the abortion question. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights); *The Abortion Decision of the Federal Constitutional Court — First Senate — of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c. 87 (U.K.)

But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler (1975)*, at p. 671, that:

> The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms* .... It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

While I differ with the Chief Justice in the disposition of this appeal, I would accept his words, referred to above, which describe the role of the Court, but I would suggest that in "ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*" the courts must confine

luer la sagesse des lois édictées par nos députés élus démocratiquement, ni de réinterpréter les choix difficiles de politique auxquels tous les gouvernements sont confrontés. Dans l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, à la p. 671, (ci-après l'arrêt «*Morgentaler (1975)*») j'ai souligné que la Cour «n'est pas appelée à trancher, ni même à aborder, le débat public animé et constant sur l'avortement». Onze ans plus tard, la controverse fait toujours rage et il est tout aussi vrai que la Cour ne saurait prétendre concilier toutes les allégations contradictoires avancées dans le vigoureux et sain débat public ainsi suscité. Tant les tribunaux que les législateurs, dans d'autres sociétés démocratiques, sont arrivés à des décisions entièrement contradictoires lorsqu'il leur a été demandé de soupeser les valeurs que la question de l'avortement oppose. Voir, p. ex., l'arrêt *Roe v. Wade*, 410 U.S. 113 (1973); l'arrêt *Paton c. Royaume-Uni* (1980), 3 E.H.R.R. (Cour européenne des droits de l'homme); *The Abortion Decision of the Federal Constitutional Court — First Senate — of the Federal Republic of Germany*, 25 février 1975, traduit en anglais et réédité dans (1976), 9 John Marshall J. Prac. and Proc. 605; et l'*Abortion Act, 1967*, 1967, chap. 87 (R.-U.)

Mais depuis 1975, et le premier arrêt *Morgentaler*, la Cour s'est vue confier des responsabilités additionnelles. Je disais dans l'arrêt *Morgentaler (1975)*, à la p. 671:

> Les valeurs que nous devons accepter aux fins du pourvoi sont celles qu'a proclamées le Parlement, qui s'en tient à l'opinion que le désir d'une femme d'être soulagée de sa grossesse ne justifie pas en soi l'avortement.

Quoiqu'on puisse toujours sans aucun doute affirmer que les tribunaux ne sont pas le lieu où doivent s'élaborer les politiques générales complexes et controversées, les tribunaux canadiens se voient néanmoins confier aujourd'hui l'obligation cruciale de veiller à ce que les initiatives législatives de notre Parlement et de nos législatures se conforment aux valeurs démocratiques qu'exprime la *Charte canadienne des droits et libertés* [...] C'est en ce dernier sens que le présent pourvoi diffère de celui dont nous étions saisis voici une décennie.

Bien que je ne partage pas l'avis du Juge en chef quant à la façon de trancher le pourvoi, je souscris à ce qu'il affirme, dans le passage qui vient d'être cité, concernant le rôle de cette Cour. Je prétends cependant qu'en veillant «à ce que les initiatives législatives de notre Parlement et de nos législatures se conforment aux valeurs démocratiques qu'exprime la *Charte canadienne des droits et*

themselves to such democratic values as are clearly found and expressed in the *Charter* and refrain from imposing or creating other values not so based.

It follows, then, in my view, that the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*. While this may appear to be self-evident, the distinction is of vital importance. If a particular interpretation enjoys no support, express or reasonably implied, from the *Charter*, then the Court is without power to clothe such an interpretation with constitutional status. It is not for the Court to substitute its own views on the merits of a given question for those of Parliament. The Court must consider not what is, in its view, the best solution to the problems posed; its role is confined to deciding whether the solution enacted by Parliament offends the *Charter*. If it does, the provision must be struck down or declared inoperative, and Parliament may then enact such different provisions as it may decide. I adopt the words of Holmes J., which were referred to in *Ferguson v. Skrupka*, 372 U.S. 726 (1963), at pp. 729-30:

There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner* v. *New York*, 198 U.S. 45 (1905), outlawing "yellow dog" contracts, *Coppage* v. *Kansas*, 236 U.S. 1 (1915), setting minimum wages for women, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said:

libertés», les tribunaux doivent s'en tenir aux valeurs démocratiques qui sont clairement énoncées dans la *Charte* et s'abstenir d'imposer ou de créer d'autres valeurs qui ne s'y trouvent pas.

Il s'ensuit donc, selon moi, que notre tâche en l'espèce consiste non pas à résoudre ni à tenter de résoudre ce qu'on pourrait appeler la question de l'avortement, mais simplement à examiner le contenu de l'art. 251 en fonction de la *Charte*. Quoique cela puisse paraître évident en soi, la distinction revêt une importance capitale. Si une interprétation particulière n'est pas appuyée, expressément ou implicitement, par la *Charte*, la Cour est alors impuissante à prêter à cette interprétation un caractère constitutionnel. Il n'appartient nullement à la Cour de substituer ses propres opinions à celles du législateur concernant le bien-fondé d'une question donnée. La Cour ne doit pas considérer ce qu'elle estime être la meilleure solution aux problèmes posés; son rôle se limite à décider si la solution adoptée par le législateur va à l'encontre de la *Charte*. Si c'est le cas, la disposition en question doit être déclarée invalide ou inopérante et il est alors loisible au législateur d'adopter toute disposition différente qu'il pourra juger à propos. Je fais miens les propos du juge Holmes, mentionnés dans l'arrêt *Ferguson v. Skrupka*, 372 U.S. 726 (1963), aux pp. 729 et 730:

[TRADUCTION] Il fut un temps où cette Cour recourait à la clause de l'application régulière de la loi pour invalider des lois jugées déraisonnables, c'est-à-dire insensées ou incompatibles avec une certaine philosophie économique ou sociale. C'est ainsi qu'on s'est servi de cette clause notamment pour annuler des lois prescrivant le nombre maximal d'heures de travail dans les boulangeries, *Lochner* v. *New York*, 198 U.S. 45 (1905), interdisant les contrats de «jaune», *Coppage* v. *Kansas*, 236 U.S. 1 (1915), établissant un salaire minimum pour les femmes, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), et fixant le poids des pains, *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924). Cette incursion par les tribunaux dans le domaine des jugements de valeur du législateur a suscité à l'époque une opposition vigoureuse, notamment de la part des juges Holmes et Brandeis. Bien que la Cour ait déclaré invalide une loi d'un État réglementant le prix de revente des billets de théâtre et d'autres billets, le juge Holmes, dissident, a dit:

"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain".

And in an earlier case he had emphasized that, "The criterion of constitutionality is not whether we believe the law to be for the public good."

The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Holmes J. wrote in 1927, but his words have retained their force in American jurisprudence: see *New Orleans v. Dukes,* 427 U.S. 297 (1976), at p. 304, *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981), at p. 469, and *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489 (1982), at pp. 504-5. In my view, although written in the American context, the principle stated is equally applicable in Canada.

It is essential that this principle be maintained in a constitutional democracy. The Court must not resolve an issue such as that of abortion on the basis of how many judges may favour "pro-choice" or "pro-life". To do so would be contrary to sound principle and the rule of law affirmed in the preamble to the *Charter* which must mean that no discretion, including a judicial discretion, can be unlimited. But there is a problem, for the Court must clothe the general expression of rights and freedoms contained in the *Charter* with real substance and vitality. How can the courts go about this task without imposing at least some of their views and predilections upon the law? This question has been the subject of much discussion and comment. Many theories have been postulated but

«Je crois qu'il convient de reconnaître que la législature d'un État peut faire tout ce qu'elle juge à propos, à moins qu'une disposition expresse de la Constitution des États-Unis ou de l'État en question ne l'en empêche. J'estime aussi que les tribunaux devraient prendre soin de ne pas donner à ces interdictions une portée qui aille au-delà de leur sens manifeste en y appliquant leurs propres conceptions de l'intérêt public.»

Dans un arrêt antérieur, il avait souligné que «Le critère de la constitutionnalité ne consiste pas à nous demander si nous estimons que la loi en question est pour le bien public».

Voilà maintenant longtemps que n'a plus cours le principe retenu dans les décisions *Lochner, Coppage, Adkins, Burns,* etc., savoir qu'en vertu de l'application régulière de la loi, les tribunaux peuvent déclarer des lois inconstitutionnelles lorsqu'ils estiment que le législateur a agi de façon insensée. On est en effet revenu à la vieille proposition constitutionnelle portant que les tribunaux ne doivent pas substituer leurs convictions en matière sociale et économique au jugement des corps législatifs dont les membres sont élus pour légiférer.

Les propos du juge Holmes datent de 1927, mais ils n'ont pas perdu de leur force dans la jurisprudence américaine: voir *New Orleans v. Dukes,* 427 U.S. 297 (1976), à la p. 304; *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981), à la p. 469; et *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489 (1982), aux pp. 504 et 505. À mon avis, bien qu'il ait été établi dans le contexte américain, ce principe est tout aussi applicable au Canada.

Il est essentiel de maintenir ce principe dans une démocratie constitutionnelle. Il ne faut pas que la décision de la Cour sur une question comme celle de l'avortement soit fonction du nombre de juges qui peuvent faire partie du camp «prochoix» ou «provie», car cela irait à l'encontre de principes solides et de la primauté du droit dont parle le préambule de la *Charte,* ce qui doit donc signifier qu'aucun pouvoir discrétionnaire, pas même celui des tribunaux, n'est absolu. Il existe toutefois un problème en ce sens que la Cour doit conférer à l'énoncé général des droits et libertés que contient la *Charte* une substance et une vitalité véritables. Or, comment les tribunaux peuvent-ils s'acquitter de cette tâche sans assujettir la loi à au moins certaines de leurs opinions et préférences? C'est là

few have had direct reference to the problem in the Canadian context. In my view, this Court has offered guidance in this matter. In such cases as *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56, and *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, it has enjoined what has been termed a "purposive approach" in applying the *Charter* and its provisions. I take this to mean that the Courts should interpret the *Charter* in a manner calculated to give effect to its provisions, not to the idiosyncratic view of the judge who is writing. This approach marks out the limits of appropriate *Charter* adjudication. It confines the content of *Charter* guaranteed rights and freedoms to the purposes given expression in the *Charter*. Consequently, while the courts must continue to give a fair, large and liberal construction to the *Charter* provisions, this approach prevents the Court from abandoning its traditional adjudicatory function in order to formulate its own conclusions on questions of public policy, a step which this Court has said on numerous occasions it must not take. That *Charter* interpretation is to be purposive necessarily implies the converse: it is not to be "non-purposive". A court is not entitled to define a right in a manner unrelated to the interest which the right in question was meant to protect. I endeavoured to formulate an approach to the problem in *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, in these words, at p. 394:

> It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society.

une question qui a fait l'objet de beaucoup de discussion et de commentaires. Maintes théories ont été avancées, mais peu d'entre elles se rapportent directement au problème tel qu'il se pose dans le contexte canadien. Pour ma part, j'estime que la jurisprudence de cette Cour est instructive à cet égard. Dans des arrêts comme *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, aux pp. 155 et 156, et *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 344, la Cour a recommandé que, dans l'application de la *Charte* et de ses dispositions, soit adoptée ce qu'on a appelé une «méthode qui tient compte de l'objet visé». J'interprète cela comme signifiant que les tribunaux devraient interpréter la *Charte* de manière à mettre à exécution ses dispositions plutôt que le point de vue personnel du juge qui écrit. Cette façon de procéder établit des bornes que les tribunaux ne devraient pas dépasser lorsqu'ils se prononcent sur la *Charte*. Elle circonscrit le contenu des droits et libertés garantis par la *Charte* aux objets qui y sont formulés. Par conséquent, bien que les tribunaux doivent continuer à donner aux dispositions de la *Charte* une interprétation juste, large et libérale, cette méthode empêche la Cour d'abandonner son rôle décisionnel traditionnel pour formuler ses propres conclusions sur des questions de politique générale, ce qu'à maintes reprises la Cour a dit qu'elle devait éviter de faire. Affirmer que l'interprétation de la *Charte* doit tenir compte de son objet implique nécessairement l'inverse: elle ne doit pas s'interpréter «d'une manière qui fait abstraction de l'objet visé». Une cour n'est pas habilitée à donner à un droit une définition n'ayant aucun rapport avec l'intérêt qu'est destiné à protéger le droit en question. Dans le *Renvoi relatif à la Public Service Employee Relations Act*, [1987] 1 R.C.S. 313, à la p. 394, j'ai tenté de formuler une façon d'aborder le problème:

> Il s'ensuit que, bien qu'il faille adopter une attitude libérale et pas trop formaliste en matière d'interprétation constitutionnelle, la *Charte* ne saurait être considérée comme un simple contenant, à même de recevoir n'importe quelle interprétation qu'on pourrait vouloir lui donner. L'interprétation de la *Charte*, comme celle de tout document constitutionnel, est circonscrite par la formulation, la structure et l'historique du texte constitutionnel, par la tradition constitutionnelle et par l'histoire, les traditions et les philosophies inhérentes de notre société.

The approach, as I understand it, does not mean that judges may not make some policy choices when confronted with competing conceptions of the extent of rights or freedoms. Difficult choices must be made and the personal views of judges will unavoidably be engaged from time to time. The decisions made by judges, however, and the interpretations that they advance or accept must be plausibly inferable from something in the *Charter*. It is not for the courts to manufacture a constitutional right out of whole cloth. I conclude on this question by citing and adopting the following words, although spoken in dissent, from the judgment of Harlan J. in *Reynolds v. Sims*, 377 U.S. 533 (1964), which, in my view, while stemming from the American experience, are equally applicable in a consideration of the Canadian position. Harlan J. commented, at pp. 624-25, on the:

> ... current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

Si je comprends bien, cela ne veut pas dire que les juges ne peuvent pas faire certains choix de politique générale lorsqu'ils se trouvent devant des conceptions opposées de l'étendue de droits ou de libertés. Des choix difficiles doivent être faits et le point de vue personnel des juges jouera inévitablement à l'occasion. Toutefois, les décisions rendues par les juges ainsi que les interprétations qu'ils proposent ou qu'ils retiennent doivent découler plausiblement de la *Charte*. Il n'appartient nullement aux tribunaux de forger de toutes pièces un droit constitutionnel. Pour terminer mes observations sur cette question, je cite, en les adoptant, les propos suivants tirés des motifs du juge Harlan, dissident, dans l'affaire *Reynolds v. Sims*, 377 U.S. 533 (1964), qui, selon moi, bien qu'ils découlent de l'expérience américaine, sont tout autant applicables dans une étude de la position canadienne. Le juge Harlan commente, aux pp. 624 et 625:

> [TRADUCTION] ... l'idée erronée qu'on se fait actuellement de la Constitution et du rôle qu'elle attribue à cette Cour. Ce point de vue, en un mot, porte qu'on peut trouver dans quelque «principe» constitutionnel un remède à tous les maux sociaux importants qui affligent ce pays et que cette Cour doit «prendre l'initiative» de promouvoir la réforme lorsque les autres organes du gouvernement n'agissent pas. La Constitution n'est pas une panacée qui permet de remédier à toutes les atteintes au bien-être public et cette Cour, en tant que corps judiciaire, ne doit pas non plus être considérée comme un refuge pour tous les mouvements de réforme. La Constitution est un instrument de gouvernement; elle repose sur la prémisse fondamentale selon laquelle c'est la répartition du pouvoir gouvernemental qui offre à cette nation les meilleures possibilités d'assurer la liberté à tous ses citoyens. Cette Cour, dont les fonctions sont limitées en conformité avec cette prémisse, ne remplit pas sa noble mission lorsqu'elle excède sa compétence, fût-ce par suite d'une impatience justifiée face aux lenteurs du processus politique. Car lorsqu'au nom de l'interprétation constitutionnelle, la Cour *ajoute* à la Constitution quelque chose qui en a été délibérément exclu, elle se trouve en réalité à substituer au processus d'amendement sa propre conception de ce que devrait dire la Constitution.

The Right to Abortion and s. 7 of the *Charter*

The judgment of my colleague, Wilson J., is based upon the proposition that a pregnant woman

Le droit à l'avortement et l'art. 7 de la *Charte*

Le jugement de ma collègue le juge Wilson est fondé sur la proposition selon laquelle la femme

has a right, under s. 7 of the *Charter*, to have an abortion. The same concept underlies the judgment of the Chief Justice. He reached the conclusion that a law which forces a woman to carry a foetus to term, unless certain criteria are met which are unrelated to her own priorities and aspirations, impairs the security of her person. That, in his view, is the effect of s. 251 of the *Criminal Code*. He has not said in specific terms that the pregnant woman has the right to an abortion, whether therapeutic or otherwise. In my view, however, his whole position depends for its validity upon that proposition and that interference with the right constitutes an infringement of her right to security of the person. It is said that a law which forces a woman to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations interferes with security of her person. If compelling a woman to complete her pregnancy interferes with security of her person, it can only be because the concept of security of her person includes a right not to be compelled to carry the child to completion of her pregnancy. This, then, is simply to say that she has a right to have an abortion. It follows, then, that if no such right can be shown, it cannot be said that security of her person has been infringed by state action or otherwise.

All laws, it must be noted, have the potential for interference with individual priorities and aspirations. In fact, the very purpose of most legislation is to cause such interference. It is only when such legislation goes beyond interfering with priorities and aspirations, and abridges rights, that courts may intervene. If a law prohibited membership in a lawful association it would be unconstitutional, not because it would interfere with priorities and aspirations, but because of its interference with the guaranteed right of freedom of association under s. 2(*d*) of the *Charter*. Compliance with the *Income Tax Act* has, no doubt, frequently interfered with priorities and aspirations. The taxing provisions are not, however, on that basis unconstitutional, because the ordinary taxpayer enjoys no right to be tax free. Other illustrations may be found. In my view, it is clear that before it could be concluded that any enactment infringed the concept of security of the person, it would have to infringe

enceinte a droit à l'avortement en vertu de l'art. 7 de la *Charte*. La même notion sous-tend le jugement du Juge en chef. Il en vient à la conclusion que la loi qui force une femme à mener à terme un fœtus, à moins de satisfaire à certains critères qui n'ont rien à voir avec ses propres priorités et aspirations, porte atteinte à la sécurité de sa personne. Voilà, à son avis, l'effet de l'art. 251 du *Code criminel*. Il n'a pas affirmé expressément que la femme enceinte a droit à l'avortement thérapeutique ou autre. J'estime cependant que la validité de sa position dépend de cette proposition et que l'atteinte à ce droit constitue une atteinte au droit à la sécurité de sa personne. On dit que la loi qui force une femme à mener à terme un fœtus, à moins de satisfaire à certains critères qui n'ont rien à voir avec ses propres priorités et aspirations, porte atteinte à la sécurité de sa personne. Si en obligeant une femme à mener à terme sa grossesse, on attente à la sécurité de sa personne, ce ne peut être que parce que le concept de la sécurité de la personne inclut le droit de ne pas être contrainte à mener à terme sa grossesse. Cela revient alors simplement à dire qu'elle a droit à l'avortement. Il s'ensuit donc que si on ne peut prouver l'existence d'un tel droit, on ne saurait dire que la sécurité de sa personne a été violée par l'action de l'État ou de quelque autre manière.

Toute loi, soulignons-le, peut éventuellement porter atteinte aux priorités et aux aspirations d'une personne. De fait, c'est précisément cela que visent la plupart des mesures législatives. Ce n'est que lorsque ces mesures ne constituent plus une simple entrave auxdites priorités et aspirations et qu'elles portent atteinte à des droits que les tribunaux peuvent intervenir. La loi qui interdirait de faire partie d'une association licite serait inconstitutionnelle, non parce qu'elle porterait atteinte à des priorités et à des aspirations, mais parce qu'elle léserait le droit à la liberté d'association garanti par l'al. 2*d*) de la *Charte*. Il ne fait aucun doute que le respect de la *Loi de l'impôt sur le revenu* a souvent porté atteinte aux priorités et aux aspirations de particuliers. Les dispositions fiscales n'en sont toutefois pas pour autant inconstitutionnelles, parce que le contribuable ordinaire ne jouit d'aucun droit à l'exemption d'impôts. On pourrait en donner d'autres exemples. À mon avis, il est

some underlying right included in or protected by the concept. For the appellants to succeed here, then, they must show more than an interference with priorities and aspirations; they must show the infringement of a right which is included in the concept of security of the person.

évident qu'on ne saurait conclure qu'un texte législatif porte atteinte à la sécurité de la personne que dans la mesure où ce texte porte atteinte à quelque droit sous-jacent inclus dans cette notion ou protégé par celle-ci. Donc, pour que les appelants aient gain de cause en l'espèce, ils ne peuvent pas se contenter de démontrer l'existence d'une simple entrave à des priorités et à des aspirations; ils doivent prouver qu'il y a atteinte à un droit inclus dans la notion de la sécurité de la personne.

The proposition that women enjoy a constitutional right to have an abortion is devoid of support in the language of s. 7 of the *Charter* or any other section. While some human rights documents, such as the *American Convention on Human Rights, 1969* (Article 4(1)), expressly address the question of abortion, the *Charter* is entirely silent on the point. It may be of some significance that the *Charter* uses specific language in dealing with other topics, such as voting rights, religion, expression and such controversial matters as mobility rights, language rights and minority rights, but remains silent on the question of abortion which, at the time the *Charter* was under consideration, was as much a subject of public controversy as it is today. Furthermore, it would appear that the history of the constitutional text of the *Charter* affords no support for the appellants' proposition. A reference to the Minutes of the Special Joint Committee of Senate and House of Commons on the Constitution of Canada (Proceedings 32nd. Parl., Sess. 1 (1981), vol. 46, p. 43) reveals the following exchange:

Ni l'article 7 de la *Charte* ni aucune autre disposition n'appuie la proposition selon laquelle les femmes jouissent d'un droit constitutionnel à l'avortement. Alors que certains textes sur les droits de la personne, comme l'*American Convention on Human Rights, 1969* (article 4(1)), abordent expressément la question de l'avortement, la *Charte* est tout à fait muette sur ce point. Par ailleurs, il n'est peut-être pas sans importance que la *Charte* traite explicitement d'autres sujets, comme le droit de vote, la liberté de religion, la liberté d'expression et d'autres questions controversées comme la liberté de circulation et d'établissement, les droits linguistiques et les droits des minorités, sans toutefois parler de la question de l'avortement qui, à l'époque de son élaboration, était tout aussi publiquement controversée qu'elle l'est aujourd'hui. Il semblerait en outre n'y avoir rien dans l'historique du texte constitutionnel de la *Charte* qui puisse étayer la proposition avancée par les appelants. Dans les procès-verbaux du Comité mixte spécial du Sénat et de la Chambre des communes sur la Constitution du Canada (Procès-verbaux 32e Parl., sess. 1 (1981), vol. 46, p. 43), on trouve l'échange de propos suivant:

Mr. Crombie: ... And I ask you then finally, what effect will the inclusion of the due process clause have on the question of marriage, procreation, or the parental care of children?

. . .

Mr. Chrétien: The point, Mr. Crombie, that it is important to understand the difference is that we pass legislation here on abortion, criminal code, and we pass legislation on capital punishment; parliament [*sic*] has the authority to do that, and the court at this moment, because we do not have the due process of law written there, cannot go and see whether we made the right decision or the wrong decision in Parliament.

M. Crombie: Je vous demande donc, en terminant, quelles seront les répercussions de l'inclusion de cet article sur les voies de droit régulières sur le mariage, la procréation et le soin des enfants?

. . .

M. Chrétien: Monsieur Crombie, il est important de comprendre la différence entre l'adoption d'une loi sur l'avortement, le Code criminel et l'adoption d'une loi sur la peine capitale. Le Parlement est habilité à adopter ces lois et le tribunal, parce que nous n'avons pas de voies de droit régulières écrites, ne peut pas vérifier si le Parlement a pris une bonne décision.

If you write down the words, "due process of law" here, the advice I am receiving is the court could go behind our decision and say that their decision on abortion was not the right one, their decision on capital punishment was not the right one, and it is a danger, according to legal advice I am receiving, that it will very much limit the scope of the power of legislation by the Parliament and we do not want that; and it is why we do not want the words "due process of law". These are the two main examples that we should keep in mind.

You can keep speculating on all the things that have never been touched, but these are two very sensitive areas that we have to cope with as legislators and my view is that Parliament has decided a certain law on abortion and a certain law on capital punishment, and it should prevail and we do not want the courts to say that the judgment of Parliament was wrong in using the constitution.

This passage, of course, revolves around the second and not the first limb of s. 7, but it offers no support for the suggestion that it was intended to bring the question of abortion into the *Charter*.

It cannot be said that the history, traditions and underlying philosophies of our society would support the proposition that a right to abortion could be implied in the *Charter*. The history of the legal approach to this question, reflective of public policy, was conveniently canvassed in the Ontario Court of Appeal in this case in these terms, at pp. 364-66:

History of the law of abortion

The history of the law of abortion is of some importance. At common law procuring an abortion before quickening was not a criminal offence. Quickening occurred when the pregnant woman could feel the foetus move in her womb. It was a misdemeanour to procure an abortion after quickening: *Blackstone's Commentaries on the Laws of England*, Book 1, pp. 129-30. The law of criminal abortion was first codified in England in *Lord Ellenborough's Act*, 1803 (U.K.), c. 58. That Act made procuring an abortion of a quick foetus a capital offence and provided lesser penalties for abortion before quickening. After the *Offences Against the Person Act*, 1861 (U.K.), c. 100, s. 58, no differentiation in penalty was made in England on the basis of the stage of foetal development. The offence was a felony and the max-

Si nous couchons cela sur le papier, on me dit que le tribunal pourra désormais aller au-delà de la décision du Parlement et renverser une décision que ce dernier aurait prise sur l'avortement ou sur la peine capitale. On risque donc, selon les avis juridiques que j'ai reçus, de limiter le pouvoir législatif du Parlement, et ce n'est pas ce que nous souhaitons. C'est pourquoi nous ne voulons pas inclure cette expression «voies de droit régulières». Ce sont deux exemples qu'il faut garder à l'esprit.

On peut spéculer quant aux implications que cela aurait sur des domaines sur lesquels on n'a pas encore légiférer (*sic*); mais voilà deux domaines très particuliers avec lesquels les législateurs sont aux prises et, à mon avis, le Parlement qui a adopté certaines lois sur l'avortement et la peine capitale devrait avoir préséance en la matière, et nous ne voulons pas que les tribunaux puissent, en invoquant la constitution, renverser le jugement du Parlement.

Bien entendu, ce passage concerne le second plutôt que le premier volet de l'art. 7, mais il ne permet pas du tout d'affirmer qu'on a voulu que la question de l'avortement relève de la *Charte*.

On ne saurait prétendre que l'histoire, les traditions et les philosophies fondamentales de notre société appuient la proposition selon laquelle la *Charte* confère implicitement un droit à l'avortement. La Cour d'appel de l'Ontario a fait en l'espèce un examen utile de la manière dont la position du législateur face à cette question a évolué en fonction des exigences de l'ordre public. Voici ce qu'a dit la Cour d'appel, aux pp. 364 à 366:

[TRADUCTION] *Historique du droit en matière d'avortement*

L'historique du droit en matière d'avortement revêt passablement d'importance. En *common law*, procurer un avortement avant que le fœtus ne donne des signes de vie ne constituait pas une infraction criminelle. Le fœtus donnait des signes de vie lorsque la femme enceinte pouvait le sentir bouger dans son ventre. Quiconque procurait un avortement à ce stade-là de la grossesse commettait une infraction mineure (*misdemeanour*): *Blackstone's Commentaries on the Laws of England*, tome 1, pp. 129 et 130. Le droit en matière d'avortement criminel a été codifié pour la première fois en Angleterre dans *Lord Ellenborough's Act*, 1803 (R.-U.), chap. 58. Cette loi prévoyait que la pratique d'un avortement lorsqu'il s'agissait d'un fœtus qui donnait des signes de vie constituait une infraction majeure (*felony*), et pres-

imum penalty life imprisonment. The *Infant Life (Preservation) Act*, 1929 (U.K.), c. 34, gave greater protection to a viable foetus by creating the offence of child destruction where a child capable of being born alive was caused to die except in good faith to preserve the life of the mother. In *R. v. Bourne*, [1939] 1 K.B. 687, the prohibition against abortion both at common law and by statute was held to be subject to the common law defence based upon the necessity of saving the mother's life.

crivait des peines moindres pour l'avortement pratiqué à un stade moins avancé. Suite à l'adoption de l'*Offences Against the Person Act*, 1861 (R.-U.), chap. 100, art. 58, on n'imposait plus en Angleterre des peines différentes selon le stade de développement fœtal. L'infraction était majeure et entraînait alors une peine maximale d'emprisonnement à perpétuité. L'*Infant Life (Preservation) Act*, 1929 (R.-U.), chap. 34, accordait une plus grande protection à un fœtus viable en créant l'infraction de destruction d'enfant qui consistait à faire mourir un enfant susceptible de naître vivant, sauf lorsque la mort était provoquée de bonne foi afin de protéger la vie de la mère. Dans la décision *R. v. Bourne*, [1939] 1 K.B. 687, on a jugé qu'on pouvait opposer à l'interdiction de l'avortement édictée tant par la *common law* que par la loi écrite le moyen de défense de *common law* fondé sur la nécessité de sauver la vie de la mère.

The earliest statutory prohibition in Canada against attempting to procure an abortion is to be found in "An Act respecting Offences against the Person", 1869 (Can.), c. 20, ss. 59 and 60. The Act was based on *Lord Ellenborough's Act* and the *Offences Against the Person Act, 1861*. The provisions relating to abortion were included in the Canadian *Criminal Code* in 1892 (1892 (Can.), c. 29, ss. 272 to 274), and with slight changes were included in the Codes of 1906 (R.S.C. 1906, c. 146, ss. 303 to 306); 1927 (R.S.C. 1927, c. 36, ss. 303 to 306) and 1954 (1953-54 (Can.), c. 51, ss. 237 and 238).

Les premières dispositions législatives canadiennes interdisant de tenter de procurer un avortement se trouvent dans l'Acte concernant les offenses contre la Personne, 1869 (Can.), chap. 20, art. 59 et 60. Il s'agissait d'un texte qui s'inspirait de la *Lord Ellenborough's Act* et de l'*Offences Against the Person Act, 1861*. Les dispositions relatives à l'avortement ont été incluses dans le *Code criminel* de 1892 (1892 (Can.), chap. 29, art. 272 à 274) et, avec de légères modifications, dans les codes de 1906 (S.R.C. 1906, chap. 146, art. 303 à 306), de 1927 (S.R.C. 1927, chap. 36, art. 303 à 306), et de 1954 (1953-54 (Can.), chap. 51, art. 237 et 238).

Section 251(1) made it clear that Parliament regarded procuring an abortion as a very serious crime for which there was a maximum sentence of imprisonment for life.

Il se dégage nettement du par. 251(1) que le législateur considérait que procurer un avortement constituait un crime très grave punissable par une peine maximale d'emprisonnement à perpétuité.

In 1969, Parliament alleviated the situation by the addition to s. 251 of s-ss (4), (5), (6) and (7) as exculpatory provisions by 1968-69, c. 38, s. 18. These subsections provided that it was not a criminal act to procure an abortion where the continuation of the pregnancy would or would be likely to endanger the life or health of a female person. As can be seen, in order to come within the exceptions to s. 251(1) and (2),

En 1969, le législateur a atténué la rigueur de la loi par l'adjonction à l'art. 251 des par. (4), (5), (6) et (7) à titre de dispositions disculpatoires (1968-69, chap. 38, art. 18). Ces paragraphes prévoient que procurer un avortement ne constitue pas un acte criminel lorsque la continuation de la grossesse de cette personne du sexe féminin mettrait ou mettrait probablement en danger la vie ou la santé de cette dernière. Comme on le constate, les exceptions aux par. 251(1) et (2) ne jouent que

(a) the majority of the members of a therapeutic abortion committee comprising not less than three qualified medical practitioners of an accredited or approved hospital had to certify in writing after reviewing the case at a meeting that in the opinion of the majority the continuation of the pregnancy would or would be likely to endanger the life or health of a female person;

a) si la majorité des membres d'un comité de l'avortement thérapeutique, composé d'au moins trois médecins qualifiés, d'un hôpital accrédité ou approuvé certifie par écrit à la suite d'un examen du cas au cours d'une réunion du comité que, de l'avis de la majorité, la continuation de la grossesse mettrait ou mettrait probablement en danger la vie ou la santé d'une personne du sexe féminin;

(b) the abortion had to be performed in an accredited or approved hospital by a medical practitioner to whom the certificate was given who was not a member of the committee.

By defining criminal conduct more narrowly, these amendments reflected the contemporary view that abortion is not always socially undesirable behaviour.

As the Court of Appeal said, the amendments to the *Criminal Code* which imported s. 251 are indicative of a changing view on this question, but it is not possible to erect upon the words of s. 251 a constitutional right to abortion.

The historical review of the legal approach in Canada taken from the judgment of the Court of Appeal serves, as well, to cast light on the underlying philosophies of our society and establishes that there has never been a general right to abortion in Canada. There has always been clear recognition of a public interest in the protection of the unborn and there has been no evidence or indication of any general acceptance of the concept of abortion at will in our society. It is to be observed as well that at the time of adoption of the *Charter* the sole provision for an abortion in Canadian law was that to be found in s. 251 of the *Criminal Code*. It follows then, in my view, that the interpretive approach to the *Charter*, which has been accepted in this Court, affords no support for the entrenchment of a constitutional right of abortion.

As to an asserted right to be free from any state interference with bodily integrity and serious state-imposed psychological stress, I would say that to be accepted, as a constitutional right, it would have to be based on something more than the mere imposition, by the State, of such stress and anxiety. It must, surely, be evident that many forms of government action deemed to be reasonable, and even necessary in our society, will cause stress and anxiety to many, while at the same time being acceptable exercises of government power in pursuit of socially desirable goals. The very facts of life in a modern society would preclude the entrenchment of such a constitutional right. Governmental action for the due governance and

b) si l'avortement se fait dans un hôpital accrédité ou approuvé, par un médecin à qui le certificat a été remis et qui n'est pas membre du comité.

En définissant la conduite criminelle plus étroitement, ces modifications reflétaient le point de vue contemporain selon lequel l'avortement n'est pas toujours une conduite socialement répréhensible.

Comme l'a dit la Cour d'appel, les modifications apportées à l'art. 251 du *Code criminel* traduisent un changement de point de vue sur cette question, mais on ne saurait déduire du texte de l'art. 251 l'existence d'un droit constitutionnel à l'avortement.

L'historique qu'a fait la Cour d'appel de la position prise par le législateur canadien permet en outre de mettre en lumière les philosophies fondamentales ayant cours dans notre société et démontre qu'il n'y a jamais eu de droit général à l'avortement au Canada. L'existence d'un intérêt public dans la protection des enfants non encore nés a toujours été clairement reconnue et rien ne prouve ni n'indique que le concept de l'avortement à volonté est généralement accepté dans notre société. On doit noter également qu'au moment où la *Charte* a été adoptée, la seule disposition en matière d'avortement qui existait en droit canadien était l'art. 251 du *Code criminel*. Il s'ensuit donc, selon moi, que la façon d'interpréter la *Charte* acceptée par cette Cour ne justifie aucunement une conclusion que le droit à l'avortement est enchâssé dans la Constitution.

Pour ce qui est de la revendication d'un droit à la protection contre toute atteinte de l'État à l'intégrité physique et contre toute tension psychologique causée par l'État, je dirais que pour être accepté à titre de droit constitutionnel, il devrait reposer sur autre chose que les simples tensions et l'angoisse causées par l'État. Il est certainement évident que bien des formes d'action gouvernementale considérées comme raisonnables, voire nécessaires, dans notre société sont pour beaucoup de gens une source de tensions et d'angoisse, tout en constituant des exercices acceptables du pouvoir gouvernemental dans la poursuite d'objectifs socialement désirables. La réalité même de la vie dans une société moderne vient s'opposer à ce qu'un tel

administration of society can rarely please everyone. It is hard to imagine a governmental policy or initiative which will not create significant stress or anxiety for some and, frequently, for many members of the community. Governments must have the power to expropriate land, to zone land, to regulate its use and the rights and conditions of its occupation. The exercise of these powers is frequently the cause of serious stress and anxiety. In the interests of public health and welfare, governments must have and exercise the power to regulate, control — and even suppress — aspects of the manufacture, sale and distribution of alcohol and drugs and other dangerous substances. Stress and anxiety resulting from the exercise of such powers cannot be a basis for denying them to the authorities. At the present time there is great pressure on governments to restrict — and even forbid — the use of tobacco. Government action in this field will produce much stress and anxiety among smokers and growers of tobacco, but it cannot be said that this will render unconstitutional control and regulatory measures adopted by governments. Other illustrations abound to make the point.

droit soit enchâssé dans la Constitution. Il est rare que les actes accomplis pour le bon gouvernement et la bonne administration de la collectivité aient l'heur de plaire à tous. Il est difficile de concevoir une politique ou une initiative gouvernementale qui ne créera pas beaucoup de tensions ou d'angoisse chez certaines personnes et, souvent, chez un bon nombre de citoyens. Les gouvernements doivent être habilités à exproprier des biens-fonds, à procéder au zonage et à réglementer l'utilisation de biens-fonds ainsi que les droits et les conditions rattachés à l'occupation de ceux-ci. L'exercice de ces pouvoirs est souvent une source de tensions graves et d'angoisse. Or il faut, dans l'intérêt de la santé et du bien-être publics, que les gouvernements possèdent et exercent le pouvoir de réglementer, de contrôler et, voire même, d'abolir certains aspects de la fabrication, de la vente et de la distribution d'alcool et de médicaments ainsi que d'autres substances dangereuses. Les tensions et l'angoisse résultant de l'exercice de ces pouvoirs ne sauraient justifier qu'on les refuse aux autorités. À l'heure actuelle, beaucoup de pressions sont exercées sur les gouvernements pour qu'ils limitent, interdisent même, l'usage du tabac. L'action gouvernementale dans ce domaine engendrera beaucoup de tensions et d'angoisse chez les fumeurs et les producteurs de tabac, mais on ne saurait dire que cela entraînera l'inconstitutionnalité des mesures de contrôle et de réglementation que pourront adopter les gouvernements. Une foule d'autres exemples pourraient être cités à ce propos.

To invade the s. 7 right of security of the person, there would have to be more than state-imposed stress or strain. A breach of the right would have to be based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection. This, it would seem to me, would be limited to cases where the state-action complained of, in addition to imposing stress and strain, also infringed another right, freedom or interest which was deserving of protection under the concept of security of the person. For the reasons outlined above, the right to have an abortion — given the language, structure and history of the *Charter* and given the history, traditions and underlying philosophies of our society — is not such an inter-

Pour qu'il y ait atteinte au droit à la sécurité de la personne garanti par l'art. 7, il devrait y avoir plus que des tensions ou de l'angoisse causées par l'État. Une violation de ce droit devrait dépendre d'une atteinte à quelque intérêt dont la nature et l'importance justifieraient une protection constitutionnelle. Cela, me semble-t-il, se limiterait aux cas où l'action de l'État dont on se plaint a, en plus d'engendrer des tensions et de l'angoisse, porté également atteinte à un autre droit, à une autre liberté ou à un autre intérêt qui méritaient d'être protégés selon le concept de la sécurité de la personne. Pour les raisons exposées ci-dessus, le droit à l'avortement, compte tenu du texte, de la structure et de l'historique de la *Charte* ainsi que de l'histoire, des traditions et des philosophies

est. Any right to an abortion will remain circumscribed by the terms of s. 251 of the *Criminal Code*. I refer to the following passage from the judgment of the court below, at p. 378:

> One cannot overlook the fact that the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate. We agree with Parker A.C.J.H.C. in the court below that, bearing in mind the statutory prohibition against abortion in Canada which has existed for over 100 years, it could not be said that there is a right to procure an abortion so deeply rooted in our traditions and way of life as to be fundamental. A woman's only right to an abortion at the time the Charter came into force would accordingly appear to be that given to her by s-s. (4) of s. 251.

I would only add that even if a general right to have an abortion could be found under s. 7 of the *Charter*, it is by no means clear from the evidence the extent to which such a right could be said to be infringed by the requirements of s. 251 of the *Code*. In the nature of things that is difficult to determine. The mere fact of pregnancy, let alone an unwanted pregnancy, gives rise to stress. The evidence reveals that much of the anguish associated with abortion is inherent and unavoidable and that there is really no psychologically painless way to cope with an unwanted pregnancy.

It is for these reasons I would conclude, that save for the provisions of the *Criminal Code*, which permit abortion where the life or health of the woman is at risk, no right of abortion can be found in Canadian law, custom or tradition, and that the *Charter*, including s. 7, creates no further right. Accordingly, it is my view that s. 251 of the *Code* does not in its terms violate s. 7 of the *Charter*. Even accepting the assumption that the concept of security of the person would extend to vitiating a law which would require a woman to carry a child to the completion of her pregnancy at the risk of her life or health, it must be observed that this is not our case. As has been pointed out,

fondamentales de notre société, ne constitue pas un tel intérêt. Tout droit à l'avortement demeure circonscrit par les termes de l'art. 251 du *Code criminel*. Je reprends le passage suivant tiré de la p. 378 de l'arrêt de la Cour d'appel:

> [TRADUCTION] On ne saurait oublier que la situation du droit de la femme à être maîtresse de sa propre personne se complique davantage lorsqu'elle devient enceinte et qu'un certain contrôle de la loi peut se révéler approprié. Nous sommes d'accord avec le juge en chef adjoint Parker de la Haute Cour pour dire que, si on garde à l'esprit l'interdiction légale de l'avortement qui existe depuis plus de cent ans au Canada, on ne saurait affirmer qu'il existe un droit de procurer un avortement qui soit ancré dans nos traditions et notre mode de vie au point d'être fondamental. Le seul droit à l'avortement que possédaient les femmes au moment de l'entrée en vigueur de la *Charte* semblerait donc être celui que leur conférait le par. 251(4).

J'ajouterais seulement que même s'il était possible de conclure à l'existence d'un droit général à l'avortement en vertu de l'art. 7 de la *Charte*, la preuve est loin de révéler clairement jusqu'à quel point on pourrait dire que les exigences de l'art. 251 du *Code* peuvent porter atteinte à ce droit. Il est normal que ce soit difficile à déterminer. Le seul fait d'être enceinte, sans parler de la grossesse non voulue, est une source de stress. Il ressort de la preuve que l'angoisse liée à l'avortement est, dans une large mesure, naturelle et inévitable et qu'il est vraiment impossible de faire face à une grossesse non voulue, sans difficulté sur le plan psychologique.

Pour ces raisons, je conclus que, sous réserve des dispositions du *Code criminel* qui autorisent l'avortement lorsque la vie ou la santé de la mère est en danger, aucun droit à l'avortement ne saurait se trouver dans le droit, la coutume ou les traditions ayant cours au Canada, et que la *Charte*, y compris l'art. 7, ne crée aucun droit supplémentaire. Par conséquent, j'estime que les modalités de l'art. 251 du *Code* ne violent pas l'art. 7 de la *Charte*. Même en acceptant de supposer que la notion de la sécurité de la personne aurait pour effet d'entacher de nullité une loi qui obligerait une femme à mener à terme sa grossesse au risque de sa propre vie ou santé, il faut noter que ce n'est pas le cas en

s. 251 of the *Code* already provides for abortion in such circumstances.

Procedural Fairness

I now turn to the appellant's argument regarding the procedural fairness of s. 251 of the *Criminal Code*. The basis of the argument is that the exemption provisions of subs. (4) are such as to render illusory or practically illusory any defence arising from the subsection for many women who seek abortions. It is pointed out that therapeutic abortions are available only in accredited or approved hospitals, that hospitals so accredited or approved may or may not appoint abortion committees, and that "health" is defined in vague terms which afford no clear guide to its meaning. Statistically, it was said that abortions could be lawfully performed in only twenty per cent of all hospitals in Canada. Because abortions are not generally available to all women who seek them, the argument goes, the defence is illusory, or practically so, and the section therefore fails to comport with the principles of fundamental justice.

Precise evidence on the questions raised is, of course, difficult to obtain and subject to subjective interpretation depending upon the views of those adducing it. Much evidence was led at trial based largely on the Ontario experience. Additional material in the form of articles, reports and studies was adduced, from which the Court was invited to conclude that access to abortion is not evenly provided across the country and that this could be the source of much dissatisfaction. While I recognize that in constitutional cases a greater latitude has been allowed concerning the reception of such material, I would prefer to place principal reliance upon the evidence given under oath in court in my considerations of the factual matters. Evidence was adduced from the chairman of a therapeutic abortion committee at a hospital in Hamilton, where in 1982 eleven hundred and eighty-seven abortions were performed, who testified that of all applications received by his committee in that year

l'espèce. Comme je l'ai déjà souligné, l'art. 251 du *Code* prescrit déjà l'avortement dans ces circonstances.

L'équité en matière de procédure

Je passe maintenant à l'argument des appelants relatif à l'équité, sur le plan de la procédure, de l'art. 251 du *Code criminel*. Cet argument a pour fondement que les exceptions prévues au par. (4) rendent illusoire ou pratiquement illusoire pour bien des femmes désireuses de se faire avorter tout moyen de défense découlant dudit paragraphe. On fait remarquer que des avortements thérapeutiques ne peuvent être obtenus que dans des hôpitaux accrédités ou approuvés, que les hôpitaux ainsi accrédités ou approuvés peuvent à leur guise constituer ou ne pas constituer des comités de l'avortement, et que le mot «santé» est défini en des termes vagues qui n'indiquent pas clairement son sens. Selon les statistiques, a-t-on affirmé, des avortements ne peuvent être légalement accomplis que dans vingt pour cent des hôpitaux canadiens. Toujours suivant cet argument, puisque l'avortement n'est pas généralement accessible à toutes les femmes qui cherchent à l'obtenir, le moyen de défense en question est illusoire ou pratiquement illusoire et l'article n'est donc pas conforme aux principes de justice fondamentale.

Il est évidemment difficile de réunir des éléments de preuve précis portant sur les questions soulevées en l'espèce et ces éléments de preuve feront l'objet d'une interprétation subjective en fonction des opinions de ceux qui les apportent. La majeure partie de la preuve volumineuse produite au procès concernait l'expérience ontarienne. On a produit en outre des textes sous la forme d'articles, de rapports et d'études sur lesquels on a demandé à la Cour de se fonder pour conclure que les possibilités d'obtenir un avortement n'étaient pas les mêmes partout au pays et qu'il pouvait en résulter un grand mécontentement. Tout en reconnaissant que, dans les affaires constitutionnelles, une plus grande latitude a été accordée en ce qui concerne la réception de tels documents, je préfère, pour ce qui est d'examiner les questions de fait, m'appuyer principalement sur les dépositions faites sous serment au cours du procès. On a cité comme témoin le président d'un comité de l'avortement

less than a dozen were ultimately refused. Refusal in each case was based upon the fact that a majority of the committee was not convinced that "the continuation of the pregnancy would be detrimental to the woman's health". All physicians who performed abortions under the *Criminal Code* provisions admitted in cross-examination that they had never had an application for a therapeutic abortion on behalf of the patient ultimately refused by an abortion committee. No woman testified that she personally had applied for an abortion anywhere in Canada and had been refused, and no physician testified to his participation in such an application. In 1982, the province of Ontario had ninety-nine hospitals with abortion committees. In that year in Ontario, hospitals performed 31,379 abortions and thirty-six of those hospitals performed more than two hundred in one year. There were seventeen hospitals with abortion committees in metropolitan Toronto and they performed 16,706 abortions in 1982, nine of them performing more than one thousand abortions each. In 1982 all ten provinces and both territories had at least one hospital with an abortion committee. The evidence was not as clear as to the situation in rural or more remote areas. It would be reasonable to assume that access to abortion would have been more difficult outside of the principal inhabited areas. This situation, however, is common to the delivery of all health-care services. Significantly, the testimony and exhibits entered at trial reflect that even in the more permissive abortion regime in the United States there is a similar problem of access. Ten years after the decision in *Roe v. Wade*, 410 U.S. 113 (1973), only slight gains in access had been made in rural areas. It is also worth noting that the evidence adduced at trial, comparing the respective abortion regimes in Canada and the United States, reveals other significant parallels. For example, there is a close parallel in the two countries concerning such matters as the stage in the pregnancy at which abortions are performed and the procedures used to perform abortions at the respective stages. There is also a high degree of similarity in the two countries regarding the percentages and methods of abortion performed in the crucial early second trimester. In both countries, it

thérapeutique d'un hôpital de Hamilton où onze cent quatre-vingt-sept avortements ont été pratiqués en 1982. Celui-ci a affirmé que, sur toutes les demandes reçues par son comité cette année-là, moins de douze ont finalement été rejetées. Dans chacun de ces cas, le refus était motivé par le fait que la majorité des membres du comité n'était pas convaincue que [TRADUCTION] «la continuation de la grossesse compromettrait la santé de la femme en question». Tous les médecins qui ont témoigné et qui ont pratiqué des avortements en vertu du *Code criminel* ont reconnu, en contre-interrogatoire, que jamais il ne leur était arrivé qu'une demande d'avortement thérapeutique présentée pour le compte d'une patiente se heurte au refus d'un comité de l'avortement. Aucune femme n'est venue témoigner qu'elle s'était vu refuser une demande qu'elle avait faite personnellement en vue d'obtenir un avortement où que ce soit au Canada, et aucun médecin n'a dit avoir participé à une telle demande. En 1982, la province de l'Ontario comptait quatre-vingt-dix-neuf hôpitaux dotés d'un comité de l'avortement. Cette année-là en Ontario, 31 379 avortements ont été pratiqués dans des hôpitaux et dans trente-six de ceux-ci, le chiffre des avortements s'élevait à plus de deux cents en une seule année. Dans la communauté urbaine de Toronto, il y avait dix-sept hôpitaux qui étaient dotés d'un comité de l'avortement et où 16 706 avortements ont été pratiqués en 1982. Dans neuf cas, le nombre dépassait mille avortements par année. En 1982, il y avait dans chaque province et dans les deux territoires au moins un hôpital doté d'un comité de l'avortement. La preuve n'est toutefois pas aussi claire quant à la situation dans les régions rurales ou éloignées. Il serait néanmoins raisonnable de supposer qu'en dehors des principales régions habitées, il aurait été plus difficile d'obtenir un avortement. En cela, l'avortement ne diffère donc pas de n'importe quel autre service de santé. Fait révélateur, il se dégage des dépositions et des pièces produites au procès que, même sous le régime d'avortement plus libéral que l'on trouve aux États-Unis, l'accessibilité demeure un problème. En effet, dix ans après l'arrêt *Roe v. Wade*, 410 U.S. 113 (1973), il n'y avait eu qu'une modeste amélioration de l'accessibilité dans les régions rurales. Il vaut également la peine de noter

appears that many of the problems that have arisen in relation to abortion reflect the more general reality that medical services are subject to budgetary, time, space and staff constraints. With abortion, in particular, matters are further complicated by the fact that many physicians regard abortions as unethical and refuse to perform them. In all, the extent to which the statutory procedure contributes to the problems connected with procuring an abortion is anything but clear. Accordingly, even if one accepts that it would be contrary to the principles of fundamental justice for Parliament to make available a defence which, by reason of its terms, is illusory or practically so, it cannot, in my view, be said that s. 251 of the *Code* has had that effect.

It would seem to me that a defence created by Parliament could only be said to be illusory or practically so when the defence is not available in the circumstances in which it is held out as being available. The very nature of the test assumes, of course, that it is for Parliament to define the defence and, in so doing, to designate the terms and conditions upon which it may be available. The Chief Justice has said in his reasons, at p. 70:

The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is

que la preuve présentée au procès, qui compare les régimes d'avortement respectifs du Canada et des États-Unis, fait ressortir d'autres ressemblances importantes. Il y a par exemple entre les deux pays une grande similarité en ce qui concerne notamment le stade de la grossesse auquel l'avortement est pratiqué et les méthodes employées aux stades respectifs. Les deux pays se ressemblent beaucoup également quant aux pourcentages et aux méthodes d'avortements pratiqués au début du second trimestre crucial. Dans l'un et l'autre pays, un bon nombre des problèmes qui ont surgi en matière d'avortement paraissent traduire une réalité plus générale, savoir que les services médicaux sont assujettis à des restrictions budgétaires et à des restrictions sur les plans du temps, des locaux et du personnel disponible. En matière d'avortement en particulier, la situation se complique davantage du fait que beaucoup de médecins considèrent l'avortement comme immoral et refusent de pratiquer ce type d'intervention. Somme toute, on est loin de savoir clairement dans quelle mesure la procédure établie par la loi contribue à créer les problèmes liés à l'obtention d'un avortement. Par conséquent, même si l'on accepte qu'il serait contraire aux principes de justice fondamentale que le législateur prévoie un moyen de défense qui, en raison de ses modalités, est illusoire ou pratiquement illusoire, je ne crois pas que l'on puisse dire que l'art. 251 du *Code* a eu cet effet.

Il me semble qu'on ne pourrait dire qu'un moyen de défense créé par le législateur n'est illusoire ou pratiquement illusoire que lorsqu'on ne peut pas recourir à ce moyen de défense dans les circonstances où l'on a dit qu'il était possible de le faire. De par sa nature même, ce critère sous-entend, bien sûr, que c'est au législateur qu'il incombe de définir le moyen de défense et, en ce faisant, de préciser les conditions à remplir pour pouvoir l'invoquer. Le Juge en chef affirme, à la p. 70 de ses motifs:

Le droit criminel constitue une forme très spéciale de réglementation gouvernementale, car il cherche à exprimer la désapprobation collective de notre société pour certains actes ou omissions. Lorsqu'un moyen de défense est prévu, surtout lorsqu'il s'agit d'un moyen de défense conçu spécifiquement pour une accusation particulière,

not warranted when the conditions of the defence are met.

From this comment, I would suggest it is apparent that the Court's role is not to second-guess Parliament's policy choice as to how broad or how narrow the defence should be. The determination of when "the disapprobation of society is not warranted" is in Parliament's hands. The Court's role when the enactment is attacked on the basis that the defence is illusory is to determine whether the defence is available in the circumstances in which it was intended to apply. Parliament has set out the conditions, in s. 251(4), under which a therapeutic abortion may be obtained, free from criminal sanction. It is patent on the face of the legislation that the defence is circumscribed and narrow. It is clear that this was the Parliamentary intent and it was expressed with precision. I am not able to accept the contention that the defence has been held out to be generally available. It is, on the contrary, carefully tailored and limited to special circumstances. Therapeutic abortions may be performed only in certain hospitals and in accordance with certain specified provisions. It could only be classed as illusory or practically so if it could be found that it does not provide lawful access to abortions in circumstances described in the section. No such finding should be made upon the material before this Court. The evidence will not support the proposition that significant numbers of those who meet the conditions imposed in s. 251 of the *Criminal Code* are denied abortions.

It is evident that what the appellants advocate is not the therapeutic abortion referred to in s. 251 of the *Code*. Their clinic was called into being because of the perceived inadequacies of s. 251. They propose and seek to justify "abortion on demand". The defence in s. 251(4) was not intend-

c'est parce que le législateur a jugé que la désapprobation de la société n'est pas justifiée lorsque les conditions de ce moyen de défense sont remplies.

Selon moi, il est clair à la lecture de ces observations qu'il n'appartient nullement à cette Cour de revenir sur le choix de principe fait par le législateur quant à la portée précise de ce moyen de défense. Il appartient au Parlement de déterminer quand «la désapprobation de la société n'est pas justifiée». Lorsque le texte législatif fait l'objet d'une attaque fondée sur le caractère illusoire du moyen de défense offert, la tâche de la Cour consiste à déterminer s'il est possible de recourir à ce moyen de défense dans les circonstances où on a voulu qu'il puisse être invoqué. Au paragraphe 251(4), le législateur énonce les conditions qui doivent être remplies pour obtenir un avortement thérapeutique sans s'exposer à des sanctions criminelles. Il est évident, à la lecture de cette disposition législative, que le moyen de défense a une portée restreinte. Il est clair que c'est ce qu'a voulu le législateur qui a exprimé cette intention en des termes précis. Je ne puis retenir l'argument selon lequel ce moyen de défense a été présenté comme pouvant être invoqué de manière générale. Bien au contraire, il s'agit d'un moyen de défense soigneusement conçu dont l'application se limite à des circonstances particulières. Les avortements thérapeutiques ne peuvent être pratiqués que dans certains hôpitaux et en conformité avec certaines dispositions précises. Le moyen de défense ne pourrait être qualifié d'illusoire ou de pratiquement illusoire que s'il était possible de conclure qu'il ne permet pas d'obtenir un avortement licite dans les circonstances décrites dans l'article en cause. Or, la documentation soumise à cette Cour ne permet pas de tirer une telle conclusion. La preuve n'appuie pas la proposition selon laquelle de nombreuses femmes qui remplissent les conditions imposées par l'art. 251 du *Code criminel* se voient refuser l'avortement.

Il est évident que ce que préconisent les appelants n'est pas l'avortement thérapeutique visé par l'art. 251 du *Code*. Ils ont ouvert leur clinique en raison des lacunes que présentait, d'après eux, cet article. Ils proposent et cherchent à justifier «l'avortement libre». Or, le moyen de défense prévu

ed to meet the views of the appellants and provide a defence at large which would effectively repeal the operative subsections of s. 251. Some feel strongly that s. 251 is not adequate in today's society. Be that as it may, it does not follow that the defence provisions of s. 251(4) are illusory. They represent the legislative choice on this question and, as noted, it has not been shown that therapeutic abortions have not been available in cases contemplated by the provision.

au par. 251(4) n'a pas été conçu pour refléter les opinions des appelants ni pour créer un moyen de défense général qui aurait pour effet d'abroger les dispositions essentielles de l'art. 251. D'aucuns croient fermement que l'art. 251 ne répond plus aux besoins de la société moderne. Quoi qu'il en soit, il ne s'ensuit pas que les dispositions du par. 251(4) qui établissent un moyen de défense sont illusoires. Elle traduisent le choix qu'a fait le législateur en la matière et, comme je l'ai déjà souligné, il n'a pas été démontré que des avortements thérapeutiques n'ont pu être obtenus dans les cas envisagés par l'article.

It was further argued that the defence in s. 251(4) is procedurally unfair in that it fails to provide an adequate standard of "health" to guide the abortion committees which are charged with the responsibility for approving or disapproving applications for abortions. It is argued that the meaning of the word "health" in s. 251(4) is so vague as to render the sub-section unconstitutional. This argument was, in my view, dealt with fully and effectively in the Court of Appeal. I accept and adopt the following passage from the judgment of that court, at pp. 387-88:

On a fait valoir, en outre, que le moyen de défense prévu par le par. 251(4) est inéquitable sur le plan de la procédure en ce sens qu'il n'établit pas une norme satisfaisante de «santé» pour la gouverne des comités de l'avortement chargés d'approuver ou de rejeter les demandes d'avortement. On soutient que le sens du mot «santé» employé au par. 251(4) est vague au point de rendre ce paragraphe inconstitutionnel. À mon avis, la Cour d'appel a donné à cet argument une réponse complète et efficace. J'accepte et je fais mien le passage suivant tiré des pp. 387 et 388 des motifs de la Cour d'appel:

Counsel for the respondent in his attack on s. 251 also argued that the section was void for "vagueness". The argument under this head was that the concepts of "health" and "miscarriage" in s. 251(4) yield an arbitrary application being so vague and uncertain that it is difficult to understand what conduct is proscribed. It is fundamental justice that a person charged with an offence should know with sufficient particularity the nature of the offence alleged.

There was a far-ranging discussion by the respondents' counsel on the concept of "health" and the meaning of the term "miscarriage"; the way in which courts deal with the "vagueness" in the interpretation of municipal by-laws, and an extensive examination of American authorities.

In this case, however, from a reading of s. 251 with its exception, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus, it is for the courts to say what meaning the statute will bear. Counsel was unable to give the Court any authority for holding a statute void for uncertainty. In any event, there is no doubt the respondents

[TRADUCTION] L'avocat des intimés reproche en outre à l'art. 251 d'être entaché de nullité pour cause d'«imprécision». Suivant cet argument, les termes «santé» et «avortement» utilisés au par. 251(4) ouvrent la voie à une application arbitraire si vague et incertaine qu'on a de la difficulté à comprendre quelle conduite est proscrite. Or, la justice fondamentale exige que soient communiqués à l'inculpé des détails suffisants concernant la nature de l'infraction qu'on lui impute.

L'avocat des intimés a parlé en long et en large du concept de la «santé» et du sens du mot «avortement» ainsi que de la manière dont les tribunaux font face au problème de l'«imprécision» en interprétant les règlements municipaux. De plus, l'avocat a fait un examen poussé de la jurisprudence américaine.

Dans cette affaire, cependant, après lecture de l'art. 251 et de ses exceptions, il n'y a aucune difficulté à déterminer ce qui est interdit et ce qui est permis. On ne peut pas dire qu'aucun sens raisonnable ne peut être donné aux termes de cet article. Donc, il revient aux tribunaux de dire quel sens il faut donner à la loi. L'avocat a été incapable de citer à la Cour une décision dans laquelle une loi a été déclarée nulle pour cause

knew that the acts they proposed and carried out were in breach of the section. The fact that they did not approve of the law in this regard does not make it "uncertain". They could have no doubt but that the procuring of a miscarriage which they proposed (and we agree with the trial judge that the phrase "procuring a miscarriage" is synonymous with "performing an abortion"), could only be carried out in an accredited or approved hospital after the securing of the required certificate in writing from the therapeutic abortion committee of that hospital.

Finally, this Court has dealt with the matter. Dickson J. (as he then was), speaking for the majority in *Morgentaler (1975)*, *supra*, in concluding a discussion of s. 251(4) of the *Criminal Code*, said, at p. 675:

> Whether one agrees with the Canadian legislation or not is quite beside the point. Parliament has spoken unmistakably in clear and unambiguous language.

In the same case, Laskin C.J., while dissenting on other grounds, said at p. 634:

> The contention under point 2 is equally untenable as an attempt to limit the substance of legislation in a situation which does not admit of it. In submitting that the standard upon which therapeutic abortion committees must act is uncertain and subjective, counsel who make the submission cannot find nourishment for it even in *Doe v. Bolton*. There it was held that the prohibition of abortion by a physician except when "based upon his best clinical judgment that an abortion is necessary" did not prescribe a standard so vague as to be constitutionally vulnerable. *A fortiori*, under the approach taken here to substantive due process, the argument of uncertainty and subjectivity fails. It is enough to say that Parliament has fixed a manageable standard because it is addressed to a professional panel, the members of which would be expected to bring a practised judgment to the question whether "the continuation of the pregnancy . . . would or would be likely to endanger . . . life or health".

In my opinion, then, the contention that the defence provided in s. 251(4) of the *Criminal Code* is illusory cannot be supported. From evidence adduced by the appellants, it may be said that

d'imprécision. Quoi qu'il en soit, il ne fait pas de doute que les intimés savaient que les actes projetés et accomplis par eux constituaient une infraction à l'article en cause. Ce n'est pas parce qu'ils désapprouvaient la loi à cet égard que celle-ci est «imprécise». Ils ne pouvaient pas douter que l'avortement qu'ils comptaient pratiquer (et nous sommes d'accord avec le juge du procès que l'expression «procurer l'avortement» est synonyme de «pratiquer un avortement») ne pouvait être accompli que dans un hôpital accrédité ou approuvé après avoir obtenu du comité de l'avortement thérapeutique de l'hôpital en question le certificat requis.

Finalement, cette Cour s'est déjà penchée sur la question. Le juge Dickson (alors juge puîné), en terminant une étude du par. 251(4) du *Code criminel* dans l'affaire *Morgentaler (1975)*, précitée, a affirmé, au nom de la majorité, à la p. 675:

> La question n'est pas de savoir si l'on est d'accord avec la législation canadienne. Le Parlement s'est exprimé sans équivoque en des termes clairs et précis.

Dans la même cause, le juge en chef Laskin, quoique dissident pour d'autres motifs, affirmait, à la p. 634:

> La prétention avancée sur le 2e point est également insoutenable parce qu'on veut restreindre la portée d'une loi dans une situation qui ne s'y prête pas. Les avocats qui prétendent que le critère prescrit aux comités de l'avortement thérapeutique est imprécis et subjectif, ne peuvent rien trouver à l'appui de cette prétention même dans l'arrêt *Doe v. Bolton*. En cette affaire-là il a été décidé que l'interdiction au médecin de procurer l'avortement sauf lorsque [TRADUCTION] «d'après son meilleur jugement fondé sur un examen physique, un avortement est nécessaire» ne prescrit pas un critère assez peu précis pour être constitutionnellement vulnérable. *A fortiori*, de la façon dont on aborde ici la question de l'application régulière des garanties légales aux principes de droit, l'argument d'imprécision et de subjectivité ne peut être retenu. Qu'il suffise de dire que le Parlement a fixé un critère maniable parce qu'il s'adresse à un comité composé d'hommes de l'art, dont on peut s'attendre que les membres portent un jugement exercé sur la question de savoir si «la continuation de la grossesse . . . mettrait ou mettrait probablement en danger la vie ou la santé . . . ».

Je tiens donc pour insoutenable l'argument voulant que le moyen de défense prévu par le par. 251(4) du *Code criminel* soit illusoire. On peut conclure de la preuve produite par les appelants qu'un bon

many women seeking abortions have been unable to get them in Canada because s. 251(4) fails to respond to this need. This cannot serve as an argument supporting the claim that subs. (4) is procedurally unfair. Section 251(4) was designed to meet specific circumstances. Its aim is to restrict abortion to cases where the continuation of the pregnancy would, or would likely, be injurious to the life or health of the woman concerned, not to provide unrestricted access to abortion. It was to meet this requirement that Parliament provided for the administrative procedures to invoke the defence in subs. (4). This machinery was considered adequate to deal with the type of abortion Parliament had envisaged. When, however, as the evidence would indicate, many more would seek abortions on a basis far wider than that contemplated by Parliament, any system would come under stress and possibly fail. It is not without significance that many of the appellants' clients did not meet the standard set or did not seek to invoke it and that is why their clinic took them in. What has confronted the scheme has been a flood of demands for abortions, some of which could meet the tests of s. 251(4) and many which could not. In so far as it may be said that the administrative scheme of the Act has operated inefficiently, a proposition which may be highly questionable, it is caused principally by forces external to the statute, the external circumstances being a general demand for abortion irrespective of the provisions of s. 251. It is not open to a court, in my view, to strike down a statutory provision on this basis.

nombre de femmes désireuses d'obtenir un avortement n'ont pas pu l'obtenir au Canada parce que le par. 251(4) ne répond pas à ce besoin. Cela ne peut toutefois pas servir d'argument appuyant l'allégation que le par. (4) est inéquitable sur le plan de la procédure. Le paragraphe 251(4) a été conçu pour faire face à des circonstances bien précises. Il vise à limiter l'avortement aux cas où la continuation de la grossesse nuirait ou nuirait probablement à la vie ou à la santé de la femme en cause, et non pas à donner la possibilité illimitée de se faire avorter. C'est pour satisfaire à cette exigence que le législateur a établi des procédures administratives qui doivent être suivies lorsqu'on invoque le moyen de défense prévu au par. (4). Ce mécanisme a été considéré comme suffisant pour traiter le type d'avortement envisagé par le législateur. Si, toutefois, comme l'indique la preuve, beaucoup plus de femmes demandaient des avortements pour un motif beaucoup plus large que celui envisagé par le législateur, tout système finirait peut-être par céder sous le poids de ce fardeau trop lourd. Il est révélateur que beaucoup de patientes des appelants ne satisfaisaient pas au critère établi et n'ont pas cherché à l'invoquer, et c'est là la raison pour laquelle elles ont été acceptées à la clinique des appelants. Le système a eu à répondre à une avalanche de demandes d'avortement dont certaines pouvaient remplir les conditions du par. 251(4), mais dont un grand nombre ne le pouvait pas. Dans la mesure où l'on peut dire que le régime administratif instauré par la loi a fonctionné inefficacement, ce qui peut être fort douteux, cela tient principalement à des facteurs étrangers à la loi, savoir la demande générale d'avortements en dépit des dispositions de l'art. 251. À mon avis, un tribunal ne peut, pour ce motif, invalider une disposition législative.

The appellants in this Court raised other arguments, most of which, in my view, may be briefly dealt with.

Section 605 of the *Criminal Code*

It was contended that s. 605(1)(*a*), giving the Crown a right of appeal against an acquittal in a trial court on any ground involving a question of law alone offended ss. 7 and 11(*d*), (*f*) and (*h*) of the *Charter*. Reliance was placed primarily on s.

Les appelants en cette Cour ont soulevé d'autres arguments dont la plupart peuvent, selon moi, être traités brièvement.

L'article 605 du *Code criminel*

On a soutenu que l'al. 605(1)*a*), qui habilite le ministère public à interjeter appel contre un verdict d'acquittement prononcé par une cour de première instance, pour tout motif comportant une question de droit seulement, est contraire à l'art. 7

11(*h*). There is a simple answer to this argument. The words of s. 11(*h*), "if finally acquitted" and "if finally found guilty", must be construed to mean after the appellate procedures have been completed, otherwise there would be no point or meaning in the word "finally". There is no merit in this ground. I would dispose of this question for the reasons given by the Court of Appeal.

Section 251 of the *Criminal Code* — Violation of s. 15 of the *Charter*

I find no merit in the argument advanced under this heading to the effect that the equality rights of women are infringed by s. 251 of the *Criminal Code* and on this issue again I would adopt the reasons of the Ontario Court of Appeal found at (1985), 52 O.R. (2d) 353, at pp. 392-97.

Section 251 of the *Criminal Code* and s. 2(*a*) of the *Charter*

I am unable to find any abridgement of freedom of conscience and religion in s. 251 of the *Criminal Code*. I agree with, and on this ground of appeal I would adopt, the reasons for judgment of the Ontario Court of Appeal: *supra*, at pp. 389-91.

Section 251 of the *Criminal Code* and s. 12 of the *Charter* — Cruel and Unusual Punishment

I would reject this argument and again adopt without variation or addition the reasons of the Ontario Court of Appeal: *supra*, at p. 392.

Section 91(27) *Constitution Act, 1867* (*ultra vires*)

It was submitted on this issue that s. 251 was *ultra vires* of Parliament and could no longer be supported under the criminal power because it was colourable legislation in pith and substance, legislation for the protection of health and, therefore, within provincial competence. There is, in my view, no merit in this argument and I again adopt the reasons of the Ontario Court of Appeal: *supra*, at pp. 397-99.

et aux al. 11*d*), *f*) et *h*) de la *Charte*. C'est principalement sur l'al. 11*h*) qui a été invoqué. Or, la réponse à cet argument est simple. Les expressions «définitivement acquitté» et «définitivement déclaré coupable» employées à l'al. 11*h*) doivent s'interpréter comme signifiant après que toutes les procédures d'appel sont terminées, sinon le mot «définitivement» serait inutile ou dénué de tout sens. Ce moyen n'est donc pas fondé. Je suis d'avis de trancher cette question en adoptant les motifs donnés par la Cour d'appel.

L'article 251 du *Code criminel* — violation de l'art. 15 de la *Charte*

Je juge mal fondé l'argument avancé sous cette rubrique, suivant lequel l'art. 251 du *Code criminel* porte atteinte aux droits des femmes à l'égalité. Sur ce point également, j'adopte les motifs de la Cour d'appel de l'Ontario que l'on trouve à (1985), 52 O.R. (2d) 353, aux pp. 392 à 397.

L'article 251 du *Code criminel* et l'al. 2*a*) de la *Charte*

Je ne vois pas en quoi l'art. 251 du *Code criminel* porte atteinte à la liberté de conscience et de religion. Sur ce moyen d'appel, je partage et je fais miens les motifs de la Cour d'appel de l'Ontario: précité, aux pp. 389 à 391.

L'article 251 du *Code criminel* et l'art. 12 de la *Charte* — peine cruelle et inusitée

Je suis d'avis de rejeter cet argument et d'adopter, encore une fois sans modification ni adjonction, les motifs de la Cour d'appel de l'Ontario: précité, à la p. 392.

Le paragraphe 91(27) de la *Loi constitutionnelle de 1867* (*ultra vires*)

On fait valoir relativement à cette question que l'art. 251 outrepasse la compétence du Parlement et ne peut plus se justifier par la compétence en matière criminelle parce qu'il s'agit de législation déguisée qui vise, de par son caractère véritable, à protéger la santé et qui relève donc de la compétence provinciale. À mon avis, cet argument n'est pas fondé et j'adopte, une fois de plus les motifs de la Cour d'appel de l'Ontario: précité, aux pp. 397 à 399.

Section 96 *Constitution Act, 1867*

The essence of this argument was that s. 251 of the *Criminal Code* purported to give powers to therapeutic abortion committees exercised by county, district and superior courts at the time of Confederation. There is no merit in this argument. I adopt the reasons of the Ontario Court of Appeal: *supra*, at p. 400.

Wrongful Interdelegation of Powers

I would dispose of this argument which was to the effect that s. 251 delegated powers relating to criminal law to the provinces generally, as did the Court of Appeal in their reasons: *supra*, at p. 399. I do not wish, however, to say anything about *Re Peralta and The Queen in Right of Ontario* (1985), 49 O.R. (2d) 705, which is relied upon by that court and is currently on appeal to this Court.

Defence of Necessity

This ground of appeal must also fail. There is no evidence whatever in the record that could support the defence.

Counsel's Address

In his reasons for judgment, the Chief Justice referred to defence counsel's address to the jury at trial, in which he had told the jury that they need not apply s. 251 of the *Criminal Code* if they thought it was bad law. I would associate myself with what the Chief Justice has said on this question. I am in full agreement with him that counsel was wrong in addressing the jury as he did and I would add that such practice, if commonly adopted, would undermine and place at risk the whole jury system.

Conclusion

Before leaving this case, I wish to make it clear that I express no opinion on the question of whether, or upon what conditions, there should be a right for a pregnant woman to have an abortion free of legal sanction. No valid constitutional objection to s. 251 of the *Criminal Code* has, in my view, been raised and, consequently, if there is to be a change

L'article 96 de la *Loi constitutionnelle de 1867*

Cet argument porte essentiellement que l'art. 251 du *Code criminel* a pour effet d'investir les comités de l'avortement thérapeutique de pouvoirs qui étaient exercés, à l'époque de la Confédération, par les cours de comté et de district et les cours supérieures. Cet argument est sans fondement. Je fais miens les motifs de la Cour d'appel de l'Ontario: précité, à la p. 400.

Délégation illégale de pouvoirs

Suivant cet argument, l'art. 251 délègue aux provinces en général des pouvoirs en matière de droit criminel. J'y réponds de la même manière que le fait la Cour d'appel dans ses motifs: précité, à la p. 399. Je m'abstiens toutefois de me prononcer sur la décision *Re Peralta and The Queen in Right of Ontario* (1985), 49 O.R. (2d) 705, qui a été invoquée par cette cour et qui fait actuellement l'objet d'un pourvoi devant nous.

Le moyen de défense fondé sur la nécessité

Ce moyen doit également être rejeté. D'après le dossier, il n'y a aucun élément de preuve qui puisse justifier ce moyen de défense.

La plaidoirie de l'avocat

Dans ses motifs de jugement, le Juge en chef fait mention de la plaidoirie dans laquelle l'avocat de la défense, au procès, a dit aux jurés qu'ils n'avaient pas à appliquer l'art. 251 du *Code criminel* s'ils estimaient qu'il s'agissait là d'une mauvaise règle de droit. Sur cette question, je me range à l'avis du Juge en chef. Je souscris entièrement à son opinion que l'avocat a eu tort de s'adresser ainsi au jury et j'ajouterais qu'une telle pratique, si elle devait se répandre, minerait et compromettrait tout le système des procès par jury.

Conclusion

Avant de terminer, je tiens à préciser que je n'exprime aucune opinion sur la question de savoir si, et à quelles conditions, les femmes enceintes devraient avoir le droit de se faire avorter impunément. On n'a soulevé selon moi aucune objection à l'art. 251 du *Code criminel* qui soit valable sur le plan constitutionnel et, par conséquent, j'estime

in the law concerning this question it will be for Parliament to make. Questions of public policy touching on this controversial and divisive matter must be resolved by the elected Parliament. It does not fall within the proper jurisdiction of the courts. Parliamentary action on this matter is subject to judicial review but, in my view, nothing in the *Canadian Charter of Rights and Freedoms* gives the Court the power or duty to displace Parliament in this matter involving, as it does, general matters of public policy.

I would adopt as clearly expressive of the proper approach to be taken by the courts in dealing with *Charter* issues the words of Taylor J., of the Supreme Court of British Columbia, in the case of *Harrison v. University of British Columbia*, [1986] 6 W.W.R. 7. The facts of that case concerned the question of a mandatory retirement provision for employees of the University of British Columbia. The question of discrimination under s. 15 was raised. In dealing with the question of the purpose and constitutional effect of the *Charter*, Taylor J., at p. 11, after noting that the *Charter* functions assigned to the courts do not "allocate to the courts the responsibility for designing, initiating or directing social or economic policy", continued:

> It is, of course, true that the function of the courts has been extended. In many cases in which the meaning or proper application of the Charter is in doubt the courts must decide whether or not a legislative, administrative or other act complained of requires constitutional sanction, and such decisions may well have social or economic consequences. As has been emphasized by Lamer J. in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 496-97, [1986] 1 W.W.R. 481 (sub nom. *Ref. re S. 94(2) of Motor Vehicle Act*), 69 B.C.L.R. 145, 48 C.R. (3d) 289, 36 M.V.R. 240, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 63 N.R. 266, this imposes on the courts a new and onerous duty. In carrying out that task, however, the courts can be concerned with social or economic implications only to the extent that they assist in answering the question whether or not the right claimed is one entitled to constitutional protection. The rights to which the Chart-

que si la loi doit être changée à ce propos, il appartiendra au Parlement de le faire. C'est aux députés élus que revient la tâche de résoudre les questions de politique générale touchant ce domaine controversé qui est la cause de tant de discorde. Les tribunaux n'ont pas compétence en la matière. Certes, les mesures prises par le législateur peuvent être soumises à un contrôle judiciaire mais, selon moi, il n'y a rien dans la *Charte canadienne des droits et libertés* qui habilite ou oblige la Cour à se substituer au Parlement dans ce domaine qui comporte des questions générales d'intérêt public.

J'adopte comme un énoncé clair de la façon dont les tribunaux doivent aborder les questions touchant la *Charte*, les propos qu'a tenus le juge Taylor de la Cour suprême de la Colombie-Britannique dans la décision *Harrison v. University of British Columbia*, [1986] 6 W.W.R. 7. Dans cette affaire, il était question d'une disposition prescrivant la retraite obligatoire d'employés de l'Université de la Colombie-Britannique. On a soulevé la question de la discrimination au sens de l'art. 15. En traitant de l'objet et de l'effet constitutionnel de la *Charte*, le juge Taylor affirme ce qui suit, à la p. 11, après avoir fait observer que les fonctions dont la *Charte* investit les tribunaux [TRADUCTION] "n'impose[nt] pas . . . aux tribunaux la responsabilité de concevoir, d'inaugurer ou de diriger la politique sociale ou économique":

> [TRADUCTION] Il est vrai, bien entendu, que le rôle des tribunaux a pris de l'ampleur. Dans bien des cas où il subsiste des doutes quant au sens de la Charte ou quant à la façon dont il convient de l'appliquer, les tribunaux doivent décider si un acte législatif, administratif ou autre, dont on se plaint, requiert une sanction en vertu de la Constitution, et il se peut bien que ces décisions aient des conséquences sociales ou économiques. Comme l'a souligné le juge Lamer dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, aux pp. 496 et 497, [1986] 1 W.W.R. 481 (*sub nom. Ref. re S. 94(2) of Motor Vehicle Act*), 69 B.C.L.R. 145, 48 C.R. (3d) 289, 36 M.V.R. 240, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 63 N.R. 266, cela a pour effet d'imposer aux tribunaux une responsabilité nouvelle et lourde. En remplissant cette tâche, cependant, ils ne peuvent tenir compte des répercussions sociales ou économiques que dans la mesure où celles-ci

er grants protection are those fundamental to the free and democratic society.

This approach is applicable to the abortion question. The solution to this question in this country must be left to Parliament. It is for Parliament to pronounce on and to direct social policy. This is not because Parliament can claim all wisdom and knowledge but simply because Parliament is elected for that purpose in a free democracy and, in addition, has the facilities — the exposure to public opinion and information — as well as the political power to make effective its decisions. I refer with full approval to a further comment by Taylor J., *supra*, at p. 12:

> The present case may serve, perhaps, to emphasize that the courts lack both the exposure to public opinion required in order to discharge the essentially "political" task of weighing social or economic interests and deciding between them, and also the ability to gather the information they would need for that task. When it has run its course the litigation may also have served to demonstrate — if demonstration be needed — that the judicial system of necessity lacks the capacity of parliamentary bodies to act promptly when economic or social considerations indicate that a change in the law is desirable and, of equal importance, to react promptly when results show either that a change made for that purpose has not achieved its objective or that the objective is no longer desirable.

For all of these reasons, I would dismiss the appeal. I would answer the constitutional questions as follows:

1. Question:

> Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

aident à répondre à la question de savoir si le droit revendiqué jouit d'une protection en vertu de la Constitution. Or, les droits garantis par la Charte sont ceux qui sont fondamentaux dans une société libre et démocratique.

Ce point de vue est applicable à la question de l'avortement. Au Canada, il appartient au Parlement de régler cette question. C'est au Parlement qu'il revient de formuler et de diriger la politique sociale, non pas parce qu'il possède une sagesse infinie et la connaissance de toutes choses, mais simplement parce que c'est précisément dans ce but que les députés sont élus dans une démocratie libre. De plus, le Parlement dispose des moyens (du fait qu'il est au courant de l'opinion publique) ainsi que du pouvoir politique de mettre à exécution ses décisions. J'approuve entièrement les observations suivantes que fait le juge Taylor dans la décision précitée, à la p. 12:

> [TRADUCTION] La présente affaire sert peut-être à mettre en relief le fait que les tribunaux ne sont pas suffisamment au courant de l'opinion publique pour pouvoir s'acquitter de la tâche essentiellement «politique» qui consiste à soupeser les différents intérêts sociaux ou économiques et à faire un choix entre ces intérêts et aussi le fait qu'ils ne sont pas non plus à même de réunir les données qu'il leur faudrait pour pouvoir remplir cette fonction. Il se peut par ailleurs que le litige, quand il aura abouti, aura servi en outre à démontrer, à supposer que cela soit nécessaire, que, par la force des choses, le système judiciaire n'a pas la capacité des organes parlementaires d'agir promptement lorsque des facteurs d'ordre économique ou social indiquent qu'il est souhaitable de modifier la loi ni, ce qui est tout aussi important, celle de réagir promptement lorsqu'il s'avère qu'une telle modification n'a pas eu l'effet escompté ou que l'objectif visé n'est plus souhaitable.

Pour tous ces motifs, je suis d'avis de rejeter le pourvoi et de répondre ainsi aux questions constitutionnelles:

1. Question:

> L'article 251 du *Code criminel* du Canada porte-t-il atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*?

Answer:

No.

2. Question:

If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:

No answer is required.

3. Question:

Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?

Answer:

No.

4. Question:

Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?

Answer:

No.

5. Question:

Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

Answer:

No.

6. Question:

Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?

Réponse:

Non.

2. Question:

Si l'article 251 du *Code criminel* du Canada porte atteinte aux droits et aux libertés garantis par l'al. 2*a*) et les art. 7, 12, 15, 27 et 28 de la *Charte canadienne des droits et libertés*, est-il justifié par l'article premier de la *Charte canadienne des droits et libertés* et donc compatible avec la *Loi constitutionnelle de 1982*?

Réponse:

Il n'est pas nécessaire de répondre à cette question.

3. Question:

L'article 251 du *Code criminel* du Canada excède-t-il les pouvoirs du Parlement du Canada?

Réponse:

Non.

4. Question:

L'article 251 du *Code criminel* du Canada viole-t-il l'art. 96 de la *Loi constitutionnelle de 1867*?

Réponse:

Non.

5. Question:

L'article 251 du *Code criminel* du Canada délègue-t-il illégalement la compétence fédérale en matière criminelle aux ministres de la Santé provinciaux ou aux comités de l'avortement thérapeutique et, ce faisant, le gouvernement fédéral a-t-il abdiqué son autorité dans ce domaine?

Réponse:

Non.

6. Question:

L'article 605 et le par. 610(3) du *Code criminel* du Canada portent-ils atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*?

Answer:

With respect to s. 605, the answer is No. As to s. 610(3), I adopt the reasons of the Court of Appeal and say that no costs should be awarded.

7. Question:

If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:

No answer is required.

The following are the reasons delivered by

WILSON J.—At the heart of this appeal is the question whether a pregnant woman can, as a constitutional matter, be compelled by law to carry the foetus to term. The legislature has proceeded on the basis that she can be so compelled and, indeed, has made it a criminal offence punishable by imprisonment under s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, for her or her physician to terminate the pregnancy unless the procedural requirements of the section are complied with.

My colleagues, the Chief Justice and Justice Beetz, have attacked those requirements in reasons which I have had the privilege of reading. They have found that the requirements do not comport with the principles of fundamental justice in the procedural sense and have concluded that, since they cannot be severed from the provisions creating the substantive offence, the whole of s. 251 must fall.

With all due respect, I think that the Court must tackle the primary issue first. A consideration as to whether or not the procedural requirements for obtaining or performing an abortion comport with fundamental justice is purely academic if such requirements cannot as a constitutional matter be imposed at all. If a pregnant

Réponse:

La réponse est négative quant à l'art. 605. Pour ce qui est du par. 610(3), je suis d'avis d'adopter les motifs de la Cour d'appel et de ne pas accorder de dépens.

7. Question:

Si l'article 605 et le par. 610(3) du *Code criminel* du Canada portent atteinte aux droits et aux libertés garantis par l'art. 7, les al. 11*d*), 11*f*), 11*h*) et le par. 24(1) de la *Charte canadienne des droits et libertés*, sont-ils justifiés par l'article premier de la *Charte canadienne des droits et libertés* et donc compatibles avec la *Loi constitutionnelle de 1982*?

Réponse:

Il n'est pas nécessaire de répondre à cette question.

Version française des motifs rendus par

LE JUGE WILSON—La question au cœur de ce pourvoi est de savoir si une femme enceinte peut, sur le plan constitutionnel, être forcée par la loi à mener le fœtus à terme. Le législateur a tenu pour acquis qu'on pouvait l'y forcer et a d'ailleurs prévu, à l'art. 251 du *Code criminel*, S.R.C. 1970, chap. C-34, que l'interruption de grossesse par une femme ou son médecin, à moins que les exigences procédurales de cet article ne soient respectées, constitue une infraction criminelle punissable d'emprisonnement.

Mes collègues, le Juge en chef et le juge Beetz, ont attaqué ces exigences dans des motifs que j'ai eu l'avantage de lire. Ils ont jugé qu'elles ne respectent pas les principes de justice fondamentale sur le plan de la procédure et ont conclu que, puisqu'elles ne peuvent être séparées des dispositions de fond qui créent l'infraction, l'ensemble de l'art. 251 doit être invalidé.

Avec égards, je pense que la Cour doit s'attaquer d'abord à la question fondamentale. Se demander si les exigences procédurales pour obtenir un avortement ou pour le pratiquer respectent ou non la justice fondamentale devient une question purement théorique si, sur le plan constitutionnel, ces exigences ne peuvent absolument pas

woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, a review of the procedural requirements by which she may be compelled to do so seems pointless. Moreover, it would, in my opinion, be an exercise in futility for the legislature to expend its time and energy in attempting to remedy the defects in the procedural requirements unless it has some assurance that this process will, at the end of the day, result in the creation of a valid criminal offence. I turn, therefore, to what I believe is the central issue that must be addressed.

1. The Right of Access to Abortion

Section 7 of the *Charter* provides:

> 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.

I agree with the Chief Justice that we are not called upon in this case to delineate the full content of the right to life, liberty and security of the person. This would be an impossible task because we cannot envisage all the contexts in which such a right might be asserted. What we are asked to do, I believe, is define the content of the right in the context of the legislation under attack. Does section 251 of the *Criminal Code* which limits the pregnant woman's access to abortion violate her right to life, liberty and security of the person within the meaning of s. 7?

Leaving aside for the moment the implications of the section for the foetus and addressing only the s. 7 right of the pregnant woman, it seems to me that we can say with a fair degree of confidence that a legislative scheme for the obtaining of an abortion which exposes the pregnant woman to a threat to her security of the person would violate her right under s. 7. Indeed, we have already stated in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, that security of the person even on the purely physical level must encompass freedom from the threat of physical punishment or suffering as well as freedom from the actual punishment or suffering itself. In other words, the fact of exposure is enough to violate security of the person. I agree with the Chief Justice and Beetz J. who, for differing reasons,

être imposées. Si une femme enceinte ne peut, sur le plan constitutionnel, être forcée par la loi à mener le fœtus à terme contre sa volonté, l'examen des exigences procédurales par lesquelles elle peut y être forcée perd sa raison d'être. En outre, il serait, à mon avis, futile pour le législateur de gaspiller temps et énergie à tenter de remédier aux défauts des exigences procédurales s'il n'a quelque assurance que ce faisant, une infraction criminelle valide sera en fin de compte créée. J'en viens donc à ce que je crois être le point central qu'il faut examiner.

1. Le droit à l'avortement

L'article 7 de la *Charte* porte:

> 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.

Je conviens avec le Juge en chef qu'il ne nous est pas demandé dans cette affaire de délimiter dans tous ses aspects le droit à la vie, à la liberté et à la sécurité de la personne. Ce serait là une tâche impossible car nous ne pouvons concevoir tous les contextes dans lesquels ce droit pourrait être revendiqué. Ce qu'on nous demande de faire, je crois, c'est de définir ce droit dans le contexte de la loi contestée. L'article 251 du *Code criminel* qui limite le recours d'une femme enceinte à l'avortement viole-t-il son droit à la vie, à la liberté et à la sécurité de sa personne au sens de l'art. 7?

Si nous mettons de côté pour le moment les incidences que peut avoir l'article pour le fœtus et que nous nous intéressons uniquement au droit que l'art. 7 confère à la femme enceinte, il me semble que nous pouvons dire avec suffisamment de certitude qu'une structure législative régissant l'avortement qui menace la sécurité de la personne de la femme enceinte viole le droit que lui garantit l'art. 7. D'ailleurs, nous avons déjà dit dans l'arrêt *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, que la sécurité de la personne, même au niveau purement physique, doit comprendre la liberté d'être exempt de toute menace de châtiment corporel ou de souffrance, tout autant que la liberté d'être exempt du châtiment ou de la souffrance eux-mêmes. En d'autres termes, l'éventualité elle-même suffit pour qu'il y

find that pregnant women are exposed to a threat to their physical and psychological security under the legislative scheme set up in s. 251 and, since these are aspects of their security of the person, their s. 7 right is accordingly violated. But this, of course, does not answer the question whether even the ideal legislative scheme, assuming that it is one which poses no threat to the physical and psychological security of the person of the pregnant woman, would be valid under s. 7. I say this for two reasons: (1) because s. 7 encompasses more than the right to security of the person; it speaks also of the right to liberty, and (2) because security of the person may encompass more than physical and psychological security; this we have yet to decide.

ait atteinte à la sécurité de la personne. Je partage l'avis du Juge en chef et du juge Beetz qui, pour des raisons différentes, ont conclu que les femmes enceintes voient leur sécurité physique et psychologique menacée par la structure législative élaborée à l'art. 251 et, comme il s'agit là d'aspects de la sécurité de la personne, leur droit en vertu de l'art. 7 est par conséquent violé. Mais bien entendu, cela ne répond pas à la question de savoir si même une structure législative idéale, en présumant qu'elle ne constitue pas une menace à la sécurité physique et psychologique de la personne de la femme enceinte, serait valide en vertu de l'art. 7. Il y a deux raisons à cela: (1) parce que l'art. 7 englobe plus que le droit à la sécurité de la personne, il mentionne aussi le droit à la liberté, et (2) parce qu'il se peut que la sécurité de la personne englobe plus que la sécurité physique et psychologique; c'est ce que nous avons à décider.

It seems to me, therefore, that to commence the analysis with the premise that the s. 7 right encompasses only a right to physical and psychological security and to fail to deal with the right to liberty in the context of "life, liberty and security of the person" begs the central issue in the case. If either the right to liberty or the right to security of the person or a combination of both confers on the pregnant woman the right to decide for herself (with the guidance of her physician) whether or not to have an abortion, then we have to examine the legislative scheme not only from the point of view of fundamental justice in the procedural sense but in the substantive sense as well. I think, therefore, that we must answer the question: what is meant by the right to liberty in the context of the abortion issue? Does it, as Mr. Manning suggests, give the pregnant woman control over decisions affecting her own body? If not, does her right to security of the person give her such control? I turn first to the right to liberty.

Il me semble donc que prendre comme point de départ de l'analyse la prémisse que le droit de l'art. 7 ne comprend qu'un droit à la sécurité physique et psychologique, sans traiter du droit à la liberté, dans ce contexte de «la vie, la liberté et la sécurité de sa personne», c'est présumer résolue dès le départ la question centrale en litige. Si le droit à la liberté, le droit à la sécurité de la personne ou une combinaison des deux confèrent à la femme enceinte le droit de décider elle-même (sur les conseils de son médecin) d'avoir ou non un avortement, il nous faut alors examiner la structure législative non seulement du point de vue de la justice fondamentale quant à la procédure mais aussi quant au fond. Je pense donc que nous devons répondre à la question: qu'entend-on par le droit à la liberté dans le contexte de la question de l'avortement? Donne-t-il, comme Me Manning le prétend, à la femme enceinte le pouvoir de prendre des décisions relativement à son corps? Sinon, son droit à la sécurité de sa personne lui donne-t-il ce pouvoir? Je traiterai d'abord du droit à la liberté.

(a) *The Right to Liberty*

In order to ascertain the content of the right to liberty we must, as Dickson C.J. stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, commence with an analysis of the purpose of the right. Quoting from the Chief Justice at p. 344:

a) *Le droit à la liberté*

Pour déterminer ce que comprend le droit à la liberté, nous devons, comme le juge en chef Dickson le dit dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, procéder d'abord à l'analyse de l'objet de ce droit. Pour citer le Juge en chef, à la p. 344:

... the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.

We are invited, therefore, to consider the purpose of the *Charter* in general and of the right to liberty in particular.

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. Professor Neil MacCormick, Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh, in his work entitled *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), speaks of liberty as "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life" (p. 39). He says at p. 41:

To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a

... l'objet du droit ou de la liberté en question doit être déterminé en fonction de la nature et des objectifs plus larges de la *Charte* elle-même, des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la *Charte*. Comme on le souligne dans l'arrêt *Southam*, l'interprétation doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte*.

On nous invite donc à examiner l'objet de la *Charte* en général et du droit à la liberté en particulier.

La *Charte* est fondée sur une conception particulière de la place de l'individu dans la société. Un individu ne constitue pas une entité totalement coupée de la société dans laquelle il vit. Cependant l'individu n'est pas non plus un simple rouage impersonnel d'une machine subordonnant ses valeurs, ses buts et ses aspirations à celles de la collectivité. L'individu est un peu les deux. La *Charte* exprime cette réalité en laissant un vaste champ d'activités et de décisions au contrôle légitime du gouvernement, tout en fixant des bornes à l'étendue appropriée de ce contrôle. Ainsi, les droits garantis par la *Charte* érigent autour de chaque individu, pour parler métaphoriquement, une barrière invisible que l'État ne sera pas autorisé à franchir. Le rôle des tribunaux consiste à délimiter, petit à petit, les dimensions de cette barrière.

La *Charte* et le droit à la liberté individuelle qu'elle garantit sont inextricablement liés à la notion de dignité humaine. Neil MacCormick, professeur de droit public et de droit naturel et international à l'Université d'Édimbourg, dans son ouvrage intitulé *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), parle de la liberté comme [TRADUCTION] "une condition du respect de soi et de la satisfaction que procure la capacité de réaliser sa propre conception d'une vie bien remplie, qui vaille la peine d'être vécue" (à la p. 39). Il dit à la p. 41:

[TRADUCTION] Pouvoir décider ce qu'on veut faire et comment le faire, pour concrétiser ses propres décisions, en en acceptant les conséquences, me semble essentiel au

human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

Dickson C.J. in *R. v. Big M Drug Mart Ltd.* makes the same point at p. 346:

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

It was further amplified in Dickson C.J.'s discussion of *Charter* interpretation in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the

respect de soi en tant qu'être humain et essentiel pour parvenir à cette satisfaction. Ce respect de soi et cette satisfaction sont, à mon avis, des biens fondamentaux pour l'être humain, la vie elle-même ne valant la peine d'être vécue qu'à la condition de les éprouver ou de les rechercher. L'individu auquel on refuserait délibérément la possibilité de parvenir au respect de lui-même et à cette satisfaction se verrait privé de l'essence de son humanité.

Le juge en chef Dickson, dans l'arrêt *R. c. Big M Drug Mart Ltd.*, soutient le même point de vue, à la p. 346:

Toutefois, il faut aussi remarquer que l'insistance sur la conscience et le jugement individuels est également au cœur de notre tradition politique démocratique. La possibilité qu'a chaque citoyen de prendre des décisions libres et éclairées constitue la condition sine qua non de la légitimité, de l'acceptabilité et de l'efficacité de notre système d'auto-détermination. C'est précisément parce que les droits qui se rattachent à la liberté de conscience individuelle se situent au cœur non seulement des convictions fondamentales quant à la valeur et à la dignité de l'être humain, mais aussi de tout système politique libre et démocratique, que la jurisprudence américaine a insisté sur la primauté ou la prééminence du Premier amendement. À mon avis, c'est pour cette même raison que la *Charte canadienne des droits et libertés* parle de libertés «fondamentales». Celles-ci constituent le fondement même de la tradition politique dans laquelle s'insère la *Charte*.

Le juge en chef Dickson a approfondi ce point de vue dans son analyse de l'interprétation de la *Charte* dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, à la p. 136:

Un second élément contextuel d'interprétation de l'article premier est fourni par l'expression «société libre et démocratique». L'inclusion de ces mots à titre de norme finale de justification de la restriction des droits et libertés rappelle aux tribunaux l'objet même de l'enchâssement de la *Charte* dans la Constitution: la société canadienne doit être libre et démocratique. Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à

ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

This view is consistent with the position I took in the case of *R. v. Jones*, [1986] 2 S.C.R. 284. One issue raised in that case was whether the right to liberty in s. 7 of the *Charter* included a parent's right to bring up his children in accordance with his conscientious beliefs. In concluding that it did I stated at pp. 318-19:

> I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric — to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to

l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer.

La notion de dignité humaine trouve son expression dans presque tous les droits et libertés garantis par la *Charte*. Les individus se voient offrir le droit de choisir leur propre religion et leur propre philosophie de vie, de choisir qui ils fréquenteront et comment ils s'exprimeront, où ils vivront et à quelle occupation ils se livreront. Ce sont tous là des exemples de la théorie fondamentale qui sous-tend la *Charte*, savoir que l'État respectera les choix de chacun et, dans toute la mesure du possible, évitera de subordonner ces choix à toute conception particulière d'une vie de bien.

Ainsi, un aspect du respect de la dignité humaine sur lequel la *Charte* est fondée est le droit de prendre des décisions personnelles fondamentales sans intervention de l'État. Ce droit constitue une composante cruciale du droit à la liberté. La liberté, comme nous l'avons dit dans l'arrêt *Singh*, est un terme susceptible d'une acception fort large. À mon avis, ce droit, bien interprété, confère à l'individu une marge d'autonomie dans la prise de décisions d'importance fondamentale pour sa personne.

Ce point de vue est conforme à la position que j'ai prise dans l'arrêt *R. c. Jones*, [1986] 2 R.C.S. 284. Dans cette affaire, il s'agissait de déterminer notamment si le droit à la liberté énoncé à l'art. 7 de la *Charte* incluait le droit pour un père d'élever ses enfants conformément à ses croyances intimes. En concluant que c'était le cas, j'ai dit, aux pp. 318 et 319:

> Je crois que les rédacteurs de la Constitution en garantissant la «liberté» en tant que valeur fondamentale d'une société libre et démocratique, avaient à l'esprit la liberté pour l'individu de se développer et de réaliser son potentiel au maximum, d'établir son propre plan de vie, en accord avec sa personnalité; de faire ses propres choix, pour le meilleur ou pour le pire, d'être non conformiste, original et même excentrique, d'être, en langage courant, «lui-même» et d'être responsable en tant que tel. John Stuart Mill décrit cela ainsi: [TRA-

do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it". He added:

> Each is the proper guardian of his own health, whether bodily *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.

Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

This conception of the proper ambit of the right to liberty under our *Charter* is consistent with the American jurisprudence on the subject. While care must undoubtedly be taken to avoid a mechanical application of concepts developed in different cultural and constitutional contexts, I would respectfully agree with the observation of my colleague, Estey J., in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at pp. 366-67:

> With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.
>
> The courts in the United States have had almost two hundred years experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts.

As early as the 1920's the American Supreme Court employed the Fifth and Fourteenth Amendments to the American Constitution to give parents a degree of choice in the education of their children. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court struck down a law prohibiting the teaching of any subject in a language other than English. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), an Oregon statute requiring all "normal children" to attend public school and thus prohibiting private school attendance was held to be unconstitutional. The Court in *Pierce* at pp. 534-35 characterized the interest being infringed

DUCTION] «rechercher notre propre bien, à notre façon». Nous devrions, pensait-il, être libre de le faire «dans la mesure où nous ne tentons pas de priver les autres du leur, ni d'entraver leurs efforts pour y parvenir». Il ajoutait:

> [TRADUCTION] Chacun est le véritable gardien de sa propre santé, tant physique que mentale et spirituelle. L'humanité a plus à gagner à laisser chacun vivre comme cela lui semble bon, qu'à forcer chacun à vivre comme cela semble bon aux autres.

La liberté dans une société libre et démocratique n'oblige pas l'État à approuver les décisions personnelles de ses citoyens; elle l'oblige cependant à les respecter.

Cette conception de la portée qu'il convient de donner au droit à la liberté sous le régime de notre *Charte* est conforme à la jurisprudence américaine sur le sujet. Quoiqu'il faille sans doute prendre garde d'appliquer mécaniquement des concepts élaborés dans des contextes culturels et constitutionnels différents, je souscris à l'observation que fait le juge Estey dans l'arrêt *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357, aux pp. 366 et 367:

> La *Loi constitutionnelle de 1982* apporte une nouvelle dimension, un nouveau critère d'équilibre entre les individus et la société et leurs droits respectifs, une dimension qui, comme l'équilibre de la Constitution, devra être interprétée et appliquée par la Cour.
>
> Les tribunaux américains ont presque deux cents ans d'expérience dans l'accomplissement de cette tâche, et l'analyse de leur expérience offre plus qu'un intérêt passager pour ceux qui s'intéressent à cette nouvelle évolution au Canada.

Dès les années 20, la Cour suprême des États-Unis a eu recours au Cinquième et au Quatorzième amendements de la Constitution américaine pour accorder aux parents une certaine latitude dans l'éducation de leurs enfants. Dans l'arrêt *Meyer v. Nebraska*, 262 U.S. 390 (1923), la Cour a annulé une loi interdisant l'enseignement, quelle que soit la matière, dans une langue autre que l'anglais. Dans l'arrêt *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), une loi de l'Oregon obligeant tous les «enfants normaux» à fréquenter l'école publique, et leur interdisant par le fait même la fréquentation d'une école privée, a été jugée

as "the liberty of parents and guardians to direct the upbringing and education of children under their control".

The sanctity of the family was underlined by the decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the Supreme Court invalidated a state law authorizing the sterilization of individuals convicted of two or more crimes involving moral turpitude. While the law was struck down on the basis that it violated the equal protection clause of the Fourteenth Amendment, the Court had this to say of the interest at stake: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race" (at p. 541).

Later the Supreme Court was asked to determine the constitutionality of a Connecticut statute forbidding the use of contraceptives by married couples. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the majority held this statute to be invalid. The judges writing for the majority used various constitutional routes to arrive at this conclusion but the common denominator seems to have been a profound concern over the invasion of the marital home required for the enforcement of the law. *Griswold* was interpreted by the Supreme Court in the later case of *Eisenstadt v. Baird*, 405 U.S. 438 (1972), where the majority stated at p. 453:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make up. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

In *Eisenstadt* the Court struck down a Massachusetts law that prohibited the distribution of any

Le caractère sacré de la famille a été souligné par l'arrêt *Skinner v. Oklahoma*, 316 U.S. 535 (1942), où la Cour suprême a invalidé la loi d'un État qui autorisait la stérilisation des individus reconnus coupables de deux ou plusieurs crimes impliquant la turpitude morale. Quoique la loi ait été annulée parce qu'elle violait la clause de l'égale protection de la loi établie par le Quatorzième amendement, voici ce que la Cour a dit de l'intérêt en cause: [TRADUCTION] "Nous avons affaire ici à une loi qui touche aux droits civils fondamentaux de l'homme. Le mariage et la procréation sont fondamentaux pour l'existence et la survie mêmes de la race" (à la p. 541).

Ultérieurement, la Cour suprême a été appelée à statuer sur la constitutionnalité d'une loi du Connecticut interdisant aux gens mariés d'utiliser des contraceptifs. Dans l'arrêt *Griswold v. Connecticut*, 381 U.S. 479 (1965), la majorité a jugé cette loi invalide. Les juges qui ont écrit au nom de la majorité ont emprunté diverses voies constitutionnelles pour arriver à cette conclusion, mais le dénominateur commun semble avoir été une profonde appréhension que l'application de la loi exige une incursion dans le foyer conjugal. La Cour suprême a interprété l'arrêt *Griswold* dans une affaire ultérieure, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), où elle a dit, à la majorité, à la p. 453:

> [TRADUCTION] Il est vrai que dans l'arrêt *Griswold* le droit à la vie privée en cause a été considéré comme inhérent à la relation conjugale. Néanmoins le couple marié n'est pas une entité indépendante dotée d'un esprit et d'un cœur distincts, mais une association de deux individus, chacun pourvu de caractéristiques intellectuelles et émotionnelles distinctes. Si le droit à la vie privée signifie quelque chose, c'est bien le droit de *l'individu*, marié ou célibataire, d'être libre de toute intrusion gouvernementale injustifiée dans des domaines touchant si fondamentalement à la personne, comme la décision de porter ou de mettre au monde un enfant.

Dans l'arrêt *Eisenstadt*, la Cour a annulé une loi du Massachusetts qui interdisait la distribution de

drug for the purposes of contraception to unmarried persons on the ground that it violated the equal protection clause.

The equal protection clause was also used by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967), to strike down legislation that purported to forbid inter-racial marriage. The Court tied its decision to the previous line of cases that protected basic choices relating to family life. It stated at p. 12: "The freedom to marry has long been recognized as one of the 'vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival .... [The] freedom to marry . . . resides with the individual...." Thus, by a process of accretion the scope of the right of individuals to make fundamental decisions affecting their private lives was elaborated in the United States on a case by case basis. The parameters of the fence were being progressively defined.

For our purposes the most interesting development in this area of American law are the decisions of the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and its sister case *Doe v. Bolton*, 410 U.S. 179 (1973). In *Roe v. Wade* the Court held that a pregnant woman has the right to decide whether or not to terminate her pregnancy. This conclusion, the majority stated, was mandated by the body of existing law ensuring that the state would not be allowed to interfere with certain fundamental personal decisions such as education, child-rearing, procreation, marriage and contraception. The Court concluded that the right to privacy found in the Fourteenth Amendment guarantee of liberty "... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (p. 153).

This right was not, however, to be taken as absolute. At some point the legitimate state interests in the protection of health, proper medical standards, and pre-natal life would justify its qualification. Lawrence H. Tribe, Professor of Law at Harvard University, in his work entitled

toute drogue à des fins de contraception aux gens non mariés pour le motif qu'elle violait la clause de l'égale protection de la loi.

La Cour suprême a aussi eu recours à la clause de l'égale protection de la loi dans l'arrêt *Loving v. Virginia*, 388 U.S. 1 (1967), pour invalider une loi qui avait pour objet d'interdire les mariages raciaux mixtes. La Cour a lié sa décision à la jurisprudence antérieure qui protégeait les choix fondamentaux en matière de vie familiale. Elle dit, à la p. 12: [TRADUCTION] «La liberté de se marier est reconnue depuis longtemps comme l'un des droits vitaux personnels essentiels à la recherche méthodique du bonheur par les hommes libres. Le mariage est l'un des «droits civils fondamentaux de l'homme», le fondement de notre existence et de notre survie mêmes . . . [La] liberté de se marier . . . réside chez l'individu». Ainsi, en quelque sorte par accrétion, l'étendue du droit des individus de prendre des décisions fondamentales concernant leur vie privée a été élaborée cas par cas aux États-Unis. Les dimensions de la barrière ont ainsi été progressivement définies.

Pour nos fins, les décisions concomitantes de la Cour suprême *Roe v. Wade*, 410 U.S. 113 (1973), et *Doe v. Bolton*, 410 U.S. 179 (1973), constituent le développement le plus intéressant dans ce domaine du droit américain. Dans l'arrêt *Roe v. Wade*, la Cour a jugé qu'une femme enceinte a le droit de décider d'interrompre ou non sa grossesse. Cette conclusion, a dit la majorité, était imposée par le corps de droit existant qui interdit à l'État d'intervenir dans certaines décisions personnelles fondamentales telles l'enseignement donné aux enfants et leur éducation, la procréation, le mariage et la contraception. La Cour a conclu que le droit à la vie privée que l'on trouve dans la garantie de la liberté du Quatorzième amendement [TRADUCTION] «... est suffisamment large pour inclure la décision d'une femme d'interrompre ou non sa grossesse» (à la p. 153).

Ce droit ne doit pas, toutefois, être considéré comme absolu. Parvenu à un certain point, les intérêts légitimes de l'État vis-à-vis de la protection de la santé, des normes médicales appropriées et de la vie fœtale justifient de le restreindre. Dans son ouvrage intitulé *American Constitutional Law*,

American Constitutional Law (1978), conveniently summarizes the limits the Court found to be inherent in the woman's right. I quote from pp. 924-25:

Specifically, the Court held that, because the woman's right to decide whether or not to end a pregnancy is fundamental, only a compelling interest can justify state regulation impinging in any way upon that right. During the first trimester of pregnancy, when abortion is less hazardous in terms of the woman's life than carrying the child to term would be, the state may require only that the abortion be performed by a licensed physician; no further regulations peculiar to abortion as such are compellingly justified in that period.

After the first trimester, the compelling state interest in the mother's health permits it to adopt reasonable regulations in order to promote safe abortions — but requiring abortions to be performed in hospitals, or only after approval of another doctor or committee in addition to the woman's physician, is impermissible, as is requiring that the abortion procedure employ a technique that, however preferable from a medical perspective, is not widely available.

Once the fetus is viable, in the sense that it is capable of survival outside the uterus with artificial aid, the state interest in preserving the fetus becomes compelling, and the state may thus proscribe its premature removal (i.e., its abortion) except to preserve the mother's life or health.

The decision in *Roe v. Wade* was re-affirmed by the Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and again, though by a bare majority, in *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986). In *Thornburgh*, Blackmun J., speaking for the majority, identifies the core value which the American courts have found to inhere in the concept of liberty. He states at pp. 2184-85:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . . [citations omitted] That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a

1978, Lawrence H. Tribe, professeur de droit à l'Université Harvard, donne un résumé commode des limites que la Cour a jugé inhérentes au droit de la femme. Je cite les pp. 924 et 925:

[TRADUCTION] Plus précisément, la Cour a jugé que, puisque le droit de la femme de décider d'interrompre ou non une grossesse est fondamental, seul un intérêt supérieur peut justifier une réglementation de l'État qui entraverait ce droit de quelque façon. Au cours du premier trimestre de la grossesse, alors que l'avortement est moins dangereux pour la vie de la femme que mener la grossesse à terme le serait, tout ce que l'État peut exiger, c'est que l'avortement soit pratiqué par un médecin qualifié; aucune autre réglementation de l'avortement comme tel n'est impérieusement justifiée au cours de cette période.

Après le premier trimestre, l'intérêt supérieur de l'État dans la santé de la mère l'autorise à adopter une réglementation raisonnable afin de favoriser des avortements sans danger; mais exiger que les avortements ne soient pratiqués que dans des hôpitaux, ou uniquement après qu'un autre médecin ou comité aura donné son aval, outre le médecin de la femme, ne saurait être autorisé, car ce serait exiger que la procédure d'avortement suive une technique qui, si préférable soit-elle dans une optique médicale, n'est pas largement répandue.

Lorsque le fœtus devient viable, en ce sens qu'il peut survivre à l'extérieur de l'utérus pourvu qu'on l'aide artificiellement, l'intérêt de l'État dans la préservation du fœtus devient supérieur et l'État peut alors interdire qu'on l'enlève prématurément (c.-à-d. le faire avorter) sauf pour préserver la vie ou la santé de la mère.

L'arrêt *Roe v. Wade* a été réaffirmé par la Cour suprême dans l'arrêt *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), et aussi, quoique par une très mince majorité, dans l'arrêt *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986). Dans l'arrêt *Thornburgh*, le juge Blackmun, s'exprimant au nom de la majorité, cerne la valeur centrale que les tribunaux américains ont jugé inhérente à la notion de liberté. Il dit, aux pp. 2184 et 2185:

[TRADUCTION] Notre jurisprudence reconnaît depuis longtemps que la Constitution comporte la promesse qu'une certaine sphère privée de la liberté individuelle demeurera largement hors de portée du gouvernement . . . [références omises]. Cette promesse vaut pour les femmes autant que pour les hommes. Peu de décisions sont aussi personnelles et intimes, aussi littéralement

woman's decision — with the guidance of her physician and within the limits specified in *Roe* — whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

In my opinion, the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian *Charter*. Indeed, as the Chief Justice pointed out in *R. v. Big M Drug Mart Ltd.*, beliefs about human worth and dignity "are the *sine qua non* of the political tradition underlying the *Charter*". I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has point-

privées ou aussi fondamentales pour la dignité et l'autonomie individuelles que la décision prise par une femme — sur les conseils de son médecin et dans les limites indiquées dans l'arrêt *Roe* — d'interrompre ou non une grossesse. Le droit de la femme de faire ce choix librement est fondamental. Toute autre conclusion, à notre avis, protégerait inadéquatement un aspect central de cette sphère de liberté que notre droit garantit également à tous.

À mon avis, le respect du pouvoir décisionnel de l'individu dans des domaines d'importance personnelle aussi fondamentaux que traduit la jurisprudence américaine nous renseigne aussi sur la *Charte* canadienne. D'ailleurs, comme le Juge en chef le rappelle dans l'arrêt *R. c. Big M Drug Mart Ltd.*, la foi en la valeur et en la dignité humaines «constitue [. . .] le fondement même de la tradition politique dans laquelle s'insère la *Charte*». Je conclus donc que le droit à la liberté énoncé à l'art. 7 garantit à chaque individu une marge d'autonomie personnelle sur ses décisions importantes touchant intimement à sa vie privée.

La question devient alors de savoir si la décision que prend une femme d'interrompre sa grossesse relève de cette catégorie de décisions protégées. Je n'ai pas de doute que ce soit le cas. Cette décision aura des conséquences psychologiques, économiques et sociales profondes pour la femme enceinte. Les circonstances qui y mènent peuvent être compliquées et multiples et il peut y avoir, comme c'est généralement le cas, des considérations puissantes en faveur de décisions opposées. C'est une décision qui reflète profondément l'opinion qu'une femme a d'elle-même, ses rapports avec les autres et avec la société en général. Ce n'est pas seulement une décision d'ordre médical; elle est aussi profondément d'ordre social et éthique. La réponse qu'elle y donne sera la réponse de tout son être.

Il est probablement impossible pour un homme d'imaginer une réponse à un tel dilemme, non seulement parce qu'il se situe en dehors du domaine de son expérience personnelle (ce qui, bien entendu, est le cas), mais aussi parce qu'il ne peut y réagir qu'en l'objectivant et en éliminant par le fait même les éléments subjectifs de la psyché féminine qui sont au cœur du dilemme. Comme Noreen Burrows, maître de conférence en

ed out in her essay on "International Law and Human Rights: the Case of Women's Rights", in *Human Rights: From Rhetoric to Reality* (1986), the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-82). It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.

Given then that the right to liberty guaranteed by s. 7 of the *Charter* gives a woman the right to decide for herself whether or not to terminate her pregnancy, does s. 251 of the *Criminal Code* violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee. Furthermore, as the Chief Justice correctly points out, at p. 56, the committee bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations". The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.

droit européen à l'Université de Glasgow, le fait observer dans son essai "International Law and Human Rights: the Case of Women's Rights", dans *Human Rights: From Rhetoric to Reality* (1986), l'histoire du combat pour les droits de la personne, du dix-huitième siècle à aujourd'hui, est l'histoire des hommes qui ont lutté pour affirmer leur dignité et leur commune humanité contre un appareil d'État autoritaire. Plus récemment, la lutte pour la reconnaissance des droits des femmes a été un combat contre la discrimination, pour que les femmes trouvent une place dans un monde d'hommes, pour élaborer un ensemble de réformes législatives afin de placer les femmes sur le même pied que les hommes (aux pp. 81 et 82). Il ne s'agit pas d'une lutte pour définir les droits des femmes par rapport à leur position particulière dans la structure sociale et par rapport à la différence biologique entre les deux sexes. Ainsi les besoins et les aspirations des femmes se traduisent seulement aujourd'hui en des droits garantis. Le droit de se reproduire ou de ne pas se reproduire, qui est en cause en l'espèce, est l'un de ces droits et c'est à raison qu'on le considère comme faisant partie intégrante de la lutte contemporaine de la femme pour affirmer sa dignité et sa valeur en tant qu'être humain.

Étant donné alors que le droit à la liberté garanti par l'art. 7 de la *Charte* confère à une femme le droit de décider elle-même d'interrompre ou non sa grossesse, l'art. 251 du *Code criminel* viole-t-il ce droit? Manifestement il le viole. L'article a pour objet d'enlever cette décision à la femme pour confier à un comité le soin de la prendre. En outre, comme le Juge en chef l'observe à juste titre, à la p. 56, le comité fonde sa décision sur "des critères totalement sans rapport avec ses [celles de la femme enceinte] propres priorités et aspirations". Le fait que la décision d'autoriser ou non une femme à interrompre sa grossesse soit dans les mains d'un comité est une violation tout aussi grave du droit de la femme à l'autonomie personnelle en matière de décision de nature intime et privée que serait celle d'établir un comité pour décider s'il faut autoriser une femme à mener sa grossesse à terme. Dans les deux cas, il y a violation du droit de la femme à la liberté, car on décide pour elle ce qu'elle a le droit de décider elle-même.

(b) *The Right to Security of the Person*

Section 7 of the *Charter* also guarantees everyone the right to security of the person. Does this, as Mr. Manning suggests, extend to the right of control over one's own body?

I agree with the Chief Justice and with Beetz J. that the right to "security of the person" under s. 7 of the *Charter* protects both the physical and psychological integrity of the individual. State enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity. Lamer J. held in *Mills v. The Queen*, [1986] 1 S.C.R. 863, that the right to security of the person entitled a person to be protected against psychological trauma as well — in that case the psychological trauma resulting from delays in the trial process under s. 11(*b*) of the *Charter*. He found that psychological trauma could take the form of "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 outcome and sanction". I agree with my colleague and I think that his comments are very germane to the instant case because, as the Chief Justice and Beetz J. point out, the present legislative scheme for the obtaining of an abortion clearly subjects pregnant women to considerable emotional stress as well as to unnecessary physical risk. I believe, however, that the flaw in the present legislative scheme goes much deeper than that. In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not, in my view, just a matter of interfering with her right to liberty in the sense (already discussed) of her right to personal autonomy in decision-making, it is a direct interference with her physical "person" as well. She is truly being treated as a means — a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this

b) *Le droit à la sécurité de sa personne*

L'article 7 de la *Charte* garantit aussi à chacun le droit à la sécurité de sa personne. Cela va-t-il, comme le prétend Me Manning, jusqu'au droit à la maîtrise de son propre corps?

Je suis d'accord avec le Juge en chef et le juge Beetz pour dire que le droit de chacun à «la sécurité de sa personne» garanti par l'art. 7 de la *Charte* protège à la fois l'intégrité physique et psychologique de la personne. Les traitements médicaux ou chirurgicaux imposés par l'État viennent tout de suite à l'esprit comme exemples d'atteintes manifestes à l'intégrité corporelle. Le juge Lamer a conclu dans l'arrêt *Mills c. La Reine*, [1986] 1 R.C.S. 863, qu'aux termes du droit à la sécurité de la personne on avait aussi le droit d'être protégé contre le traumatisme psychologique: dans cette affaire, le traumatisme psychologique résultait du retard à être jugé au sens de l'al. 11*b*) de la *Charte*. Il a conclu que le traumatisme psychologique pouvait prendre pour forme «la stigmatisation de l'accusé, l'atteinte à la vie privée, la tension et l'angoisse 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». Je partage l'opinion de mon collègue et j'estime ses commentaires particulièrement appropriés en l'espèce car, comme le Juge en chef et le juge Beetz le soulignent, la structure législative actuelle d'obtention d'un avortement soumet clairement les femmes enceintes à une tension émotionnelle considérable ainsi qu'à un risque physique inutile. Je crois néanmoins que la faille dans la structure législative actuelle est beaucoup plus profonde. Essentiellement, ce qu'elle fait, c'est affirmer que la capacité de reproduction de la femme ne doit pas être soumise à son propre contrôle. Elle doit être soumise au contrôle de l'État. On ne lui permet pas de choisir d'exercer la capacité qui est la sienne ou de ne pas l'exercer. À mon avis, il ne s'agit pas seulement d'une entrave à son droit à la liberté au sens (déjà analysé) de son droit à son autonomie décisionnelle personnelle, c'est aussi une atteinte à sa «personne» physique. Elle est littéralement traitée comme un moyen, un moyen pour une fin qu'elle ne désire pas et qu'elle ne

position have any sense of security with respect to her person? I believe that s. 251 of the *Criminal Code* deprives the pregnant woman of her right to security of the person as well as her right to liberty.

2. The Scope of the Right under s. 7

I turn now to a consideration of the degree of personal autonomy the pregnant woman has under s. 7 of the *Charter* when faced with a decision whether or not to have an abortion or, to put it into the legislative context, the degree to which the legislature can deny the pregnant woman access to abortion without violating her s. 7 right. This involves a consideration of the extent to which the legislature can "deprive" her of it under the second part of s. 7 and the extent to which it can put "limits" on it under s. 1.

(a) *The Principles of Fundamental Justice*

Does section 251 deprive women of their right to liberty and to security of the person "in accordance with the principles of fundamental justice"? I agree with Lamer J. who stated in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 513, that the principles of fundamental justice "cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7". In the same judgment Lamer J. also stated at p. 503:

In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the

contrôle pas. Elle subit une décision prise par d'autres sur l'éventuelle utilisation de son corps pour alimenter une nouvelle vie. Que peut-il y avoir de moins compatible avec la dignité humaine et le respect de soi? Comment une femme dans cette situation peut-elle entretenir un quelconque sentiment de sécurité à l'égard de sa personne? Je crois que l'art. 251 du *Code criminel* prive la femme enceinte à la fois de son droit à la sécurité de sa personne et de son droit à la liberté.

2. La portée du droit garanti par l'art. 7

J'examine maintenant le degré d'autonomie personnelle dont jouit la femme enceinte en vertu de l'art. 7 de la *Charte*, lorsqu'elle a à prendre la décision de se faire avorter ou non ou, pour situer la question dans son cadre législatif, jusqu'à quel point le législateur peut refuser à la femme enceinte de se faire avorter sans violer le droit que lui garantit l'art. 7. Ceci amène à examiner dans quelle mesure le législateur peut y «porter atteinte», dans son cas, en vertu du second volet de l'art. 7 et dans quelle mesure il peut le restreindre par des «limites» en vertu de l'article premier.

a) *Les principes de justice fondamentale*

L'article 251 prive-t-il les femmes de leur droit à la liberté et à la sécurité de leur personne «en conformité avec les principes de justice fondamentale»? Je partage l'opinion du juge Lamer lorsqu'il dit, dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, à la p. 513, en parlant des principes de justice fondamentale, «on ne peut donner à ces mots un contenu exhaustif ou une simple définition par énumération; ils prendront un sens concret au fur et à mesure que les tribunaux étudieront des allégations de violation de l'art. 7.» Dans le même arrêt, le juge Lamer dit aussi, à la p. 503:

En d'autres mots, les principes de justice fondamentale se trouvent dans les préceptes fondamentaux de notre système juridique. Ils relèvent non pas du domaine de l'ordre public en général, mais du pouvoir inhérent de l'appareil judiciaire en tant que gardien du système judiciaire. Cette façon d'aborder l'interprétation de l'expression «principes de justice fondamentale» est conforme à la lettre et à l'économie de l'art. 7, au contexte de cet article, c.-à-d. les art. 8 à 14, ainsi qu'à la nature

s. 7 guarantee all the while avoiding adjudication of policy matters.

While Lamer J. draws mainly upon ss. 8 to 14 of the *Charter* to give substantive content to the principles of fundamental justice, he does not preclude, but seems rather to encourage, the idea that recourse may be had to other rights guaranteed by the *Charter* for the same purpose. The question, therefore, is whether the deprivation of the s. 7 right is in accordance not only with procedural fairness (and I agree with the Chief Justice and Beetz J. for the reasons they give that it is not) but also with the fundamental rights and freedoms laid down elsewhere in the *Charter*.

This approach to s. 7 is supported by comments made by La Forest J. in *R. v. Lyons*, [1987] 2 S.C.R. 309. He urged that the rights enshrined in the *Charter* should not be read in isolation. Rather, he states at p. 326:

> . . . the *Charter* protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136), and the particularization of rights and freedoms contained in the *Charter* thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole and, in particular, of the content of the other specific rights and freedoms it embodies.

I believe, therefore, that a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles of fundamental justice.

In my view, the deprivation of the s. 7 right with which we are concerned in this case offends s. 2(*a*) of the *Charter*. I say this because I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of con-

et aux objets plus généraux de la *Charte* elle-même. Elle donne de la substance aux droits garantis par l'art. 7 tout en évitant de trancher des questions de politique générale.

Quoique le juge Lamer puise surtout dans les art. 8 à 14 de la *Charte* pour donner une substance aux principes de justice fondamentale, il n'écarte pas l'idée, qu'il semble au contraire encourager, qu'on puisse recourir aux autres droits garantis par la *Charte* dans le même but. Il faut donc se demander si l'atteinte au droit garanti par l'art. 7 respecte non seulement l'équité en matière de procédure (et je suis d'accord avec les motifs que le Juge en chef et le juge Beetz donnent pour exposer que tel n'est pas le cas), mais aussi les droits et libertés fondamentaux énoncés ailleurs dans la *Charte*.

Les commentaires du juge La Forest dans l'arrêt *R. c. Lyons*, [1987] 2 R.C.S. 309, vont dans le sens de cette conception de l'art. 7. Il invite à ne pas interpréter les droits enchâssés dans la *Charte* isolément. Au contraire, dit-il, à la p. 326:

> . . . la *Charte* sert à sauvegarder un ensemble complexe de valeurs interreliées, dont chacune constitue un élément plus ou moins fondamental de la société libre et démocratique qu'est le Canada (*R. c. Oakes*, [1986] 1 R.C.S. 103, à la p. 136), et la spécification des droits et libertés dans la *Charte* représente en conséquence une tentative quelque peu artificielle, quoique nécessaire et intrinsèquement valable, de structurer et d'orienter l'expression judiciaire de ces mêmes droits et libertés. La nécessité d'une analyse structurée ne devrait toutefois pas nous amener à perdre de vue l'importance que revêt la manière dont l'élargissement de la portée de chaque droit et liberté énoncé donne sens et forme à notre compréhension du système de valeurs que vise à protéger la *Charte* dans son ensemble et, en particulier, à notre compréhension de la portée des autres droits et libertés qu'elle garantit.

Je crois donc qu'une atteinte au droit conféré par l'art. 7 qui a pour effet d'enfreindre un droit que garantit par ailleurs la *Charte* ne saurait être conforme aux principes de justice fondamentale.

À mon avis, l'atteinte au droit conféré par l'art. 7 qui nous intéresse en l'espèce enfreint l'al. 2*a*) de la *Charte*. Si je dis ceci, c'est que je crois que la décision d'interrompre ou non une grossesse est essentiellement une décision morale, une question

science. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state? I believe, for the reasons I gave in discussing the right to liberty, that in a free and democratic society it must be the conscience of the individual. Indeed, s. 2(*a*) makes it clear that this freedom belongs to "everyone", i.e., to each of us individually. I quote the section for convenience:

> **2.** Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion;

In *R. v. Big M Drug Mart Ltd., supra,* Dickson C.J. made some very insightful comments about the nature of the right enshrined in s. 2(*a*) of the *Charter* at pp. 345-47:

> Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendent religion, came to voice opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(*a*) of our *Charter*, the single integrated concept of "freedom of conscience and religion".

What unites enunciated freedoms in the American First Amendment, in s. 2(*a*) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam Inc., supra,* the purpose of the *Charter* was identified, at p. 155, as "the unremitting protection of individual rights and liberties". It is easy to see the relationship between respect

de conscience. Je ne pense pas qu'on le conteste ni puisse le contester. La question qui se pose est donc: quelle conscience? La conscience de la femme doit-elle prévaloir sur la conscience de l'État? Je crois, pour les raisons que j'ai données dans mon analyse du droit à la liberté, que dans une société libre et démocratique ce doit être la conscience de l'individu. D'ailleurs l'al. 2*a*) dit clairement que cette liberté c'est celle de "chacun", c.-à-d. de chacun de nous pris individuellement. Je cite l'alinéa pour plus de commodité:

> **2.** Chacun a les libertés fondamentales suivantes:
>
> *a*) liberté de conscience et de religion;

Dans l'arrêt *R. c. Big M Drug Mart Ltd.*, précité, le juge en chef Dickson fait preuve d'une grande perspicacité dans ses commentaires sur la nature du droit enchâssé à l'al. 2*a*) de la *Charte*, aux pp. 345 à 347:

> Toutefois, suivant le mouvement amorcé à l'époque du Commonwealth ou de l'Interrègne par la faction dite «indépendante» au sein du parti parlementaire, bien des gens, même parmi les adeptes des croyances fondamentales de la religion dominante, ont fini par s'opposer à ce que le pouvoir coercitif de l'État soit utilisé pour assurer l'obéissance à des préceptes religieux et pour extirper les croyances non conformistes. Il s'agissait, à ce moment-là, non plus d'une opposition fondée simplement sur la conviction que l'État imposait l'observance des mauvaises croyances et pratiques, mais d'une opposition fondée sur le sentiment que la croyance elle-même n'était pas quelque chose qui pouvait être imposé. Toute tentative d'imposer l'observance de croyances et de pratiques constituait un déni de la réalité de la conscience individuelle et déshonorait le Dieu qui en avait doté Ses créatures. Voilà donc comment les concepts de la liberté de religion et de la liberté de conscience se sont rattachés pour former, comme c'est le cas à l'al. 2*a*) de notre *Charte*, une seule et unique notion qui est la «liberté de conscience et de religion».

Les libertés énoncées dans le Premier amendement de la Constitution des États-Unis, à l'al. 2*a*) de la *Charte* et dans les dispositions d'autres documents relatifs aux droits de la personne ont en commun la prééminence de la conscience individuelle et l'inopportunité de toute intervention gouvernementale visant à forcer ou à empêcher sa manifestation. L'arrêt *Hunter c. Southam Inc.* précité, précise à la p. 155, que la *Charte* a pour objet «la protection constante des droits et libertés individuels». On voit facilement le rapport entre le respect de

for individual conscience and the valuation of human dignity that motivates such unremitting protection.

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(*a*) might otherwise prohibit. [Emphasis added.]

The Chief Justice sees religious belief and practice as the paradigmatic example of conscientiously-held beliefs and manifestations and as such

la conscience individuelle et la valorisation de la dignité humaine qui motive cette protection constante.

Toutefois, il faut aussi remarquer que l'insistance sur la conscience et le jugement individuels est également au *a* cœur de notre tradition politique démocratique. La possibilité qu'a chaque citoyen de prendre des décisions libres et éclairées constitue la condition sine qua non de la légitimité, de l'acceptabilité et de l'efficacité de notre système d'auto-détermination. C'est précisément parce *b* que les droits qui se rattachent à la liberté de conscience individuelle se situent au cœur non seulement des convictions fondamentales quant à la valeur et à la dignité de l'être humain, mais aussi de tout système politique libre et démocratique, que la jurisprudence américaine a *c* insisté sur la primauté ou la prééminence du Premier amendement. À mon avis, c'est pour cette même raison que la *Charte canadienne des droits et libertés* parle de libertés «fondamentales». Celles-ci constituent le fondement même de la tradition politique dans laquelle s'in*d* sère la *Charte*.

Vu sous cet angle, l'objet de la liberté de conscience et de religion devient évident. Les valeurs qui sous-tendent nos traditions politiques et philosophiques exigent que chacun soit libre d'avoir et de manifester les croyances *e* et les opinions que lui dicte sa conscience, à la condition notamment que ces manifestations ne lèsent pas ses semblables ou leur propre droit d'avoir et de manifester leurs croyances et opinions personnelles. Historiquement, la foi et la pratique religieuses sont, à bien des *f* égards, des archétypes des croyances et manifestations dictées par la conscience et elles sont donc protégées par la *Charte*. La même protection s'applique, pour les mêmes motifs, aux expressions et manifestations d'incroyance et au refus d'observer les pratiques religieuses. *g* Il se peut que la liberté de conscience et de religion outrepasse ces principes et qu'elle ait pour effet d'interdire d'autres sortes d'ingérences gouvernementales dans les affaires religieuses. Aux fins de la présente espèce, il me paraît suffisant d'affirmer que, quels que soient les *h* autres sens que peut avoir la liberté de conscience et de religion, elle doit à tout le moins signifier ceci: le gouvernement ne peut, dans un but sectaire, contraindre des personnes à professer une foi religieuse ou à pratiquer une religion en particulier. Je ne me prononce pas *i* ici sur la question de savoir dans quelle mesure, s'il y a lieu, le gouvernement peut, en vue de réaliser un intérêt ou un objectif essentiel, exercer une coercition qui pourrait par ailleurs être interdite par l'al. 2*a*). [Je souligne.]

j Le Juge en chef voit dans la foi et la pratique religieuses l'archétype de croyances et de manifestations dictées par la conscience et, de ce fait,

protected by the *Charter*. But I do not think he is saying that a personal morality which is not founded in religion is outside the protection of s. 2(*a*). Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(*a*). In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that "Canada is founded upon principles that recognize the supremacy of God . . . ." But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society.

As is pointed out by Professor Cyril E. M. Joad, then Head of the Department of Philosophy and Psychology at Birkbeck College, University of London, in *Guide to the Philosophy of Morals and Politics* (1938), the role of the state in a democracy is to establish the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life. He states at p. 801:

> For the welfare of the state is nothing apart from the good of the citizens who compose it. It is no doubt true that a State whose citizens are compelled to go right is more efficient than one whose citizens are free to go wrong. But what then? To sacrifice freedom in the interests of efficiency, is to sacrifice what confers upon human beings their humanity. It is no doubt easy to govern a flock of sheep; but there is no credit in the governing, and, if the sheep were born as men, no virtue in the sheep.

Professor Joad further emphasizes at p. 803 that individuals in a democratic society can never be treated "merely as means to ends beyond themselves" because:

> To the right of the individual to be treated as an end, which entails his right to the full development and expression of his personality, all other rights and claims must, the democrat holds, be subordinated. I do not know how this principle is to be defended any more than I can frame a defence for the principles of democracy and liberty.

Professor Joad stresses that the essence of a democracy is its recognition of the fact that the state is made for man and not man for the state (p. 805). He firmly rejects the notion that science

protégées par la *Charte*. Mais je ne pense pas qu'il dise qu'une morale personnelle qui n'est pas fondée sur la religion se trouve en dehors de la sphère de protection de l'al. 2*a*). Certainement, je serais d'avis que ce que l'on croit en conscience, sans motivation religieuse, est également protégé par la liberté de conscience garantie à l'al. 2*a*). En disant cela, je n'oublie pas que la *Charte* s'ouvre par l'affirmation que «le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu . . . » Mais je n'oublie pas non plus que les valeurs que consacre la *Charte* sont celles qui caractérisent une société libre et démocratique.

Comme l'a fait observer Cyril E. M. Joad, à l'époque chef du département de philosophie et de psychologie au Birkbeck College de l'Université de Londres, dans *Guide to the Philosophy of Morals and Politics* (1938), le rôle de l'État dans une démocratie consiste à créer les conditions de base qui permettent aux citoyens, pris individuellement, de chercher les valeurs éthiques qui à leurs yeux sous-tendent une vie de bien. Il dit, à la p. 801:

> [TRADUCTION] Car le bien de l'État n'est rien sans le bien des citoyens qui le composent. Il est sans doute vrai qu'un État dont les citoyens sont forcés de suivre le droit chemin est plus efficace que celui où les citoyens sont libres de s'en écarter. Et alors? Sacrifier la liberté dans l'intérêt de l'efficacité, c'est sacrifier ce qui donne aux êtres humains leur humanité. Sans doute est-il facile de régenter un troupeau de moutons; mais il n'y a alors aucune gloire à gouverner et, si les moutons sont nés hommes, guère de vertu chez les moutons.

Le professeur Joad souligne encore, à la p. 803, que les individus dans une société démocratique ne peuvent jamais être traités [TRADUCTION] «comme un simple moyen pour des fins qui les dépassent», car:

> [TRADUCTION] Au droit de l'individu d'être traité comme une fin, qui comporte son droit au plein développement et à la pleine expression de sa personnalité, tous les autres droits et prétentions doivent, prétend le démocrate, être subordonnés. Je ne sais comment défendre ce principe, tout comme je ne saurais concevoir une défense des principes démocratiques et de la liberté.

Le professeur Joad souligne que l'essence d'une démocratie est sa reconnaissance du fait que l'État est fait pour l'homme et non l'homme pour l'État (à la p. 805). Il rejette fermement la notion que la

provides a basis for subordinating the individual to the state. He says at pp. 805-6:

Human beings, it is said, are important only in so far as they fit into a biological scheme or assist in the furtherance of the evolutionary process. Thus each generation of women must accept as its sole function the production of children who will constitute the next generation who, in their turn, will devote their lives and sacrifice their inclinations to the task of producing a further generation, and so on *ad infinitum*. This is the doctrine of eternal sacrifice — "jam yesterday, jam tomorrow, but never jam today". For, it may be asked, to what end should generations be produced, unless the individuals who compose them are valued in and for themselves, are, in fact, ends in themselves? There is no escape from the doctrine of the perpetual recurrence of generations who have value only in so far as they produce more generations, the perpetual subordination of citizens who have value only in so far as they promote the interests of the State to which they are subordinated, except in the individualist doctrine, which is also the Christian doctrine, that the individual is an end in himself.

It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning. Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their "essential humanity". Can this comport with fundamental justice? Was Blackmun J. not correct when he said in *Thornburgh, supra*, at p. 2185:

A woman's right to make that choice freely is fundamental. Any other result . . . would protect inadequately

science fournit un fondement pour subordonner l'individu à l'État. Il dit, aux pp. 805 et 806:

[TRADUCTION] Les êtres humains, dit-on, ne sont importants que dans la mesure où ils s'insèrent dans une structure biologique ou contribuent au processus évolutif. Ainsi chaque génération de femmes doit accepter comme unique fonction de produire les enfants qui formeront la génération suivante et qui, à leur tour, consacreront leur vie et sacrifieront leurs inclinations à la tâche de produire une autre génération, et ainsi de suite, *ad infinitum*. C'est là la doctrine de l'éternel sacrifice. «Confiture demain et confiture hier, mais jamais confiture aujourd'hui». Car, pourrait-on demander, pour quelle fin ces générations sont-elles produites, à moins que les individus qui les composent ne soient valorisés en eux-mêmes et pour eux-mêmes, et deviennent, en fait, des fins en eux-mêmes? On ne peut échapper à la doctrine du cycle perpétuel des générations n'ayant de valeur que dans la mesure où elles produisent d'autres générations, à la subordination perpétuelle des citoyens, qui n'auraient de valeur que dans la mesure où ils favorisent les intérêts de l'État auquel ils sont subordonnés, si ce n'est dans la doctrine individualiste, qui est aussi la doctrine chrétienne, que l'individu est une fin en lui-même.

Il me semble donc que, dans une société libre et démocratique, la "liberté de conscience et de religion" devrait être interprétée largement et s'étendre aux croyances dictées par la conscience, qu'elles soient fondées sur la religion ou sur une morale laïque. D'ailleurs, sur le plan de l'interprétation législative, les termes "conscience" et "religion" ne devraient pas être considérés comme tautologiques quand ils peuvent avoir un sens distinct, quoique relié. Par conséquent, lorsque l'État prend parti sur la question de l'avortement, comme il le fait dans la loi contestée en incriminant l'exercice par la femme enceinte d'une de ses options, non seulement il adopte mais aussi il impose, sous peine d'une autre perte de liberté par emprisonnement, une opinion dictée par la conscience des uns aux dépens d'une autre. C'est nier la liberté de conscience à certains, les traiter comme un moyen pour une fin, les priver, selon le mot du professeur MacCormick, de "l'essence de leur humanité". Est-ce compatible avec la justice fondamentale? Le juge Blackmun n'a-t-il pas raison quand il dit dans l'arrêt *Thornburgh*, précité, à la p. 2185:

[TRADUCTION] Le droit de la femme de faire ce choix librement est fondamental. Toute autre conclusion [. . .]

a central part of the sphere of liberty that our law guarantees equally to all.

Legislation which violates freedom of conscience in this manner cannot, in my view, be in accordance with the principles of fundamental justice within the meaning of s. 7.

(b) *Section 1 of the Charter*

The majority of this Court held in *Re B.C. Motor Vehicle Act*, *supra*, that a deprivation of the s. 7 right in violation of the principles of fundamental justice in the substantive sense could nevertheless constitute a reasonable limit under s. 1 and be justified in a free and democratic society. It is necessary therefore to consider whether s. 251 of the *Criminal Code* can be saved under s. 1. The section provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section received judicial scrutiny by this Court in *R. v. Oakes*, *supra*. Dickson C.J., speaking for the majority, set out two criteria which must be met if the limit is to be found reasonable: (1) the objective which the legislation is designed to achieve must relate to concerns which are pressing and substantial; and (2) the means chosen must be proportional to the objective sought to be achieved. The Chief Justice identified three important components of proportionality at p. 139:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

protégerait inadéquatement un aspect central de cette sphère de liberté que notre droit garantit également à tous.

Une loi qui viole la liberté de conscience de cette manière ne saurait, à mon avis, être conforme aux principes de justice fondamentale au sens de l'art. 7.

b) *L'article premier de la Charte*

Cette Cour, à la majorité, a jugé dans le *Renvoi: Motor Vehicle Act de la C.-B.*, précité, qu'une atteinte au droit garanti par l'art. 7, en violation des principes de justice fondamentale sur le plan du fond, pouvait néanmoins constituer une limite raisonnable au sens de l'article premier et être justifiée dans une société libre et démocratique. Il est donc nécessaire de rechercher si l'art. 251 du *Code criminel* peut être sauvegardé en vertu de l'article premier. Cet article porte:

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

La Cour a étudié cet article dans son arrêt *R. c. Oakes*, précité. Le juge en chef Dickson, au nom de la majorité, y énonce deux critères qui doivent être respectés pour que la limite soit jugée raisonnable: 1) l'objectif pour lequel la loi a été conçue doit être lié à des préoccupations urgentes et réelles; 2) les moyens choisis doivent être proportionnels à l'objectif recherché. Le Juge en chef discerne trois composantes importantes de la proportionnalité, à la p. 139:

> Premièrement, les mesures adoptées doivent être soigneusement conçues pour atteindre l'objectif en question. Elles ne doivent être ni arbitraires, ni inéquitables, ni fondées sur des considérations irrationnelles. Bref, elles doivent avoir un lien rationnel avec l'objectif en question. Deuxièmement, même à supposer qu'il y ait un tel lien rationnel, le moyen choisi doit être de nature à porter «le moins possible» atteinte au droit ou à la liberté en question: *R. c. Big M Drug Mart Ltd.* précité, à la p. 352. Troisièmement, il doit y avoir proportionnalité entre les effets des mesures restreignant un droit ou une liberté garantis par la *Charte* et l'objectif reconnu comme «suffisamment important».

Does section 251 meet this test?

In my view, the primary objective of the impugned legislation must be seen as the protection of the foetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman's s. 7 right is the protection of the foetus. I think this is a perfectly valid legislative objective.

Miss Wein submitted on behalf of the Crown that the Court of Appeal was correct in concluding at p. 378 that "the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate". I agree. I think s. 1 of the *Charter* authorizes reasonable limits to be put upon the woman's right having regard to the fact of the developing foetus within her body. The question is: at what point in the pregnancy does the protection of the foetus become such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the foetus to term? At what point does the state's interest in the protection of the foetus become "compelling" and justify state intervention in what is otherwise a matter of purely personal and private concern?

In *Roe v. Wade*, *supra*, the United States Supreme Court held that the state's interest became compelling when the foetus became viable, i.e., when it could exist outside the body of the mother. As Miss Wein pointed out, no particular justification was advanced by the Court for the selection of viability as the relevant criterion. The Court expressly avoided the question as to when human life begins. Blackmun J. stated at p. 159:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

L'article 251 répond-il à ce critère?

À mon avis, il faut voir dans l'objectif premier de la loi contestée la protection du fœtus. Elle a sans doute d'autres objectifs secondaires, telle la protection de la vie et de la santé de la femme enceinte, mais je crois que l'objectif principal invoqué pour justifier la restriction du droit de la femme enceinte garanti par l'art. 7 est la protection du fœtus. J'estime que c'est là un objectif législatif parfaitement valide.

Me Wein a soutenu au nom du ministère public que la Cour d'appel pouvait, à bon droit, conclure que [TRADUCTION] «la situation du droit de la femme à être maîtresse de sa propre personne se complique lorsqu'elle devient enceinte et qu'un certain contrôle de la loi peut se révéler approprié» (à la p. 378). J'en conviens. Je pense que l'article premier de la *Charte* permet de fixer des limites raisonnables au droit de la femme compte tenu du fœtus qui se développe dans son corps. Il faut donc se demander à quel stade de la grossesse, la protection du fœtus devient-elle urgente et revêt-elle une importance réelle telle qu'elle prévaut sur le droit fondamental de la femme de décider de le mener ou non à terme? À quel stade l'intérêt qu'a l'État à protéger le fœtus devient-il «supérieur» et justifie-t-il son intervention dans ce qui, autrement, ne serait qu'une question purement personnelle et privée?

Dans l'arrêt *Roe v. Wade*, précité, la Cour suprême des États-Unis a jugé que l'intérêt de l'État doit prévaloir lorsque le fœtus devient viable, c'est-à-dire lorsqu'il peut vivre à l'extérieur du corps de la mère. Comme Me Wein l'a fait observer, la Cour n'a proposé aucune justification particulière pour le choix du critère de la viabilité. La Cour a expressément évité la question du moment où la vie humaine commence. Le juge Blackmun dit, à la p. 159:

> [TRADUCTION] Nous n'avons pas à résoudre la difficile question du moment où commence la vie. Lorsque les spécialistes de ces disciplines respectives que sont la médecine, la philosophie et la théologie sont incapables d'arriver à un consensus, le pouvoir judiciaire, à ce point du développement des connaissances humaines, n'est pas en mesure de conjecturer une réponse.

He referred, therefore, to the developing foetus as "potential life" and to the state's interest as "the protection of potential life".

Il qualifie donc le fœtus en développement de [TRADUCTION] «vie potentielle» et l'intérêt de l'État comme étant [TRADUCTION] «la protection d'une vie potentielle».

Miss Wein submitted that it was likewise not necessary for the Court in this case to decide when human life begins although she acknowledged that the value to be placed on "potential life" was significant in assessing the importance of the legislative objective sought to be achieved by s. 251. It would be my view, and I think it is consistent with the position taken by the United States Supreme Court in *Roe v. Wade*, that the value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place in between these two extremes and, in my opinion, this progression has a direct bearing on the value of the foetus as potential life. It is a fact of human experience that a miscarriage or spontaneous abortion of the foetus at six months is attended by far greater sorrow and sense of loss than a miscarriage or spontaneous abortion at six days or even six weeks. This is not, of course, to deny that the foetus is potential life from the moment of conception. Indeed, I agree with the observation of O'Connor J., dissenting in *City of Akron v. Akron Center for Reproductive Health, Inc., supra*, at p. 461, (referred to by my colleague Beetz J. in his reasons, at p. 113) that the foetus is potential life from the moment of conception. It is simply to say that in balancing the state's interest in the protection of the foetus as potential life under s. 1 of the *Charter* against the right of the pregnant woman under s. 7 greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier. The foetus should accordingly, for purposes of s. 1, be viewed in differential and developmental terms: see L. W. Sumner, Professor of Philosophy at the University of Toronto, *Abortion and Moral Theory* (1981), pp. 125-28.

Me Wein a fait valoir qu'il n'était de même pas nécessaire qu'en l'espèce la Cour décide du moment où commence la vie quoiqu'elle ait reconnu que la valeur attribuée à une "vie potentielle" devait être prise en compte dans l'évaluation de l'importance de l'objectif législatif recherché par l'art. 251. Je serais d'avis, et je pense que ce point de vue est compatible avec la position prise par la Cour suprême des États-Unis dans l'arrêt *Roe v. Wade*, que la valeur attribuée au fœtus en tant que vie potentielle est directement reliée au stade de son développement au cours de la grossesse. Le fœtus au stade embryonnaire provient d'un ovule nouvellement fécondé; le fœtus totalement développé devient en définitive un nouveau-né. Le développement progresse entre ces deux extrêmes et, à mon avis, cette progression influe directement sur la valeur à attribuer au fœtus en tant que vie potentielle. Il ressort en fait de l'expérience humaine qu'une fausse-couche ou un avortement spontané du fœtus à six mois cause un chagrin et une épreuve beaucoup plus grands qu'une fausse-couche ou un avortement spontané à six jours ou même à six semaines. Ceci ne revient évidemment pas à nier que le fœtus soit une vie potentielle dès le moment de la conception. De fait, je suis d'accord avec le commentaire du juge O'Connor, dissidente, dans l'affaire *City of Akron v. Akron Center for Reproductive Health, Inc.*, précitée, à la p. 461 (citée par le juge Beetz dans ses motifs, à la p. 113) que le fœtus est une vie potentielle dès le moment de la conception. Cela revient simplement à dire qu'en soupesant l'intérêt qu'a l'État à protéger le fœtus en tant que vie potentielle en vertu de l'article premier de la *Charte* et le droit de la femme enceinte en vertu de l'art. 7, un plus grand poids devrait être donné à l'intérêt de l'État dans les derniers stades de la grossesse que dans les premiers. On devrait donc considérer le fœtus, aux fins de l'article premier, en termes de développement et de phases: voir L. W. Sumner, professeur de philosophie à l'Université de Toronto, *Abortion and Moral Theory* (1981), aux pp. 125 à 128.

As Professor Sumner points out, both traditional approaches to abortion, the so-called "liberal" and "conservative" approaches, fail to take account of the essentially developmental nature of the gestation process. A developmental view of the foetus, on the other hand, supports a permissive approach to abortion in the early stages of pregnancy and a restrictive approach in the later stages. In the early stages the woman's autonomy would be absolute; her decision, reached in consultation with her physician, not to carry the foetus to term would be conclusive. The state would have no business inquiring into her reasons. Her reasons for having an abortion would, however, be the proper subject of inquiry at the later stages of her pregnancy when the state's compelling interest in the protection of the foetus would justify it in prescribing conditions. The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester. Indeed, according to Professor Sumner (p. 159), a differential abortion policy with a time limit in the second trimester is already in operation in the United States, Great Britain, France, Italy, Sweden, the Soviet Union, China, India, Japan and most of the countries of Eastern Europe although the time limits vary in these countries from the beginning to the end of the second trimester (cf. Stephen L. Isaacs, "Reproductive Rights 1983: An International Survey" (1982-83), 14 *Columbia Human Rights Law Rev.* 311, with respect to France and Italy).

Section 251 of the *Criminal Code* takes the decision away from the woman at all stages of her pregnancy. It is a complete denial of the woman's constitutionally protected right under s. 7, not merely a limitation on it. It cannot, in my opinion, meet the proportionality test in *Oakes*. It is not sufficiently tailored to the legislative objective and does not impair the woman's right "as little as possible". It cannot be saved under s. 1. Accordingly, even if the section were to be amended to

Comme le fait observer le professeur Sumner, les deux approches traditionnelles de l'avortement, les approches dites "libérale" et "conservatrice", ne tiennent pas compte de la nature essentiellement évolutive de la grossesse. Une conception du fœtus fondée sur le stade de développement, d'autre part, appuie une approche permissive de l'avortement dans les premiers stades de la grossesse et une approche restrictive dans les derniers stades. Dans les premiers stades, l'autonomie de la femme serait absolue; sa décision, prise en consultation avec son médecin, de ne pas mener le fœtus à terme serait décisive. L'État n'aurait pas à connaître ses raisons. Ses raisons d'avoir un avortement pourraient toutefois, à bon droit, faire l'objet d'une investigation dans les derniers stades de sa grossesse, alors que l'intérêt supérieur qu'a l'État de protéger le fœtus justifierait l'imposition de conditions. Quant au point précis du développement du fœtus où l'intérêt qu'a l'État de le protéger devient "supérieur", je laisse le soin de le fixer au jugement éclairé du législateur, qui est en mesure de recevoir des avis à ce sujet de l'ensemble des disciplines pertinentes. Il me semble cependant que ce point pourrait se situer quelque part au cours du second trimestre. D'ailleurs, d'après le professeur Sumner (à la p. 159), une politique d'avortement en fonction de phases, avec une limite placée au cours du second trimestre, est déjà en vigueur aux États-Unis, en Grande-Bretagne, en France, en Italie, en Suède, en Union soviétique, en Chine, en Inde, au Japon et dans la plupart des pays de l'Europe de l'Est, le délai variant, selon les pays, du début à la fin du second trimestre (cf. Stephen L. Isaacs, "Reproductive Rights 1983: An International Survey" (1982-83), 14 *Columbia Human Rights Law Rev.* 311, en ce qui concerne la France et l'Italie).

L'article 251 du *Code criminel* enlève cette décision à la femme à tous les stades de la grossesse. C'est une dénégation complète du droit constitutionnellement garanti à la femme par l'art. 7, non une simple limitation de celui-ci. L'article ne saurait, à mon avis, répondre au critère de proportionnalité de l'arrêt *Oakes*. Il n'est pas suffisamment adapté à l'objectif législatif et ne porte pas atteinte au droit de la femme «le moins possible». Il ne saurait être sauvegardé en vertu de l'article pre-

remedy the purely procedural defects in the legislative scheme referred to by the Chief Justice and Beetz J. it would, in my opinion, still not be constitutionally valid.

One final word. I wish to emphasize that in these reasons I have dealt with the existence of the developing foetus merely as a factor to be considered in assessing the importance of the legislative objective under s. 1 of the *Charter*. I have not dealt with the entirely separate question whether a foetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section. The Crown did not argue it and it is not necessary to decide it in order to dispose of the issues on this appeal.

3. Disposition

I would allow the appeal. I would strike down s. 251 of the *Criminal Code* as having no force or effect under s. 52(1) of the *Constitution Act, 1982*. I would answer the first constitutional question in the affirmative as regards s. 7 of the *Charter* and the second constitutional question in the negative. I would answer questions 3, 4 and 5 in the negative and question 6 in the manner proposed by Beetz J. It is not necessary to answer question 7.

I endorse the Chief Justice's critical comments on Mr. Manning's concluding remarks to the jury.

Appeal allowed, MCINTYRE *and* LA FOREST JJ. *dissenting. The first constitutional question should be answered in the affirmative as regards s. 7 only and the second in the negative as regards s. 7 only. The third, fourth and fifth constitutional questions should be answered in the negative. The sixth constitutional question should be answered in the negative with respect to s. 605 of the Criminal Code and should not be answered as regards s. 610(3). The seventh constitutional question should not be answered.*

mier. Par conséquent, même si l'article devait être modifié pour remédier aux vices de procédure de la structure législative dont ont parlé le Juge en chef et le juge Beetz, il demeurerait, à mon avis, inconstitutionnel.

Un dernier mot. Je désire souligner que dans ces motifs je n'ai traité du fœtus en développement que dans la mesure où il s'agissait d'un facteur dont il fallait tenir compte pour évaluer l'importance de l'objectif législatif, au regard de l'article premier de la *Charte*. Je n'ai pas traité de la question entièrement distincte de savoir si le terme «chacun», à l'art. 7, vise aussi le fœtus, lui conférant un droit indépendant à la vie en vertu de l'article. Le ministère public n'en a pas débattu et il n'est pas nécessaire de la trancher pour statuer sur les questions en litige en l'espèce.

3. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler l'art. 251 du *Code criminel* parce qu'inopérant en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*. Je suis également d'avis de répondre à la première question constitutionnelle par l'affirmative en ce qui concerne l'art. 7 de la *Charte*, et à la seconde question constitutionnelle par la négative. Je réponds aux troisième, quatrième et cinquième questions par la négative et à la sixième question de la manière proposée par le juge Beetz. Il n'est pas nécessaire de répondre à la septième question.

J'adopte les critiques du Juge en chef à l'égard des observations finales adressées par Me Manning au jury.

Pourvoi accueilli, les juges MCINTYRE *et* LA FOREST *étant dissidents. La première question constitutionnelle reçoit une réponse affirmative en ce qui concerne l'art. 7 uniquement et la deuxième question une réponse négative en ce qui concerne l'art. 7 uniquement. Les troisième, quatrième et cinquième questions reçoivent une réponse négative. La sixième question reçoit une réponse négative en ce qui concerne l'art. 605 du Code criminel et aucune réponse en ce qui concerne le par. 610(3). Il n'est pas nécessaire de répondre à la septième question.*

Solicitor for the appellants: Morris Manning, Toronto.

Solicitor for the respondent: Attorney General for Ontario, Toronto.

Solicitor for the intervener: Frank Iacobucci, Ottawa.

Procureur des appelants: Morris Manning, Toronto.

Procureur de l'intimé: Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant: Frank Iacobucci, Ottawa.

SUPREME COURT OF CANADA

CITATION: References re *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11

APPEALS HEARD: September 22, 23, 2020
JUDGMENT RENDERED: March 25, 2021
DOCKETS: 38663, 38781, 39116

BETWEEN:

Attorney General of Saskatchewan
Appellant

and

Attorney General of Canada
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Alberta, Progress Alberta Communications Limited, Canadian Labour Congress, Saskatchewan Power Corporation, SaskEnergy Incorporated, Oceans North Conservation Society, Assembly of First Nations, Canadian Taxpayers Federation, Canada's Ecofiscal Commission, Canadian Environmental Law Association, Environmental Defence Canada Inc., Sisters of Providence of St. Vincent de Paul, Amnesty International Canada, National Association of Women and the Law, Friends of the Earth, International Emissions Trading Association, David Suzuki Foundation, Athabasca Chipewyan First Nation, Smart Prosperity Institute, Canadian Public Health Association, Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV, Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New Brunswick

Anti-Shale Gas Alliance, Youth of the Earth, Centre québécois du droit de l'environnement, Équiterre, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child, Youth Climate Lab, Assembly of Manitoba Chiefs, City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland, City of Vancouver and Thunderchild First Nation
Interveners

AND BETWEEN:

Attorney General of Ontario
Appellant

and

Attorney General of Canada
Respondent

- and -

Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Progress Alberta Communications Limited, Anishinabek Nation, United Chiefs and Councils of Mnidoo Mnising, Canadian Labour Congress, Saskatchewan Power Corporation, SaskEnergy Incorporated, Oceans North Conservation Society, Assembly of First Nations, Canadian Taxpayers Federation, Canada's Ecofiscal Commission, Canadian Environmental Law Association, Environmental Defence Canada Inc., Sisters of Providence of St. Vincent de Paul, Amnesty International Canada, National Association of Women and the Law, Friends of the Earth, International Emissions Trading Association, David Suzuki Foundation, Athabasca Chipewyan First Nation, Smart Prosperity Institute, Canadian Public Health Association, Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV, Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New Brunswick Anti-Shale Gas Alliance, Youth of the Earth, Centre québécois du droit de l'environnement, Équiterre, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child, Youth Climate Lab, Assembly of Manitoba Chiefs, City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland, City of Vancouver and Thunderchild First Nation
Interveners

AND BETWEEN:

Attorney General of British Columbia
Appellant

and

Attorney General of Alberta
Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of Saskatchewan, Progress Alberta Communications Limited, Saskatchewan Power Corporation, SaskEnergy Incorporated, Oceans North Conservation Society, Assembly of First Nations, Canadian Taxpayers Federation, Canada's Ecofiscal Commission, Canadian Environmental Law Association, Environmental Defence Canada Inc., Sisters of Providence of St. Vincent de Paul, Amnesty International Canada, International Emissions Trading Association, David Suzuki Foundation, Athabasca Chipewyan First Nation, Smart Prosperity Institute, Canadian Public Health Association, Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV, Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New Brunswick Anti-Shale Gas Alliance, Youth of the Earth, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child, Youth Climate Lab and Thunderchild First Nation
Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 221)	Wagner C.J. (Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. concurring)
REASONS DISSENTING IN PART: (paras. 222 to 295)	Côté J.

DISSENTING REASONS: Brown J.
(paras. 296 to 456)

DISSENTING REASONS: Rowe J.
(paras. 457 to 616)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

RE: *GREENHOUSE GAS POLLUTION PRICING ACT*

IN THE MATTER OF References to the Court of Appeal for Saskatchewan, the Court of Appeal for Ontario and the Court of Appeal of Alberta respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186

Attorney General of Saskatchewan *Appellant*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Alberta,
Progress Alberta Communications Limited,
Canadian Labour Congress,
Saskatchewan Power Corporation,
SaskEnergy Incorporated,
Oceans North Conservation Society,
Assembly of First Nations,
Canadian Taxpayers Federation,
Canada's Ecofiscal Commission,
Canadian Environmental Law Association,
Environmental Defence Canada Inc.,
Sisters of Providence of St. Vincent de Paul,
Amnesty International Canada,
National Association of Women and the Law,
Friends of the Earth,
International Emissions Trading Association,

David Suzuki Foundation,
Athabasca Chipewyan First Nation,
Smart Prosperity Institute,
Canadian Public Health Association,
Climate Justice Saskatoon,
National Farmers Union,
Saskatchewan Coalition for Sustainable Development,
Saskatchewan Council for International Cooperation,
Saskatchewan Environmental Society,
SaskEV,
Council of Canadians: Prairie and Northwest Territories Region,
Council of Canadians: Regina Chapter,
Council of Canadians: Saskatoon Chapter,
New Brunswick Anti-Shale Gas Alliance,
Youth of the Earth,
Centre québécois du droit de l'environnement,
Équiterre,
Generation Squeeze,
Public Health Association of British Columbia,
Saskatchewan Public Health Association,
Canadian Association of Physicians for the Environment,
Canadian Coalition for the Rights of the Child,
Youth Climate Lab,
Assembly of Manitoba Chiefs,
City of Richmond,
City of Victoria,
City of Nelson,
District of Squamish,
City of Rossland,
City of Vancouver and
Thunderchild First Nation *Interveners*

- and -

Attorney General of Ontario *Appellant*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Quebec,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Progress Alberta Communications Limited,
Anishinabek Nation,
United Chiefs and Councils of Mnidoo Mnising,
Canadian Labour Congress,
Saskatchewan Power Corporation,
SaskEnergy Incorporated,
Oceans North Conservation Society,
Assembly of First Nations,
Canadian Taxpayers Federation,
Canada's Ecofiscal Commission,
Canadian Environmental Law Association,
Environmental Defence Canada Inc.,
Sisters of Providence of St. Vincent de Paul,
Amnesty International Canada,
National Association of Women and the Law,
Friends of the Earth,
International Emissions Trading Association,
David Suzuki Foundation,
Athabasca Chipewyan First Nation,
Smart Prosperity Institute,
Canadian Public Health Association,
Climate Justice Saskatoon,
National Farmers Union,
Saskatchewan Coalition for Sustainable Development,
Saskatchewan Council for International Cooperation,
Saskatchewan Environmental Society,
SaskEV,
Council of Canadians: Prairie and Northwest Territories Region,
Council of Canadians: Regina Chapter,
Council of Canadians: Saskatoon Chapter,
New Brunswick Anti-Shale Gas Alliance,
Youth of the Earth,
Centre québécois du droit de l'environnement,
Équiterre,
Generation Squeeze,
Public Health Association of British Columbia,

Saskatchewan Public Health Association,
Canadian Association of Physicians for the Environment,
Canadian Coalition for the Rights of the Child,
Youth Climate Lab,
Assembly of Manitoba Chiefs,
City of Richmond,
City of Victoria,
City of Nelson,
District of Squamish,
City of Rossland,
City of Vancouver and
Thunderchild First Nation *Interveners*

- and -

Attorney General of British Columbia *Appellant*

v.

Attorney General of Alberta *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of Saskatchewan,
Progress Alberta Communications Limited,
Saskatchewan Power Corporation,
SaskEnergy Incorporated,
Oceans North Conservation Society,
Assembly of First Nations,
Canadian Taxpayers Federation,
Canada's Ecofiscal Commission,

Canadian Environmental Law Association,
Environmental Defence Canada Inc.,
Sisters of Providence of St. Vincent de Paul,
Amnesty International Canada,
International Emissions Trading Association,
David Suzuki Foundation,
Athabasca Chipewyan First Nation,
Smart Prosperity Institute,
Canadian Public Health Association,
Climate Justice Saskatoon,
National Farmers Union,
Saskatchewan Coalition for Sustainable Development,
Saskatchewan Council for International Cooperation,
Saskatchewan Environmental Society,
SaskEV,
Council of Canadians: Prairie and Northwest Territories Region,
Council of Canadians: Regina Chapter,
Council of Canadians: Saskatoon Chapter,
New Brunswick Anti-Shale Gas Alliance,
Youth of the Earth,
Generation Squeeze,
Public Health Association of British Columbia,
Saskatchewan Public Health Association,
Canadian Association of Physicians for the Environment,
Canadian Coalition for the Rights of the Child,
Youth Climate Lab and
Thunderchild First Nation *Interveners*

Indexed as: References re *Greenhouse Gas Pollution Pricing Act*

2021 SCC 11

File Nos.: 38663, 38781, 39116.

2020: September 22, 23; 2021: March 25.

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

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Constitutional law — Division of powers — Greenhouse gas emissions — Federal legislation setting minimum national standards of greenhouse gas pricing — Whether greenhouse gas pricing is matter of national concern falling within Parliament's power to legislate in respect of peace, order and good government of Canada — Constitution Act, 1867, s. 91 "preamble" — Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12, s. 186.

In 2018, Parliament enacted the *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*"). The *GGPPA* comprises four parts and four schedules. Part 1 establishes a fuel charge that applies to producers, distributors and importers of various types of carbon-based fuel. Part 2 sets out a pricing mechanism for industrial greenhouse gas ("GHG") emissions by large emissions-intensive industrial facilities. Part 3 authorizes the Governor in Council to make regulations providing for the application of provincial law concerning GHG emissions to federal works and undertakings, federal land and Indigenous land located in that province, as well as to internal waters located in or contiguous with the province. Part 4 requires the Minister of the Environment to prepare an annual report on the administration of the *GGPPA* and have it tabled in Parliament.

Saskatchewan, Ontario and Alberta challenged the constitutionality of the first two parts and the four schedules of the *GGPPA* by references to their respective

courts of appeal, asking whether the *GGPPA* is unconstitutional in whole or in part. In split decisions, the courts of appeal for Saskatchewan and Ontario held that the *GGPPA* is constitutional, while the Court of Appeal of Alberta held that it is unconstitutional. The Attorney General of British Columbia, who had intervened in the Court of Appeal of Alberta, the Attorney General of Saskatchewan and the Attorney General of Ontario now appeal as of right to the Court.

Held (Côté J. dissenting in part and Brown and Rowe JJ. dissenting): The appeals by the Attorney General of Saskatchewan and the Attorney General of Ontario should be dismissed, and the appeal by the Attorney General of British Columbia should be allowed. The reference questions are answered in the negative.

Per **Wagner** C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ.: The *GGPPA* is constitutional. It sets minimum national standards of GHG price stringency to reduce GHG emissions. Parliament has jurisdiction to enact this law as a matter of national concern under the peace, order, and good government ("POGG") clause of s. 91 of the *Constitution Act, 1867*.

Federalism is a foundational principle of the Canadian Constitution. Its objectives are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local and regional level and foster cooperation between Parliament and the provincial legislatures for the common good. Sections 91 and 92 of the Constitution give expression to the principle of federalism and divide legislative powers between Parliament and the provincial legislatures. Under the

division of powers, broad powers were conferred on the provinces to ensure diversity, while at the same time reserving to the federal government powers better exercised in relation to the country as a whole to provide for Canada's unity. Federalism recognizes that within their spheres of jurisdiction, provinces have autonomy to develop their societies. Federal power cannot be used in a manner that effectively eviscerates provincial power.

Courts, as impartial arbiters, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism. Although early Canadian constitutional decisions by the Judicial Committee of the Privy Council applied a rigid division of federal-provincial powers as watertight compartments, the Court has favoured a flexible view of federalism, best described as a modern cooperative federalism, that accommodates and encourages intergovernmental cooperative efforts. However, the Court has also always maintained that flexibility and cooperation, while important, cannot override or modify federalism and the constitutional division of powers.

The review of legislation on federalism grounds consists of the well-established two-stage analytical approach. At the first stage, a court must consider the purpose and effects of the challenged statute or provision with a view to characterizing the subject matter or "pith and substance". A court must then classify the subject matter with reference to federal and provincial heads of power under the Constitution in order to determine whether it is *intra vires* Parliament and therefore valid.

At the first stage of the division of powers analysis, a court must consider the purpose and effects of the challenged statute or provision in order to identify its "pith and substance" or its main thrust or dominant or most important characteristic. In determining the purpose of the challenged statute or provision, a court can consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary committees. In considering the effects of the challenged legislation, a court can consider both the legal effects, those that flow directly from the provisions of the statute itself, and the practical effects, the side effects that flow from the application of the statute. Where a court is asked to adjudicate the constitutionality of legislation that has been in force for only a short time, any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation. The characterization process is not technical or formalistic. A court can look at the background and circumstances of a statute's enactment as well as at the words used in it.

Three points with respect to the identification of the pith and substance are important to clarify. First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction. However, precision should not be confused with narrowness. A court must focus on the law itself and what it is really

about. The pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow. Second, it is permissible in some circumstances for a court to include the legislative choice of means in the definition of a statute's pith and substance, as long as it does not lose sight of the fact that the goal of the analysis is to identify the true subject matter of the challenged statute or provision. In some cases, the choice of means may be so central to the legislative objective that the main thrust of a statute or provision, properly understood, is to achieve a result in a particular way, which would justify including the means in identifying the pith and substance. Third, the characterization and classification stages of the division of powers analysis are and must be kept distinct. The pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence.

At the second stage of the division of power analysis, a court must classify the matter by reference to the heads of power set out in the Constitution. Matters and classes of subjects are distinct. Law-making powers are exercisable in relation to matters, which in turn generally come within broader classes of subjects. Section 91 does not provide in the context of the POGG power that Parliament can make laws in relation to classes of subjects; instead, it states that Parliament can make laws for the peace, order, and good government of Canada in relation to "Matters". National concern is a well-established but rarely applied doctrine of Canadian constitutional law derived from the introductory clause of s. 91 of the Constitution, which empowers Parliament to make laws for the peace, order, and good government of Canada, in

relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. A matter that falls under the POGG power necessarily does not come within the classes of subjects enumerated in ss. 91 and 92.

Courts must approach a finding that the federal government has jurisdiction on the basis of the national concern doctrine with great caution. The effect of finding that a matter is one of national concern is permanent and confers exclusive jurisdiction over that matter on Parliament. However, the scope of the federal power is defined by the nature of the national concern itself and only aspects with a sufficient connection to the underlying inherent national concern will fall within the scope of the federal power.

A closely related question concerns the applicability of the double aspect doctrine to a matter of national concern. The double aspect doctrine recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power. The doctrine can apply in cases in which the federal government has jurisdiction on the basis of the national concern doctrine. Such an approach fosters coherence in the law, because the double aspect doctrine can apply to every enumerated federal and provincial head of power. It is also consistent with the modern approach to federalism, which favours flexibility and a degree of overlapping jurisdiction. However, the fact that the double aspect doctrine can apply does not mean that it will apply in a given case. It may apply if a fact situation can be regulated from different federal and provincial perspectives and each level of

government has a compelling interest in enacting legal rules in relation to that situation. It should be applied cautiously so as to avoid eroding the importance attached to provincial autonomy.

The double aspect doctrine takes on particular significance where Canada asserts jurisdiction over a matter that involves a minimum national standard imposed by legislation that operates as a backstop. The recognition of a matter of national concern such as this will inevitably result in a double aspect situation. This is in fact the very premise of a federal scheme that imposes minimum national standards: Canada and the provinces are both free to legislate in relation to the same fact situation but the federal law is paramount. In such a case, even if the national concern test would otherwise be met, a cautious approach to the double aspect doctrine should act as an additional check. The court must be satisfied that Canada in fact has a compelling interest in enacting legal rules over the federal aspect of the activity at issue and that the multiplicity of aspects is real and not merely nominal.

Turning to the national concern test, there are two points worth noting about the framework as a whole. First, the recognition of a matter of national concern must be based on evidence. An onus rests on Canada throughout the national concern analysis to adduce evidence in support of its assertion of jurisdiction. Second, there is no requirement that a matter be historically new in order to be found to be one of national concern. Many new developments may be predominantly local and provincial in character and fall under provincial heads of power. The term “new”, as used in the

jurisprudence, refers to matters that could satisfy the national concern test and includes both “new” matters that did not exist in 1867 and matters that are “new” in the sense that the understanding of those subject matters has, in some way, shifted so as to bring out their inherently national character. Thus, the critical element of the analysis is the requirement that matters of national concern be inherently national in character, not that they be historically new.

Finding that a matter is one of national concern involves a three-step analysis. First, as a threshold question, Canada must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. Second, the matter must have a singleness, distinctiveness and indivisibility. Third, Canada must show that the proposed matter has a scale of impact on provincial jurisdiction that is reconcilable with the division of powers. The purpose of the national concern analysis is to identify matters of inherent national concern — matters which, by their nature, transcend the provinces.

The analysis begins by asking, as a threshold question, whether the matter is of sufficient concern to Canada as a whole to warrant consideration under the national concern doctrine. This invites a common-sense inquiry into the national importance of the proposed matter. This approach does not open the door to the recognition of federal jurisdiction simply on the basis that a legislative field is important; it operates to limit the application of the national concern doctrine and provides essential context for the analysis that follows.

The second step of the analysis requires that a matter have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. Two principles underpin this requirement: first, to prevent federal overreach, jurisdiction should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter.

Under the first principle of the singleness, distinctiveness and indivisibility analysis, the court should inquire into whether the matter is predominantly extraprovincial and international in its nature or its effects, into the content of any international agreements in relation to the matter, and into whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces. It is clearly not enough for a matter to be quantitatively different from matters of provincial concern — the mere growth or extent of a problem across Canada is insufficient to justify federal jurisdiction. International agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern. However, the existence of treaty obligations is not determinative of federal jurisdiction as there is no freestanding federal treaty implementation power and Parliament's jurisdiction to implement treaties signed by the federal government depends on the ordinary division of powers. Furthermore, to be qualitatively different from matters of provincial concern, the matter must not be an aggregate of provincial matters. The federal legislative role must be distinct from and not duplicative of that of the

provinces. Federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern.

The second principle underpinning the singleness, distinctiveness, and indivisibility analysis is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. Provincial inability functions as a strong constraint on federal power and should be seen as a necessary but not sufficient requirement for the purposes of the national concern doctrine. In order for provincial inability to be established both of these factors are required: (1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (2) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. And there is a third factor that is required in the context of the national concern doctrine in order to establish provincial inability: a province's failure to deal with the matter must have grave extraprovincial consequences. The requirement for grave extraprovincial consequences sets a high bar for a finding of provincial inability for the purposes of the national concern doctrine and can be satisfied by actual harm or by a serious risk of harm being sustained in the future. It may include serious harm to human life and health or to the environment, though it is not necessarily limited to such consequences. Mere inefficiency or additional financial costs stemming from divided or overlapping jurisdiction is clearly insufficient. Evaluating extraprovincial harm helps to determine whether a national law

is not merely desirable, but essential, in the sense that the problem is beyond the power of the provinces to deal with it. This connects the provincial inability test to the overall purpose of the national concern test, which is to identify matters of inherent national concern that transcend the provinces.

At the third and final step of the national concern analysis, Canada must show that the proposed matter has a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. The purpose of the scale of impact analysis is to protect against unjustified intrusions on provincial autonomy and prevent federal overreach. At this stage of the analysis, the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former.

In this case, the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions. Both the short and long titles of the *GGPPA* confirm that its true subject matter is not just to mitigate climate change, but to do so through the pan-Canadian application of pricing mechanisms to a broad set of GHG emission sources. Likewise, it is clear from reading the preamble as a whole that the focus of the *GGPPA* is on national GHG pricing. In Parliament's eyes, the relevant mischief is the effects of the failure of some provinces

to implement GHG pricing systems or to implement sufficiently stringent pricing systems, and the consequential failure to reduce GHG emissions across Canada. To address this mischief, the *GGPPA* establishes minimum national standards of GHG pricing that apply across Canada, setting a GHG pricing floor across the country.

Similarly, it can be seen from the events leading up to the enactment of the *GGPPA* and from government policy papers that there was a focus on GHG pricing and establishing minimum national standards of GHG price stringency for GHG emissions — through a federally imposed national direct GHG pricing backstop — without displacing provincial and territorial jurisdiction over the choice and design of pricing instruments. This is supported by evidence of the legislative debates. Both elected representatives and senior public servants consistently described the purpose of the *GGPPA* in terms of imposing a Canada-wide GHG pricing system, not of regulating GHG emissions generally.

The legal effects of the *GGPPA* confirm that its focus is on national GHG pricing and confirm its essentially backstop nature. In jurisdictions where Parts 1 and 2 of the *GGPPA* apply, the primary legal effect is to create one GHG pricing scheme that prices GHG emissions in a manner that is consistent with what is done in the rest of the Canadian economy. Part 1 of the *GGPPA* directly prices the emissions of certain fuel producers, distributors and importers. Part 2 directly prices the GHG emissions of covered facilities to the extent that they exceed the applicable efficiency standards. The *GGPPA* does not require those to whom it applies to perform or refrain from

performing specified GHG emitting activities. Nor does it tell industries how they are to operate in order to reduce their GHG emissions. Instead, all it does is to require persons to pay for engaging in specified activities that result in the emission of GHGs. The *GGPPA* leaves individual consumers and businesses free to choose how they will respond, or not, to the price signals sent by the marketplace. The legal effects of the *GGPPA* are thus centrally aimed at pricing GHG emissions nationally.

Moreover, because the *GGPPA* operates as a backstop, the legal effects of Parts 1 and 2 of the statute — a federally imposed GHG pricing scheme — apply only if the Governor in Council has listed a province or territory. The *GGPPA* provides that the Governor in Council may make listing decisions for Parts 1 and 2 of the statute only for the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, taking into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions. As a result, the GHG pricing mechanism described in Parts 1 and 2 of the *GGPPA* will not come into operation at all in a province or territory that already has a sufficiently stringent GHG pricing system. Not only does this confirm the backstop nature of the *GGPPA* — that of creating minimum national standards of GHG pricing — but this feature gives legal effect to the federal government's commitment to give the provinces and territories the flexibility to design their own policies to meet emissions reductions targets, including carbon pricing, adapted to each province and territory's specific circumstances, as well as to recognize carbon pricing policies already implemented or in development by provinces and territories.

Although evidence of practical effects is not helpful in this case given the dearth of such evidence, the evidence of practical effects to date is consistent with providing flexibility and support for provincially designed GHG pricing schemes. Practically speaking, the only thing not permitted by the *GGPPA* is for provinces and territories not to implement a GHG pricing mechanism or one that is not sufficiently stringent.

Applying the threshold question, Canada has adduced evidence that clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of sufficient concern to Canada as a whole that it warrants consideration in accordance with the national concern doctrine. The history of efforts to address climate change in Canada reflects the critical role of carbon pricing strategies in policies to reduce GHG emissions. There is also a broad consensus among expert international bodies that carbon pricing is a critical measure for the reduction of GHG emissions. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it passes the threshold test and warrants consideration as a possible matter of national concern.

Minimum national standards of GHG price stringency, which are implemented by means of the backstop architecture of the *GGPPA*, relate to a federal role in carbon pricing that is qualitatively different from matters of provincial concern. GHGs are a specific and precisely identifiable type of pollutant. The harmful effects of GHGs are known, and the fuel and excess emissions charges are based on the global

warming potential of the gases. GHG emissions are also predominantly extraprovincial and international in their character and implications. This flows from their nature as a diffuse atmospheric pollutant and from their effect in causing global climate change. Moreover, the regulatory mechanism of GHG pricing is also specific and limited. GHG pricing operates in a particular way, seeking to change behaviour by internalizing the cost of climate change impacts, incorporating them into the price of fuel and the cost of industrial activity. It is a distinct form of regulation that does not amount to the regulation of GHG emissions generally or encompass regulatory mechanisms that do not involve pricing. The Governor in Council's power to make a regulation that applies the *GGPPA*'s pricing system to a province may be exercised only if it is first determined that the province's pricing mechanisms are insufficiently stringent. If each province designed its own pricing system and all the provincial systems met the federal pricing standards, the *GGPPA* would achieve its purpose without operating to directly price GHG emissions anywhere in the country. The *GGPPA* is tightly focused on this distinctly federal role and does not descend into the detailed regulation of all aspects of GHG pricing.

Provincial inability is established in this case. First, the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. While the provinces could choose to cooperatively establish a uniform carbon pricing scheme, doing so would not assure a sustained approach because the provinces and territories are constitutionally incapable of establishing a binding outcome-based minimum legal

standard — a national GHG pricing floor — that applies in all provinces and territories at all times. Second, a failure to include one province in the scheme would jeopardize its success in the rest of Canada. The withdrawal of one province from the scheme would clearly threaten its success for two reasons: emissions reductions that are limited to a few provinces would fail to address climate change if they were offset by increased emissions in other Canadian jurisdictions; and any province's failure to implement a sufficiently stringent GHG pricing mechanism could undermine the efficacy of GHG pricing everywhere in Canada because of the risk of carbon leakage. Third, a province's failure to act or refusal to cooperate would have grave consequences for extraprovincial interests. It is well established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, coastal regions and on Indigenous peoples.

Although the matter has a clear impact on provincial jurisdiction, its impact on the provinces' freedom to legislate and on areas of life that would fall under provincial heads of power is qualified and limited. First, the matter is limited to GHG pricing of GHG emissions — a narrow and specific regulatory mechanism. If a province fails to meet the minimum national standards, the *GGPPA* imposes a backstop pricing system, but only to the extent necessary to remedy the deficiency in provincial regulation to address the extraprovincial and international harm that might arise from the province's failure to act or to set sufficiently stringent standards. Second, the matter's impact on areas of life that would generally fall under provincial heads of power is also limited. The discretion of the Governor in Council is necessary in order

to ensure that some provinces do not subordinate or unduly burden the other provinces through their unilateral choice of standards. Although this restriction may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionality by vulnerable communities and regions in Canada. The impact on those interests justify the limited constitutional impact on provincial jurisdiction.

As a final matter, the fuel and excess emission charges imposed by the *GGPPA* have a sufficient nexus with the regulatory scheme to be considered constitutionally valid regulatory charges. To be a regulatory charge, as opposed to a tax, a governmental levy with the characteristics of a tax must be connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme; if such a scheme is found to exist, the second step is to establish a relationship between the charge and the scheme itself. Influencing behaviour is a valid purpose for a regulatory charge and regulatory charges need not reflect the cost of the scheme. The amount of a regulatory charge whose purpose is to alter behaviour is set at a level designed to proscribe, prohibit, or lend preference to a behaviour. Limiting such a charge to the recovery of costs would be incompatible with the design of a scheme of this nature. Nor must the revenues that are collected be used to further the purposes of the regulatory scheme. Rather, the required nexus with the scheme will exist where the

charges themselves have a regulatory purpose. There is ample evidence that the fuel and excess emission charges imposed by Parts 1 and 2 of the *GGPPA* have a regulatory purpose. They cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the *GGPPA*'s regulatory purpose by altering behaviour.

Per **Côté** J. (dissenting in part): There is agreement with the majority with respect to the formulation of the national concern test. There is also agreement that Parliament has the power to enact constitutionally valid legislation establishing minimum national standards of price stringency to reduce GHG emissions. However, the *GGPPA* is, in its current form, unconstitutional. It cannot be said to accord with the matter of national concern formulated by the majority because the breadth of the discretion that it confers on the Governor in Council results in no meaningful limits on the power of the executive. Minimum standards are set by the executive, not the *GGPPA*. Additionally, the provisions in the *GGPPA* that permit the Governor in Council to amend and override the *GGPPA* violate the *Constitution Act, 1867*, and the fundamental constitutional principles of parliamentary sovereignty, rule of law and the separation of powers. Clauses that purport to confer on the executive branch the power to nullify or amend Acts of Parliament are unconstitutional.

The *GGPPA*, as it is currently written, vests inordinate discretion in the executive with no meaningful checks on fundamental alterations of the current pricing scheme. The critical feature of the fuel levy established in Part 1, that being what fuels are covered under the *GGPPA*, is so open-ended, allowing any substance, if prescribed

by the Governor in Council, to fall within the ambit of the fuel charge regime. The operative provisions of Part 1 similarly prescribe vast law-making power to the executive such that the very nature of the regime can be altered. The full breadth of executive powers can be seen most notably within ss. 166 and 168. The only limit whatsoever on the expansive regulation-making powers set out in s. 166 is that, in amending Part 1 of Schedule 1 to modify the list of provinces where the fuel levy is payable, the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for GHGs (s. 166(3)). No such factor applies to the Governor in Council's regulation-making powers under Part 1's provisions, thus, by virtue of s. 166(4), the executive has a wholly-unfettered ability to amend Part 1 of the *GGPPA*. Sections 168(2) and (3) also allow the Governor in Council to make and amend regulations in relation to the fuel charge system, its application, and its implementation. These wide-ranging powers set forth a wholly-unfettered grant of broad discretion to amend Part 1. Most notably, s. 168(4) states that in the event of a conflict between the statute enacted by Parliament and the regulations made by the executive, the regulation prevails to the extent of the conflict. This breathtaking power circumvents the exercise of law-making power by the legislative branch by permitting the executive to amend by regulation the very statute which authorizes the regulation.

Further, it is clear from a review of Part 2's provisions that the broad powers accorded to the executive permit the Governor in Council to regulate GHG emissions broadly or regulate specific industries in other ways than by setting GHG

emissions limits and pricing excess emissions across the country, despite the majority's assertion to the contrary. The sole limit on the executive's expansive discretion found in Part 2, similar to Part 1, is in s. 189(2): when amending Part 2 of Schedule 1 to modify the list of provinces where the output-based pricing system applies, the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for GHGs. Again, as in Part 1, no such factor applies to the Governor in Council's regulation-making powers under Part 2's provisions. There is agreement with Brown and Rowe JJ. that Part 2's skeletal framework accords the executive vast discretion to unilaterally set standards on an industry-by-industry basis, creating the potential for differential treatment of industries at the executive's whim.

Therefore, minimum standards are set by the executive, not the *GGPPA*. Accordingly, the *GGPPA* cannot be said to establish national standards of price stringency because there is no meaningful limit to the power of the executive. Rather than establishing minimum national standards, Part 2 empowers the executive to establish variable and inconsistent standards on an industry-by-industry basis. The fact that the executive is permitted to place a number of conditions on individuals and industries at any time, and is moreover allowed to revise those conditions at any time to any extent, is untenable. The *GGPPA*, as it is currently written, employs a discretionary scheme that knows no bounds. While it is agreed that a matter which is restricted to minimum national GHG pricing stringency standards properly fits within federal authority, the *GGPPA* does not reflect this crucial restriction.

Moreover, certain parts of the *GGPPA* are so inconsistent with our system of democracy that they are independently unconstitutional. Sections 166(2), 166(4) and 192 all confer on the Governor in Council the power to amend parts of the *GGPPA*. Section 168(4) confers the power to adopt secondary legislation that is inconsistent with Part 1 of the *Act*. Executive power to amend or repeal provisions in primary legislation raises serious constitutional concerns.

Sections 17 and 91 of the *Constitution Act, 1867*, both affirm that the authority to legislate is exclusively exercisable by the Queen, with the advice and consent of the Senate and the House of Commons. This means that every exercise of the federal legislative power must have the consent of all three elements of Parliament. The fundamental principles of the Constitution support this reading of ss. 17 and 19.

First, although Parliamentary sovereignty could appear to support Parliament's ability to delegate whatever they want to whomever they wish, this is not the case. Parliamentary sovereignty contains both a positive and negative aspect. The positive aspect is that Parliament has the ability to create any law. The negative aspect, however, is that no institution is competent to override the requirements of an Act of Parliament. Henry VIII clauses, as found in the *GGPPA*, run afoul of the negative aspect of parliamentary sovereignty, as they give the executive the authority to override the requirements of primary legislation and create a contradiction within an Act by simultaneously requiring the executive to do something and authorizing the executive to defy that requirement. Henry VIII clauses are also incompatible with the conception

of parliamentary sovereignty that demands an impartial, independent and authoritative body to interpret Parliament's acts, as they limit the availability of judicial review by providing no meaningful limits against which a court could review.

Second, the rule of law, which provides a shield for individuals from arbitrary state action, requires that all legislation be enacted in the manner and form prescribed by law. This includes the requirements that legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. When the Governor in Council amends legislation, it does not follow this prescribed manner and thus violates the rule of law. There are other additional rule of law concerns with the delegation of legislative power to the executive: the delegation of power to amend a statute is generally regarded as objectionable for the reason that the text of the statute is then not to be found in the statute book, which gives rise to confusion and uncertainty; Henry VIII clauses endow the executive with authority to act arbitrarily by permitting it to act contrary to the empowering statute, creating an authority without meaningful limits enforceable through judicial review and thus an absolute discretion; and given that judicial review is constitutionally required, legislation cannot oust review, either expressly or implicitly.

Lastly, the Constitution insists on a separation of powers according to the separation of function among the three branches of government — the legislature, the executive and the judiciary. The executive cannot interfere with the legislative process in a manner that would restrict the power to enact, amend and repeal legislation, despite

the important role played by the executive in the legislative process. The separation of powers equally demands that the core function of enacting, amending and repealing statutes be protected from the executive and remain exclusive to the legislature. Doing so supports the two main normative principles underlying the separation of powers: the legislature is the institution best suited to set policy down into legislation, and limiting the power to enact, amend and repeal legislation to the legislature helps to confine power and prevent an even greater concentration of power in the executive. There is nothing more core to the legislative power than legislating. When the executive usurps this function, the separation of powers is clearly violated.

Per **Brown** J. (dissenting): The *Greenhouse Gas Pollution Pricing Act* ("*Act*") cannot be supported by any source of federal authority, and it is therefore wholly *ultra vires* Parliament. The *Act*'s subject matter falls squarely within provincial jurisdiction. The fact that the *Act*'s structure and operation is premised on provincial legislatures having authority to enact the same scheme is fatal to the constitutionality of the *Act* under Parliament's residual authority to legislate with respect to matters of national concern for the peace, order, and good government of Canada under the *Constitution Act, 1867*.

There is agreement with Rowe J.'s reasons, and therefore Rowe J.'s review of the jurisprudence on the residual POGG power is adopted. To determine whether an enactment falls within the legislative authority of its enacting body, a reviewing court must apply two steps: first, it must characterize the enactment to determine its pith and

substance or dominant subject matter and, secondly, it must classify the identified subject matter, with reference to the classes of subjects or heads of power enumerated in ss. 91 and 92 of the *Constitution Act, 1867*. Where an enumerated head of power is relied upon, the pith and substance of the impugned law is identified at the characterization step, and that pith and substance is then classified under a head of power or class of subjects. Where Parliament relies upon the national concern branch of POGG as the source of its authority to legislate, the analytical process differs. If it is decided that the pith and substance of the impugned law does not fall under an enumerated head of power, the reviewing court must then consider whether the matter said to be of national concern satisfies the requirements of singleness, distinctiveness and indivisibility as stated in *Crown Zellerbach*. If so, the matter is placed under exclusive and permanent federal jurisdiction.

The dominant subject matter of an enactment is determined by considering its purpose and effects. The purpose of characterization is to facilitate classification so as to determine whether the Constitution grants the enacting body legislative authority over the subject matter. The legislation's dominant subject matter must therefore be characterized precisely enough for it to be associated with a specific class of subjects described in the Constitution's heads of power. If an enactment's subject matter could be classified under different heads of power listed under both ss. 91 and 92 of the *Constitution Act, 1867*, then the subject matter should be identified with more precision until it is clear which single level of authority (as between federal and provincial) may legislate in respect thereof.

As a sufficiently precise description may well refer to why and how the law operates, it can be appropriate to include reference to the legislative means in the pith and substance analysis. However, it is not appropriate to do so where describing legislation only in terms of its means would not accurately capture its dominant subject matter or where the description of the means is something that only federal legislative authority can undertake, such as minimum national standards. The determinative consideration in identifying an appropriate level of abstraction should be facilitating the subject matter's classification among the classes of subjects described in the Constitution's heads of power so far as necessary to resolve the case.

In this case, describing the *Act*'s pith and substance as relating to the regulation of GHG emissions is too broad because it does not facilitate classification under a federal or provincial head of power. Greater specificity in describing how the legislation proposes to regulate GHG emissions is required so as to determine whether the Constitution grants Parliament legislative authority over the subject matter. However, the inclusion of minimum national standards in the pith and substance of the *Act* is equally unhelpful. It adds nothing to the pith and substance of a matter, which is directed not to the fact of a standard, but to the subject matter to which the standard is to be applied. The inclusion of minimum national standards in the pith and substance of a federal statute also effectively decides the jurisdictional dispute, given that only Parliament is capable of imposing minimum national standards — only federally enacted standards can apply nationwide, and, by operation of paramountcy, only federally enacted standards can be a minimum. Furthermore, reference to "integral"

standards also has no relevance to identifying the *Act*'s pith and substance because such a determination would require the Court to consider whether the standards set out in the *Act* are effective, which is not a valid consideration in the pith and substance analysis.

In order to characterize the *Act*'s pith and substance appropriately, its purpose and effects must be determined. In this case, the pith and substance of Parts 1 and 2 of the *Act* must be characterized separately. While the two parts share a purpose — the reduction of GHG emissions — they are otherwise not remotely similar to each other. They each have distinct operational features and the legislative means they employ are mutually distinct. The pith and substance of Part 1 is the reduction of GHG emissions by raising the cost of fuel. The pith and substance of Part 2 is the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure.

Once identified, the subject matter must be classified, with reference to the classes of subjects or heads of power described in ss. 91 and 92 of the *Constitution Act, 1867*. Courts should look first to the enumerated powers, rather than immediately considering whether a statute's dominant subject matter fits within the residual POGG authority.

In this case, provincial jurisdiction over property and civil rights authorized by s. 92(13) stands out as the most relevant source of legislative authority for the pith and substance of Parts 1 and 2 of the *Act*. Regulating trade and industrial activity, all

within the boundaries of specified provinces, is indisputably captured by this broad head of power, which includes the regulation of business not coming within one of the enumerated federal heads of power, as well as the law of property and of contracts. In the alternative, the provincial residuum in s. 92(16), granting authority over all matters of a local or private nature, could also authorize Parts 1 and 2. Part 2, as a deep foray into industrial policy, also falls within matters of provincial legislative authority granted by s. 92(10) over local works and undertakings. Also relevant to Part 2 is s. 92A, which gives the provinces the exclusive jurisdiction to make laws in relation to the exploration, development, conservation and management of non-renewable natural resources in the province.

The identification of several applicable provincial heads of power should be the end of the matter, since all such heads of power are, by the terms of ss. 92 and 92A(1), matters over which the provincial legislatures may exclusively make laws. By the terms of s. 91, the POGG power applies only in relation to matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. This exclusivity of provincial jurisdiction over matters falling under s. 92 is fundamental to the Canadian brand of federalism, and was a unique and deliberate choice by the makers of the Constitution who were concerned about federal overreach via the POGG power. The federal law-making authority for the peace, order, and good government of Canada was intended to be subject to the division of powers. Within their areas of legislative authority, provinces are not only sovereign, but exclusively so. The *Act*'s entire scheme is premised on the provinces having jurisdiction to do precisely

what Parliament has presumed to do in the *Act* — it operates only where provincial legislative authority is not exercised, or not exercised in a manner acceptable to the federal Cabinet. The *Act*'s backstop model is therefore constitutionally impossible: if the provinces have jurisdiction to do what the *Act* does, then the *Act* cannot be constitutional under the national concern branch of POGG. This demonstrates that Parliament has legislated in respect of a matter that falls within provincial legislative authority.

Even so, given the majority's acceptance that some aspect of the *Act* is truly and distinctly national in scope and lies outside provincial jurisdiction, the question of whether the matter said to be of national concern satisfies the requirements stated in *Crown Zellerbach* must be considered. The POGG jurisprudence offers little guidance on the question of whether the pith and substance of the impugned legislation can or should be coextensive with the matter of national concern, or whether the matter of national concern can or should be broader than the pith and substance of the legislation. It would be unprecedented and undesirable to accept that the matter of national concern must always be the same as the pith and substance of the statute under review, which can include legislative means, because this would effectively confine Parliament to that particular legislative means in responding to the matter of national concern.

It is not possible for a matter formerly under provincial jurisdiction to be transformed, when minimum national standards are invoked, into a matter of national

concern. To accept that allocating national targets or minimum national standards can serve as a basis for recognizing that some aspect of an area of provincial jurisdiction is distinctly national in scope, and therefore lies outside provincial jurisdiction, would be to accept a model of supervisory federalism by which the provinces can exercise their jurisdiction only as long as they do so in a manner that the federal legislation authorizes. This would open up any area of provincial jurisdiction to unconstitutional federal intrusion once Parliament decides to legislate uniform treatment.

In this case, a broad characterization of the national concern is unavoidable in order to encompass the pith and substance of both Part 1 and Part 2. The matter said to be of national concern can therefore be identified as the purpose of the *Act* as a whole: the reduction of GHG emissions. This matter does not meet the requirements of *Crown Zellerbach* for a valid national concern: it fails to meet the requirements of singleness and indivisibility. The fact that harms may cross borders is not enough to make out indivisibility. The matter is divisible because GHGs emissions can be connected to the source province. Responsibility for the reduction of GHG emissions among the provinces can therefore be readily identified for regulation at the source of the emissions. Nationwide GHG emissions are nothing more than the sum of provincial and territorial GHG emissions. The reduction of GHG emissions therefore lacks the degree of unity required to qualify as an indivisible matter of national concern. While a provincial failure to deal effectively with the control or regulation of GHG emissions may cause more emissions from that province to cross provincial boundaries, that is insufficient to meet the requirement of indivisibility in *Crown Zellerbach*.

Even if each of the pith and substance of Parts 1 and 2 as proposed matters of national concern are considered on their own, the pith and substance of each part is not distinct from matters falling under provincial jurisdiction under s. 92; they therefore do not meet the requirements of *Crown Zellerbach*. The reduction of GHG emissions (whether by raising the cost of fuel, or by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure) does not have the requisite distinctiveness to be recognized as a matter of national concern because the *Act* encourages provinces to enact substantially the same scheme to serve the same regulatory purpose. The provinces clearly have jurisdiction to establish standards of GHG price stringency in the province.

The double aspect doctrine has no application in this case. While this doctrine allows for the concurrent application of both federal and provincial legislation, it does not create concurrent jurisdiction. The *Act* purports to do exactly what the provinces can do, and for precisely the same reason. There are simply no distinctly federal aspects of the reduction of GHG emissions that cannot be divided among the enumerated heads of power. The imposition of minimum national standards cannot be described as the distinctly federal aspect of the matter.

Even were the reduction of GHG emissions a single and indivisible area of jurisdiction, its impact on provincial jurisdiction would be of a scale that is irreconcilable with the division of powers. Because the power to legislate to reduce GHG emissions effectively authorizes an array of regulations and extends to the

regulation of any activity that requires carbon-based fuel, it has the potential to undo Canada's division of powers. GHG emissions simply cannot be treated as a single regulatory matter. While the *Act* does not forbid any activity, the charges it imposes will affect the cost of fuel and dictate the viability of emissions-intensive trade-exposed activities. These charges thereby stand to have a profound effect on provincial jurisdiction and the division of powers. The division of powers analysis allows no recourse to balancing or proportionality considerations. The *Constitution Act, 1867*, sets out spheres of exclusive jurisdiction so that within their sphere of jurisdiction, the provincial legislatures are sovereign, which sovereignty connotes provincial power to act or not act as they see fit, not as long as they do so in a manner that finds approval at the federal Cabinet table.

The delegation granted by the *Act* to the Cabinet is breathtakingly broad. On this point, the guidance provided by Rowe J. is endorsed, both as to the imperative that the division of powers confines the exercise by the federal Cabinet of Parliament's delegated authority, and as to the appropriate methodology for reviewing regulations for compliance with the division of powers.

The long-established principles set down in *Crown Zellerbach* should not be departed from. The doctrine of *stare decisis* establishes a high threshold for departing from precedents and that threshold is not met in this case. There is disagreement with the majority's modernization of the national concern doctrine and with the three-step framework it adopts, which dilutes the national concern test set

down in *Crown Zellerbach*. The framework adopted results in a new, distinctly hierarchical and supervisory model of Canadian federalism that subjects provincial legislative authority to Parliament's overriding authority to establish national standards of how such authority may be exercised and replaces the constitutionally mandated division of powers with a judicially struck balance of power, which must account for other interests. No province, and not even Parliament itself, ever agreed to — or even contemplated — either of these features. This is a model of federalism that rejects the Constitution and re-writes the rules of Confederation. Its implications go far beyond the *Act*, opening the door to federal intrusion — by way of the imposition of national standards — into all areas of provincial jurisdiction, including intra-provincial trade and commerce, health, and the management of natural resources. It is bound to lead to serious tensions in the federation. And all for no good reason, since Parliament could have achieved its goals in constitutionally valid ways.

Per **Rowe** J. (dissenting): The national concern doctrine is a residual power of last resort. Faithful adherence to the doctrine leads inexorably to the conclusion that the national concern branch of the POGG power cannot be the basis for the constitutionality of the *Greenhouse Gas Pollution Pricing Act* ("*Act*"). Accordingly, there is agreement with Brown J.'s analysis and with his conclusion that the *Act* is *ultra vires* in whole.

Federalism is one of the fundamental underlying principles animating the Canadian Constitution. The primary textual expression of the principle of federalism

can be found in the division of powers effected mainly by ss. 91 and 92 of the *Constitution Act, 1867*. An essential characteristic of the division of powers is its exhaustiveness, which precludes legislative voids and reconciles parliamentary sovereignty and federalism: it ensures that there is no subject matter which cannot be legislated upon and that Canada, as a whole, is fully sovereign. The exhaustive nature of the division of powers means that matters that do not come within the enumerated classes must fit somewhere. This is dealt with by two residual clauses: one federal, and one provincial. The federal residual clause, the POGG power, comes from the opening words of s. 91 of the *Constitution Act, 1867*. The provincial residual clause is in s. 92(16), and provides that the provincial legislatures may exclusively make laws relating to matters of "a merely local or private Nature in the Province". The wording of s. 91 provides textual support for the view that the POGG power is residual to s. 92, as s. 91 confers the power to legislate for peace, order and good government "in relation to all Matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of the Provinces". Further, every conferral of provincial legislative jurisdiction is qualified by words such as "in the Province", including s. 92(16). The result is that the POGG power is limited to only those matters that are not of a provincial nature, as the residual scope of the POGG power is narrowed by s. 92(16), which applies to matters that are of a local and private nature even if they do not come within any other enumerated head of power. The scope of s. 92(16) must be interpreted as a counterbalance to the introductory paragraph of s. 91 to reflect the constitutional principle that both Parliament and provincial legislatures must be seen as equals. The POGG power is also residual to the federal heads of power, as the normal

process of constitutional interpretation is to rely first on a more specific provision before resorting to a more general one.

Since the POGG power is residual to both the enumerated provincial and federal heads of power, matters that come within enumerated federal or provincial heads of power should be located in those enumerated heads and the POGG power accommodates the matters which do not come within any of the enumerated federal or provincial heads. There is no reason to hold that a matter falls under POGG when it comes within an enumerated head of jurisdiction and it is not possible for a matter to fall both within the POGG power and within a federal enumerated head of power at the same time. If a matter cannot fit within any enumerated head, only then may resort be had to the federal residual clause. This methodology helps ensure that the federal residual power cannot be used as a tool to upset the balance of federalism by stripping away provincial powers.

Courts have long struggled to define the contours of the POGG power in a way that preserves the division of powers. Early POGG cases suffered from a series of twists and turns, with various national concern statements infusing them at various points. The common theme of these cases, however, is that courts rely on POGG to give effect to the exhaustive nature of the division of powers, but courts have always been cautious to guard provincial jurisdiction and ensure POGG does not become a vehicle for federal overreach. The POGG jurisprudence should be read as signaling the existence of just two branches: a general residual power and the emergency power.

What some commentators have named "gap" and "national concern" are simply manifestations of the exhaustive nature of the division of powers, and the residual nature of the POGG power. Matters that do not come within any enumerated head of power or cannot be distributed among multiple heads of power must fit somewhere, and they belong under POGG when they pass the test set out in *Crown Zellerbach*. However, the analysis of the *Crown Zellerbach* framework would be the same even if there is only one residual authority (POGG) and even if there are three branches to POGG.

The national concern doctrine, when properly applied, plays an essential role in achieving the goal that the division of powers be collectively exhaustive, in a way that respects provincial jurisdiction. Matters that do not come within one of the enumerated heads of jurisdiction and that cannot be separated and shared between the enumerated heads of jurisdiction of both orders of government do not fit comfortably within the division of powers. In order to maintain exhaustiveness, such matters fall under the general residual power of Parliament by virtue of their distinctiveness from matters under provincial jurisdiction and their indivisibility between various heads of jurisdiction. But when the national concern doctrine is improperly applied, POGG ceases to be residual in nature. When that is so, it can become an instrument to enhance federal and correspondingly decrease provincial authority. Courts must be careful in recognizing matters of national concern, because the national concern branch has great potential to upset the division of powers. Once a matter is qualified as of national concern, Parliament has exclusive jurisdiction over the matter, including its intra-

provincial aspects. Thus, an expansive interpretation of the doctrine can threaten the fundamental structure of federalism and unduly restrain provincial legislature's law-making authority. It would allow Parliament to acquire exclusive jurisdiction over matters that fall squarely within provincial jurisdiction and flatten regional differences. Courts should never start a division of powers analysis by looking to the federal residual power. To preserve the federal balance, courts should treat POGG as a power of last resort. The scope of the national concern doctrine must be limited to matters that cannot fall under other heads of jurisdiction and that cannot be distributed among multiple heads, thus filling a constitutional gap. Accordingly, the doctrine only applies to matters which are truly of national concern, as opposed to matters of a merely local or private nature that fall under s. 92(16).

The national concern doctrine applies when two conditions are met: first, the matter does not fall within (i.e., it is distinct from) the enumerated heads of jurisdiction and, second, it is single and indivisible. The requirements of singleness, distinctiveness and indivisibility serve the purpose of identifying matters that are truly residual in two ways. The matter must be distinct from provincial matters and must be incapable of division between both orders of government such that it must be entrusted solely to Parliament. These requirements give effect to the general residual power of Parliament under POGG and ensure that there is no jurisdictional gap in the division of powers. They apply to both new matters and to matters which, although originally falling under provincial jurisdiction, have come to extend beyond the powers of the province and, due to indivisibility, must be entrusted exclusively to Parliament.

Given the residual nature of POGG, the importance of a matter has nothing to do with whether it is a matter of national concern. The role of the general residual power is to maintain the exhaustiveness of the division of powers, not to centralize important matters that can be legislated upon by the provinces or by both orders of government. First, the impugned matter must be distinct from matters falling under the enumerated heads of s. 92. This will be met when the matter is beyond provincial reach, including because of the limitation of provincial jurisdiction to matters in the province. This inquiry includes consideration of the provincial residuum: if the matter is of a merely local or private nature, it would fall under s. 92(16). The matter must also be distinct from matters falling under federal jurisdiction, as POGG is purely residual. Second, even if the matter does not come within an enumerated head of power, it must be single and indivisible to fall under POGG rather than an aggregate that can be broken down and distributed to enumerated heads of jurisdiction. The fact that provinces are unable to deal with a matter is insufficient to conclude that it falls under POGG. The nature of the matter must be such that it cannot be shared between both orders of government and that it must be entrusted to Parliament, exclusively, to avoid a jurisdictional vacuum.

In evaluating whether the matter has a singleness, distinctiveness and indivisibility, it is relevant to consider what is known as the provincial inability test, that is, what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspect of the matter. The provincial inability inquiry has been designed to control the centralization

of powers and to limit the extension of the national concern doctrine to matters that are beyond the power of the provinces to deal with and that must be legislated upon by Parliament, exclusively. Extra-provincial effects, on their own, are insufficient to satisfy the provincial inability test. Rather, the extra-provincial effects must be such that the matter, or part of the matter, is beyond the powers of the provinces to deal with on their own or in tandem. If the pith and substance of provincial legislation comes within the classes of subjects assigned to the provinces, incidental or ancillary extra-provincial effects are irrelevant to its validity. Evidence that provinces are not cooperating, even combined with the presence of extra-provincial effects, is also insufficient to make out provincial inability. Provinces are sovereign within their sphere of jurisdiction and can legitimately choose different policies than other provinces. Further, provincial inability is no more than an indicium of singleness, distinctiveness and indivisibility. In line with the residual role of POGG, federal authority over what was formerly within provincial competence is only justified where a matter has become distinct from what the provinces can do, and cannot be shared between orders of government because of its indivisibility. In such a case, reliance on POGG is the only way to maintain the exhaustiveness of the division of powers. Otherwise, there would be a jurisdictional void — if the federal Parliament did not have jurisdiction over such a matter, no one would.

When determining if a matter can pass muster as a subject matter falling under POGG, the final consideration is whether it has a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power

under the Constitution. The evaluation of the scale of impact on the federal balance illustrates the need for caution when determining whether a new permanent head of exclusive power should, in effect, be added to the federal list of powers. This prong of the test requires courts to determine whether recognizing the proposed new federal power would be compatible with the federal structure. It does not ask whether the importance of the proposed new federal power outweighs the infringement on provincial jurisdiction. Importance is irrelevant because it does not indicate whether there is a jurisdictional gap that must be filled with the general residual power. Important matters can and should be dealt with by the provinces. Courts must also be careful not to let the double aspect doctrine undermine the scale of impact inquiry by suggesting that provinces retain ample means to regulate the matter. The double aspect doctrine recognizes that the same fact situation or matter may possess both federal and provincial aspects, which means that both orders of government can legislate from their respective perspective. This doctrine only applies when a subject matter has multiple aspects, some that may be regulated under provincial jurisdiction, and some under federal jurisdiction. The double aspect doctrine must be applied carefully, since increasing overlap between provincial and federal competence can severely disrupt the federal balance. The combined operation of the doctrines of double aspect and federal paramountcy can have profound implications for the federal structure and for provincial autonomy.

The national concern doctrine must be applied with caution in light of its residual role and its potential to upset the division of powers. If the doctrine is not

strictly applied so as to limit it to ensuring that the division of powers is exhaustive, the federal nature of the Constitution would disappear not gradually but rapidly.

Canada's proposed doctrinal expansion of national concern should be rejected because it departs in a marked and unjustified way from the jurisprudence of the Court and, if adopted, it will provide a broad and open pathway for further incursions into what has been exclusive provincial jurisdiction. In the instant case, Canada's proposed pith and substance of the *Act* of "establishing minimum national standards integral to reducing nationwide GHG emissions" has not attained national dimensions. While the seriousness or the immediacy of the threat that climate change poses may be relevant to an argument under the emergency branch, it has no place in the national concern analysis. Furthermore, the distinctiveness requirement is inherently incompatible with the backstop nature of the *Act*, which contemplates that some or all provinces could implement GHG pricing schemes that accord with standards set (from time to time) by the federal Cabinet, thereby avoiding the triggering of federal intervention. Singleness, distinctiveness and indivisibility should not be collapsed into provincial inability, and provincial inability should not be informed by tests for enumerated heads of power, because this approach fails to give effect to the residual nature of the POGG power.

The device of "minimum national standards" makes wider still the pathway for enhancement of federal jurisdiction. "By means of minimum national standards" could be applied to any matter, and therefore adds nothing to the description of a matter

and has no place. Including "minimum national standards" in the matter of national concern short-circuits the analysis and opens the door to federal "minimum standards" with respect to other areas of provincial jurisdiction, artificially expanding federal capacity to legislate in what have been until now matters coming within provincial jurisdiction. This device undermines federalism by replacing provincial autonomy in the exercise of its jurisdiction with the exercise of such jurisdiction made permanently subject to federal supervision. Finally, the *Act*'s scale of impact on provincial jurisdiction is not reconcilable with the distribution of powers. The *Act* leaves room for provincial jurisdiction only insofar as the decision of the province conforms to the will of Parliament and the federal Cabinet. It is not an exercise in cooperative federalism; rather, it is the means to enforce supervisory federalism. The problem is not cured by the double aspect doctrine: since the federal matter is defined in terms of the extent to which it can limit the provinces' discretion to legislate (the backstop mechanism), this is not two aspects of the same fact situation — it is one aspect, and it gives the federal government the upper hand and the final say. Parliament did not have jurisdiction to enact the *Act* under its general residual power.

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concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. Appeal dismissed, Côté J. dissenting in part and Brown and Rowe JJ. dissenting.

APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J.O., Hoy A.C.J.O. and MacPherson, Sharpe and Huscroft JJ.A.), 2019 ONCA 544, 146 O.R. (3d) 65, 2019 D.T.C. 5090, 436 D.L.R. (4th) 1, 29 C.E.L.R. (4th) 113, [2019] O.J. No. 3403 (QL), 2019 CarswellOnt 10495 (WL Can.), in the matter of a reference concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. Appeal dismissed, Côté J. dissenting in part and Brown and Rowe JJ. dissenting.

APPEAL from a judgment of the Alberta Court of Appeal (Fraser C.J.A. and Watson, Wakeling, Hughes and Feehan JJ.A.), 2020 ABCA 74, 3 Alta. L.R. (7th) 1, 2020 D.T.C. 5025, [2021] 1 W.W.R. 1, 446 D.L.R. (4th) 1, 35 C.E.L.R. (4th) 1, [2020] A.J. No. 234 (QL), 2020 CarswellAlta 328 (WL Can.), in the matter of a reference concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. Appeal allowed, Côté J. dissenting in part and Brown and Rowe JJ. dissenting.

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Stewart Elgie, for the intervener Canada's Ecofiscal Commission.

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The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. was delivered by

THE CHIEF JUSTICE —

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I. Overview

[1] In 2018, Parliament enacted the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 ("*GGPPA*"). Three provinces challenged the constitutionality of the *GGPPA* by references to their respective courts of appeal. The question divided the courts. In split decisions, the courts of appeal for Saskatchewan and Ontario held that the *GGPPA* is constitutional, while the Court of Appeal of Alberta held that it is unconstitutional. Those decisions have now been appealed to this Court.

[2] The essential factual backdrop to these appeals is uncontested. Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions. In the *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, December 12, 2015, states around the world undertook to drastically reduce their greenhouse gas emissions in order to mitigate the effects of climate change. In Canada, Parliament enacted the *GGPPA* as part of the country's effort to implement its commitment.

[3] However, none of these facts answer the question in these appeals. The issue here is whether Parliament had the constitutional authority to enact the *GGPPA*.

To answer this question, the Court must identify the true subject matter of the *GGPPA* and then classify that subject matter with reference to the division of powers set out in the *Constitution Act, 1867* ("Constitution"). In doing so, the Court must give effect to the principle of federalism, a foundational principle of the Canadian Constitution, which requires that an appropriate balance be maintained between the powers of the federal government and those of the provinces.

[4] Below, I conclude that the *GGPPA* sets minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions, pollutants that cause serious extraprovincial harm. Parliament has jurisdiction to enact this law as a matter of national concern under the "Peace, Order, and good Government" clause of s. 91 of the Constitution. National concern is a well-established but rarely applied doctrine of Canadian constitutional law. The application of this doctrine is strictly limited in order to maintain the autonomy of the provinces and respect the diversity of Confederation, as is required by the principle of federalism. However, Parliament has the authority to act in appropriate cases, where there is a matter of genuine national concern and where the recognition of that matter is consistent with the division of powers. In this case, Parliament has acted within its jurisdiction.

[5] I also conclude that the levies imposed by the *GGPPA* are constitutionally valid regulatory charges. In the result, the *GGPPA* is constitutional.

II. Reference Question

[6] The reference question in each of the three appeals is substantially the same: Is the *Greenhouse Gas Pollution Pricing Act* unconstitutional in whole or in part?

III. Background

A. *The Global Climate Crisis*

[7] Global climate change is real, and it is clear that human activities are the primary cause. In simple terms, the combustion of fossil fuels releases greenhouse gases ("GHGs") into the atmosphere, and those gases trap solar energy from the sun's incoming radiation in the atmosphere instead of allowing it to escape, thereby warming the planet. Carbon dioxide is the most prevalent and recognizable GHG resulting from human activities. Other common GHGs include methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and nitrogen trifluoride.

[8] At appropriate levels, GHGs are beneficial, keeping temperatures around the world at levels at which humans, animals, plants and marine life can live in balance. And the level of GHGs in the atmosphere has been relatively stable over the last 400,000 years. Since the 1950s, however, the concentrations of GHGs in the atmosphere have increased at an alarming rate, and they continue to rise. As a result, global surface temperatures have already increased by 1.0°C above pre-industrial levels, and that increase is expected to reach 1.5°C by 2040 if the current rate of warming continues.

[9] These temperature increases are significant. As a result of the current warming of 1.0°C, the world is already experiencing more extreme weather, rising sea levels and diminishing Arctic sea ice. Should warming reach or exceed 1.5°C, the world could experience even more extreme consequences, including still higher sea levels and greater loss of Arctic sea ice, a 70 percent or greater global decline of coral reefs, the thawing of permafrost, ecosystem fragility and negative effects on human health, including heat-related and ozone-related morbidity and mortality.

[10] The effects of climate change have been and will be particularly severe and devastating in Canada. Temperatures in this country have risen by 1.7°C since 1948, roughly double the global average rate of increase, and are expected to continue to rise faster than that rate. Canada is also expected to continue to be affected by extreme weather events like floods and forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise, and the spread of potentially life-threatening vector-borne diseases like Lyme disease and West Nile virus.

[11] The Canadian Arctic faces a disproportionately high risk from climate change. There, the average temperature has increased at a rate of nearly three times the global average, and that increase is causing significant reductions in sea ice, accelerated permafrost thaw, the loss of glaciers and other ecosystem impacts. Canada's coastline, the longest in the world, is also being affected disproportionately by climate change, as it experiences changes in relative sea level and rising water temperatures, as well as

increased ocean acidity and loss of sea ice and permafrost. Climate change has also had a particularly serious effect on Indigenous peoples, threatening the ability of Indigenous communities in Canada to sustain themselves and maintain their traditional ways of life.

[12] Climate change has three unique characteristics that are worth noting. First, it has no boundaries; the entire country and entire world are experiencing and will continue to experience its effects. Second, the effects of climate change do not have a direct connection to the source of GHG emissions. Provinces and territories with low GHG emissions can experience effects of climate change that are grossly disproportionate to their individual contributions to Canada's and the world's total GHG emissions. In 2016, for example, Alberta, Ontario, Quebec, Saskatchewan and British Columbia accounted for approximately 90.5 percent of Canada's total GHG emissions, while the approximate percentages were 9.1 percent for the other five provinces and 0.4 percent for the territories. Yet the effects of climate change are and will continue to be experienced across Canada, with heightened impacts in the Canadian Arctic, coastal regions and Indigenous territories. Third, no one province, territory or country can address the issue of climate change on its own. Addressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders.

B. *Canada's Efforts to Address Climate Change*

[13] Canada's history of international commitments to address climate change began in 1992 with its ratification of the *United Nations Framework Convention on Climate Change*, U.N. Doc. A/AC.237/18 (Part II)/Add.1, May 15, 1992 ("*UNFCCC*"). After failing to meet its commitments under multiple *UNFCCC* agreements, including the *Kyoto Protocol*, U.N. Doc. FCCC/CP/1997/L.7/Add.1, December 10, 1997, and the *Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/11/Add.1, December 18, 2009, Canada agreed to the *Paris Agreement* in 2015. Recognizing that "climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries", the participating states agreed to hold the global average temperature increase to well below 2.0°C above pre-industrial levels and to pursue efforts to limit that increase to 1.5°C: United Nations, Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session*, U.N. Doc. FCCC/CP/2015/10/Add.1, January 29, 2016, at p. 2; *Paris Agreement*, art. 2(1)(a). Canada ratified the *Paris Agreement* in 2016, and the agreement entered into force that same year. Canada committed to reducing its GHG emissions by 30 percent below 2005 levels by 2030.

[14] Under the *Paris Agreement*, states are free to choose their preferred approaches for meeting their nationally determined contributions. In Canada, the provinces and the federal government agreed to work together in order to meet the country's international commitments. In March 2016, before Canada had ratified the *Paris Agreement*, all the First Ministers met in Vancouver and adopted the *Vancouver*

Declaration on clean growth and climate change ("*Vancouver Declaration*"): Canadian Intergovernmental Conference Secretariat, March 3, 2016 (online). In that declaration, the First Ministers recognized the call in the *Paris Agreement* for significant reductions in GHG emissions and committed to "[i]mplement[ing] GHG mitigation policies in support of meeting or exceeding Canada's 2030 target of a 30% reduction below 2005 levels of emissions, including specific provincial and territorial targets and objectives": *ibid*, at p. 3. In the *Vancouver Declaration*, the First Ministers also recognized the importance of a collaborative approach between provincial and territorial governments and the federal government to reducing GHG emissions and noted that "the federal government has committed to ensuring that the provinces and territories have the flexibility to design their own policies to meet emission reductions targets": *ibid*.

[15] The *Vancouver Declaration* resulted in the establishment of a federal-provincial-territorial Working Group on Carbon Pricing Mechanisms ("Working Group") to study the role of carbon pricing mechanisms in meeting Canada's emissions reduction targets. The Working Group included at least one representative from each provincial and territorial government as well as the federal government. Its final report identified carbon pricing as one of the most efficient policy approaches for reducing GHG emissions and outlined three carbon pricing options: (1) a single form broad-based carbon pricing mechanism that would apply across Canada, an option that would not be supportive of existing or planned provincial or territorial pricing policies; (2) broad-based carbon pricing mechanisms across Canada, an option that would give each

province and territory flexibility as to the choice of instruments; and (3) a range of broad-based carbon pricing mechanisms in some jurisdictions, while the remaining jurisdictions would implement other mechanisms or policies designed to meet GHG emissions reduction targets within their borders: Working Group on Carbon Pricing Mechanisms, *Final Report*, 2016 (online), at pp. 1, 44-47 and 50.

[16] Carbon pricing, or GHG pricing, is a regulatory mechanism that, in simple terms, puts a price on GHG emissions in order to induce behavioural changes that will lead to widespread reductions in emissions. By putting a price on GHG emissions, governments can incentivize individuals and businesses to change their behaviour so as to make more environmentally sustainable purchasing and consumption choices, to redirect their financial investments, and to reduce their GHG emissions by substituting carbon-intensive goods for low-GHG alternatives. Generally speaking, there are two different approaches to GHG pricing: (1) a carbon tax that entails setting a price on GHG emissions directly, but not setting a cap on emissions; and (2) a cap-and-trade system that prices emissions indirectly by placing a cap on GHG emissions, allocating emission permits to businesses and allowing businesses to buy and sell emission permits from and to other businesses. A carbon tax sets an effective price per unit of GHG emissions. In a cap-and-trade system, the market sets an effective price per unit of GHG emissions, but a cap is placed on permitted emissions. Both approaches put a price on GHG emissions. I also find it worthwhile to note that while "carbon tax" is the term used among policy experts to describe GHG pricing approaches that directly price

GHG emissions, it has no connection to the concept of taxation as understood in the constitutional context.

[17] Building on the Working Group's final report, the federal government released the *Pan-Canadian Approach to Pricing Carbon Pollution* ("*Pan-Canadian Approach*") in October 2016: Environment and Climate Change Canada, October 3, 2016 (online). In it, the federal government introduced a pan-Canadian benchmark for carbon pricing and stated the benchmark's underlying principles, two of which were that carbon pricing should be a central component of the pan-Canadian framework and that the overall approach should be flexible and recognize carbon pricing policies already being implemented or developed by provinces and territories. The *Pan-Canadian Approach* also set out the criteria for the pan-Canadian benchmark that would be used for determining acceptable minimum carbon pricing systems. Provinces and territories would have the flexibility to implement, by 2018, one of two carbon pricing systems with a common broad scope and legislated increases in stringency. A federal backstop carbon pricing system would be implemented in jurisdictions that either requested it or failed to implement a system that met the benchmark.

[18] In December 2016, based on the *Pan-Canadian Approach*, the federal government released the *Pan-Canadian Framework on Clean Growth and Climate Change* ("*Pan-Canadian Framework*"): Environment and Climate Change Canada, December 9, 2019 (online). In it, the federal government reaffirmed the principles expounded in the *Vancouver Declaration* and the *Pan-Canadian Approach*, and

outlined in greater detail the criteria of the pan-Canadian benchmark for carbon pricing. As in the *Pan-Canadian Approach*, the *Pan-Canadian Framework* required every province and territory to have one of two carbon pricing systems in place by 2018: a carbon tax or carbon levy system similar to the ones that had already been implemented in British Columbia and Alberta, or a cap-and-trade system similar to the ones that had been implemented in Ontario and Quebec. All carbon pricing systems had to have a common broad scope and to increase in stringency over time. All revenues from the carbon pricing system would remain in the jurisdiction of origin. A federal backstop pricing system would apply only in jurisdictions that requested it, that had no carbon pricing system or that had an insufficiently stringent carbon pricing system. All revenues from the federal system would be returned to the jurisdiction of origin.

[19] On the day the federal government released the *Pan-Canadian Framework*, it was adopted by eight provinces, including Ontario and Alberta, and by all three territories. Manitoba adopted the framework in February 2018, but Saskatchewan has not done so yet. Later in 2018, Ontario, Alberta and Manitoba withdrew their support from the *Pan-Canadian Framework*.

[20] In May 2017, after the release of the *Pan-Canadian Framework*, the federal government published the *Technical Paper on the Federal Carbon Pricing Backstop*: Environment and Climate Change Canada, May 18, 2017 (online). This paper provided further details, outlined the components of the proposed federal carbon pricing system and sought feedback from stakeholders. The federal government then

published documents entitled *Guidance on pan-Canadian carbon pollution pricing benchmark*, in August 2017, and *Supplemental benchmark guidance*, in December 2017, which further detailed the scope of the GHG emissions to which the carbon pricing system would apply as well as the minimum legislated increases in stringency: Environment and Climate Change Canada, *Guidance on the pan-Canadian Carbon pollution pricing benchmark*, August 2017 (online); Environment and Climate Change Canada, *Supplemental benchmark guidance*, December 20, 2017 (online).

[21] On the day the *Supplemental benchmark guidance* document was released, the federal Minister of Finance and Minister of Environment and Climate Change wrote to their provincial and territorial counterparts to reaffirm Canada's commitment to carbon pricing under the *Pan-Canadian Framework*. The letter requested the provincial and territorial ministers to explain how they would be implementing carbon pricing and also outlined the next steps in the federal government's process to price carbon.

[22] In the context of this process, the *GGPPA* was introduced in Parliament as Part 5 of Bill C-74, *An Act to implement certain provisions of the budget*, 1st Sess., 42nd Parl., on March 27, 2018, and it received royal assent on June 21, 2018. In the lead-up to the introduction of the *GGPPA*, the federal government had published further guidance on the components of the proposed federal carbon pricing system.

C. *Provincial Action on Climate Change*

[23] At the time the *Pan-Canadian Framework* was released, most of the provinces and territories had already taken significant actions to address climate change, including rehabilitating forests, developing low carbon fuels, capping emissions for oil sands projects and the electricity sector, regulating methane emissions, closing fossil-fuelled and coal-fired electricity generating stations, and investing in renewable energy and transportation. British Columbia, Alberta, Ontario and Quebec were the only provinces with carbon pricing systems. All the other provinces and territories, except Saskatchewan and Manitoba, had indicated that they planned to implement either a carbon tax or levy system or a cap-and-trade system.

[24] Despite the actions that had been taken, Canada's overall GHG emissions had decreased by only 3.8 percent between 2005 and 2016, which was well below its target of 30 percent by 2030. Over that period, GHG emissions had decreased in British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Yukon, but had increased in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Northwest Territories and Nunavut. Illustrative of the collective action problem of climate change, between 2005 and 2016, the decreases in GHG emissions in Ontario, Canada's second largest GHG emitting province, were mostly offset by increases in emissions in two of Canada's five largest emitting provinces, Alberta and Saskatchewan. Canada's remaining emissions reduction between 2005 and 2016 came from two of Canada's remaining five largest emitting provinces, Quebec and British Columbia, as well as from decreases in GHG emissions of over 10 percent — well

above Canada's 3.8 percent overall GHG emissions reduction — in New Brunswick, Nova Scotia, Prince Edward Island and Yukon.

IV. The *GGPPA*

[25] The *GGPPA* came into force on June 21, 2018.

A. *Basic Architecture of the GGPPA*

[26] The *GGPPA* comprises four parts and four schedules. Part 1 of the *GGPPA* establishes a fuel charge that applies to producers, distributors and importers of various types of carbon-based fuel. Part 2 sets out a pricing mechanism for industrial GHG emissions by large emissions-intensive industrial facilities. Part 3 authorizes the Governor in Council to make regulations providing for the application of provincial law concerning GHG emissions to federal works and undertakings, federal land and Indigenous land located in that province, as well as to internal waters located in or contiguous with the province. And Part 4 requires the Minister of the Environment to prepare an annual report on the administration of the *GGPPA* and have it tabled in Parliament. Only the first two parts and the four schedules are at issue in these appeals. The parties do not challenge the constitutionality of Parts 3 and 4 of the *GGPPA*.

[27] Because the *GGPPA* operates as a backstop, the GHG pricing mechanism described in Parts 1 and 2 of the *GGPPA* does not automatically apply in all provinces and territories. A province or territory will only be subject to Part 1 or 2 of the *GGPPA*

if the Governor in Council determines that its GHG pricing mechanism is insufficiently stringent. However, the *GGPPA* itself always applies in the sense that provincial and territorial GHG pricing mechanisms are always subject to assessment to ensure they are sufficiently stringent. At the time of the hearing of these appeals, Ontario, New Brunswick, Manitoba, Saskatchewan, Yukon and Nunavut were subject to both Parts 1 and 2 of the *GGPPA*. Alberta was subject only to Part 1, and Prince Edward Island only to Part 2. After the hearing, the *GGPPA* was amended such that Part 1 no longer applies to New Brunswick: *Regulations Amending Part 1 of Schedule 1 and Schedule 2 to the Greenhouse Gas Pollution Pricing Act and the Fuel Charge Regulations*, SOR/2020-261. The federal government has also announced that Ontario will be subject only to Part 1, but the *GGPPA* has not yet been amended to reflect this announcement.

B. *The Preamble*

[28] The *GGPPA* has a 16-paragraph preamble that sets out the background to and purpose of the legislation. This preamble can helpfully be divided into five parts in which the following points are articulated: (1) GHG emissions contribute to global climate change, and that change is already affecting Canadians and poses a serious risk to the environment, to human health and safety and to economic prosperity both in Canada and internationally (at paras. 1-5); (2) Canada has committed internationally to reducing its GHG emissions by ratifying the *UNFCCC* and the *Paris Agreement* (at paras. 6-8); (3) it is recognized in the *Pan-Canadian Framework* that climate change

requires immediate action by the federal, provincial and territorial governments, and GHG pricing is a core element of that framework (at paras. 9-10); (4) behavioural change that leads to increased energy efficiency is necessary to take effective action against climate change (at para. 11); and (5) the purpose of the *GGPPA* is to implement stringent pricing mechanisms designed to reduce GHG emissions by creating incentives for that behavioural change (paras. 12-16).

[29] In the fifth part of the preamble, it is recognized that some provinces are developing or have implemented GHG pricing systems: para. 14. However, it is also acknowledged that the absence of such systems in some provinces and a lack of stringency in some provincial pricing systems could contribute to significant harm to the environment, to human health and safety and to economic prosperity: para. 15. The preamble concludes with a statement that it is accordingly necessary to create a federal GHG pricing system in order to ensure that GHG pricing applies broadly in Canada: para. 16.

C. *Part 1: Fuel Charge*

[30] Part 1 of the *GGPPA* establishes a charge on prescribed types of fuel that applies to fuel produced, delivered or used in a listed province, fuel brought into a listed province from another place in Canada and fuel imported into Canada at a location in a listed province: ss. 17(1), 18(1), 19(1) and (2) and 21(1). Part 1 of Sch. 1 contains the list of provinces to which Part 1 of the *GGPPA* applies. The fuel charge applies to 22 types of carbon-based fuel that release GHG emissions when burned, including

gasoline, diesel fuel and natural gas, as well as to combustible waste. Schedule 2 lists the types of fuel to which the fuel charge applies and indicates the applicable rates of charge for each one. Although the fuel charge is paid by fuel producers, distributors and importers, and not directly by consumers, it is anticipated that retailers will pass the fuel charge on to consumers in the form of higher energy prices. The fuel charge is not payable on qualifying fuel delivered to farmers and fishers (s. 17(2)) or on fuel used at prescribed facilities, including industrial facilities to which the pricing mechanism in Part 2 of the *GGPPA* applies (ss. 3 and 18(4)). The fuel charge is administered by the Minister of National Revenue acting through the Canada Revenue Agency.

[31] Section 165 of the *GGPPA* concerns the distribution of the proceeds of the fuel charge. Section 165(2) provides that the Minister of National Revenue must distribute the amount collected in respect of the fuel charge in any listed province less amounts that are rebated, refunded or remitted in respect of those charges, but that the Minister of National Revenue has discretion whether to distribute the net amount to the province itself, other prescribed persons or classes of persons or a combination of the two. The federal government's present policy is to give 90 percent of the proceeds of the fuel charge directly to residents of the province of origin in the form of "Climate Action Incentive" payments under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as provided for in s. 13 of the *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27. The Climate Action Incentive is a deemed rebate under the *GGPPA* that reduces the amount that must be distributed under s. 165: *Income Tax Act*, s. 122.8(6). The remaining 10 percent of the proceeds is paid out to schools, hospitals, colleges and

universities, municipalities, not-for-profit organizations, Indigenous communities and small and medium-sized businesses in the province of origin. Simply put, the net amount collected from a listed province is returned to persons and entities in that province.

[32] Part 1 of the *GGPPA* also provides the Governor in Council with considerable power to make regulations. For example, s. 166 authorizes the Governor in Council to make regulations to list or delist provinces in relation to the application of the fuel charge under Part 1 of the *GGPPA*. Any such regulations must be made "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" (s. 166(2)), and the Governor in Council must, in making them, "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions" (s. 166(3)).

[33] In addition, the Governor in Council is authorized to make regulations prescribing anything that is to be prescribed or determined by regulation under Part 1: s. 166(1)(a). Specifically, the Governor in Council can make regulations in relation to the fuel charge system (s. 168(2)) by, for example, modifying the listed types of fuel and the applicable rates of charge in Sch. 2 (ss. 166(4) and 168(3)(a)), or defining words or expressions used in Part 1 of the *GGPPA*, in Part 1 of Sch. 1, or in Sch. 2 (s. 168(3)(a) and (b)). In the event of a conflict between a regulation and Part 1 of the *GGPPA*, s. 168(4) provides that the regulation prevails to the extent of the conflict.

D. *Part 2: Industrial Greenhouse Gas Emissions*

[34] Part 2 of the *GGPPA* establishes an output-based pricing system ("OBPS") for industrial GHG emissions by large emissions-intensive industrial facilities. The OBPS applies only to a "covered facility" in a province listed in Part 2 of Sch. 1: ss. 169 and 174. Covered facilities include facilities that meet the criteria set out in the *Output-Based Pricing System Regulations*, SOR/2019-266 ("*OBPS Regulations*"): *GGPPA*, s. 169. Under the *OBPS Regulations*, a covered facility is one that meets a specified emissions threshold and is engaged in specific industrial activities: s. 8. The Minister of the Environment may also, upon request, designate an industrial facility located in a backstop jurisdiction (i.e., one listed in Part 2 of Sch. 1) as a covered facility even if it does not meet the criteria in the regulations: *GGPPA*, s. 172. A covered facility is exempt from the fuel charge (ss. 18(3) and 18(4)), but it must pay for any GHG emissions that exceed its applicable emissions limits on the basis of sector-specific output-based standards. This can be done in one of three ways: (1) by remitting surplus compliance units earned by the facility at a time when its GHG emissions were below its annual limit, or surplus credits purchased from other facilities; (2) paying an excess emissions charge; or (3) a combination of the two (ss. 174(1) and (2) and 175). The *OBPS Regulations* require that a covered facility's emissions limit be generally calculated on the basis of the facility's production from each industrial activity and an output-based emissions standard in respect of that activity expressed in units of emissions per unit of product: s. 36; Sch. 1. If the efficiency of a facility's industrial processes meets the applicable efficiency standards, the facility will not exceed its

emissions limit. It is only where an industrial process is not sufficiently efficient in terms of its production per unit of emissions that a person responsible for a covered facility must provide compensation for the facility's excess emissions. A facility whose efficiency exceeds the standards earns surplus credits: *GGPPA*, s. 175. Schedule 3 lists 33 GHGs and sets out the global warming potential of each one as defined in accordance with the OBPS, while Sch. 4 sets out the charges for excess emissions. The OBPS is administered by the Minister of the Environment.

[35] Section 188 of the *GGPPA*, which concerns the distribution of revenues from excess emission charge payments, works similarly to s. 165 of Part 1. Section 188(1) provides that the Minister of National Revenue must distribute all revenues from excess emissions charge payments, but that the Minister has discretion whether to distribute them to the province itself, to persons specified in the regulations or that meet criteria set out in the regulations, or to a combination of both. The federal government has indicated that these revenues will be used to support carbon pollution reduction in the jurisdictions in which they were collected, but has not yet provided further details.

[36] Part 2 of the *GGPPA* — like Part 1 — also provides the Governor in Council with considerable power to make regulations and orders. For example, s. 189 authorizes the Governor in Council to make orders to list or delist provinces in relation to the application of the OBPS in Part 2 of the *GGPPA*. As with s. 166, any such order must be made "[f]or the purpose of ensuring that the pricing of greenhouse gas

emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" (s. 189(1)), and the Governor in Council must, in making it, "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions" (s. 189(2)).

[37] As well, the Governor in Council is authorized to make orders adding GHGs to, or deleting them from, Sch. 3 or amending the global warming potential of any gas; in doing so, the Governor in Council may take into account any factor it considers appropriate: ss. 190(1) and (2). The Governor in Council also has the authority to amend Sch. 4 by amending an excess emissions charge or by adding calendar years: s. 191. Finally, the Governor in Council is authorized to make regulations pertaining to a number of aspects of the OBPS, including covered facilities, GHG emissions limits, the quantification of GHGs, the circumstances under which GHGs are deemed to have been emitted by a facility, compensation, and permitted transfers of compliance units: s. 192.

[38] It is important to understand that Parts 1 and 2 of the *GGPPA* together create a single GHG pricing scheme. Part 1 of the *GGPPA* directly prices GHG emissions. The OBPS created by the *OBPS Regulations* made under Part 2 of the *GGPPA* constitutes a complex exemption to Part 1. The OBPS exempts covered facilities from the blunt fuel charge under Part 1, creating a more tailored GHG pricing scheme that lowers the effective GHG price such facilities would otherwise have to pay under Part 1. Part 2 thus also directly prices GHG emissions, but only to the extent that

covered facilities exceed applicable efficiency standards. Parts 1 and 2 of the *GGPPA* therefore function together to price GHG emissions throughout the Canadian economy.

V. Judicial History

A. *Court of Appeal for Saskatchewan, 2019 SKCA 40, 440 D.L.R. (4th) 398*

[39] The majority of the Court of Appeal for Saskatchewan (Richards C.J.S., Jackson and Schwann JJ.A.) concluded that the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine. The majority identified the pith and substance of the *GGPPA* as "the establishment of minimum national standards of price stringency for GHG emissions": para. 125. Applying the framework from *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, they found that the establishment of minimum national standards of price stringency for GHG emissions is a matter of national concern. This matter is of genuine national importance and has the requisite singleness, distinctiveness and indivisibility. GHGs are readily identifiable and distinguishable from other gases, and minimum pricing standards are distinguishable from other forms of regulation. Each province is vulnerable to another province's failure to adequately price GHG emissions. Interprovincial cooperation could not be a basis for a sustainable approach to minimum GHG pricing, because provinces are free to withdraw from cooperative arrangements. As well, recognizing federal authority over minimum national standards of price stringency for GHG emissions would have an acceptable impact on provincial jurisdiction, because it would limit Parliament's

role to pricing and would not threaten the constitutional validity of provincial initiatives to regulate GHGs.

[40] Ottenbreit and Caldwell JJ.A. dissented. They concluded that Part 1 of the *GGPPA* is the result of an unconstitutional exercise of Parliament's taxation power and that the *GGPPA* as a whole is *ultra vires* Parliament. GHG emissions do not represent a constitutionally distinct matter, and the concepts of "stringency" and "national standards" should not be used to tease an abstraction out of recognizable matters within provincial jurisdiction. The asserted need for a national standard of stringency is based not on a genuine provincial inability to set such a standard, but simply on a policy dispute. Finally, the dissent concluded that the matter's scale of impact on provincial jurisdiction is not reconcilable with the balance of federalism. The *GGPPA* would deprive provinces of the ability to regulate GHGs within their borders. Furthermore, it would be possible for the power delegated to the executive branch by the *GGPPA* to be exercised so as to widen the scope of the statute, thus further eroding provincial authority.

B. *Court of Appeal for Ontario, 2019 ONCA 544, 146 O.R. (3d) 65*

[41] The majority of the Court of Appeal for Ontario (Strathy C.J.O., MacPherson and Sharpe JJ.A.) concluded that the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine. The majority characterized the pith and substance of the *GGPPA* as "establishing minimum national standards to reduce greenhouse gas emissions": para. 77. Applying the framework from *Crown Zellerbach,*

they reasoned that this matter is new as it was not recognized at Confederation. It is a matter of national concern, as evidenced by the *GGPPA*'s relationship to Canada's international obligations and by the fact that the statute was the product of extensive efforts to achieve a national response to climate change. The matter meets the singleness, distinctiveness and indivisibility requirement. GHGs are a chemically distinct form of pollution with international and interprovincial impacts. The provinces cannot establish minimum national standards to reduce GHG emissions. No province can control the deleterious effects of GHGs emitted in other provinces or require other provinces to take steps to do so. In assessing the matter's scale of impact on provincial jurisdiction, the majority found that the *GGPPA* strikes an appropriate balance between Parliament and the provincial legislatures. Finally, the majority rejected the Attorney General of Ontario's argument that the levies imposed by the *GGPPA* are unconstitutional regulatory charges. The majority found the levies to be valid because they have a sufficient connection to the regulatory scheme based on their purpose of behaviour modification.

[42] Hoy A.C.J.O. concurred with Strathy C.J.O.'s national concern analysis, although she characterized the pith and substance of the *GGPPA* more narrowly as "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions": paras. 165-66 (emphasis added). In her view, including the means — carbon pricing — in the description of the pith and substance is legally permissible and desirable. In some cases, as here, Parliament's choice of means may

be so central to the legislative objective that the main thrust of the law, properly understood, is to achieve a result in a particular way.

[43] Huscroft J.A. dissented. He characterized the pith and substance of the *GGPPA* broadly as the regulation of GHG emissions. At the classification stage, he reasoned that the national concern doctrine requires the identification of a new subject matter that is independent of the means adopted in the relevant law. In this case, the proposed matter of national concern is federal authority over GHG emissions, which fails to meet the singleness, distinctiveness and indivisibility requirement from *Crown Zellerbach*. In addition, recognizing federal jurisdiction on the basis of provincial inability to establish a national standard would allow any matter to be transformed into a matter of national concern by just adding the word "national" to it. The fact that one province's inaction could undermine another province's carbon pricing efforts does not establish provincial inability either; this simply reflects a legitimate policy disagreement. Finally, Huscroft J.A. concluded that the matter's scale of impact on provincial jurisdiction is incompatible with the federal-provincial division of powers. For a matter to be one of national concern, it must have ascertainable and reasonable limits in order to contain its reach.

C. *Court of Appeal of Alberta, 2020 ABCA 74, 3 Alta. L.R. (7th) 1*

[44] The majority of the Court of Appeal of Alberta (Fraser C.J.A., Watson and Hughes JJ.A.) held that the *GGPPA* is unconstitutional. They reasoned that the national concern doctrine can apply only to matters that would originally have fallen within the

provincial power respecting matters of a merely local or private nature under s. 92(16) of the Constitution. The doctrine has no application to matters that would originally have fallen under other enumerated provincial heads of power. The majority characterized the pith and substance of the *GGPPA* as "at a minimum, regulation of GHG emissions": paras. 211 and 256. This subject falls under various enumerated provincial powers, and in particular the power relating to the development and management of natural resources under s. 92A of the Constitution. Accordingly, the majority reasoned, the national concern doctrine has no application in this case. The majority went on to apply the framework from *Crown Zellerbach*. They found that the regulation of GHG emissions is not a single, distinctive and indivisible matter and that it would have an unacceptable impact on provincial jurisdiction. The *GGPPA* intrudes significantly into the provinces' exclusive jurisdiction over the development and management of natural resources, thereby depriving provinces of their right to balance environmental concerns with economic sustainability.

[45] Wakeling J.A., writing separately, questioned the need for the national concern doctrine and proposed a significant reformulation of the *Crown Zellerbach* framework. He concluded that the *GGPPA* is *ultra vires* Parliament. Canada was in fact seeking judicial approbation of the "environment" or "climate change" as a new federal head of power. Recognition of such a broad federal power would fundamentally destabilize Canadian federalism. The provinces are already taking action to reduce GHG emissions, and the country is better served when governments at both levels work to reduce GHG emissions within their own areas of jurisdiction.

[46] Feehan J.A., dissenting, found that the *GGPPA* is valid on the basis of the national concern doctrine. He identified the pith and substance of the law as follows: "To effect behavioural change throughout Canada leading to increased energy efficiencies by the use of minimum national standards necessary and integral to the stringent pricing of greenhouse gas emissions" (para. 1056). He found that this is a new matter or a matter of national concern, and that it is single, distinctive and indivisible. The *GGPPA* has a small scale of impact on provincial jurisdiction, since it accommodates existing provincial systems and is designed merely to set minimum national standards in order to ensure equity as between provinces. The provincial inability test is also met, given that one province's failure to address GHG emissions would have an adverse effect on other provinces.

VI. Analysis

[47] Alberta, Ontario and Saskatchewan challenge the constitutionality of the *GGPPA* on federalism-related grounds. Ontario further argues that the levies imposed by the *GGPPA* are unconstitutional. Canada and British Columbia argue that the *GGPPA* is constitutional on the basis of the national concern doctrine. Below, I will begin by briefly discussing the foundational principle of federalism. I will then undertake the well-established two-stage analytical approach to the review of legislation on federalism grounds: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 ("*2018 Securities Reference*"), at para. 86. I will first consider the purpose and effects of the *GGPPA* with a view to characterizing the

subject matter — the pith and substance — of the statute. Then I will classify the subject matter of the *GGPPA* with reference to federal and provincial heads of power under the Constitution in order to determine whether it is *intra vires* Parliament and therefore valid. Finally, independently of the jurisdiction issue, I will consider the constitutionality of the levies imposed by the *GGPPA*.

A. *Principle of Federalism*

[48] Federalism is a foundational principle of the Canadian Constitution. It was a legal response to the underlying political and cultural realities that existed at Confederation, and its objectives are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local or regional level and foster cooperation between Parliament and the provincial legislatures for the common good: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), at para. 43; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22.

[49] Sections 91 and 92 of the Constitution give expression to the principle of federalism and divide legislative powers between Parliament and the provincial legislatures: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 ("*2011 Securities Reference*"), at para. 54. Under the division of powers, broad powers were conferred on the provinces to ensure diversity, while at the same time reserving to the federal government powers better exercised in relation to the country as a whole to provide for Canada's unity: *Canadian Western Bank*, at para. 22. Importantly, the

principle of federalism is based on a recognition that within their spheres of jurisdiction, provinces have autonomy to develop their societies, such as through the exercise of the significant provincial power in relation to "Property and Civil Rights" under s. 92(13). Federal power cannot be used in a manner that effectively eviscerates provincial power: *Secession Reference*, at para. 58; *2011 Securities Reference*, at para. 7. A view of federalism that disregards regional autonomy is in fact as problematic as one that underestimates the scope of Parliament's jurisdiction: *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 82.

[50] As this Court observed in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 124, courts, as impartial arbiters, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism. Although early Canadian constitutional decisions by the Judicial Committee of the Privy Council applied a rigid division of federal-provincial powers as watertight compartments, this Court has favoured a flexible view of federalism — what is best described as a modern form of cooperative federalism — that accommodates and encourages intergovernmental cooperation: *2011 Securities Reference*, paras. 56-58. That being said, the Court has always maintained that flexibility and cooperation, while important to federalism, cannot override or modify the constitutional division of powers. As the Court remarked in *2011 Securities Reference*, "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers

out to sea, nor erode the constitutional balance inherent in the Canadian federal state": para. 62. It is in light of this conception of federalism that I approach this case.

B. *Characterization of the GGPPA*

(1) Overarching Principles

[51] At the first stage of the division of powers analysis, a court must consider the purpose and effects of the challenged statute or provision in order to identify its "pith and substance", or true subject matter: *2018 Securities Reference*, at para. 86; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, at paras. 28 and 166. The court does so with a view to identifying the statute's or provision's main thrust, or dominant or most important characteristic: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 31. To determine the purpose of the challenged statute or provision, the court can consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary committees: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 53; *Canadian Western Bank*, at para. 27. In considering the effects of the challenged legislation, the court can consider both the legal effects, those that flow directly from the provisions of the statute itself, and the practical effects, the "side" effects that flow from the application of the statute: *Kitkatla*, at para. 54; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 480. The characterization process is not technical or formalistic. A court can look at the background and circumstances of a statute's enactment as well as

at the words used in it: *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 18.

[52] Three further points with respect to the identification of the pith and substance are important here. First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 ("*Assisted Human Reproduction Act*"), at para. 190. However, precision should not be confused with narrowness. Instead, the pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow: *Genetic Non-Discrimination*, at para. 32. It is only in this manner that a court can determine what the law is in fact "all about": *Desgagnés Transport*, at para. 35, quoting A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 490.

[53] Second, it is permissible in some circumstances for a court to include the legislative choice of means in the definition of a statute's pith and substance, as long as it does not lose sight of the fact that the goal of the analysis is to identify the true subject matter of the challenged statute or provision. In the courts below, a central issue was the permissibility of including the means of the statute in the definition of the

subject matter of the *GGPPA*. In *Ward* and other cases, this Court cautioned against "confus[ing] the purpose of the legislation with the means used to carry out that purpose": *Ward*, at para. 25; see also *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 24. However, those cases did not establish a blanket prohibition on considering the means in characterizing the pith and substance of a law. Rather, they stand for the basic proposition that Parliament's or a provincial legislature's choice of means is not determinative of the legislation's true subject matter, although it may sometimes be permissible to consider the choice of means in defining a statute's purpose. This Court has in fact frequently included references to legislative means when defining the pith and substance of laws: *Ward*, at para. 28; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 ("*Firearms*"), at paras. 4 and 19; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2002] 2 S.C.R. 669, at para. 34; *2011 Securities Reference*, at para. 106. And there may be cases in which an impugned statute's dominant characteristic or main thrust is so closely tied to its means that treating the means as irrelevant to the identification of the pith and substance would make it difficult to define the matter of a statute or a provision precisely. In such a case, a broad pith and substance that does not include the means would be the very type of vague and general characterization, like "health" or "the environment", that this Court described as unhelpful in *Desgagnés Transport*, at paras. 35 and 167 (citing *Assisted Human Reproduction Act*, at para. 190).

[54] Even this Court's jurisprudence on the national concern doctrine illustrates that there is nothing impermissible about defining a matter with reference to the legislative means. In *Munro v. National Capital Commission*, [1966] S.C.R. 663, the Court defined the matter in terms of both the overarching objective — ensuring that "the nature and character of the seat of the Government of Canada may be in accordance with its national significance" — and the legislative means for achieving this objective — "development, conservation and improvement of the National Capital Region": pp. 669 and 671. Similarly, in *Crown Zellerbach*, the Court did not define the matter of the statute broadly in terms of marine pollution. The definition of the matter was in fact a combination of the overarching purpose — controlling marine pollution — and the particular means that had been chosen — controlling the dumping of substances into the sea: pp. 436-37. La Forest J., dissenting, pointed out that regulating the dumping of substances into the sea was only one of multiple means to control marine pollution, given that pollution could also enter the sea through fresh water and through the air: p. 457.

[55] I therefore agree with Hoy A.C.J.O.'s statement in the case at bar that in some cases the choice of means may be so central to the legislative objective that the main thrust of a statute or provision, properly understood, is to achieve a result in a particular way, which would justify including the means in identifying the pith and substance: para. 179.

[56] Third, the characterization and classification stages of the division of powers analysis are and must be kept distinct. In other words, the pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence. As Binnie J. noted in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16, a failure to keep these two stages of the analysis distinct would create "a danger that the whole exercise will become blurred and overly oriented towards results". The characterization exercise must ultimately be rooted in the purpose and the effects of the impugned statute or provision.

(2) Application to the *GGPPA*

[57] In this case, the judges in the courts below, the parties and the interveners have proposed various formulations of the *GGPPA*'s pith and substance. These formulations can be grouped in three basic categories: (1) a broad formulation to the effect that the *GGPPA*'s pith and substance is the regulation of GHG emissions; (2) a national standards-based formulation to the effect that the *GGPPA*'s pith and substance is to establish minimum national standards to reduce GHG emissions; and (3) a national standards pricing-based formulation to the effect that the *GGPPA*'s pith and substance is to establish minimum national standards of GHG price stringency to reduce GHG emissions. I would adopt a national standards pricing-based formulation of the pith and substance of the *GGPPA*. In my view, the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions. Allow me to explain why.

(a) *Intrinsic Evidence*

[58] This Court has frequently used a statute's title as a tool for the purposes of characterization: *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1077; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1004; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at para. 21. However, a statute's title is not determinative in the pith and substance analysis: *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 451. In the case at bar, the statute is titled "*Greenhouse Gas Pollution Pricing Act*". Its long title is "*An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts*". Both of these titles confirm that the purpose of the *GGPPA* is more precise than the regulation of GHG emissions. As the long title makes clear, the true subject matter of the *GGPPA* is not just "*to mitigate climate change*", but to do so "*through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources*". The short title also makes it clear that the *GGPPA* is concerned not simply with regulating GHG emissions, but with pricing them, as the statute is titled the "*Greenhouse Gas Pollution Pricing Act*". Just as Lamer C.J. found in *Swain*, it is in the instant case clear even from the title of the *GGPPA* that its main thrust is national GHG pricing, not, more broadly, the reduction of GHG emissions.

[59] Likewise, the preamble of the *GGPPA* confirms that its subject matter is national GHG pricing. In general, preambles are useful in constitutional litigation in

order to illustrate the "mischief" the legislation is designed to cure and the goals Parliament sought to achieve: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 14.25; P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at pp. 15-14 to 15-15. Although a preamble is not conclusive or determinative, it can be a useful tool in interpreting the purpose of a statute or a provision.

[60] It is clear from reading the preamble as a whole that the focus of the *GGPPA* is on national GHG pricing. The preamble begins with a review of the contribution of GHG emissions to global climate change, of the impact of climate change on — and the risks it poses to — Canada and Canadians (at paras. 1-5), and of the international commitments made by Canada in the *UNFCCC* and the *Paris Agreement* to reduce GHG emissions (paras. 6-8). It then focuses on establishing a minimum national standards GHG pricing scheme. It identifies GHG pricing as "a core element" of the *Pan-Canadian Framework* (at para. 10), and recognizes that climate change requires immediate collective action to promote behavioural change which leads to increased energy efficiency (paras. 9 and 11). After that, pricing mechanisms are commented on at length (at paras. 12-16): in particular, it is noted that some provinces are developing or have implemented GHG pricing systems (at para. 14), but that the absence of such systems or a lack of stringency in some provincial GHG pricing systems could contribute to significant harm to the environment and to human health (para. 15). The preamble concludes with a statement that a national GHG pricing scheme is accordingly necessary in order to ensure that, taking provincial pricing

systems into account, "greenhouse gas emissions pricing applies broadly in Canada": para. 16.

[61] Furthermore, the "mischief" the *GGPPA* is intended to address is clearly identified in the preamble: the profound nationwide harm associated with a purely intraprovincial approach to regulating GHG emissions. In *Firearms*, the Court stated that the mischief approach — one in which a court considers the problem a statute is intended to address — is one way to determine the purpose of impugned legislation: para. 21. In the instant case, the preamble shows that the law is intended to address the "significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity" that could result from "the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems": para. 15. In Parliament's eyes, the relevant mischief is not GHG emissions generally, but rather the effects of the failure of some provinces to implement GHG pricing systems or to implement sufficiently stringent pricing systems, and the consequential failure to reduce GHG emissions across Canada. To address this mischief, the *GGPPA* establishes minimum national standards for GHG pricing that apply across Canada, setting a GHG pricing "floor" across the country.

(b) *Extrinsic Evidence*

[62] In considering extrinsic evidence, a court may consider the statute's legislative history — the events leading up to its enactment, for example, as well as

government policy papers and legislative debates — in order to determine what the legislative purpose is: Hogg, at pp. 15-14 to 15-15; *Kitkatla*, at para. 53. In the case at bar, the extrinsic evidence confirms that the main thrust of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions.

[63] First, it can be seen from the events leading up to the enactment of the *GGPPA* and from government policy papers that there was a focus on GHG pricing and establishing a national GHG pricing benchmark, and that GHG pricing is a distinct portion of the field of governmental responses to climate change. In the *Paris Agreement*, states made general international commitments to reduce GHG emissions. They are not required to adopt GHG pricing systems; rather, they are free to choose their preferred means. Immediately after the adoption of the *Paris Agreement*, however, the First Ministers endorsed the *Vancouver Declaration*, in which they recognized that governments in Canada and around the world were using carbon pricing mechanisms to combat climate change, and Canada and the provinces committed to adopting "a broad range of domestic measures, including carbon pricing mechanisms" in order to reduce GHG emissions: at p. 3 (emphasis added). Moreover, the signers of the *Vancouver Declaration* clearly recognized carbon pricing as a distinct aspect of the field of governmental responses to climate change by establishing a working group on carbon pricing mechanisms that was independent of other working groups on clean technology, innovation and jobs, on specific opportunities for mitigation of climate change, and on adaptation to climate change and climate resilience.

[64] The Working Group on Carbon Pricing Mechanisms was established to explore the role of carbon pricing mechanisms in meeting Canada's GHG emissions reduction targets under the *Paris Agreement*. In its final report, the Working Group identified carbon pricing as one of the most efficient policy approaches for reducing GHG emissions and advocated for broad-based carbon pricing mechanisms across Canada that would give each province and territory flexibility on instrument choice. The federal government then endorsed this recommendation in both the *Pan-Canadian Approach* and the *Pan-Canadian Framework*, and the *Pan-Canadian Approach* introduced a federal benchmark for carbon pricing. Each province and territory would have flexibility to implement either a direct or an indirect carbon pricing system that would have a common scope to ensure effectiveness and minimize interprovincial competitiveness impacts, while a federal backstop, a direct carbon pricing system, would apply only in jurisdictions that did not meet the federal benchmark. This approach would ensure that GHG pricing would be applied across the Canadian economy, and it would recognize GHG pricing policies already implemented or being developed by provinces or territories. The *Pan-Canadian Framework* reaffirmed the *Pan-Canadian Approach* and outlined the federal benchmark for carbon pricing in greater detail. In the *Pan-Canadian Framework*, the federal government reiterated the need for a regulatory framework for carbon pricing that priced GHG emissions across the Canadian economy, highlighted the federal commitment to "ensuring that the provinces and territories have the flexibility to design their own policies and programs to meet emission-reductions targets" and stated that the purpose of the federal benchmark was to preserve the flexibility of the provinces and territories to design their

own GHG pricing policies: Foreword and pp. 7-8. Each province or territory would have flexibility to implement a direct or indirect GHG pricing system within its borders. A federal direct GHG pricing backstop would apply in jurisdictions that did not meet the benchmark.

[65] In my view, it is clear from the Working Group's final report, the *Pan-Canadian Approach* and the *Pan-Canadian Framework* that the federal government's intention was not to take over the field of regulating GHG emissions, or even that of GHG pricing, but was, rather, to establish minimum national standards of GHG price stringency for GHG emissions — through a federally imposed national direct GHG pricing backstop — without displacing provincial and territorial jurisdiction over the choice and design of pricing instruments. Courts should generally hesitate to attribute to Parliament an intention to occupy an entire field: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 20. In the instant case, this statement rings all the more true because the extrinsic evidence of the lead-up to the enactment of the *GGPPA* reveals a process of federal-provincial-territorial cooperation in which the federal government's goal was a system where the provincial and territorial governments would be free to design and implement their own GHG pricing programs.

[66] Second, it can also be seen from the legislative debates leading up to the *GGPPA* that the focus of the statute was not broadly on regulating GHG emissions or establishing minimum national standards to reduce GHG emissions, but was, rather, on

establishing minimum national standards of GHG price stringency. During the parliamentary debate on the *GGPPA*, the then Minister of Environment and Climate Change, the Hon. Catherine McKenna, indicated that pricing carbon pollution was "[c]entral to any credible climate plan" and was "a major contribut[or] to helping Canada meet its climate targets under the Paris Agreement": *House of Commons Debates*, vol. 148, No. 289, 1st Sess., 42nd Parl., May 1, 2018, at p. 18958. The then Parliamentary Secretary to the Minister of the Environment and Climate Change, Jonathan Wilkinson, echoed these comments. He observed that, "[t]o ensure that a national pollution pricing system can be implemented across the country, the government promised to set a regulated federal floor price on carbon": *House of Commons Debates*, vol. 148, No. 294, 1st Sess., 42nd Parl., May 8, 2018, at p. 19213 (emphasis added). What is more, he identified carbon pricing as a distinct part of the field of governmental responses to climate change, stating that "the focus of the pricing of carbon pollution is to actually incent choices that drive people toward more efficient use of hydrocarbon resources so that we will reduce our GHG emissions over time. It is an important piece of a broader approach to addressing climate change and to achieving our Paris targets": p. 19214 (emphasis added).

[67] Similarly, before the House of Commons Standing Committee on Finance, Judy Meltzer, the then Director General, Carbon Pricing Bureau, Department of the Environment, observed that the *GGPPA* was "a step in the development of a federal carbon pricing backstop system" and that "[t]he key purpose of the [*GGPPA*] is to help reduce [GHG] emissions by ensuring that a carbon price applies broadly throughout

Canada, with increasing stringency over time": House of Commons, Standing Committee on Finance, *Evidence*, No. 146, 1st Sess., 42nd Parl., April 25, 2018, at p. 6 (emphasis added). And finally, before the same Standing Committee, John Moffet, the then Associate Assistant Deputy Minister, Environmental Protection Branch, Department of the Environment, expressed the opinion that "the government's goal was to ensure that carbon pricing applied throughout Canada" as well as "to send a signal to other countries and businesses planning to invest in Canada that Canada was committed to carbon pricing": House of Commons, Standing Committee on Finance, *Evidence*, No. 148, 1st Sess., 42nd Parl., May 1, 2018, at p. 5 (emphasis added). He also mentioned another goal of the *GGPPA*, that is, to "make a contribution, but not be the sole contributor to attaining the [*Paris*] target": House of Commons, Standing Committee on Finance, *Evidence*, No. 152, 1st Sess., 42nd Parl., May 8, 2018, at p. 8.

[68] Although statements made in the course of parliamentary debates should be viewed with caution, given that the purpose of the statute is that of Parliament, not that of its individual members, such statements can nonetheless be helpful in discerning Parliament's purpose: *Genetic Non-Discrimination*, at paras. 40 and 194; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.), at p. 131; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 47. In the case at bar, it is notable that both elected representatives and senior public servants consistently described the purpose of the *GGPPA* in terms of imposing a Canada-wide GHG pricing system, not of regulating GHG emissions generally.

[69] As an aside, I note that in finding that the *GGPPA* is *ultra vires* Parliament, the majority of the Court of Appeal of Alberta did not deny that Parliament was concerned with setting a minimum national GHG pricing standard in enacting the legislation. But they found that Parliament's focus on GHG pricing was merely a means to achieve its ultimate purpose of reducing GHG emissions and mitigating the effects of climate change: paras. 213-14. As I explained above, however, a court should characterize the pith and substance — including the purpose being pursued by Parliament or the provincial legislature — precisely. The fact that Parliament's purpose can be stated at multiple levels of generality does not mean that the most general purpose is the true one, or the one that most accurately reflects the thrust of the legislation. This Court has in fact often declined to attribute the broadest possible purpose to Parliament: see *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 130. When characterizing a matter, a court must strive to be as precise as possible, because a precise statement more accurately reflects the true nature of what Parliament did and what it intended to do. Here, that means not denying that Parliament ultimately intended to reduce GHG emissions but, rather, recognizing that its goal in enacting this particular statute was to establish minimum national standards of GHG price stringency to reduce GHG emissions.

(c) *Legal Effects*

[70] A law's legal effects are discerned from its provisions by asking "how the legislation as a whole affects the rights and liabilities of those subject to its terms":

Morgentaler, at p. 482. In my view, the legal effects of the *GGPPA* confirm that its focus is on national GHG pricing and confirm its essentially backstop nature.

[71] In jurisdictions where Parts 1 and 2 of the *GGPPA* are applied, the primary legal effect is to create one GHG pricing scheme that prices GHG emissions in a manner that is consistent with what is done in the rest of the Canadian economy. Certain fuel producers, distributors and importers are required to pay a charge for fuel and for combustible waste under Part 1. And as I explained earlier, the OBPS created by the *OBPS Regulations* made under Part 2 creates a complex exemption to Part 1: covered industrial facilities are exempt from the flat fuel charge under Part 1 of the *GGPPA*, but must pay a charge that applies to the extent that they fail to meet applicable GHG efficiency standards. Both Part 1 and Part 2 of the *GGPPA* thus directly price GHG emissions. Part 1 directly prices the emissions of certain fuel producers, distributors and importers. Part 2 directly prices the GHG emissions of covered facilities to the extent that they exceed the applicable efficiency standards. Significantly, the *GGPPA* does not require those to whom it applies to perform or refrain from performing specified GHG-emitting activities. Nor does it tell industries how they are to operate in order to reduce their GHG emissions. Instead, all the *GGPPA* does is to require persons to pay for engaging in specified activities that result in the emission of GHGs. As the majority of the Court of Appeal for Saskatchewan observed, the *GGPPA* leaves "individual consumers and businesses . . . free to choose how they will respond, or not, to the price signals sent by the marketplace": para. 160. The legal effects of the *GGPPA* are thus centrally aimed at pricing GHG emissions nationally. The *GGPPA* does not

represent an attempt to occupy other areas of the field of GHG emissions reduction that were discussed in the *Pan-Canadian Framework*, such as tightening energy efficiency standards and codes, taking sector-specific action with respect to electricity, buildings, transportation, industry, forestry, agriculture, waste and the public sector, and promoting clean technology innovation: pp. 2-3 and 7-25.

[72] Moreover, because the *GGPPA* operates as a backstop, the legal effects of Parts 1 and 2 of the statute — a federally imposed national GHG pricing scheme — apply only if the Governor in Council has listed a province or territory pursuant to s. 166 for Part 1 or s. 189 for Part 2. The *GGPPA* provides that the Governor in Council may make decisions with respect to listing only "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" (ss. 166(2) and 189(1)) and must, in making them, "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions" (ss. 166(3) and 189(2)). As a result, the GHG pricing mechanism described in Parts 1 and 2 of the *GGPPA* will not come into operation at all in a province or territory that already has a sufficiently stringent GHG pricing system. Not only does this confirm the backstop nature of the *GGPPA* — that of creating minimum national standards of GHG pricing — but this feature of the statute gives legal effect to the federal government's commitment in the *Pan-Canadian Framework* to give the provinces and territories "the flexibility to design their own policies to meet emissions reductions targets, including carbon pricing, adapted to each province and territory's specific circumstances", as well as to "recognize carbon

pricing policies already implemented or in development by provinces and territories": pp. 7-8.

[73] It is notable that the *GGPPA* does not itself define the word "stringency" used in ss. 166 and 189. But this does not mean that the Governor in Council's discretion with respect to listing is "open-ended and entirely subjective": Alta. C.A. reasons, at para. 221. Rather, the Governor in Council's discretion is limited both by the statutory purpose of the *GGPPA* and by specific guidelines set out in the statute for listing decisions: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 108; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 24. Specifically, the discretion to list a province or territory must be exercised in a way that is consistent with the statutory purpose of reducing GHG emissions by putting a price on them. And any decision of the Governor in Council with respect to listing would have to be consistent with the specific guideline of ensuring that emissions pricing is applied broadly in Canada and would have to take the stringency of existing provincial GHG pricing mechanisms into account as the primary factor: preamble, para. 16, and ss. 166 and 189. Moreover, because the *GGPPA* provides for a legal standard to be applied in assessing provincial and territorial pricing mechanisms, any decision of the Governor in Council in this regard would be open to judicial review to ensure that it is consistent with the purpose of the *GGPPA* and with the specific constraints set out in ss. 166(2) and (3) and 189(1) and (2). In other words, although the Governor in Council has considerable discretion with respect to listing, that discretion is limited, as it must be exercised in accordance

with the purpose for which it was given. The Governor in Council certainly does not, therefore, have "absolute and untrammelled 'discretion'": *Vavilov*, at para. 108, quoting *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140.

[74] Similarly, the Governor in Council's discretion under the *GGPPA* to make regulations modifying the schedules and, in some cases, provisions of the statute itself does not make the pith and substance of the *GGPPA* broader. Nor does it permit the Governor in Council to include "any substance, material or thing known to mankind" in the system under Part 1 or to boundlessly change the coverage of Part 2 of the *GGPPA* by adding gases or redefining what qualifies as a covered facility in a way that is unrelated to the underlying purpose of the statute: Alta. C.A. reasons, at paras. 227 and 237.

[75] Under Part 1 of the *GGPPA*, the Governor in Council has the discretion to make regulations prescribing anything that is to be prescribed or determined by regulation under that Part (s. 166(1)(a)), including regulations in relation to the fuel charge system (s. 168(2)), regulations modifying the listed types of fuel and the rates of charge in Sch. 2 (ss. 166(4) and 168(3)(a)), and regulations defining words or expressions used in Part 1 of the *GGPPA*, in Part 1 of Sch. 1, or in Sch. 2 (s. 168(3)(a) and (b)). First, no aspect of this discretion permits the Governor in Council to regulate GHG emissions broadly in any way other than by implementing a GHG pricing scheme. Second, any exercise of the power to make regulations under Part 1 of the *GGPPA* is constrained by that Part's own words and statutory purpose. Part 1, as its

very title indicates, establishes a "Fuel Charge". Any exercise of the regulation-making power that prescribed substances other than fuel or combustible waste would be open to judicial review and could be found to be *ultra vires* the *GGPPA*. Similarly, the Governor in Council could not list a fuel or substance that does not emit GHGs when burned; any regulation to that effect would be *ultra vires* the *GGPPA*, whose purpose is to reduce GHG emissions by putting a price on GHGs.

[76] The Governor in Council also has a discretion under Part 2 of the *GGPPA*, that is, the discretion to make orders adding GHGs to, or deleting them from, Sch. 3 or amending the global warming potential of any gas while taking into account any factor the Governor in Council considers appropriate (ss. 190(1) and (2)), amending an excess emissions payments charge in, or adding calendar years to, Sch. 4 (s. 191), or making regulations pertaining to a number of aspects of the OBPS, including covered facilities, GHG emissions limits, the quantification of GHGs, the circumstances under which GHGs are deemed to have been emitted by a facility, compensation, and permitted transfers of compliance units (s. 192). First, as with Part 1 of the *GGPPA*, no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country. Instead, the OBPS uses GHG intensity standards to set emissions limits and price emissions beyond those limits in order to create incentives for behavioural change across industries. Industrial entities can determine whether to increase their efficiency or to pay to exceed their applicable efficiency standard emission limits. Second, the power to make orders

concerning which gases Part 2 applies to is also limited by the statutory purpose of reducing GHG emissions through GHG pricing. If the Governor in Council were to list a gas that does not contribute to GHG emissions or to indicate a figure for the global warming potential of a gas that was unsupported by scientific evidence, the regulation would be open to judicial review. As for the power to redefine what qualifies as a covered facility, it must be understood in light of the title of Part 2, which specifies that the focus is on "Industrial Greenhouse Gas Emissions". Any attempt to extend Part 2 to a facility other than an industrial facility would also be *ultra vires* the *GGPPA* and open to judicial review.

(d) *Practical Effects*

[77] A law's practical effects are "'side' effects flow[ing] from the application of the statute which are not direct effects of the provisions of the statute itself": *Kitkatla*, at para. 54. Where, as here, a court is asked to adjudicate the constitutionality of legislation that has been in force for only a short time, "any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation": *Morgentaler*, at p. 486.

[78] In my view, the evidence of practical effects in the case at bar is not particularly helpful for characterizing the *GGPPA*. Given the dearth of such evidence, it would be unwise to attempt to predict the economic consequences of the *GGPPA*. It is, moreover, not for the Court to assess how effective the *GGPPA* is at reducing GHG emissions: *Firearms*, at para. 18.

[79] Nonetheless, it should be noted that the evidence of practical effects to date is consistent with the principle of flexibility and support for provincially designed GHG pricing schemes. Practically speaking, the only thing not permitted by the *GGPPA* is for a province or a territory not to implement a GHG pricing mechanism, or to implement one that is not sufficiently stringent. The federal backstop GHG pricing regime in Parts 1 and 2 of the *GGPPA* does not have a legal effect to the extent that there is a provincial system of comparable stringency in place, whatever its design. For example, the Governor in Council has declined to list Alberta under Part 2 of the *GGPPA*, because Alberta's self-designed Technology Innovation and Emissions Reduction ("TIER") system is considered to meet federal stringency requirements: Alberta, *TIER Regulation Fact Sheet*, July 2020 (online). The government of Alberta has itself described the TIER system as one "that is cost-efficient and tailored to Alberta's industries and priorities": *TIER Regulation Fact Sheet*. Similarly, Part 2 applies only partially in Saskatchewan, because that province has implemented its own output-based performance standards system for large industrial facilities. Part 2 applies only to electricity generation and natural gas transmission pipelines, which are exempt from Saskatchewan's self-designed system: Sask. C.A. reasons, at para. 50; see also Environment and Climate Change, *Saskatchewan and pollution pricing*, February 21, 2019 (online).

(e) *Conclusion on Pith and Substance*

[80] For the foregoing reasons, I conclude that the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions. With respect, I cannot accept the broader characterizations of the *GGPPA* advanced by the majorities of the Court of Appeal for Ontario and the Court of Appeal of Alberta. Not only is GHG pricing central to the *GGPPA*, but Parts 1 and 2 of the statute operate as a backstop by creating a national GHG pricing floor. In my view, a national GHG pricing scheme is not merely the means of achieving the end of reducing GHG emissions. Rather, it is the entire matter to which the *GGPPA* is directed, as is evident from the analysis of the purpose and effects of the statute. It is also the most precise characterization of the subject matter of the *GGPPA*, as it accurately reflects both what the statute does — imposing a minimum standard of GHG price stringency — and why the statute does what it does — reducing GHG emissions in order to mitigate climate change: see *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 ("*COPA*"), at para. 17.

[81] I would pause here to note that my colleague Brown J. argues that the phrase "minimum national standards" is an artifice that adds nothing to the pith and substance of the *GGPPA*. I respectfully disagree. Here, "minimum national standards" gives expression to the national backstop nature of the *GGPPA*. In my view, this phrase adds something essential to the pith and substance that goes to the true subject matter of the *GGPPA*, because the statute operates as a national backstop that gives effect to Parliament's purpose of ensuring that GHG pricing applies broadly across Canada.

"Minimum national standards" expresses the fact that the *GGPPA* functions through the imposition of an outcome-based minimum legal standard on all provinces and territories at all times. This contrasts with the proposed federal legislation the Court considered in *2011 Securities Reference*, which had not been enacted to impose a unified system of securities regulation for Canada that would apply in all the provinces and territories, but would instead have permitted provinces to opt in, in the hope that this would create an effective unified national securities regulation system: para. 31. By contrast, the *GGPPA* applies in all the provinces at all times. It is "national" in scope. At the same time, the backstop system set out in the *GGPPA* also gives the provinces flexibility by allowing them to implement their own GHG pricing mechanisms, provided they meet the federally determined standard of stringency. It imposes "minimum standards". In this way, the *GGPPA* does not create a blunt unified national system. The national GHG pricing system provided for in it is limited to the imposition of minimum national standards of stringency.

[82] Moreover, the legislation in this case is distinguishable from the equivalency provision of the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), that was considered in *Hydro-Québec*. In that case, the equivalency provision was but one feature of the federal legislation at issue, which had a broader pith and substance of prohibiting acts causing the entry of certain toxic substances into the environment: para. 130. In the instant case, as I have mentioned, the *GGPPA* operates as a backstop. The intrinsic evidence, the extrinsic evidence, the legal effects and the practical effects all illustrate that operation as a backstop is the main thrust and

dominant characteristic of the *GGPPA*. In my view, a mechanism that may be a mere feature of one law can be the defining feature of another law such that it goes to that other law's pith and substance. The evidence in this case clearly shows that Parliament acted with a remedial mindset in order to address the risks of provincial non-cooperation on GHG pricing by establishing a national GHG pricing floor.

[83] I also note here that my colleague Côté J. finds that ss. 166(2), 166(4), 168(4) and 192 of the *GGPPA* are unconstitutional delegations of power to the Governor in Council (at para. 242). I respectfully disagree.

[84] First, it is necessary to review the concept of delegation. As this Court explained in *2018 Securities Reference*, the principle of parliamentary sovereignty "means that the legislature has the authority to enact laws on its own *and* the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations": para. 73 (emphasis in original). Delegation is common in the administrative state: *ibid*. As this Court further explained, "a delegated power is rooted in and limited by the governing statute . . . . [T]he sovereign legislature always ultimately retains the complete authority to revoke any such delegated power": para. 74.

[85] This Court has consistently held that delegation such as the one at issue in this case is constitutional. Even broad or important powers may be delegated to the executive, so long as the legislature does not abdicate its legislative role. In *Hodge v. The Queen*, (1883) 9 App. Cas. 117, the starting point of the jurisprudence on delegated

authority, the Privy Council found that the Ontario legislature's delegation of power to a board to regulate and license taverns was constitutional. The Privy Council held that delegating the power to make "important regulations" did not amount to an abdication of the legislature's role and that the choice and the extent of any such delegation were matters for the legislature, not the courts. Next, in *Re George Edwin Gray* (1918), 57 S.C.R. 150, this Court affirmed the constitutionality of a very broad grant of law-making power by Parliament to the Governor in Council that included a "Henry VIII clause", that is, a clause by which Parliament delegates to the executive the power to make regulations that amend an enabling statute: see also *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 (P.C.), in which a broad delegation to the provincial executive by way of a provincial skeletal statute was upheld. This Court affirmed and applied *Re Gray* in *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1. And in *R. v. Furtney*, [1991] 3 S.C.R. 89, Stevenson J., writing for a unanimous Court, commented in obiter that "[t]he power of Parliament to delegate its legislative powers has been unquestioned, at least since the *Reference as to the Validity of the Regulations in relation to Chemicals*. The delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn": p. 104 (citations omitted). This governing law has been consistently applied by courts of appeal: see, e.g., *R. v. P. (J.)* (2003), 67 O.R. (3d) 321, at paras. 20-23 (C.A.); *Canadian Generic Pharmaceutical Association v. Canada (Health)*, 2010 FCA 334, [2012] 2 F.C.R. 618, at para. 63; *House of Sga'nisim v. Canada (Attorney General)*, 2013 BCCA 49, 41 B.C.L.R. (5th) 23, at paras. 89-91.

[86] None of the impugned provisions are unconstitutional delegations of power to the Governor in Council. Sections 166(2), 166(4) and 192 of the *GGPPA* are permissible delegations of law-making power to the Governor in Council to implement Parliament's policy choice to legislate a nationwide GHG pricing backstop. Section 166(2) and s. 166(4) allow the Governor in Council to determine where and to what the fuel charge established and detailed in Part 1 of the statute applies. Section 192 permits the Governor in Council to make regulations to implement the OBPS established in Part 2 of the *GGPPA*. Legislatures frequently include provisions with a similar regulation-making scope to that of s. 192 in complex environmental legislative schemes: see, e.g., *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 175.1 to 177 (provisions that have been used to develop a scheme equivalent to the OBPS in *Greenhouse Gas Emissions Performance Standards*, O. Reg. 241/19); *Carbon Tax Act*, S.B.C. 2008, c. 40, s. 84; *Greenhouse Gas Industrial Reporting and Control Act*, S.B.C. 2014, c. 29, ss. 46 to 53; *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 37(1), 59, 86, 120, 122(1), 133, 146, 162, 166, 175, 187, 193 and 239; *Environment Quality Act*, CQLR, c. Q-2, s. 46.5 (a provision used to develop Quebec's cap-and-trade system in *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances*, CQLR, c. Q-2, r. 46.1). Indeed, it is common for a statute to "set out the legislature's basic objects and provisions", while "most of the heavy lifting [is] done by regulations, adopted by the executive branch of government under orders-in-council": B. McLachlin, P.C., *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online).

[87] To the extent that the *GGPPA* delegates to the executive the power to make regulations that amend the statute, such as in s. 168(4), this too, constitutes a permissible delegation to the Governor in Council. As I explained above, the constitutionality of Henry VIII clauses is settled law, and I would decline to revisit the issue in this case. Furthermore, the power to make regulations under a Henry VIII clause is not exempted from the general rules of administrative law. Any regulation that is made must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object (*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266 (B.C.S.C.), at p. 292, quoted in *Katz Group*, at para. 24), and it must be "within the scope [of] and subject to the conditions prescribed" by that statute (*Re Gray*, at p. 168). Therefore, the scope of the authority delegated in s. 168(4) is limited by and subject to the provisions of the *GGPPA*. The Governor in Council cannot use s. 168(4) of the *GGPPA* to alter the character of Part 1 of the statute, since any exercise of this authority to make regulations that are inconsistent with either the general purpose of reducing GHG emissions through the specific means of establishing minimum national standards of GHG price stringency would be *ultra vires* the *GGPPA* and open to judicial review. Moreover, the Governor in Council's power under s. 168(4) can be revoked by Parliament.

[88] In the case at bar, Parliament, far from abdicating its legislative role, has in the *GGPPA* instituted a policy for combatting climate change by establishing minimum national standards of GHG price stringency. Sections 166(2), 166(4), 168(4) and 192 of the *GGPPA* simply delegate to the executive a power to implement this

policy. This delegation of power is within constitutionally acceptable limits and the general rules of administrative law apply to constrain the Governor in Council's discretion under all of these provisions.

C. *Classification of the GGPPA*

(1) National Concern Doctrine

[89] Canada argues that the *GGPPA* is constitutional on the basis of the national concern doctrine. This doctrine is derived from the introductory clause of s. 91 of the Constitution, which empowers Parliament "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" ("POGG power"). According to the doctrine, the federal government has jurisdiction over matters that are found to be of inherent national concern. As Professor Hogg explains, it "is residuary in its relationship to the provincial heads of power": at p. 17-1 to 17-2. Therefore, the national concern doctrine does not allow Parliament to legislate in relation to matters that come within the classes of subjects assigned exclusively to the provinces under s. 92. The national concern test is the mechanism by which matters of inherent national concern, which transcend the provinces, can be identified.

[90] The effect of finding that a matter is one of national concern is permanent: see *Re: Anti-Inflation Act*, at pp. 460-61. For this reason, a finding that the federal

government has authority on the basis of the national concern doctrine raises special concerns about maintaining the constitutional division of powers. As La Forest J. put it in *Crown Zellerbach*, when the federal government asserts its authority on this basis, "[t]he challenge for the courts, as in the past, will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution" (p. 448). By grappling with this challenge over time, the courts have developed a workable framework for identifying federal authority on the basis of the national concern doctrine in appropriate, exceptional cases *and* for adequately constraining federal power in accordance with the principle of federalism.

[91] Below, I will trace the development of this framework, beginning with a discussion of the origins of the doctrine in Privy Council cases. I will then review how this Court has dealt with the doctrine, consistently taking a restrained approach to applying it while gradually developing its legal framework. Next, I will identify and clarify some areas of ongoing uncertainty with respect to the national concern doctrine and review the test for applying it. Lastly, I will apply the test to determine whether the *GGPPA* represents a valid exercise of a federal power based on the national concern doctrine.

(a) *Origins of the National Concern Doctrine*

[92] The first two cases in which the Privy Council dealt with the national concern doctrine, *Russell v. The Queen* (1882), 7 App. Cas. 829 (P.C.), and *Attorney-*

General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348 (P.C.) ("*Local Prohibition Reference*"), speak to the potential for expansion of federal power on the basis of the doctrine and to the importance of placing adequate constraints on that power.

[93] The issue in *Russell* was the constitutionality of the *Canada Temperance Act, 1878*, S.C. 1878, c. 16, a federal statute establishing a local-option prohibition scheme, that is, one that required local action in order to come into force in a given county or city. Sir Montague Smith noted that the scope and objects of the law were general — "to promote temperance by means of a uniform law throughout the Dominion" — and that intemperance was "assumed to exist throughout the Dominion": pp. 841-42. He concluded that the law fell within federal jurisdiction: "Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it" (p. 841). As commentators have noted, the reasoning in *Russell* appeared to open the door to a potentially unlimited scope of federal power: A. S. Abel, "What Peace, Order and Good Government?" (1968), 7 *West. Ont. L. Rev.* 1, at pp. 4-5; Hogg, at pp. 17-8 to 17-12.

[94] The next time the Privy Council considered the national concern doctrine, it recognized the potential breadth of the federal power as defined in *Russell* and sounded a strong note of caution. *Local Prohibition Reference* concerned the constitutionality of a provincial local-option prohibition scheme. The Privy Council accepted "that some matters, in their origin local and provincial, might attain such

dimensions as to affect the body politic of the Dominion" and therefore to fall under federal jurisdiction on the basis of the national concern doctrine: p. 361. However, Lord Watson recognized the risk the national concern doctrine represented for the division of powers in no uncertain terms: a failure to properly confine its application "would practically destroy the autonomy of the provinces": p. 361. He stressed that federal authority based on the national concern doctrine must be "strictly confined to such matters as are unquestionably of Canadian interest and importance" (p. 360) and urged courts to exercise "great caution . . . in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become [a] matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada" (p. 361). The Privy Council upheld the provincial legislation at issue in that case. Applying the double aspect doctrine, it held that provinces could regulate traffic in alcohol from a local point of view where there was no issue with respect to federal paramountcy: pp. 365-70; see also Hogg, at pp. 17-8 to 17-9.

[95] The cautious approach urged in *Local Prohibition Reference* was reflected in the rejection of federal jurisdiction over the regulation of insurance in *In Re "Insurance Act, 1910"* (1913), 48 S.C.R. 260 ("*Insurance Reference SCC*"), aff'd *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 ("*Insurance Reference PC*"). In a majority opinion that was subsequently affirmed by the Privy Council, Duff J. rejected the idea that the growth of the insurance business to "great proportions" across Canada should ground the application of the POGG power:

p. 304. Duff J. was alive to the risk that an unconstrained approach to that power could result in a continual expansion of federal jurisdiction over the provincial private sector simply as a consequence of business growth.

[96] As Professor G. Le Dain wrote before being appointed to this Court, although it had been decided in the Insurance References that "mere growth and extent was not to be the criterion for the application of the general power", the criterion that should be applied was not yet clear: "Sir Lyman Duff and the Constitution" (1974), 12 *Osgoode Hall L.J.* 261, at p. 277. The need to be cautious in applying the national concern doctrine followed from *Local Prohibition Reference*, but the limits on the federal power were not fully defined. In a series of cases over the next few decades, the Privy Council, searching for a "concrete, specific and restrictive criterion" in order to limit federal power based on the POGG clause, sought to restrict its application of that clause to emergencies: Le Dain, at pp. 277-81; see also Hogg, at p. 17-9.

[97] These cases did not satisfactorily reconcile the emergency requirement with the reasoning in *Russell* and *Local Prohibition Reference*. The Privy Council ultimately confronted this problem in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 ("*Canada Temperance Federation*"). In that case, the issue was the constitutionality of a substantially similar successor to the temperance statute that had been considered in *Russell*. Viscount Simon rejected an argument that the POGG power could apply only in an emergency. In the critical passage of his reasons, he stated the test as follows:

> . . . the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. [Citations omitted; pp. 205-6.]

Some of the examples Viscount Simon listed, such as war, would of course satisfy an emergency requirement. The precise distinction between emergency cases and national concern cases was ultimately clarified some decades later: see *Re: Anti-Inflation Act*, at pp. 459-461. But the holding of *Canada Temperance Federation* with respect to national concern is clear: an emergency is not required for a case to meet the national concern test; instead, the test is whether the real subject matter of the legislation goes beyond provincial concern and is, from its inherent nature, the concern of the country as a whole. On this basis, Viscount Simon firmly established national concern as a distinct branch of the POGG power that grounded federal jurisdiction over matters that were inherently of national concern.

(b) *Early Application of the National Concern Doctrine by the Court*

[98] This Court stepped into its role as the final court of appeal for Canada in 1949. Over the next two decades, there were only two matters that the Court, relying on the *Canada Temperance Federation* test and heeding the concern for provincial

autonomy highlighted in *Local Prohibition Reference*, found to come within federal jurisdiction on the basis of national concern. The first was aeronautics (*Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292). The second was the development of the National Capital Region: *Munro*, at p. 671. In the same period, Canadian lower courts identified a third matter of national concern, the control of atomic energy: *Pronto Uranium Mines Limited v. The Ontario Labour Relations Board*, [1956] O.R. 862 (H.C.); *Denison Mines Ltd. v. Attorney-General of Canada*, [1973] 1 O.R. 797 (H.C.).

[99] Ten years after *Munro*, the Court applied the national concern doctrine again, for the first time in the environmental context: *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477. The issue was whether Manitoba could legislate in relation to pollution that originated outside its provincial boundaries but caused damage within them. The majority in the result, in reasons written by Pigeon J., held that a province has no authority to legislate in relation to acts done outside the province, even if those acts cause damaging pollution to enter the province. Pigeon J. recognized that the federal government can legislate in relation to the pollution of interprovincial rivers, which he described as "a pollution problem that is not really local in scope but truly interprovincial": p. 514. The concurring and dissenting judges also endorsed the view that the federal government has jurisdiction over interprovincial rivers: pp. 499, 520 and 525-26. Although none of the judges explicitly referenced the POGG power, the application of that power explains the result: *Crown Zellerbach*, at pp. 445-46, per La Forest J. (dissenting, but not on this point); *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1099; W. R. Lederman, "Unity and

Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, at p. 614.

[100] In applying *Canada Temperance Federation* in its decisions, this Court confirmed that an emergency is not needed in order for a matter to be of national concern, and offered some incremental guidance on the criteria for identifying a matter that is inherently of national concern. Moreover, although the Court did find that the federal government had jurisdiction in a small number of cases in that period, it "exhibited the caution and restraint" displayed in the Privy Council's approach to the doctrine: Lederman, at p. 609.

(c) *Development of the National Concern Test*

[101] The specific parameters of the limits on the federal power began to take shape in *Re: Anti-Inflation Act*, which marked the Court's first serious effort to wrestle with the national concern doctrine. The issue was the constitutionality of the federal *Anti-Inflation Act*, S.C. 1974-75-76, c. 75, the purpose of which was to comprehensively contain and reduce inflation. A majority of the Court upheld the law as a valid exercise of Parliament's POGG power on the basis of the existence of an emergency. Although Beetz J. dissented in the result, his views on the national concern doctrine were endorsed by a majority of the Court.

[102] As in the cases discussed above, Beetz J. stressed the threat the national concern doctrine poses to provincial autonomy. In an emergency case, federal

jurisdiction on the basis of the POGG power is temporary, but the national concern doctrine involves a finding of federal jurisdiction that is permanent: p. 461. Beetz J. emphasized that federal jurisdiction over a matter of national concern is exclusive. Thus, if the federal government were found to have jurisdiction over the proposed matter of "containment and reduction of inflation", then "the provinces could probably continue to regulate profit margins, prices, dividends and compensation if Parliament saw fit to leave them any room; but they could not regulate them in relation to inflation which would have become an area of exclusive federal jurisdiction": pp. 444-45. If broad subjects such as "inflation", "economic growth" or "protection of the environment" were found to be matters of national concern, the federal-provincial balance "would disappear not gradually but rapidly": p. 445.

[103] In Beetz J.'s view, the national concern doctrine does not allow for an erosion of provincial autonomy such as that. After reviewing the jurisprudence, he explained that the doctrine applies only to "clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern": p. 457. Elaborating on the framework for identifying a matter that is inherently of national concern, he found that federal authority based on the national concern doctrine had rightly been reserved for "cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form": p. 458. The Court also had to consider the scale upon which the new matter permitted Parliament to affect provincial matters so as to preserve the federal-

provincial division of powers. The containment and reduction of inflation failed these tests. It lacked specificity and was instead an aggregate of several subjects, such as monetary policy, public spending and restraint of profits, prices and wages, many of which fell under provincial jurisdiction. Moreover, because its scope was so broad, finding that it was a federal matter "would render most provincial powers nugatory": p. 458. Although Beetz J.'s views on the national concern doctrine were not determinative in *Re: Anti-Inflation Act*, they were subsequently adopted by Le Dain J. in *Crown Zellerbach*, in which the Court gave further structure to the national concern doctrine.

[104] There were several cases after *Re: Anti-Inflation Act* in which another consideration was applied to limit the application of the national concern doctrine: provincial inability. This test took centre stage in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, in which Estey J. endorsed the following statement by Professor Hogg:

> . . . the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces.
>
> (p. 945, quoting *Constitutional Law of Canada* (1977), at p. 261)

In *Labatt Breweries*, the brewing and labelling of beer failed the provincial inability test. It was not "a matter of national concern transcending the local authorities' power to meet and solve it by legislation": p. 945. Indeed, the proposed matter did not even

concern the extraprovincial distribution of beer, but instead related to the brewing process itself: pp. 943-45. Likewise, in *Schneider v. The Queen*, [1982] 2 S.C.R. 112, the Court explained that the treatment of drug dependency was not a matter of national concern, because, unlike the illegal trade in drugs, one province's failure to provide treatment facilities would not endanger other provinces' interests: p. 131. Bookending this group of cases is *R. v. Wetmore*, [1983] 2 S.C.R. 284, in which Dickson J., dissenting but not on this point, rejected regulation of the pharmaceutical industry as a matter of national concern. Dickson J. referred both to Beetz J.'s framework and to Professor Hogg's formulation of the provincial inability test, and concluded that the matter failed to meet both standards: p. 296.

[105] *Crown Zellerbach* afforded this Court an opportunity to give structure to the national concern doctrine. At issue was the validity of s. 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, which prohibited the dumping of any substance at sea without a permit. The definition of the word "sea" in that Act excluded fresh waters but included internal marine waters within provincial boundaries. In a split decision, the Court found that the law was valid on the basis of the national concern doctrine. Le Dain J., writing for the majority, restated that doctrine. After surveying the jurisprudence, he set out a framework that now serves as a touchstone for analyzing proposed matters of national concern, determining that the following four conclusions were "firmly established":

> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power,

> which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
>
> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
>
> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter. [pp. 431-32]

Le Dain J. elaborated on the final point, the provincial inability test. He reasoned that provincial inability would be established where a "provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests": p. 434. He characterized provincial inability as "one of the indicia" of singleness or indivisibility: *ibid*.

[106] Applying this framework to the federal ocean dumping law at issue in that case, Le Dain J. held that the law was valid on the basis of the national concern doctrine. He found that marine pollution in general is clearly a matter of concern to Canada as a whole because of its predominantly extraprovincial and international character. Focusing specifically on "the control of pollution by the dumping of substances in

marine waters, including provincial marine waters", Le Dain J. concluded that this matter is single and distinctive: p. 436. In a relevant international convention, marine pollution by dumping was treated as a distinct and separate form of water pollution. Marine pollution has its own characteristics and scientific considerations that distinguish it from fresh water pollution. It is indivisible, because there is a close relationship between pollution in provincial internal waters and pollution in the federal territorial sea, and because it is difficult to ascertain by visual observation the boundary between these waters. The distinction in the statute between fresh water and salt water ensured that the matter would have "ascertainable and reasonable limits" so that its impact on provincial jurisdiction would be acceptable: p. 438.

[107] In the more than 30 years since *Crown Zellerbach*, the Court has not found that the federal government has jurisdiction over any new matters of national concern. However, in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, the Court accepted the earlier finding by lower courts that atomic energy is a matter of national concern: see *Pronto*; *Denison*. In accepting the applicability of the national concern doctrine in that case, this Court was unanimous on the point that federal jurisdiction over atomic energy is grounded in the potential for catastrophic interprovincial and international harm. At issue was whether labour relations comprised part of the matter of atomic energy. A majority of the Court held that labour relations falls within that matter of national concern, finding that labour relations is "integral" to the federal interests that make atomic energy a national concern: pp. 340, 352 and 379-80.

[108] Finally, the most recent case in which the Court considered the national concern doctrine was *Hydro-Québec*. At issue was the constitutional validity of Part II of the *Canadian Environmental Protection Act*, which empowered federal ministers to determine what substances are toxic and to prohibit the introduction of such substances into the environment except in accordance with specified terms and conditions. La Forest J., writing for the majority, upheld the law on the basis of the criminal law power and declined to apply the national concern doctrine. He cautioned against an "enthusiastic adoption" of that doctrine, but acknowledged that a "discrete area of environmental legislative power" can form a matter of national concern if it meets the *Crown Zellerbach* test: paras. 115-16.

[109] From the infancy of the national concern doctrine in *Local Prohibition Reference* to the Court's most recent consideration of the doctrine in *Hydro-Québec*, the jurisprudence reviewed above shows that the Court has been responsive to the legitimate concern that the doctrine poses a threat to provincial autonomy. The national concern test, properly understood, adequately addresses this risk. The test places a clear limit on the federal POGG power and ensures that the national concern doctrine can be applied only in exceptional cases, where doing so is necessary in order for the federal government to discharge its duty to address truly national problems and is consistent with the division of powers.

(2) Clarifying the National Concern Doctrine

[110] The case law reviewed above firmly establishes the national concern doctrine in Canadian law and explains the fundamental principles underlying its application. This doctrine applies only to matters that transcend the provinces owing to their inherently national character. In *Crown Zellerbach*, this Court explained that a proposed matter of national concern must have a "singleness, distinctiveness and indivisibility". Furthermore, a finding that the matter is one of national concern must be reconcilable with the division of powers.

[111] As can be seen from the decisions of the courts below and from the parties' arguments, there is significant uncertainty regarding a number of issues that are central to the national concern doctrine. This is unsurprising, given that there are very few recent cases concerning the doctrine, which in turn flows from the fact that one of its defining features is its restrictive application. This case presents an opportunity to clarify these issues.

[112] In particular, each of the steps of the national concern test requires further discussion. Before turning to those steps, however, I must address two preliminary issues with respect to the "matter" in question in the analysis. First, there is some uncertainty about what the "matter" to which the national concern test applies actually is. Second, this case raises the question of the scope and nature of the federal power over a matter of national concern, and in particular whether the double aspect doctrine can apply in this context. In other words, what are the consequences for the division of powers of identifying a new matter of national concern? The answer to this question

will have a significant impact on the analysis undertaken at the final step of the test, at which the court must determine whether finding that the proposed matter is one of national concern is reconcilable with the division of powers.

[113] Throughout my analysis on these issues, I will be relying in part on this Court's trade and commerce jurisprudence, and in particular on *2011 Securities Reference* and *2018 Securities Reference*. As the Court has observed, the national concern doctrine and the trade and commerce power pose similar challenges to federalism. In both contexts, the Court has interpreted the federal power narrowly to ensure that it does not overwhelm provincial jurisdiction and undermine the federal-provincial division of powers: *Re: Anti-Inflation Act*, at p. 458; *Wetmore*, at p. 294. Although the Court has not addressed the national concern doctrine in any detail for many years, the more recent cases of *2011 Securities Reference* and *2018 Securities Reference*, in which it applied the general branch of the trade and commerce power, offer useful insight and are consistent with the modern approach to federalism. However, my citing these cases should not be taken as an invitation to conflate the two powers. They are distinct, and, as Beetz J. warned in *Re: Anti-Inflation Act*, courts should be "all the more careful" when applying the residual POGG power than when interpreting the enumerated trade and commerce power: p. 458.

(a) *"Matter" of National Concern*

[114] As I explained above, the division of powers analysis follows a familiar pathway. The first stage is to characterize the pith and substance, or matter, of the

impugned statute or provision. The second stage is to classify that matter by reference to the heads of power set out in the Constitution. Having identified the pith and substance of the *GGPPA*, I come now to the classification analysis in relation to the national concern doctrine. The Attorney General of Saskatchewan argues that the classification analysis in this context must depart from the usual framework. Rather than assessing whether the matter of the statute can be classified on the basis of the national concern doctrine, Saskatchewan submits that the classification analysis must be applied to a different "proposed head of power" based on the POGG power, one cast at a level of generality that is broader than the matter of the statute: A.F., at para. 58. This approach cannot be accepted. There is no principled basis for departing from the ordinary division of powers analysis to require that the matter of national concern analyzed by the court at the classification stage be broader than the matter of the statute as identified by the court at the characterization stage. Applying the classification analysis to the matter of the statute in the context of the national concern doctrine is consistent with the constitutional text, with the jurisprudence and with the principle of judicial restraint.

[115] First, as to the constitutional text, s. 91 does not provide in the context of the POGG power that Parliament can make laws in relation to *classes of subjects*. Instead, it states that Parliament can make laws for the peace, order, and good government of Canada "in relation to . . . Matters". Matters and classes of subjects are distinct. Law-making powers are exercisable in relation to matters, which in turn generally come within broader classes of subjects. A matter that falls under the POGG

power necessarily does not come within the classes of subjects enumerated in ss. 91 and 92. This does not mean, however, that the word "matter" has a different meaning in the context of the POGG power. "Matter" is used in ss. 91 and 92 to refer to the pith and substance of legislation: *Firearms*, at para. 16. Nothing in the words of the Constitution supports the construction of a class of subjects under the POGG power that is broader than the matter of the statute. Instead, the text of the Constitution supports the approach of applying the national concern test to the matter of the statute as identified by the court at the characterization stage.

[116] Second, this approach is consistent with the jurisprudence. In the leading cases on the national concern doctrine, the Court focused on the matter of the statute in considering the classification issue. In *Re: Anti-Inflation Act*, the broad matter of containment and reduction of inflation that Beetz J. rejected was not based on a statute whose real focus was narrower, but was in fact what the Attorney General of Canada identified as the matter of the statute at issue: p. 450. In *Crown Zellerbach*, the majority did not find that marine pollution generally was a matter of national concern, but instead found that the specific matter of the *Ocean Dumping Control Act* — the control of marine pollution by the dumping of substances — was one: see p. 436. In those cases, the pith and substance of the legislation itself determined the breadth and content of the matter to which the national concern test was applied.

[117] Third, this approach is consistent with the principle of judicial restraint. In *Munro*, Cartwright J. emphasized on the subject of the national concern doctrine that

the court should "confine itself to the precise question raised in the proceeding which is before it": p. 672. Similarly, in *Canadian Western Bank*, this Court stated that courts should not attempt to "define the possible scope of [broad] powers in advance and for all time", but should instead "procee[d] with caution on a case-by-case basis": para. 43. The Attorney General of Saskatchewan proposes that the court go beyond the precise question asked. In fact, however, a more cautious approach is appropriate in the context of the national concern doctrine, given its potential to disrupt the federal-provincial balance. Put simply, if Parliament has not indicated in a statute that its intention is to exercise jurisdiction over a broad matter, there is no reason for a court to artificially construct such a broad matter.

[118] Finally, I respectfully reject the suggestion that this approach somehow conflates the characterization and classification stages: see Ont. C.A. reasons, at para. 224. It does not. As I explained above, the analyses at the two stages are distinct. At the first stage, a court must follow the accepted approach to the pith and substance analysis in order to characterize the matter of the statute. As both Karakatsanis J. and Kasirer J. recently stated in *Genetic Non-Discrimination*, the court must focus on "the law itself and what it is really about": paras. 31 and 165. Only then does it proceed to the classification analysis, which in the case at bar involves consideration of the national concern doctrine. If the matter is not legally viable as a matter of national concern, then, as was the case in *Re: Anti-Inflation Act*, the statute cannot be upheld on the basis of that doctrine. If, on the other hand, the matter meets the national concern test, then the statute will be valid. Respectfully, this does not "constitutionalize" the

statute: see Ont. C.A. reasons, at para. 224. It simply determines the validity of the law and resolves the question before the court.

[119] Therefore, the matter to consider in this national concern analysis is establishing minimum national standards of GHG price stringency to reduce GHG emissions. I agree with the majority of the Court of Appeal for Saskatchewan that stringency in this context is not limited to the charge per unit of GHG emissions. It encompasses the scope or breadth of application of the charge in the sense of the fuels, operations and activities to which the charge applies and the authority to implement regulatory schemes that are necessary in order to implement such a charge: para. 139.

(b) *Exclusive Federal Jurisdiction Based on the National Concern Doctrine*

[120] There is no doubt that a finding that a matter is of national concern confers exclusive jurisdiction over that matter on Parliament: *Re: Anti-Inflation Act*, at p. 444; *Crown Zellerbach*, at pp. 433 and 455; *Hydro-Québec*, at para. 115. However, the nature and consequences of this exclusive federal jurisdiction is contested by the parties in this case and requires clarification. Understanding the consequences of the recognition of a new matter of national concern is critical in order to properly undertake the scale of impact analysis at the third step of the national concern test.

[121] Uncertainty about the nature of exclusive federal jurisdiction based on the national concern doctrine may be rooted in the use of the word "plenary" to describe the power in certain cases. In *Crown Zellerbach*, Le Dain J. characterized Beetz J.'s

views in *Re: Anti-Inflation Act* as follows: ". . . where a matter falls within the national concern doctrine . . . Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects" (p. 433). However, Le Dain J. went on to reject the proposition that there must be "plenary jurisdiction . . . to deal with any legislative problem": p. 434. In *Ontario Hydro*, a majority of this Court concluded that federal jurisdiction based on the national concern doctrine is *not* plenary and does not give Parliament jurisdiction over "all aspects" of, in that case, atomic energy. Instead, the Court had to determine whether the regulation of labour relations falls within the national concern aspects of atomic energy: pp. 340 and 425; see also M. Olsynski, N. Bankes, and A. Leach, "Breaking Ranks (and Precedent): *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74" (2020), 33 *J. Env. Law & Prac.* 159, at pp. 180-81; A. Leach, and E. M. Adams, "Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction" (2020), 29 *Const. Forum* 1, at n. 71.

[122] In my view, describing the power as "plenary" is unhelpful. The word "plenary" speaks to the scope of the power: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 28 and 32. As can be seen from *Ontario Hydro*, in the context of the national concern doctrine, the scope of the federal power is defined by the nature of the national concern itself. Only aspects with a sufficient connection to the underlying inherent national concern will fall within the scope of the federal power. It was not a foregone conclusion that labour relations at a

nuclear generating station would fall within the federal government's jurisdiction over atomic energy, as one might expect if the national concern doctrine grounded a "plenary" federal power. Rather, the question was whether the safety concerns that make atomic energy a matter of inherent national concern had a sufficient connection to labour relations to bring labour relations within the scope of the federal power.

[123] The Attorney General of Ontario asserts, as a general proposition, that "[t]he consequences of recognizing a new matter of national concern are sweeping": A.F., at para. 64. It is true that the recognition of any new matter of national concern has consequences for federalism. However, the scope of such consequences is case-specific because, as I have just explained, the scope of the federal power in the context of the national concern doctrine depends on the nature of the national concern at issue in the case in question.

[124] Thus, there is some truth to Ontario's submission in the case of, for example, the national concern matter of aeronautics. But this flows from the particular nature of the matter of aeronautics and not from the general nature of the national concern doctrine. The siting of aerodromes falls within the federal power over aeronautics, not because aeronautics has some predetermined breadth flowing from its status as a matter of national concern, but because the nature of the matter is such that it must include "terrestrial installations that facilitate flight": *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 27. Moreover, in its early case law on aeronautics, this Court held that the siting of aerodromes is not merely

within the scope of the federal power, but is essential to that power, such that the doctrine of interjurisdictional immunity applies: *Johannesson*, at p. 295; *COPA*, at para. 37. The application of interjurisdictional immunity to any federal power has an obvious impact on provincial jurisdiction. But interjurisdictional immunity does not automatically apply to matters of national concern. It was applied in *COPA* because there was a precedent that compelled its application, not because the national concern doctrine required that it be applied. Today's restrained approach to interjurisdictional immunity suggests that it would not apply to a newly identified matter of national concern: *Canadian Western Bank*, at paras. 47 and 77. The example of aeronautics therefore tells us little about the consequences of identifying any other matter of national concern. Sensibly, the national concern test requires a case-specific inquiry into whether the recognition of a particular matter of national concern is reconcilable with the division of powers in the scale of impact analysis.

[125] A closely related question concerns the applicability of the double aspect doctrine to a matter of national concern. The double aspect doctrine "recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power": *Desgagnés Transport*, at para. 84. If a fact situation can be regulated from different federal and provincial perspectives and each level of government has a compelling interest in enacting legal rules in relation to that situation, the double aspect doctrine may apply: *ibid.*, at para. 85.

[126] In my view, the double aspect doctrine can apply in cases in which the federal government has jurisdiction on the basis of the national concern doctrine, but whether or not it does apply will vary from case to case. This approach fosters coherence in the law, because the double aspect doctrine can apply to every enumerated federal and provincial head of power, including the general branch of the trade and commerce power (e.g., *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 682; *2018 Securities Reference*, at para. 114. See also S. Choudhry, "Recasting social Canada: A reconsideration of federal jurisdiction over social policy" (2002), 52 *U.T.L.J.* 163, at p. 231, fn. 212; S. Elgie, "Kyoto, The Constitution, and Carbon Trading: Waking A Sleeping *BNA* Bear (Or Two)" (2007), 13 *Rev. Const. Stud.* 67, at p. 88), and can also apply in respect of POGG matters (e.g., *Munro*; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161). Applying the double aspect doctrine to the national concern doctrine is also consistent with the modern approach to federalism, which favours flexibility and a degree of overlapping jurisdiction: *Desgagnés Transport*, at para. 4; see also N. J. Chalifour, P. Oliver and T. Wormington, "Clarifying the Matter: Modernizing Peace, Order, and Good Government in the *Greenhouse Gas Pollution Pricing Act* Appeals" (2020), 40 *N.J.C.L.* 153, at pp. 204-6; Leach and Adams, at p. 6.

[127] The National Capital Region provides a helpful example of the application of the double aspect doctrine in the national concern context. The finding in *Munro* that the development, conservation and improvement of the National Capital Region is a matter of national concern has not displaced municipal planning and development,

which is based on a provincially delegated authority. Instead, the National Capital Commission and the cities of Ottawa and Gatineau each regulate land use planning, the Commission from the federal perspective of the national nature and character of the national capital and the municipalities from a local perspective: J. Poirier, "Choix, statut et mission d'une capitale fédérale: Bruxelles au regard du droit comparé", in E. Witte et al., eds., *Bruxelles et son statut* (1999), 61, at pp. 73-74; N. J. Chalifour, "Jurisdictional Wrangling Over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's *Greenhouse Gas Pollution Pricing Act*" (2019), 50 *Ottawa L. Rev.* 197, at p. 234; Leach and Adams, at p. 7.

[128] However, as I noted above, the fact that the double aspect doctrine *can* apply does not mean that it *will* apply in a given case. It should be applied cautiously so as to avoid eroding the importance attached to provincial autonomy in this Court's jurisprudence. Beetz J. cautioned that it can be applied only "in clear cases where the multiplicity of aspects is real and not merely nominal": *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 766. In some cases, the double aspect doctrine has not been applied where federal jurisdiction fell under the national concern doctrine: e.g., *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 51.

[129] The double aspect doctrine takes on particular significance where, as in the case at bar, Canada asserts jurisdiction over a matter that involves a minimum national standard imposed by legislation that operates as a backstop. The recognition of a matter

of national concern such as this will inevitably result in a double aspect situation. This is in fact the very premise of a federal scheme that imposes minimum national standards: Canada and the provinces are both free to legislate in relation to the same fact situation — in this case by imposing GHG pricing — but the federal law is paramount.

[130] I recognize that it might be argued that Canada and the provinces are exercising their jurisdiction in relation to different matters rather than to different aspects of the same matter, that is, that Canada's authority is limited to minimum national standards of GHG pricing stringency and that this is obviously different than the matters in relation to which provinces might exercise jurisdiction over GHG pricing. This view finds support in some of the language used by this Court, such as the comment in *Canadian Western Bank* that the double aspect doctrine concerns "the various 'aspects' of the 'matter'": para. 30. However, I do not read *Canadian Western Bank* that narrowly, given this Court's recent guidance in *Desgagnés Transport*, in which it stated that the double aspect doctrine concerns "fact situations". Moreover, the fact that Canada can be understood to be empowered to deal only with a different matter than the provinces does not change the resulting jurisdictional reality that where Canada is empowered to impose a minimum national standard, a double aspect situation arises: federal and provincial laws apply concurrently, but the federal law is paramount. From the perspective of provincial autonomy, the corrosive effect is the same. Therefore, courts must recognize that this amounts to an invitation to identify a

previously unidentified double aspect, with clear consequences for provincial autonomy.

[131] Beetz J.'s caution about the double aspect doctrine thus applies with particular force where Canada asserts jurisdiction over a matter that involves a minimum national standard. In such a case, even if the national concern test would otherwise be met, Beetz J.'s caution should act as an additional check. The court must be satisfied that Canada in fact has a "compelling interest" in enacting legal rules over the federal aspect of the activity at issue and that the "multiplicity of aspects is real and not merely nominal": *Desgagnés Transport*, at para. 85; *Bell Canada*, at p. 766. As I will explain in greater detail below, the court must be satisfied at the scale of impact step that the consequences of finding that the proposed matter is one of national concern are reconcilable with the division of powers.

(3) National Concern Test

[132] I will now turn to the specifics of the test for identifying matters that are inherently of national concern. As I will explain below, the applicable framework involves a three-step process: the threshold question; the singleness, distinctiveness and indivisibility analysis; and the scale of impact analysis. Before detailing these steps, there are two points worth noting about the framework as a whole.

[133] First, the recognition of a matter of national concern must be based on evidence: see K. Swinton, "Federalism under Fire: The Role of the Supreme Court of

Canada" (1992), 55 *Law & Contemp. Probs.* 121, at p. 134; J. Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005), 38 *U.B.C. L. Rev.* 353, at p. 370. I find the Court's trade and commerce power jurisprudence instructive in this regard. In the *2011 Securities Reference*, Canada argued that securities trading had once been primarily a local matter, but that it had since evolved to become a "matter of transcendent national concern" that brought it within the trade and commerce power: para. 114. For this argument to succeed, Canada had to "present the Court with a factual matrix" supporting its assertion of jurisdiction: para. 115. In other words, the onus was on Canada to show that the statute at issue "addresses concerns that transcend local, provincial interests" by producing "not mere conjecture, but evidentiary support": para. 116. Similarly, an onus rests on Canada throughout the national concern analysis to adduce evidence in support of its assertion of jurisdiction.

[134] Second, there is no requirement that a matter be historically new in order to be found to be one of national concern: *Crown Zellerbach*, at p. 432. Moreover, it is not helpful to link historical newness to a finding of federal jurisdiction. Many new developments may be predominantly local and provincial in character and fall under provincial heads of power. As LeBel and Deschamps JJ. wrote in *Assisted Human Reproduction Act* in the context of the federal criminal law power, reasoning that novelty alone justifies federal jurisdiction would upset the federal-provincial balance: paras. 255-56. I agree with scholars who have characterized newness as an unhelpful or neutral factor in the national concern analysis: Hogg, at p. 17-18; K. Lysyk,

"Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979), 57 *Can. Bar Rev.* 531, at pp. 571-72.

[135] Given that historical newness is irrelevant to the analysis, it may be helpful to explain certain references to "newness" in the jurisprudence. In *Re: Anti-Inflation Act*, Beetz J. spoke of the application of the national concern doctrine only to "new matters" (p. 458), whereas in *Crown Zellerbach*, Le Dain J. spoke of its applying to both "new matters" *and* matters that had "become" matters of national concern (p. 432). Some commentators suggest that *Crown Zellerbach* therefore represents a departure from Beetz J.'s approach: J. Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003), 28 *Queen's L.J.* 411, at p. 429; E. Brouillet, *La Négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (2005), at p. 295.

[136] In my view, all this confusion stems from what is meant by the word "new". In *Re: Anti-Inflation Act*, Beetz J. intended "new" to refer to matters that could satisfy the national concern test. This included both "new" matters that did not exist in 1867 and matters that are "new" in the sense that our understanding of those subject matters has, in some way, shifted so as to bring out their inherently national character: see also Hogg, at pp. 17-17 to 17-18. The critical element of this analysis is the requirement that matters of national concern be inherently national in character, not that they be historically new. The use of the word "become" in *Crown Zellerbach* served to articulate that the newness of the matter can also refer to our belated

understanding of a matter's true or inherent nature: see pp. 427-28 and 430-31. This is what Beetz J. meant when he explained that these matters are ones "which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern": *Re: Anti-Inflation Act*, at p. 457 (emphasis added). There is no inconsistency between *Re: Anti-Inflation Act* and *Crown Zellerbach* on this point. To be clear, the national concern doctrine does not allow Parliament to legislate in relation to matters that come within the classes of subjects assigned exclusively to the provinces. The purpose of the analysis is strictly to determine whether a matter is by nature one of national concern.

[137] It follows that the majority of the Court of Appeal of Alberta erred in adding, as a threshold restriction, that matters that originally fell under provincial heads of power other than s. 92(16) of the Constitution are incapable of acquiring national dimensions: para. 185. Instead, the possibility that an existing matter may be found to be one of national concern provides a principled basis for courts to be responsive to new evidence in their application of the constitutional text. This is as it should be: "Constitutional texts must be interpreted in a broad and purposive manner. Constitutional texts must also be interpreted in a manner that is sensitive to evolving circumstances because they 'must continually adapt to cover new realities'": *Comeau*, at para. 52 (citations omitted).

[138] Let us consider atomic energy, the matter of national concern that this Court identified in *Ontario Hydro*. This matter encompasses the mining of raw

materials such as uranium — materials that existed and were mined prior to the discovery of atomic energy. Before World War II, the dominant characteristic of uranium mining would likely have been the management of natural resources within the province, which would have come within various enumerated provincial classes of subjects: ss. 92(5), 92(9), 92(10) and 92(13) (s. 92A, while also relevant, did not come into being until the Constitution was amended in 1982). But that did not prevent atomic energy, including the production of its raw materials, from being found to be a matter which is, by nature, of national concern because of its safety and security risks, particularly the risk of catastrophic interprovincial harm: see *Pronto*; *Denison*; *Ontario Hydro*. In other words, the discovery of atomic energy brought out the inherently national character of uranium mining. The fact that uranium mining would have fallen under provincial heads of power other than s. 92(16) prior to this discovery is irrelevant to the analysis and did not preclude the finding that atomic energy is a matter of national concern. The "historical newness" of atomic energy is equally irrelevant; the dispositive feature of the cases in question was instead that the discovery of atomic energy had led to evidence grounding a new understanding of the inherent nature of the matter as one of national concern.

[139] It also follows that I do not agree with my colleague Rowe J.'s articulation of the national concern test, which consists of two requirements as follows: first, the matter must not come within the enumerated powers; and second, the matter "must be such that it cannot be shared between both orders of government and that it must be entrusted to Parliament, exclusively, to avoid a jurisdictional vacuum" (Rowe J.'s

reasons, at para. 545). With great respect, I see a jurisprudential barrier to my colleague's approach, which I find myself unable to resolve. I am not persuaded that the matters of national concern this Court has recognized, such as the development of the National Capital Region (*Munro*; see also: *Re: Anti-Inflation Act*, at p. 457) or the control of marine pollution by dumping (*Crown Zellerbach*), would necessarily meet his test if it were applied in the manner he proposes. Nor, in my view, can *Munro* or *Crown Zellerbach* be read as an application of my colleague's methodology. In those cases, this Court did not proceed by way of a two-step search for a jurisdictional vacuum; rather, it applied the national concern test to identify matters of inherent national concern.

[140] Thus, *Munro* and *Crown Zellerbach* can be explained in light of a more conventional understanding of the national concern doctrine that was articulated in *Crown Zellerbach* itself and which I will explain in greater detail below. Marine pollution is predominantly extraprovincial and international in character, while the development of the national capital is of concern to Canada as a whole. The matters proposed in those cases were specific and identifiable and had ascertainable and reasonable limits. The requirement of provincial inability, understood in the sense of serious extraprovincial harm, was met: ". . . the failure of either Quebec or Ontario to cooperate in the development of the national capital region would have denied to all Canadians the symbolic value of a suitable national capital", and ". . . the failure of one province to protect its waters would probably lead to the pollution of the waters of other provinces as well as the (federal) territorial sea and high sea" (Hogg, at p. 17-14).

Lastly, the recognition of these matters was compatible with the division of powers. The result of this analysis leads to the conclusion that these matters, by their nature, transcend the provinces. They were thus shown to fall outside of s. 92 and were appropriate matters for recognition under the national concern doctrine. I therefore respectfully disagree with my colleague's articulation of the national concern test.

[141] To sum up, the purpose of the national concern analysis is to identify matters of inherent national concern — matters which, by their nature, transcend the provinces. "Historical newness" is irrelevant to this analysis, and there is no threshold question whether the matter can be characterized as being new. Instead, the analysis has three steps: the threshold question, which relates not to newness but to whether the matter is of sufficient concern to Canada as whole; the singleness, distinctiveness and indivisibility analysis; and the scale of impact analysis. The onus is on Canada to adduce evidence to satisfy the court that a matter of inherent national concern is made out. I will now discuss each of these three steps in detail.

(a) *Threshold Question*

[142] Courts must approach a finding that the federal government has jurisdiction on the basis of the national concern doctrine with great caution. The analysis therefore begins by asking, as a threshold question, whether the matter is of sufficient concern to Canada as a whole to warrant consideration under the doctrine. This invites a common-sense inquiry into the national importance of the proposed matter.

[143] This Court's analysis in key national concern decisions has begun with an assessment of whether the matter at issue is one "of concern to Canada as a whole": *Crown Zellerbach*, at p. 436. In *Munro*, Cartwright J. began with an observation that the matter was "the concern of Canada as a whole": p. 671. The reasons of the majorities of the Saskatchewan and Ontario courts of appeal in the instant case reflect this approach: Richards C.J.S. began his analysis on this subject with the "broad starting point" of "whether this matter is something of genuine national importance" (para. 146); Strathy C.J.O. first asked whether "the matter is both 'national' and a 'concern'" before proceeding to the analysis of singleness, distinctiveness and indivisibility (para. 106). Although this inquiry was not identified as a distinct step of the analysis in *Crown Zellerbach*, it serves an important purpose. The threshold question ensures that the national concern doctrine cannot be invoked too lightly and provides essential context for the analysis that follows. Requiring that this question be asked as the first step of the test is an appropriate, incremental development in the law to ensure that federal power under the national concern doctrine is properly constrained.

[144] At the threshold step, Canada must adduce evidence to satisfy the court that the matter is of sufficient concern to Canada as a whole to warrant consideration in accordance with the national concern doctrine. If Canada discharges this burden, the analysis proceeds. This approach does not open the door to the recognition of federal jurisdiction simply on the basis that a legislative field is "important"; it operates to limit the application of the national concern doctrine.

(b) *Singleness, Distinctiveness and Indivisibility*

[145] The second step of the analysis was explained by Le Dain J. as follows in *Crown Zellerbach*: the matter "must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" (p. 432). Le Dain J. added that this inquiry includes the provincial inability test: "In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter" (p. 432).

[146] The phrase "singleness, distinctiveness and indivisibility" requires some explanation. On its own, this phrase does not amount to a readily applicable legal test. Rather, in my view, two principles underpin the singleness, distinctiveness and indivisibility requirement and must be satisfied in order to determine that a matter is one of national concern. In Le Dain J.'s formulation, these characteristics are essential because they are features that *clearly distinguish* a matter of national concern from matters of provincial concern. This is the first principle underpinning the singleness, distinctiveness and indivisibility inquiry: to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. The recognition of "provincial inability" as a marker of singleness, distinctiveness and

indivisibility points to a second principle animating the inquiry: federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. This means that the matter at issue is of a nature that the provinces cannot address either jointly or severally, because the failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing it, *and* that a province's failure to deal with the matter within its own borders would have grave extraprovincial consequences.

[147] Regarding the first principle, the proposed federal matter must be specific and readily identifiable. As Beetz J. made clear in *Re: Anti-Inflation Act*, a matter that is "lacking in specificity" or is boundless cannot pass muster as a matter of national concern: p. 458. The specific and identifiable matter must also be qualitatively different from matters of provincial concern. It is clearly not enough for a matter to be quantitatively different from matters of provincial concern — the mere growth or extent of a problem across Canada is insufficient to justify federal jurisdiction: *Insurance Reference SCC*; see also Le Dain, at pp. 277-78; *Wetmore*, at p. 296. The case law points to several factors that properly inform this analysis.

[148] One key consideration for determining whether the matter is qualitatively different from matters of provincial concern is whether it is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects. The case law demonstrates that this inquiry is central to the national concern doctrine. The finding that marine pollution is extraprovincial and international

in its character and implications was critical to the recognition of a matter of national concern in *Crown Zellerbach*: p. 436; see also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 64. In *Ontario Hydro*, the judges were unanimous in grounding the federal government's jurisdiction over atomic energy based on the POGG power in the potential for catastrophic interprovincial and international harm. By contrast, in *Hydro-Québec*, the judges who considered the issue concluded that the fact that the statute regulated substances whose effects were entirely intraprovincial and localized was a barrier to its recognition as a matter of national concern. However, they accepted that a matter dealing with toxic substances that originate in a particular province may nonetheless be predominantly extraprovincial and international in character if the substances in question have serious effects that can cross provincial boundaries: paras. 68, 74 and 76.

[149] International agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern. Consideration of international agreements figured into the Court's national concern analysis in *Johannesson* and in *Crown Zellerbach*: see also G. van Ert, "POGG and Treaties: The Role of International Agreements in National Concern Analysis" (2020), 43 *Dalhousie L.J.* 901, at p. 920. Significantly, the existence of treaty obligations is not determinative of federal jurisdiction: there is no freestanding federal treaty implementation power and Parliament's jurisdiction to implement treaties signed by the federal government depends on the ordinary division of powers: *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.). Treaty obligations and international

agreements can be relevant to the national concern analysis, however. Depending on their content, they may help to show that a matter has an extraprovincial and international character, thereby supporting a finding that it is qualitatively different from matters of provincial concern.

[150] Furthermore, to be qualitatively different from matters of provincial concern, the matter must not be an aggregate of provincial matters: *Re: Anti-Inflation Act*, at p. 458. The federal legislative role must be distinct from and not duplicative of that of the provinces. Once again, the Court's trade and commerce jurisprudence is helpful in this regard. The Court's opinions with respect to securities regulation show that a regulatory field with an international or extraprovincial dimension can also have local features. While there are aspects of securities regulation that are national in character and have genuine national goals, much of this sphere is primarily focused on local concerns related to investor protection and market fairness: *2011 Securities Reference*, at paras. 115 and 124-28; *2018 Securities Reference*, at paras. 105-6. As the *2011 Securities Reference* and the *2018 Securities Reference* confirm, federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern.

[151] Thus, the first principle underpinning the requirement of singleness, distinctiveness and indivisibility is that federal jurisdiction may only be recognized over a specific and identifiable matter that is qualitatively different from matters of

provincial concern. At this stage, the court should inquire into whether the matter is predominantly extraprovincial and international in its nature or its effects, into the content of any international agreements in relation to the matter, and into whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces.

[152] I will now turn to the second principle, that is, that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. This Court's jurisprudence in relation to the general branch of the trade and commerce power is helpful on this point, too. The starting point for this analysis should be the provincial inability test expressed through the fourth and fifth indicia discussed in *General Motors*, at p. 662: (1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (2) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. For provincial inability to be established for the purposes of the national concern doctrine, both of these factors are required.

[153] But there is a third factor that is required in the context of the national concern doctrine in order to establish provincial inability: a province's failure to deal with the matter must have grave extraprovincial consequences. Professor Hogg explains that evaluating extraprovincial harm helps to determine whether a national law "is not merely desirable, but essential, in the sense that the problem 'is beyond the

power of the provinces to deal with it'": p. 17-14, quoting D. Gibson, "Measuring 'National Dimensions'" (1976), 7 *Man. L.J.* 15, at p. 33. This connects the provincial inability test to the overall purpose of the national concern test, which is to identify matters of inherent national concern that transcend the provinces.

[154] The need for "grave consequences for the residents of other provinces" was adopted by this Court in *Labatt Breweries* (at p. 945) and can be seen woven throughout its national concern jurisprudence. In *Local Prohibition Reference*, the Privy Council suggested arms trafficking as an example of a potential matter of national concern, which is consistent with this requirement of grave extraprovincial consequences flowing from provincial inaction in relation to the matter: *Local Prohibition Reference*, at p. 362. And in *Johannesson*, Locke J. of this Court had emphasized that one province's failure to provide space for aerodromes could have the "intolerable" extraprovincial consequence of isolating northern regions of Canada: pp. 326-27. Although the extraprovincial harm at issue in *Munro* was of a different nature, it was nonetheless meaningful, as it would have resulted in the denial of a suitable national capital to all Canadians. In *Ontario Hydro*, La Forest J. reasoned that one province's failure to effectively regulate atomic energy "could invite disaster", endangering "the safety of people hundreds of miles from a nuclear facility": p. 379. In contrast, the majority in *Schneider* reasoned that one province's failure to provide treatment facilities for heroin users "will not endanger the interests of another province": p. 131. This conception of provincial inability was reaffirmed in *Crown Zellerbach*.

[155] The requirement of grave extraprovincial consequences sets a high bar for a finding of provincial inability for the purposes of the national concern doctrine. This requirement can be satisfied by actual harm or by a serious risk of harm being sustained in the future. It may include serious harm to human life and health or to the environment, though it is not necessarily limited to such consequences. Mere inefficiency or additional financial costs stemming from divided or overlapping jurisdiction is clearly insufficient: *Wetmore*, at p. 296. Moreover, as I noted above, the onus is on Canada to establish that provincial inability is made out, and evidence is required, "for the questions of provincial inability and the harm that flows therefrom are both factual in part": Swinton, at p. 134; see also Leclair (2005), at p. 370.

[156] In *Crown Zellerbach*, Le Dain J. characterized provincial inability as an indicium of singleness and indivisibility. But in much of this Court's national concern jurisprudence, it has been treated as a strict requirement rather than as a mere optional indicium. Provincial inability has been used on this basis to reject national concern arguments and limit the doctrine's application: *Labatt Breweries*; *Schneider*; *Wetmore*. In my view, provincial inability functions as a strong constraint on federal power and should be seen as a necessary but not sufficient requirement for the purposes of the national concern doctrine. Treating provincial inability as merely an optional indicium "rob[s] it of its initial, necessity-based, narrowing effect and opens doors for national concern": G. Baier, "Tempering Peace, Order and Good Government: Provincial Inability and Canadian Federalism" (1998), 9 *N.J.C.L.* 277, at p. 291; see also Leclair (2005), at p. 360.

[157] In conclusion, there are two principles that apply in relation to singleness, distinctiveness and indivisibility: first, federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. Provincial inability will be established only if the matter is of a nature that the provinces cannot address either jointly or severally, because the failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing it, *and* if a province's failure to deal with the matter within its own borders would have grave extraprovincial consequences.

[158] A few further words about indivisibility are in order, because my colleagues Brown and Rowe JJ. say that it has been written out of the national concern test in these reasons. The requirement of indivisibility is given effect through both of the principles I have discussed. The first of these principles requires a specific and identifiable matter which is not a boundless aggregate. The second principle requires provincial inability, as it is clearly defined in *Crown Zellerbach* and, indeed, throughout the Court's national concern jurisprudence, which is a marker of indivisibility.

[159] I respectfully disagree with my colleagues' understanding of indivisibility, according to which "interrelatedness" is a criterion for establishing indivisibility (Rowe J.'s reasons, at paras. 545 and 548, citing *Crown Zellerbach*, at p. 434). Le Dain J. referred to interrelatedness only once, in his explanation of why the provincial inability

test helps the court determine whether a matter has the "character of singleness or indivisibility": p. 434. Thus, if a province's approach to the intraprovincial aspects of a matter could cause grave extraprovincial harm — that is, if the provincial inability test is met — the matter can be said to have an interrelatedness, which supports a finding of indivisibility. One difficulty with my colleagues' approach, in my view, is that they treat interrelatedness (a situation in which the provincial inability test is met) as sufficient to establish indivisibility, while at the same time maintaining that meeting the provincial inability test cannot establish indivisibility (Rowe J.'s reasons, at paras. 545 and 560; see also Brown J.'s reasons, at para. 383). Respectfully, I would favour giving effect to the requirement of indivisibility on the basis of the two principles I have set out, which is consistent both with Le Dain J.'s treatment of interrelatedness and with the national concern jurisprudence as a whole, and presents no such analytical difficulties.

(c) *Scale of Impact*

[160] At the final step of the national concern test, Canada must show that the proposed matter has "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution": *Crown Zellerbach,* at p. 432; *Hydro-Québec,* at para. 66, per Lamer C.J. and Iacobucci J. (dissenting, but not on this point). Determining whether the matter's scale of impact is reconcilable with the division of powers requires the Court to balance competing interests. As Professor Elgie writes, it does not make sense to treat the acceptable

impact on provincial authority as a static threshold; instead, the effect on provincial jurisdiction should be assessed in the context of the matter at issue: pp. 85-86.

[161] The purpose of the scale of impact analysis is to prevent federal overreach: S. Choudhry, *Constitutional Law and the Politics of Carbon Pricing in Canada* (2019), IRPP Study 74, at p. 15; *2011 Securities Reference*, at para. 61. In other words, it is designed to protect against unjustified intrusions on provincial autonomy. In accordance with this purpose, at this stage of the analysis, the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former.

(d) *Summary of the Framework*

[162] In summary, finding that a matter is one of national concern involves a three-step analysis.

[163] First, Canada must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. This question arises in every case, regardless of whether the matter can be characterized as historically new. If Canada discharges its burden at the step of this threshold inquiry, the analysis will proceed.

[164] Second, the court must undertake the analysis explained in *Crown Zellerbach* through the language of "singleness, distinctiveness and indivisibility". More important than this terminology, however, are the principles underpinning the inquiry. The first of these principles is that, to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. The second principle to be considered at this stage of the inquiry is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter.

[165] If these two principles are satisfied, the court will proceed to the third and final step and determine whether the scale of impact of the proposed matter of national concern is reconcilable with the division of powers.

[166] The onus is on Canada throughout this analysis, and evidence is required. Where a proposed federal matter satisfies the requirements of all three steps of the framework, there is a principled basis to conclude that the matter is one that, by its nature, transcends the provinces and should be recognized as a matter of national concern.

(4) Application to the *GGPPA*

(a) *Threshold Question*

[167] Canada has adduced evidence that clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of sufficient concern to Canada as a whole that it warrants consideration in accordance with the national concern doctrine. To begin, this matter's importance to Canada as a whole must be understood in light of the seriousness of the underlying problem. All parties to this proceeding agree that climate change is an existential challenge. It is a threat of the highest order to the country, and indeed to the world. This context, on its own, provides some assurance that in the case at bar, Canada is not seeking to invoke the national concern doctrine too lightly. The undisputed existence of a threat to the future of humanity cannot be ignored.

[168] That being said, the matter at issue here is not the regulation of GHG emissions generally, and Canada is not seeking to have all potential forms of GHG regulation classified as matters of national concern. Rather, the specific question before the Court is whether establishing minimum national standards of GHG price stringency to reduce GHG emissions is a matter of national concern.

[169] The history of efforts to address climate change in Canada reflects the critical role of carbon pricing strategies in policies to reduce GHG emissions. As discussed above, Canada and all the provinces committed, in the *Vancouver Declaration*, to including carbon pricing in the country's efforts to reduce GHG emissions. The subsequently established Working Group on Carbon Pricing Mechanisms recognized in its final report that many experts regard carbon pricing as a

necessary tool for efficiently reducing GHG emissions: p. 5. The Working Group's final report had the support of all provinces and of Canada at the time it was published, and its affirmation of the importance of carbon pricing is supported by the record in this case. Similarly, the Specific Mitigation Opportunities Working Group, one of the other three working groups established under the *Vancouver Declaration*, listed, in its final report, "broad, economy-wide carbon pricing" as one of "three essential elements of a comprehensive approach to mitigating GHG emissions": Specific Mitigation Opportunities Working Group, *Final Report*, 2016 (online), at p. 17.

[170] Furthermore, there is a broad consensus among expert international bodies such as the World Bank, the Organization for Economic Cooperation and Development and the International Monetary Fund that carbon pricing is a critical measure for the reduction of GHG emissions. For example, the High-Level Commission on Carbon Prices' *Report of the High-Level Commission on Carbon Prices*, May 29, 2017 (online), states: "A well-designed carbon price is an indispensable part of a strategy for reducing emissions in an efficient way" (p. 1). And an International Monetary Fund Staff Discussion Note entitled *After Paris: Fiscal, Macroeconomic, and Financial Implications of Climate Change* states: "The central problem is that no single firm or household has a significant effect on climate, yet collectively there is a huge effect — so pricing is necessary to force the factoring of climate effects into individual-level decisions" (M. Farid, et al., *After Paris: Fiscal, Macroeconomic, and Financial Implications of Climate Change*, January 11, 2016 (online), at p. 6). In my view, the

evidence reflects a consensus, both in Canada and internationally, that carbon pricing is integral to reducing GHG emissions.

[171] In summary, the evidence clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it readily passes the threshold test and warrants consideration as a possible matter of national concern.

(b) *Singleness, Distinctiveness and Indivisibility*

[172] As I explained above, the first principle to be considered in the singleness, distinctiveness and indivisibility inquiry is that federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. Recognizing minimum national standards of GHG price stringency to reduce GHG emissions as a matter of national concern satisfies this requirement.

[173] Given that the matter at issue is establishing minimum national standards of GHG price stringency to reduce GHGs, it is important to begin by observing that these gases are a specific and precisely identifiable type of pollutant. The harmful effects of GHGs are known, and the fuel and excess emissions charges are based on the global warming potential of the gases (see Sch. 3 of the *GGPPA*). Moreover, GHG emissions are predominantly extraprovincial and international in their character and

implications. This flows from their nature as a diffuse atmospheric pollutant and from their effect in causing global climate change. GHG emissions are precisely the type of diffuse and persistent substances with serious deleterious extraprovincial effects that the dissent in *Hydro-Québec* suggested might appropriately be regulated on the basis of the national concern doctrine: para. 76. In *Interprovincial Co-operatives*, a case concerning one province's emission of pollutants into an interprovincial river, Pigeon J. observed that the Court was "faced with a pollution problem that is not really local in scope but truly interprovincial": p. 514. GHG emissions represent a pollution problem that is not merely interprovincial, but global, in scope.

[174] The international response to GHG emissions over the past three decades confirms this. As early as 1992, the preamble to the *UNFCCC* recognized climate change as "a common concern of humankind", and also acknowledged its "global nature". The acknowledgment that climate change is a common concern of humankind was reiterated in the *Paris Agreement*. As well, the need for an effective international response to climate change was recognized in both agreements. Specifically, the *Paris Agreement* identifies imperatives of holding the increase in the global average temperature to well below 2.0°C above pre-industrial levels and achieving net zero emissions in the second half of the 21st century: arts. 2(1)(a) and 4(1). States parties are therefore required to make nationally determined contributions that are increasingly ambitious and to implement domestic mitigation measures for the purpose of ensuring that those contributions are achieved: arts. 4(2) and (3). Both the *UNFCCC* and the *Paris Agreement* help illustrate the predominantly extraprovincial and international

nature of GHG emissions and support the conclusion that the matter at issue is qualitatively different from matters of provincial concern.

[175] Not only is the type of pollutant to which the matter applies identifiable and qualitatively different from matters of provincial concern, but the regulatory mechanism of GHG pricing is a specific, and limited, one. It operates in a particular way, seeking to change behaviour by internalizing the cost of climate change impacts, incorporating them into the price of fuel and the cost of industrial activity. The *Vancouver Declaration* and the Working Group on Carbon Pricing Mechanisms that it established reflect the status of carbon pricing as a distinct form of regulation. GHG pricing does not amount to the regulation of GHG emissions generally. It is also different in kind from regulatory mechanisms that do not involve pricing, such as sector-specific initiatives concerning electricity, buildings, transportation, industry, forestry, agriculture and waste.

[176] Minimum national standards of GHG price stringency, which are implemented in this case by means of the backstop architecture of the *GGPPA*, relate to a federal role in carbon pricing that is qualitatively different from matters of provincial concern. The *2011 Securities Reference* and *2018 Securities Reference* illustrate this point. The proposed legislation at issue in the *2011 Securities Reference* did not have a distinctly national focus; it ran afoul of the division of powers by replicating existing provincial schemes: para. 116. However, the Court held that "[l]egislation aimed at imposing minimum standards applicable throughout the country

and preserving the stability and integrity of Canada's financial markets might well relate to trade as a whole" and could be a matter of national importance to which the federal general trade and commerce power applies: para. 114. This was the approach the federal government took in the proposed legislation at issue in the *2018 Securities Reference*. The focus of that legislation was on controlling systemic risks that represented a threat to the stability of the country's financial system as a whole. Its effect was "to address any risk that 'slips through the cracks' and poses a threat to the Canadian economy": para. 92. Rather than displacing provincial securities legislation by ensuring the day-to-day regulation of securities trading, it sought to complement provincial legislation by addressing national economic objectives: para. 96.

[177] The backstop approach taken in the *GGPPA* is analogous to the approach taken in the proposed legislation that was at issue in the *2018 Securities Reference*. The *GGPPA* establishes minimum national standards of price stringency to reduce GHG emissions in order to ensure that Canada's nationally determined contribution under the *Paris Agreement* is achieved. It does so on a distinctly national basis, one that neither represents an aggregate of provincial matters nor duplicates provincial GHG pricing systems.

[178] Moreover, the Governor in Council's power to make a regulation that applies the *GGPPA*'s pricing system to a province may be exercised only if it is first determined that the province's pricing mechanisms are insufficiently stringent: ss. 166 and 189. This is similar to the situation in the *2018 Securities Reference*, in which the

legislation required the federal regulator to consider the adequacy of existing provincial regulations before designating a benchmark or prescribing a product or practice: para. 92. If each province designed its own pricing system and all the provincial systems met the federal pricing standards, the *GGPPA* would achieve its purpose without operating to directly price GHG emissions anywhere in the country. In other words, the *GGPPA*'s pricing system comes into play only to address the risk of increased GHG emissions that would otherwise "slip through the cracks" as a result of one province's failure to implement a sufficiently stringent pricing mechanism.

[179] The *GGPPA* is tightly focused on this distinctly federal role and does not descend into the detailed regulation of all aspects of GHG pricing. While it is true that the administrative pricing mechanism set out in the *GGPPA* is detailed, it can apply only to provinces that fail to meet the federal stringency standard. Thus, the *GGPPA*'s fundamental role is a distinctly federal one: evaluating provincial pricing mechanisms against an outcome-based legal standard in order to address national risks posed by insufficient carbon pricing stringency in any part of the country. The *GGPPA* does not prescribe any rules for provincial pricing mechanisms as long as they meet the federally designated standard. Even if the *GGPPA* were to apply so as to supplement an insufficiently stringent provincial pricing scheme, the prior existence of similar provincial legislation is not, as this Court confirmed in the *2018 Securities Reference*, a constitutional bar to federal legislation that pursues a qualitatively different national concern: para. 114; see also *General Motors*, at pp. 680-82.

[180] Unlike the proposed legislation that was at issue in the *2011 Securities Reference*, the *GGPPA* does not depend on provinces "opt[ing] in": para. 31. The *GGPPA* imposes minimum standards of price stringency on all provinces at all times. If a province is not listed, it is because the Governor in Council has determined that the province's system meets the federally determined standard, not because the province has opted out. Thus, like the *2018 Securities Reference*, the instant case involves the distinctly federal role of setting national targets and stepping in to make up for an absence of provincial legislation or to supplement insufficient provincial legislation. The *GGPPA* deals with the specific regulatory mechanism of GHG pricing in a way that is qualitatively different than how the provinces do so.

[181] The second principle to be considered at this stage of the inquiry is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. I find that provincial inability is established in this case.

[182] First, the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. The situation here is much like the one in the *2018 Securities Reference*, in which the provinces would be able to enact legislation to address national goals relating to systemic risk but could not do so on a sustained basis, because any province could choose to withdraw at any time: para. 113; see also *2011 Securities Reference*, at paras. 119-21. In the instant case, while the provinces could choose to cooperatively

establish a uniform carbon pricing scheme, doing so would not assure a sustained approach to minimum national standards of GHG price stringency to reduce GHG emissions: the provinces and territories are constitutionally incapable of establishing a binding outcome-based minimum legal standard — a national GHG pricing floor — that applies in all provinces and territories at all times.

[183] Second, a failure to include one province in the scheme would jeopardize its success in the rest of Canada. It is true that a cooperative scheme might continue to *exist* if one province withdrew from it, but the issue here is whether it would be successful. The withdrawal of one province from the scheme would clearly threaten its success for two reasons: emissions reductions that are limited to a few provinces would fail to address climate change if they were offset by increased emissions in other Canadian jurisdictions; and any province's failure to implement a sufficiently stringent GHG pricing mechanism could undermine the efficacy of GHG pricing everywhere in Canada because of the risk of carbon leakage.

[184] The evidence in the instant case shows that even significant emissions reductions in some provinces have failed to further the goals of any cooperative scheme, because they were offset by increased emissions in other provinces. Between 2005 and 2016, Canada's total GHG emissions declined by only 3.8 percent: Environment and Climate Change, *National Inventory Report 1990-2016: Greenhouse Gas Sources and Sinks in Canada — Executive Summary*, 2018 (online), at p. 13. In that period, emissions fell by 22 percent in Ontario, 11 percent in Quebec and 5.1

percent in British Columbia, three of the five provinces with the highest levels of emissions in Canada, as well as by over 10 percent in New Brunswick, Nova Scotia, Prince Edward Island and Yukon. But these decreases were largely offset by increases of 14 percent in Alberta and 10.7 percent in Saskatchewan, the other two provinces among the five with the highest levels of GHG emissions: p. 13. As a result, Canada failed to honour its commitment under the *Kyoto Protocol* before withdrawing from that agreement in 2011, and it is not currently on track to honour its *Copenhagen Accord* commitment.

[185] More recently, even though all the provinces made a commitment in the *Vancouver Declaration* in March 2016 to work collectively to significantly reduce GHG emissions, Saskatchewan had withdrawn by the time of the *Pan-Canadian Framework* seven months later, and Ontario and Alberta also subsequently withdrew. Together, these three provinces accounted for 71 percent of Canada's total GHG emissions in 2016: see *National Inventory Report*, at p. 13; Environment Canada, *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act — 2007*, 2007 (online), at p. 17. It is true that their withdrawal from the *Pan-Canadian Framework* does not mean that Saskatchewan, Ontario and Alberta will necessarily fail to reduce their GHG emissions. But when provinces that are collectively responsible for more than two thirds of Canada's total GHG emissions opt out of a cooperative scheme, this illustrates the stark limitations of a non-binding cooperative approach. The participating provinces can only reduce their own emissions — less than one third of

Canada's total — and are vulnerable to the consequences of the lion's share of the emissions being generated by the non-participating provinces.

[186] What is more, any province's refusal to implement a sufficiently stringent GHG pricing mechanism could undermine GHG pricing everywhere in Canada because of the risk of carbon leakage. Carbon leakage is a phenomenon by which businesses in sectors with high levels of carbon emissions relocate to jurisdictions with less stringent carbon pricing policies: *Report of the High-Level Commission on Carbon Prices*, at p. 23. To be clear, the concern here is not with the economic extraprovincial consequences of carbon leakage. Jurisdictions routinely compete for business, and mere economic effects are not among the grave consequences that would support a finding of provincial inability in the national concern context. Rather, I am referring to the environmental consequences, and the resulting harm to humans, of carbon leakage — the risk that any emissions reductions achieved by pricing in one province would be offset by an increase in emissions in another province as a result of the relocation of businesses. Thus, provincial cooperation may not result in national emissions reductions, as businesses could simply relocate to non-cooperating provinces, leaving Canada's net emissions unchanged and people across Canada vulnerable to the consequences of those emissions.

[187] Third, a province's failure to act or refusal to cooperate would in this case have grave consequences for extraprovincial interests. It is uncontroversial that GHG emissions cause climate change. It is also an uncontested fact that the effects of climate

change do not have a direct connection to the source of GHG emissions; every province's GHG emissions contribute to climate change, the consequences of which will be borne extraprovincially, across Canada and around the world. And it is well-established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life.

[188] Furthermore, I reject the notion that because climate change is "an inherently global problem", each individual province's GHG emissions cause no "measurable harm" or do not have "*tangible* impacts on other provinces": Alta. C.A. reasons, at para. 324; I.F., Attorney General of Alberta, at para. 85 (emphasis in original). Each province's emissions are clearly measurable and contribute to climate change. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail.

[189] I note that similar arguments have been rejected by courts around the world. In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), for instance, the majority of the U.S. Supreme Court rejected the federal government's

argument that projected increases in other countries' emissions meant that there was no realistic prospect that domestic reductions in GHG emissions in the U.S. would mitigate global climate change. The Supreme Court reasoned that "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere": p. 526. Similarly, in *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, the Supreme Court of the Netherlands upheld findings of The Hague District Court and The Hague Court of Appeal that "[e]very emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere" and thus contributes to the global harms of climate change: para. 4.6. The Hague District Court's finding that "any anthropogenic greenhouse gas emission, no matter how minor, contributes to . . . hazardous climate change" was thus confirmed on appeal: *Stichting Urgenda v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196, at para. 4.79. In *Gloucester Resources Limited v. Minister for Planning*, [2019] N.S.W.L.E.C. 7, a New South Wales court rejected an argument of a coal mining project's proponent that the project's GHG emissions would not make a meaningful contribution to climate change. The court noted that many courts have recognized that "climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources": para. 516 (AustLII).

[190] While each province's emissions do contribute to climate change, there is no denying that climate change is an "inherently global problem" that neither Canada nor any one province acting alone can wholly address. This weighs in favour of a finding of provincial inability. As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole. This is not to say that Parliament has jurisdiction to implement Canada's treaty obligations — it does not — but simply that the inherently global nature of GHG emissions and the problem of climate change supports a finding of provincial inability in this case.

[191] I am accordingly unpersuaded by Huscroft J.A.'s observation in his dissenting reasons in the Court of Appeal for Ontario that "[t]here are many ways to address climate change and the provinces have ample authority to pursue them, whether alone or in partnership with other provinces": para. 230. The underlying premise of this position is that the provinces will implement sufficient controls on their GHG emissions, using GHG pricing or some other mechanism. But in the absence of a federal law binding the provinces, there is nothing whatsoever to protect individual provinces or the country as a whole from the consequences of one province's decision, in exercising its authority, to take insufficient action to control GHGs, or to take no steps at all. In short, federal action is indispensable, and GHG pricing in particular is an integral aspect of any scheme to reduce GHG emissions.

[192] In my view, the principles underpinning the singleness, distinctiveness and indivisibility inquiry clearly support a finding that the federal government has jurisdiction over the matter of establishing minimum national standards of GHG price stringency to reduce GHG emissions. The matter is specific, identifiable and qualitatively different from any provincial matters. As well, federal jurisdiction is necessitated by the provinces' inability to address the matter as a whole through cooperation, which exposes each province to grave harm that it is unable to prevent.

[193] I therefore respectfully disagree with my colleague Brown. J.'s view that the requirement of indivisibility is not met in this case. My colleague places great weight on "the difficulty of knowing the source and physical location" of pollution in *Crown Zellerbach*, asserting that because "no question arises as to physical location" in the case at bar, indivisibility cannot be made out: paras. 380-81. Even if it is assumed that this represents a valid distinction between *Crown Zellerbach* and the case at bar, Le Dain J. clearly confined this aspect of his reasoning to "the matter of marine pollution by the dumping of substances": p. 437. He did not purport to lay down the only way to determine whether indivisibility is made out. This makes sense. A matter can be of inherent national concern even if it does not relate to something that is "difficult" to locate. There is no "difficulty" in determining the location of the National Capital Region, but the matter in *Munro* meets the requirement of indivisibility: pp. 671-72; *Re: Anti-Inflation Act*, at pp. 457-58; see also Rowe J.'s reasons, at para. 548. Likewise, there is no "difficulty" in identifying the sites of atomic energy generation, but atomic energy, too, is a matter of inherent national concern: *Ontario*

Hydro; *Pronto*; *Denison*. In the instant case, the indivisibility of the matter — establishing minimum national standards of GHG price stringency — is made out, as my application of the two principles underpinning the singleness, distinctiveness and indivisibility inquiry shows. This is so regardless of the "difficulty" of locating the source or physical location of GHG emissions. "GHG emissions" are not the matter in this case, and the "difficulty" of identifying the source and location of what a matter relates to is not the test for indivisibility.

[194] The analogy between this case and *Crown Zellerbach* is clear. Le Dain J. emphasized the international character of marine pollution; GHG emissions represent a truly global pollution problem that demands a coordinated international response. Le Dain J. focused on the unique scientific characteristics of marine pollution that distinguish it from fresh water pollution; GHG emissions, like marine pollution, are a precisely identifiable form of pollution that can readily be scientifically distinguished from other atmospheric pollutants.

[195] But the case for finding that the matter is of national concern is even stronger here than in *Crown Zellerbach*. This is true for two reasons. First, in the case at bar, there is uncontested evidence of grave extraprovincial harm as a result of one province's failure to cooperate. In other words, this is a true interprovincial pollution problem of the highest order. This Court's decisions have consistently reflected the view that interprovincial pollution is constitutionally different from local pollution and that it may fall within federal jurisdiction on the basis of the national concern doctrine:

Interprovincial Co-operatives; *Crown Zellerbach*, at pp. 445-46; *Hydro-Québec*, at para. 76; see also *Morguard Investments*, at p. 1099; Lederman, at p. 614. Second, the proposed federal matter in the instant case relates only to the risk of non-cooperation that gives rise to this threat of grievous extraprovincial harm. In other words, this matter would empower the federal government to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more.

(c) *Scale of Impact*

[196] At this step of the analysis, as I explained above, the court must determine whether the matter's scale of impact on provincial jurisdiction is acceptable having regard to the impact on the interests that will be affected if Parliament is unable to constitutionally address the matter at a national level. This determination is made in light of the jurisdictional consequences of accepting the proposed matter of national concern. I conclude that, while it is true that finding that the federal government has jurisdiction over this matter will have a clear impact on provincial autonomy, the matter's impact on the provinces' freedom to legislate and on areas of provincial life that fall under provincial heads of power will be limited and will ultimately be outweighed by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level.

[197] I accept that finding that this matter is one of national concern has a clear impact on provincial jurisdiction. It leads to the recognition of a previously unidentified area of double aspect in which the federal law is paramount. Provinces can regulate

GHG pricing from a local perspective (e.g., under ss. 92(13) and (16) and 92A), but legislation enacted on the basis of these provincial powers would apply concurrently in a field also occupied by a paramount federal law that establishes minimum standards of GHG price stringency. There is a clear impact on provincial autonomy. Provincial governments and their residents may well wish to pursue GHG pricing standards lower than those set by the federal government in order to protect the vitality of local industries, or may wish to choose policies that do not involve GHG pricing.

[198] However, I am persuaded that there is a real, and not merely nominal, federal perspective on the fact situation of GHG pricing: Canada can regulate GHG pricing from the perspective of addressing the risk of grave extraprovincial and international harm associated with a purely intraprovincial approach to GHG pricing. This is manifestly not the "same aspect of the same matter". On the contrary, the compelling federal interest is in doing precisely — and only — what the provinces cannot do: protect themselves from the risk of grave harm if some provinces were to adopt insufficiently stringent GHG pricing standards. Moreover, the matter's impact on the provinces' freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited.

[199] First, the matter's impact on the provinces' freedom to legislate is minimal. It is important to mention that the issue in this case is not the freedom of the provinces and territories to legislate in relation to GHG emissions generally. Here, the matter is limited to GHG pricing of GHG emissions — a narrow and specific regulatory

mechanism. Any legislation that related to non-carbon pricing forms of GHG regulation — legislation with respect to roadways, building codes, public transit and home heating, for example — would not fall under the matter of national concern.

[200] Nor is the freedom of the provinces and territories to legislate in relation to all methods of pricing GHG emissions at issue. Even where the specific regulatory mechanism of GHG pricing is concerned, the extent to which the matter interferes with provincial jurisdiction is strictly limited. Under the *GGPPA*, provinces and territories are free to design and legislate any GHG pricing system as long as it meets minimum national standards of price stringency. If a province wants to exceed the federal standards, it is free to do so without fear of federal legislation rendering its legislation inoperative, because the federal matter concerns minimum standards, not maximum standards. If a province fails to meet the minimum national standards, the *GGPPA* imposes a backstop pricing system, but only to the extent necessary to remedy the deficiency in provincial regulation in order to address the extraprovincial and international harm that might arise from the province's failure to act or to set sufficiently stringent standards. In Saskatchewan, for example, the provincially designed industrial GHG pricing scheme applies to many industrial emitters, but Part 2 of the *GGPPA* applies to electricity generation and natural gas transmission pipelines, the emissions of which Saskatchewan declined to price: see *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213, ss. 2(b)(ii), 3(a) and (c)(x). The federal matter thus deals with GHG pricing stringency in a way that relates only to the risk of non-cooperation and the attendant risk of grave

extraprovincial harm and has the ascertainable and reasonable limits required by *Crown Zellerbach* so as to ensure that provincial jurisdiction is not eroded more than necessary.

[201] Second, the matter's impact on areas of provincial life that would generally fall under provincial heads of power is also limited. Although the identified matter of national concern could arguably apply to types of fuel and to industries to which the *GGPPA* does not apply at present, that matter is, crucially, restricted to standards for GHG pricing stringency. As the majority of the Court of Appeal for Saskatchewan pointed out, it leaves "individual consumers and businesses . . . free to choose how they will respond, or not, to the price signals sent by the marketplace": para. 160. Indeed, the federal power recognized in this case is significantly less intrusive than the one at issue in *Crown Zellerbach*, in which, as La Forest J. noted, the effect of finding that the federal government has jurisdiction over ocean pollution caused by the dumping of waste was to "virtually preven[t] a province from dealing with certain of its own public property without federal consent": p. 458.

[202] Nor does the federal "supervisory" jurisdiction of the *GGPPA* increase the matter's scale of impact on provincial jurisdiction. As I explained above, the Governor in Council's discretion under the *GGPPA* is limited by the purpose of the statute, by specific guidelines set out in it and by administrative law principles. The Governor in Council does not have an unfettered discretion to determine whether a provincial GHG

pricing system is desirable, but is confined to determining whether it meets results-based standards.

[203] Moreover, the Governor in Council's decision-making role in the *GGPPA* is an incident of the flexibility the provinces retain in relation to GHG pricing within their borders. If provincial pricing systems are to be taken into account and federal intervention is to be limited to remedying deficiencies in those systems, the *GGPPA* must include a mechanism for determining whether provincial pricing systems meet federal standards. It would not be feasible for the statute itself to indicate which provincial pricing systems meet federal standards, as provincial pricing schemes and policies frequently change. The Governor in Council's decision-making role thus seems to be an incident of a flexible model designed to preserve provincial regulation. Furthermore, the discretion of the Governor in Council is necessary in order to ensure that some provinces do not subordinate or unduly burden the other provinces through their unilateral choice of standards.

[204] Indeed, the design of the *GGPPA* to ensure provincial flexibility is consistent with the *2018 Securities Reference*. In that case, the proposed law also involved a "supervisory" aspect, given that the federal regulator's intervention was contingent upon there being a risk that "slips through the cracks" of a provincial scheme that posed a threat to the Canadian economy: para. 92. The Court found that this feature weighed in favour of constitutionality, because the statute was a "carefully tailored" response to "this provincial incapacity": para. 113.

[205] In summary, although the matter has a clear impact on provincial jurisdiction, its impact on the provinces' freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited.

[206] On the whole, I am of the view that the scale of impact of this matter of national concern on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution. The *GGPPA* puts a Canada-wide price on carbon pollution. Emitting provinces retain the ability to legislate, without any federal supervision, in relation to all methods of regulating GHG emissions that do not involve pricing. They are free to design any GHG pricing system they choose as long as they meet the federal government's outcome-based targets. The result of the *GGPPA* is therefore not to limit the provinces' freedom to legislate, but to partially limit their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet the national targets. Although this restriction may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada's coastal regions. In my view, the impact on those interests justifies the limited constitutional impact on provincial jurisdiction.

(d) *Conclusion on the National Concern Doctrine*

[207] In conclusion, the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine. Canada has adduced evidence that shows that the proposed matter of establishing minimum national standards of GHG price stringency to reduce GHG emissions is of clear concern to Canada as a whole and that the two principles underpinning the "singleness, distinctiveness and indivisibility" inquiry are satisfied. Considering the impact on the interests that would be affected if Canada were unable to address this matter at a national level, the matter's scale of impact on provincial jurisdiction is reconcilable with the division of powers.

[208] I wish to emphasize that nothing about this conclusion flows inevitably from the fact that this matter of national concern involves a minimum national standard. My colleague Brown J. warns that my analysis opens the floodgates to federal "minimum national standards" in all areas of provincial jurisdiction. Respectfully, this concern is entirely misplaced. As can be seen from the foregoing reasons, the test for finding that a matter is of national concern is an exacting one. Canada must establish not just that the matter is of concern to Canada as a whole, but also that it is specific and identifiable and is qualitatively different from matters of provincial concern, and that federal jurisdiction is necessitated by provincial inability to deal with the matter. Each of these requirements, as well as the final scale of impact analysis, represents a meaningful barrier to the acceptance of *any* matter of national concern that might be proposed in the future.

[209] This Court's decision in *Schneider* demonstrates that where one province's failure to deal with health care "will not endanger the interests of another province", the national concern doctrine cannot apply: p. 131. This central insight from *Schneider* has application beyond the field of health care, and in my view precludes the application of the national concern doctrine to many of the fields my colleague suggests would be vulnerable to federal encroachment as a result of the case at bar. Many fields my colleague points to are ones in which the effects of one province's approach are in fact primarily felt in that province only. I note as well that this Court recently emphasized that education is an area of exclusive provincial jurisdiction that has a uniquely intraprovincial character: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 7. *Schneider* itself confirmed that "[the] view that the general jurisdiction over health matters is provincial . . . has prevailed and is now not seriously questioned": p. 137.

[210] Moreover, nothing in these reasons should be understood to diminish the significant place of s. 92(13), the provincial power over "Property and Civil Rights", in the Canadian constitutional order. Historically and jurisprudentially, it is well known that this head of power serves as a means to accommodate regional and cultural diversity in law, and that it is of particular importance in this regard to the province of Quebec: see *Citizens Insurance Co. v. Parsons (Canada)* (1881), 7 App. Cas. 96, at pp. 109-12; *Secession Reference*, at paras. 38 and 58-60. As a result, this Court has continued to affirm that this provincial power should be carefully protected: see, e.g., *Re: Anti-Inflation Act*, at pp. 440-41; *2018 Securities Reference*, at para. 100;

Desgagnés Transport, at para. 57. In light of this, the rigorous national concern test represents a meaningful constraint on federal power.

[211] Even in a case in which a matter can be connected to climate change, a truly global pollution problem with grave extraprovincial consequences, I emphasize that much of the reasoning in this decision turns on the evidence before the Court with respect to GHG pricing itself: the critical value of GHG pricing as a tool for the mitigation of climate change, its nature as a distinct and limited regulatory mechanism, how it operates across the economy, and the risk of carbon leakage. Furthermore, finding that this matter is of national concern is appropriate only because the matter amounts to a real, and compelling, federal perspective on GHG pricing, focused on addressing only the well-established risk of grave extraprovincial harm, and doing so in a way that has a qualified and limited impact on provincial jurisdiction.

VII. Validity of the Levies as Regulatory Charges

[212] Finally, I must address Ontario's argument that the fuel and excess emission charges imposed by the *GGPPA* do not have a sufficient nexus with the regulatory scheme to be considered constitutionally valid regulatory charges.

[213] To be a regulatory charge, as opposed to a tax, a governmental levy with the characteristics of a tax must be connected to a regulatory scheme: *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, at para. 43; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1

S.C.R. 131, at para. 24. In *Westbank*, Gonthier J. set out a two-step approach for determining whether a governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. If such a scheme is found to exist, the second step is to establish a relationship between the charge and the scheme itself: *Westbank*, at para. 44; *620 Connaught*, at paras. 25-27.

[214] Ontario does not dispute that the *GGPPA* creates a regulatory scheme. Its argument instead focuses on the second step of the *Westbank* analysis: determining whether the levy has a sufficient nexus with the regulatory scheme. The *GGPPA* does not require that revenues collected under Parts 1 and 2 be expended in a manner connected to the regulatory purpose of the *GGPPA*. Ontario argues that this undermines the levies' characterization as regulatory charges; in its view, the nexus requirement cannot be met solely by showing that the regulatory purpose of a charge is to influence behaviour. It submits that, for there to be a nexus with the regulatory scheme, the revenues that are collected must be used to recover the cost of the scheme or be spent in a manner connected to a particular regulatory purpose, and that a conclusion to the contrary would undermine the "no taxation without representation" principle that underlies s. 53 of the Constitution: A.F., at para. 97.

[215] It is well-established that influencing behaviour is a valid purpose for a regulatory charge. As Rothstein J. put it in *620 Connaught*, a regulatory charge may be intended to "alter individual behaviour", in which case "the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour": para. 20. Two

examples Gonthier J. mentioned in *Westbank* were that "[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [and that a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles": para. 29. However, the case law on the required nexus in the *Westbank* framework for a behaviour-modifying charge is not settled. In *620 Connaught*, the Court explicitly left the question "[w]hether the costs of the regulatory scheme are a limit on the fee revenue generated, where the purpose of the regulatory charge is to proscribe, prohibit or lend preference to certain conduct," for another day: para. 48.

[216] I agree with Strathy C.J.O. that regulatory charges need not reflect the cost of the scheme: paras. 159-60; see also *Canadian Assn. of Broadcasters v. Canada (F.C.A.)*, 2008 FCA 157, [2009] 1 F.C.R. 3. As contemplated in *620 Connaught*, the amount of a regulatory charge whose purpose is to alter behaviour is set at a level designed to proscribe, prohibit, or lend preference to a behaviour. Canada rightly observes that limiting such a charge to the recovery of costs would be incompatible with the design of a scheme of this nature: R.F., at para. 138. Nor must the revenues that are collected be used to further the purposes of the regulatory scheme. Rather, as Gonthier J. suggested in *Westbank*, the required nexus with the scheme will exist "where the charges themselves have a regulatory purpose": para. 44. Where, as in the instant case, the charge itself is a regulatory mechanism that promotes compliance with the scheme or furthers its objective, the nexus between the scheme and the levy inheres in the charge itself.

[217] This Court's decision in *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, is of no assistance to Ontario. Ontario seizes on an aspect of *Allard* that Iacobucci J. specifically framed as an effort "to determine the scope of s. 92(9) rather than to define 'taxation' as such": p. 398. The provincial licensing power under s. 92(9) raised specific questions about its interplay with the s. 92(2) limitation on provincial taxation to direct, as opposed to indirect, taxation, as well as about its relationship to other provincial heads of power. It had been argued that to give s. 92(9) a meaning independent of the other provincial heads of power, it ought not to be limited to raising money to support a regulatory scheme. In that context, very different from the one in the case at bar, Iacobucci J. remarked in *obiter* that a finding that there was "a power of indirect taxation in s. 92(9) extending substantially beyond regulatory costs could have the more serious consequence of rendering s. 92(2) meaningless": pp. 404-5 (emphasis in original). It was unnecessary to decide the point, however, because the levy in *Allard* was intended only to cover the costs of the regulatory scheme: p. 412.

[218] It does not follow from *Allard* that a finding that there is a nexus with the regulatory scheme where the levy is a regulatory mechanism would, as Ontario asserts, "render s. 53 meaningless": A.F., at para. 100. Section 53 codifies the principle of no taxation without representation by requiring any bill that imposes a tax to originate with the legislature: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at para. 30. Section 53 applies expressly to taxation. The *Westbank* approach remains adequate for the purpose of distinguishing between taxes and regulatory charges in order to determine whether s. 53 applies. Holding that the required nexus can be found to exist by establishing that the

charge itself is a regulatory mechanism does not open the door to disguised taxation. Instead, in every case, the court must scrutinize the scheme in order to identify the primary purpose of the levy on the basis of *Westbank*. An attempt to circumvent s. 53 by disguising a tax as a regulatory charge without a sufficient nexus to a regulatory scheme would be colourable.

[219] In the instant case, there is ample evidence that the fuel and excess emission charges imposed by Parts 1 and 2 of the *GGPPA* have a regulatory purpose. Ontario does not assert, nor would such an assertion be supportable, that the levies in this case amount to disguised taxation. The *GGPPA* as a whole is directed to establishing minimum national standards of GHG price stringency to reduce GHG emissions, not to the generation of revenue. As Richards C.J.S. aptly observed, the *GGPPA* "could fully accomplish its objectives . . . without raising a cent": para. 87. This is true of both Part 1 and Part 2. The levies imposed by Parts 1 and 2 of the *GGPPA* cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the *GGPPA*'s regulatory purpose by altering behaviour. The levies are constitutionally valid regulatory charges.

VIII. A Final Matter

[220] In this case, I have identified the pith and substance of the *GGPPA* having regard to the statute and the regulations in force at the time of these appeals. My colleague Rowe J. has taken this opportunity to propose a methodology for assessing the constitutionality of regulations made under the *GGPPA*. Although the underlying

premise of my colleague's comments — that regulations made pursuant to an enabling statute must be consistent with the division of powers and further the purpose of the statute — is uncontroversial, his speculative concern that such regulations could be used to further industrial favouritism is neither necessary nor desirable. I would leave the matter of the validity of regulations under the *GGPPA* for a future case should the issue arise. It is not this Court's role to express opinions about the substance, arguments or merits of future challenges.

IX. Conclusion

[221] In conclusion, I would answer the reference questions in the negative. The *Greenhouse Gas Pollution Pricing Act* is constitutional. Accordingly, the Attorney General of Saskatchewan's appeal is dismissed, the Attorney General of Ontario's appeal is dismissed, and the Attorney General of British Columbia's appeal is allowed.

The following are the reasons delivered by

CÔTÉ J. —

[222] I have read the carefully crafted reasons of the Chief Justice, and I am in agreement with his formulation of the national concern branch analysis. However, I must respectfully part company with the Chief Justice's ultimate conclusion that the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 ("*GGPPA*" or "*Act*")

is, in its current form, constitutional. In my view, the *GGPPA*, as presently drafted, cannot be said to accord with the matter of national concern properly formulated by the Chief Justice because the breadth of the discretion conferred by the *Act* on the Governor in Council results in the absence of any meaningful limits on the power of the executive. Additionally, the provisions in the *GGPPA* that permit the Governor in Council to amend and override the *GGPPA* itself violate the *Constitution Act, 1867*, and the fundamental constitutional principles of parliamentary sovereignty, rule of law, and the separation of powers.

[223] This Court must decide the constitutionality of the *GGPPA* based on the totality of the measures it authorizes, and not simply the steps currently taken under the *Act*. Thus, when I consider what the *GGPPA* authorizes, irrespective of whether it has in fact been implemented, it is clear that the *Act*, as it is currently written, vests inordinate discretion in the executive with no meaningful checks on fundamental alterations of the current pricing schemes.

[224] Although delegation of legislative power is not inherently problematic, as discretion provides flexibility and makes it possible to overcome the practical difficulties associated with amending provisions and enacting regulations at the legislative level, when an Act endows a select few with the power to re-write, and thus reengineer, a law which affects virtually every aspect of individuals' daily lives and provincial industrial, economic, and municipal activities, it goes too far.

[225] I would therefore find that the *Act* is unconstitutional in part.

I. The *GGPPA* Vests a Considerable Amount of Discretion in the Executive

[226] A detailed review of the provisions of the *Act* leads to the conclusion that a considerably high degree of discretion has been vested in the Governor in Council.

A. *Part 1 of the Act*

[227] Part 1 of the *Act* establishes a fuel charge against certain producers, distributors, and importers of various greenhouse gas ("GHG") producing fuels named in Schedule 2 (which includes aviation gasoline, aviation turbo fuel, butane, ethane, gas liquids, gasoline, heavy and light fuel oils, kerosene, methanol, naphtha, petroleum coke, pentanes plus, propane, coke oven gas, marketable and non-marketable natural gas, still gas and coal) and on combustible waste. In s. 3 of the *Act*, the critical feature of the fuel levy — that being, what fuels are covered by the *Act* — is so open-ended, allowing any substance, if prescribed by the Governor in Council, to fall within the ambit of the fuel charge regime:

> ***combustible waste*** means
>
> **(a)** tires or asphalt shingles whether in whole or in part; or
>
> **(b)** a prescribed substance, material or thing. (*déchet combustible*)
>
> . . .
>
> ***fuel*** means
>
> **(a)** a substance, material or thing set out in column 2 of any table in Schedule 2, other than
>
> **(i)** combustible waste,

(ii) a substance, material or thing that is prepackaged in a factory sealed container of 10 L or less, or

(iii) a prescribed substance, material or thing; and

(b) a prescribed substance, material or thing. (*combustible*)

[228] The operative provisions of Part 1 similarly prescribe vast legislative law-making power to the executive such that the very nature of the regime can be altered. For example:

Covered facility of a person
5 For the purposes of this Part, a covered facility is a covered facility of a person if

. . .

(b) the person is a prescribed person, a person of a prescribed class or a person meeting prescribed conditions in respect of the covered facility.

. . .

Delivery of marketable natural gas — distribution system
14 For the purposes of this Part, if marketable natural gas is delivered to a particular person by means of a distribution system, the person that is considered to deliver the marketable natural gas is

. . .

(b) if prescribed circumstances exist or prescribed conditions are met, the person that is a prescribed person, a person of a prescribed class or a person meeting prescribed conditions.

. . .

Charge — regulations
26 Subject to this Part, a prescribed person, a person of a prescribed class or a person meeting prescribed conditions must pay to Her Majesty in right of Canada a charge in respect of a type of fuel or combustible waste in the amount determined in prescribed manner if prescribed circumstances exist

or prescribed conditions are met. The charge becomes payable at the prescribed time.

Charge not payable — regulations
27 A charge under this Part in respect of a type of fuel or combustible waste is not payable

(a) by a prescribed person, a person of a prescribed class or a person meeting prescribed conditions; or

(b) if prescribed circumstances exist or prescribed conditions are met.

. . .

Charge amount — mixture
40(2) Despite subsection (1), if a manner is prescribed in respect of a mixture that is deemed to be fuel of a prescribed type under subsection 16(2), the amount of a charge payable under this Division in respect of such a mixture is equal to the amount determined in prescribed manner.

Charge amount — regulations
40(3) Despite subsection (1), if prescribed circumstances exist or prescribed conditions are met, the amount of a charge payable under this Division in respect of fuel and a listed province is equal to the amount determined in prescribed manner.

. . .

Charge amount — regulations
41(2) Despite subsection (1), if prescribed circumstances exist or prescribed conditions are met, the amount of a charge payable in respect of combustible waste and a listed province is equal to the amount determined in prescribed manner.

. . .

Amount of rebate — regulations
47(3) Despite subsection (2), if prescribed circumstances exist or prescribed conditions are met, the amount of a rebate payable under this section is equal to the amount determined in prescribed manner.

[229] The full breadth of executive powers can be seen most notably within ss. 166 and 168 of the *Act*. Section 166(1)(a) states that the Governor in Council may

make regulations "prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation". The only limit whatsoever on s. 166's expansive regulation-making powers is that s. 166(3) stipulates that in making a regulation under subsection (2) — that is, amending Part 1 of Schedule 1 to modify the list of provinces where the fuel levy is payable — "the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions". No such factor applies to the Governor in Council's regulation-making powers under Part 1's provisions. Most importantly, by virtue of s. 166(4), the executive has a wholly-unfettered ability to amend Part 1 of the *Act*:

> **166(4)** The Governor in Council may, by regulation, amend Schedule 2 respecting the application of the fuel charge under this Part including by adding, deleting, varying or replacing a table.

[230] Sections 168(2) and 168(3) also allow the Governor in Council to make and amend regulations in relation to the fuel charge system, its application, and its implementation. These wide-ranging powers set forth a wholly-unfettered grant of broad discretion to amend Part 1 of the *Act*:

> **168(2)** The Governor in Council may make regulations, in relation to the fuel charge system,
>
> > **(a)** prescribing rules in respect of whether, how and when the fuel charge system applies and rules in respect of other aspects relating to the application of that system, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this

Part is required to be reported and accounted for and when any period begins and ends;

(b) prescribing rules in respect of whether, how and when a change in a rate, set out in any table in Schedule 2 for a type of fuel and for a province or area, applies and rules in respect of a change to another parameter affecting the application of the fuel charge system in relation to such a fuel or province or area, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;

(c) prescribing rules in respect of whether, how and when a change to the provinces or areas listed in Part 1 of Schedule 1 or referenced in Schedule 2 applies and rules in respect of a change to another parameter affecting the application of the fuel charge system in relation to a province or area or to a type of fuel, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;

(d) if an amount is to be determined in prescribed manner in relation to the fuel charge system, specifying the circumstances or conditions under which the manner applies;

(e) providing for rebates, adjustments or credits in respect of the fuel charge system;

(f) providing for rules allowing persons, which elect to have those rules apply, to have the provisions of this Part apply in a manner different from the manner in which those provisions would otherwise apply, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported or accounted for and when any period begins and ends;

(g) specifying circumstances and any terms or conditions that must be met for the payment of rebates in respect of the fuel charge system;

(h) prescribing amounts and rates to be used to determine any rebate, adjustment or credit that relates to, or is affected by, the fuel charge system, excluding amounts that would otherwise be included in determining any such rebate, adjustment or credit, and specifying

> circumstances under which any such rebate, adjustment or credit must not be paid or made;
>
> **(i)** respecting information that must be included by a specified person in a written agreement or other document in respect of specified fuel or a specified substance, material or thing and prescribing charge-related consequences in respect of such fuel, substance, material or thing, and penalties, for failing to do so or for providing incorrect information;
>
> **(j)** deeming, in specified circumstances, a specified amount of charge to be payable by a specified person, or a specified person to have paid a specified amount of charge, for specified purposes, as a consequence of holding fuel at a specified time;
>
> **(k)** prescribing compliance measures, including anti-avoidance rules; and
>
> **(l)** generally to effect the transition to, and implementation of, that system in respect of fuel or a substance, material, or thing and in respect of a province or area.

[231] Most notably, s. 168(4) of the *Act* states that in the event of a conflict between the statute enacted by Parliament and the regulations made by the executive, "the regulation prevails to the extent of the conflict". This breathtaking power circumvents the exercise of law-making power by the legislative branch by permitting the executive to amend by regulation the very statute which authorizes the regulation. Section 168(4), along with ss. 166(2) and 166(4), all constitute what are known as "Henry VIII clauses". Their name, Henry VIII clauses, is inspired by the King whose lust for power included the Statute of Proclamations (*An Act that Proclamations made by the King shall be obeyed* (Eng.), 1539, 31 Hen. 8, c. 8), which elevated the King's proclamations to have the same legal force as Acts of Parliament (J. W. F. Allison, "The Westminster Parliament's Formal Sovereignty in Britain and Europe from a Historical Perspective" (2017), 34 *Journal of Constitutional History* 57, at pp. 62-63).

B. *Part 2 of the Act*

[232] The output-based pricing system ("OBPS") created under Part 2 of the *Act* exempts certain industrial enterprises, defined as "covered facilities", from Part 1's fuel charge regime. I have concerns about the Chief Justice's assertion that "no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country" (para. 76). In my view, and with respect, it is clear from a review of Part 2's provisions that the broad powers accorded to the executive allow for this very result.

[233] Section 192 contains a Henry VIII clause and empowers the Governor in Council to make regulations for a variety of matters, including regulations:

> **(a)** defining *facility*;
>
> **(b)** respecting covered facilities, including the circumstances under which they cease to be covered facilities;
>
> **(c)** allowing for the determination of the persons that are responsible for a facility or covered facility;
>
> **(d)** respecting designations and cancellations of designations under section 172;
>
> **(e)** respecting compliance periods and the associated regular-rate compensation deadlines and increased-rate compensation deadlines;
>
> **(f)** respecting the reports and verifications referred to in section 173 and subsections 176(2) and 177(2);
>
> **(g)** respecting greenhouse gas emissions limits referred to in sections 173 to 175, subsection 178(1), section 182 and subsection 183(1);
>
> **(h)** respecting the quantification of greenhouse gases that are emitted by a facility;

> **(i)** respecting the circumstances under which greenhouse gases are deemed to have been emitted by a facility;
>
> **(j)** respecting the methods, including sampling methods, and equipment that are to be used to gather information on greenhouse gas emissions and activities related to those emissions;
>
> **(k)** respecting the compensation referred to in sections 174 and 178;
>
> **(l)** respecting compliance units, including transfers of compliance units, the circumstances under which transfers of compliance units are prohibited and the recognition of units or credits issued by a person other than the Minister as compliance units;
>
> **(m)** respecting the tracking system referred to in section 185 and the accounts in that system;
>
> **(n)** providing for user fees;
>
> **(o)** respecting the rounding of numbers;
>
> **(p)** respecting the retention of records referred to in section 187; and
>
> **(q)** respecting the correction or updating of information that has been provided under this Division.

[234] Additionally, a number of provisions in Part 2 allow the executive, in accordance with the regulations crafted by said executive, to: designate a facility as a covered facility, thus making it exempt from paying the fuel charge (s. 172(1)), cancel the designation of a covered facility (s. 172(3)), suspend or revoke compliance units (s. 180(1)), recover compensation owing in compliance units (s. 182), or close an account (s. 186(3)). The sole limit on the executive's expansive discretion found in Part 2, similar to Part 1, is in s. 189(2); when amending Part 2 of Schedule 1 to modify the list of provinces where the OBPS applies, "the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions". Again, as in Part 1, no such factor applies to the Governor in Council's regulation-making powers under Part 2's provisions.

[235] While the Governor in Council's powers in this regard are ostensibly exercisable to allow for ongoing review, I am in agreement with both Justices Brown and Rowe that Part 2's "skeletal" framework accords the executive vast discretion to unilaterally set standards on an industry-by-industry basis, creating the potential for differential treatment of industries at the executive's whim.

II. "Minimum" Standards Are Set By the Executive, Not the *Act*

[236] As noted above, I agree with the Chief Justice that the use of minimum national standards of price stringency to reduce GHG emissions is legally viable as a matter of national concern. However, the *Act*, as it is currently written, cannot be said to establish national standards of price stringency because there is no meaningful limit to the power of the executive. In my view, it is not the *Act*, but the executive, who sets, constrains, or expands, the standards.

[237] The legislative decision to transfer law and policy-making power to the executive is central to the contours of the *GGPPA*. In his article "The Case for a Canadian Nondelegation Doctrine" (2019), 52 *U.B.C. L. Rev.* 817, (Alyn) James Johnson, a constitutional and administrative law scholar, notes the deleterious consequences of this excessive delegation:

> Legislatures are high-profile bodies where law and policy making on contentious issues can occur with a degree of public awareness, scrutiny, and input. Courts and executive bodies, on the other hand, while themselves institutionally distinct, both lack the open and broadly-

> deliberative character that gives legislatures their unique position in a democratic society. [Footnote omitted; pp. 825-26.]

This excessively broad delegation of power removes the regulation of GHGs from the legitimizing forum of the legislature and places it into the hands of the few.

[238] The Chief Justice emphasizes that regulation-making power is conscribed to the statutory purpose of reducing GHG emissions through GHG pricing — such as imposing a fuel charge and industrial GHG emissions pricing regimes. But, in my view, this is not a meaningful limitation to the executive's power. As Justice Brown has helpfully outlined, rather than establishing minimum national standards, Part 2 of the *Act* empowers the executive to establish variable and inconsistent standards on an industry-by-industry basis. For instance, the executive could decide to impose such strict limits on the fossil fuel or potash industries, both heavy emitters of GHG emissions, that the industries would be decimated. According to the majority's reasoning, this example, regardless of its improbability, would fulfill the statutory purpose of reducing GHG emissions through GHG pricing and therefore be a valid use of the executive's regulatory powers accorded by the *GGPPA*. This cannot be so.

[239] I recognize that in response, one may argue that Canadian citizens can simply make their displeasure known at election time. However, the fact that the executive is permitted to place a number of conditions on individuals and industries at any time, and is moreover allowed to revise those conditions at any time to any extent, is untenable. This results in provinces having applicable regimes one day, and being

under the federal scheme the next. The meaningful check on the legislation ought to be the separation of powers analysis, not simply a further delegation to the ballot box.

[240] The *Act*, as it is currently written, employs a discretionary scheme that knows no bounds. While I agree with the Chief Justice's reasons that a matter which is restricted to minimum national GHG pricing stringency standards properly fits within federal authority, the *Act* does not reflect this crucial restriction. Given the boundless discretion that is contained within the provisions, including the ability to expand the ambit of both Parts to fundamentally change the nature of the fuel charge regime or target specific industries, the *Act* cannot be said to accord with the matter.

III. Constitutional Restrictions on Delegated Power

[241] Moreover, I am of the view that certain parts of the *Act* are so inconsistent with our system of democracy that they are independently unconstitutional. I explain why below.

[242] Sections 166(2), 166(4) and 192 all confer on the Governor in Council the power to amend parts of the *Act*. Section 168(4) confers the power to adopt secondary legislation that is inconsistent with Part 1 of the *Act*. Scholars have long warned that executive power to amend or repeal provisions in primary legislation raises serious constitutional concerns (see Hewart L.C.J., *The New Despotism* (1929); D. J. Mullan, "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality", in M. J. Mossman and G. Otis, eds., *The Judiciary as Third Branch of*

Government: Manifestations and Challenges to Legitimacy (1999), 313, at p. 375; L. Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018), 41 *Dal. L.J.* 519, at p. 545; Johnson; see also M. Mancini, "The Non-Abdication Rule in Canadian Constitutional Law" (2020), 83 *Sask. L. Rev.* 45). The time has come to acknowledge that clauses that purport to empower a body other than Parliament to amend primary legislation are contrary to ss. 17 and 91 of the *Constitution Act, 1867*. Therefore, ss. 166(2), 166(4), 168(4) and 192 of the *GGPPA* are unconstitutional.

A. *The Architecture of the Constitution of Canada*

[243] The Constitution of Canada is a "comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32). The rules and principles that compose the Constitution of Canada "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning" (*Secession Reference*, at para. 32). They include both written and unwritten elements (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 92; *Secession Reference*, at para. 32). The question here is whether these rules and principles permit Parliament to authorize the Governor in Council to amend an Act of Parliament.

[244] One of the core features of the Constitution of Canada is the identification and definition of three constituent elements of the state: the executive, the legislative and the judicial (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 23; *Provincial Judges Reference*, at para. 108). The *Constitution Act, 1867*, plays a critical role in defining these three constituent elements. Part III of the *Constitution Act, 1867*, defines the Executive Power, Part IV the Legislative Power and Part VII the Judicature. Additionally, Part V establishes the executive and legislative powers for provinces and Part VI establishes the distribution of legislative powers between the Parliament of Canada and provincial legislatures.

[245] Constitutional documents must be interpreted in a broad and purposive manner, informed by not only the proper linguistic, philosophic and historical contexts but also by the foundational principles of the Constitution (*Senate Reference*, at para. 25; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). They must also be read in light of the broader architecture of the Constitution (*Senate Reference*, at para. 26; *Secession Reference*, at para. 50; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57).

[246] We must thus begin with the actual text of the *Constitution Act, 1867*. Under Part IV, the first provision declares that "[t]here shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons" (s. 17). Under Part VI, the first provision provides:

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say . . . .

[247] A linguistic or ordinary and grammatical reading of these sections leads me to conclude that they simultaneously confer the federal legislative power upon the Parliament of Canada and constrain how the Parliament of Canada may exercise the legislative power. Section 17 begins by emphasizing "[t]here shall be One Parliament for Canada", meaning that all of the legislative power conferred upon the federal state shall reside in a single Parliament. Then comes the constraint on how legislative power must be exercised, arising from the decision of the Fathers of Confederation to "particularize the participants in the law making process" (*Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at p. 74). Sections 17 and 91 both affirm that the authority to legislate is exclusively exercisable by the Queen, with the advice and consent of the Senate and the House of Commons. This means, at the federal level, every exercise of legislative power — every enactment, amendment and repeal of a statute — must have the consent of all three elements of Parliament: the Queen, the Senate and the House of Commons. In contrast, under Part III "Executive Power", s. 9 vests the "Executive Government and Authority of and over Canada" exclusively upon the Queen alone.

[248] Our case law also supports this interpretation. In *Hodge v. The Queen* (1883), 9 App. Cas. 117, the Privy Council held that a province could lawfully delegate the power to set regulations regarding liquor licensees to License Commissioners. However, Sir Barnes Peacock for the panel noted that "[i]t is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail" and that there were an "abundance of precedents for this legislation, entrusting a limited discretionary authority to others" (p. 132 (emphasis added)). He also noted that the provincial legislature "retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands" (p. 132).

[249] In *In re Initiative and Referendum Act*, [1919] A.C. 935, the Privy Council reviewed the constitutionality of Manitoba's *Initiative and Referendum Act*, S.M. 1916, c. 59. This Act provided that laws may be made and repealed by referendum, and that such laws would have the same effect as laws made by an Act of the Legislature (s. 7). The Manitoba Court of Appeal had found that s. 92 of the *British North America Act, 1867* (now the *Constitution Act, 1867*) vested the power of law making exclusively with the Legislature and the Legislature could not confer that power upon any other body (*Re The Initiative and Referendum Act* (1916), 27 Man. R. 1).

[250] For the Privy Council, Viscount Haldane found that "[t]he language of s. 92 is important. That section commences by enacting that 'in such Province the

Legislature may exclusively make laws in relation to matters' coming within certain classes of subjects" (p. 943). Although he went on to dismiss the appeal on the basis that Manitoba did not have jurisdiction to interfere with the office of Lieutenant-Governor, in "a deliberate and important *obiter*" (*OPSEU*, at p. 47), Viscount Haldane continued on to discuss the limits of legislative power:

> Sect. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v. The Queen*, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. [Emphasis added; footnote omitted; p. 945.]

[251] In *Re: Authority of Parliament in relation to the Upper House*, the Court reiterated this finding that "s. 92 of the Act vests the power to make or repeal laws exclusively in the Legislature and that it did not contemplate the creation of a new legislative body to which the Legislature could delegate its powers of legislation or with which it would share them" (p. 72).

[252] In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court affirmed the Constitution requires that each part of a legislature — in the case of Manitoba, both the Legislative Assembly and the Lieutenant-Governor — consent to a bill in order to validly exercise legislative power. Section 4(1) of *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, S.M. 1980, c. 3,

provided that statutes could be enacted in one official language and subsequently be translated into the other official language. It authorized the translation to merely be deposited with the Clerk of the House in order to become law. The Court found this to be "an unconstitutional attempt to interfere with the powers of the Lieutenant-Governor. Royal assent is required of all enactments" (*Manitoba Language Rights*, at p. 777).

[253] There is, however, one authority that presents a different view of Parliament's ability to delegate legislative power. In *Re George Edwin Gray* (1918), 57 S.C.R. 150, a majority of the Supreme Court upheld an Order in Council which contradicted a statute. *Re Gray* was an application for *habeas corpus*. George Gray was a young farmer who had been exempted from military service under *The Military Service Act, 1917*, S.C. 1917, c. 19, because of his farming duties. Section 6 of *The War Measures Act, 1914*, S.C. 1914, c. 2, provided that "[t]he Governor in Council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war . . . deem necessary or advisable for the security, defence, peace, order and welfare of Canada". Section 13(5) of *The Military Service Act, 1917*, correspondingly provided: "Nothing in this Act contained shall be held to limit or affect . . . the powers of the Governor in Council under *The War Measures Act, 1914*."

[254] On April 19, 1918, the Senate and House of Commons passed a joint resolution: "That in the opinion of this House, it is expedient that regulations respecting

Military Service shall be made and enacted by the Governor in Council in manner and form and in the words and figures following, that is to say . . .” (*Votes and Proceedings of the House of Commons of the Dominion of Canada*, No. 22, 1st Sess., 13th Parl., April 19, 1918, at p. 242; *Journals of the Senate of Canada*, vol. 54, 1st Sess., 13th Parl., April 19, 1918, at p. 100). The resolution went on to repeat verbatim a set of regulations that the Governor in Council made the next day. These regulations altered the exemptions from military service such that Mr. Gray was no longer exempt. The Order in Council’s military service requirements were contrary to *The Military Service Act, 1917*.

[255] The sole question before the Court was whether there was authority for the Order in Council nullifying the exemption. Writing in the majority, Fitzpatrick C.J. found that while it was argued that Parliament alone may make laws, Parliament could delegate legislative powers so long as it did not amount to abdicating its role (*Re Gray*, at pp. 156-57). He then turned to *The War Measures Act, 1914*, to determine whether the Order in Council was *intra vires*. *The War Measures Act, 1914*, did not expressly authorize the Governor in Council to promulgate orders inconsistent with statutes, but according to Fitzpatrick C.J. express language was not necessary:

> It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers. Parliament expressly enacted that, when need arises, the executive may for the common defence make such orders and regulations as they may deem necessary or advisable for the security, peace, order and welfare of Canada. The enlightened men who framed that section, and the members of parliament who adopted it, were providing for a very great emergency, and

> they must be understood to have employed words in their natural sense, and to have intended what they have said. [Emphasis added; pp. 158-59.]

[256] In finding that the statute conferred unlimited power, Fitzpatrick C.J. was most certainly influenced by the urgency of war: "Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention" (p. 160 (emphasis added)). Justices Duff and Anglin were similarly concerned, with Anglin J. even noting that thousands of men had already been drafted and were on their way to Europe under the authority of this Order in Council (pp. 169, 174 and 180). Were it not for the urgency of war, it is difficult to see any justice agreeing to permit the Governor in Council to exercise what appears to be unlimited power, as such power is the very antithesis to the rule of law. As Lord Bingham wrote:

> The rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.
>
> (*The Rule of Law* (2010), at p. 54)

[257] In contrast, the dissenting judges refused to accept the "bald proposition" that *The Military Service Act, 1917*, "was liable to be repealed or nullified by an order in council" (*Re Gray*, at p. 164). Even with the emergency of war, overruling statutes by Order in Council was not cognizable, "such conceptions of law as within the realm

of legislation assigned by the 'British North America Act' to the Dominion have no existence" (p. 165).

[258] The Chief Justice cites *Re Gray* as establishing the constitutionality of Henry VIII clauses (para. 85). With great respect, I do not read *Re Gray* as being conclusive of the constitutionality of Henry VIII clauses. First, the comments of the majority justices in *Re Gray*, particularly with respect to the unlimited powers of the Governor in Council, demonstrate that their findings are not in accord with our contemporary understandings of core constitutional principles. The justices in *Re Gray* were clearly moved by the great emergency of war. In the case before us, Parliament did not pass the impugned legislation under the emergency branch. Second, *Re Gray* is distinguishable from the present case in that all three of the bodies charged under ss. 17 and 91 with the exclusive authority to make legislation agreed with the Order in Council. Although not passed as an Act of Parliament, the joint resolution of the Senate and House of Commons along with the Order in Council may adequately meet the demands of ss. 17 and 91 in the urgent situation of war. There was no consent of the House of Commons or Senate to the regulations promulgated by the Governor in Council under the *GGPPA*. Third, this reading is inconsistent with our most recent pronouncement on delegation of law-making powers.

[259] The Chief Justice also cites *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1, and *R. v. Furtney*, [1991] 3 S.C.R. 89, as cases relying upon the findings in *Re Gray* (Chief Justice's reasons, at para. 85).

Neither of these cases concerned Henry VIII clauses. In the *Chemicals Reference*, the Governor in Council had established various boards to assist with the Second World War effort. The question at issue was whether the Governor in Council could delegate its power under *The War Measures Act, 1914*, to these other bodies. Not only was there no Henry VIII clause at issue, but the Court unanimously ruled that part of the Order in Council was *ultra vires* for being contrary to the enabling statute (pp. 7, 21, 27, 32 and 37). Despite the broad statements about Parliament's ability to delegate "legislative" power in time of emergency, Duff C.J. also recognized that the *British North America Act, 1867*, may impose limits upon Parliament's ability to commit legislative powers to the executive (p. 10). I use the word "legislative" in quotation marks because Duff C.J. spoke of actions that are legislative in character (p. 12). For the purpose of the present appeals, I define legislative power more narrowly, referring specifically to the formal power to enact, amend or repeal an Act of Parliament. On this definition, no legislative power was at issue in the *Chemicals Reference*.

[260] *Furtney* is part of a different line of jurisprudence regarding inter-governmental delegation that, in my view, only lends support to the unconstitutionality of Henry VIII clauses. In *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, this Court held that Parliament could not delegate its legislative powers to a provincial legislature and similarly, the provincial legislature could not delegate its legislative powers to Parliament. Although Rinfret C.J. distinguished this from cases where a delegation is made to a body subordinate to Parliament, his focus on the word "exclusively" in both ss. 91 and 92, along with the

lack of an express delegation power, supports my reading of ss. 17 and 91 (pp. 34-35). In the *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, we affirmed that the *Constitution Act, 1867*, prohibits Parliament from delegating legislative powers to another legislature (para. 75). Throughout the judgment we repeatedly emphasize the ability of Parliament to delegate the power to make "*subordinate*" regulations (paras. 73 and 75-76 (emphasis in original)) or exercise "*administrative*" powers (paras. 123 and 125 (emphasis in original)). At no point do we support the delegation of primary legislative authority.

[261] I thus cannot take *Re Gray* to be conclusive of the issue. I turn now to the fundamental principles of the Constitution which further support my reading of ss. 17 and 91.

B. *Fundamental Principles of the Constitution of Canada*

[262] This Court's recent jurisprudence demonstrates that the unwritten principles of our Constitution help to inform the written text (*Manitoba Language Rights*, at pp. 750-51; *Secession Reference*, at para. 53; *Provincial Judges Reference*, at paras. 94-95 and 104; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 44 and 57; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 54).

[263] In my view, there are three fundamental principles that must inform the interpretation of ss. 17 and 91: parliamentary sovereignty, rule of law and the separation of powers.

(1) Parliamentary Sovereignty

[264] Parliamentary sovereignty is a foundational principle in the Westminster system of government that the Constitution of Canada employs. Parliamentary sovereignty is generally thought to mean that Parliament has "the right to make or unmake any law whatever" (A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 39-40). Of course, in Canada the sovereignty of Parliament has always been qualified by the written constitution (*Pan-Canadian Securities Reference*, at para. 56). For that reason, the Court has said that it may be more useful to refer to our system of government as one of constitutional supremacy, rather than parliamentary supremacy (*Secession Reference*, at para. 72). Nonetheless, parliamentary sovereignty remains an important constitutional principle, as absent constitutional restraint, Parliament may make or unmake any law.

[265] At first glance, parliamentary sovereignty supports Parliament's ability to delegate whatever they want to whomever they wish. If Parliament can make or unmake any law whatever, then Parliament can make a law empowering the Governor in Council to amend Acts of Parliament. However, this is not the case. Parliamentary sovereignty contains both a positive and negative aspect. The positive aspect is, as we have seen, that Parliament has the ability to create any law. The negative aspect,

however, is that no institution is competent to override the requirements of an Act of Parliament. Dicey covered both of these aspects in his definition:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. [Footnote omitted; pp. 39-40.]

[266] It is this negative aspect of parliamentary sovereignty that Henry VIII clauses run afoul of. Henry VIII clauses "give the executive the authority to override the requirements of primary legislation and thereby directly violate the principle of parliamentary sovereignty" (A. Tucker, "Parliamentary Scrutiny of Delegated Legislation", in A. Horne and G. Drewry, eds., *Parliament and the Law* (2018), 347, at p. 359). In the 2010 Mansion House Speech to the Lord Mayor of London, the Lord Chief Justice of England and Wales agreed, declaring that "proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament and increasing yet further the authority of the executive over the legislature . . . Henry VIII clauses should be confined to the dustbin of history" (Lord Judge, July 13, 2010 (online), at p. 6; see also Lord Judge, "Ceding Power to the Executive; the Resurrection of Henry VIII", speech delivered at King's College London, April 12, 2016 (online), at p. 3).

[267] In *Pan-Canadian Securities Reference*, this Court emphasized the negative aspect of parliamentary sovereignty in its definition of parliamentary sovereignty:

". . . the legislature has the *exclusive* authority to enact, amend, and repeal any law as it sees fit, and . . . there is no matter in respect of which it may not make laws" (para. 54 (emphasis in original)). The Court unanimously found that it was consistent with parliamentary sovereignty to limit Parliament's ability to delegate its legislative powers to provincial legislatures:

> To put it simply: while Parliament or a provincial legislature may delegate the regulatory authority to make *subordinate* laws (like binding rules and regulations) in respect of matters over which it has jurisdiction to another person or body, it is nevertheless barred from transferring its *primary* legislative authority — that is, its authority to enact, amend and repeal statutes — with respect to a particular matter over which it has exclusive constitutional jurisdiction to a legislature of the other level of government. [Emphasis added; para. 76.]

[268] Even if one were to reject the idea that parliamentary sovereignty entails accepting that no other body can enact, amend or repeal statutes, the concept of parliamentary sovereignty has other inherent limitations. For instance, in order for Parliament to be sovereign it cannot be limited by the actions of previous Parliaments and therefore "neither Parliament nor the legislatures can, by ordinary legislation, fetter themselves against some future legislative action" (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 119). Similarly, logic limits Parliament from achieving two contradictory purposes simultaneously. For instance, Parliament cannot create a body of limited jurisdiction and simultaneously insulate that body from judicial review because "it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure — such a tribunal would be autocratic, not limited" (*R. v. Shoreditch*

Assessment Committee, [1910] 2 K.B. 859 (C.A.), at p. 880). Henry VIII clauses create a contradiction within an Act by simultaneously requiring the executive to do something and authorizing the executive to defy that requirement. For instance, in the *GGPPA*, s. 168(2) empowers the Governor in Council to regulate several specific subjects relating to the fuel charge, such as "providing for rebates, adjustments or credits in respect of the fuel charge system" (s. 168(2)(e)). However s. 168(4) provides that the Governor in Council can act contrary to any provision in Part 1. Therefore, Parliament simultaneously attempts to limit the Governor in Council to regulating specific subjects whilst also attempting to permit the Governor in Council to regulate anything they want.

[269] Recently, some of the senior judiciary in England and Wales have accepted that another inherent limit is that parliamentary sovereignty demands an impartial, independent and authoritative body to interpret Parliament's acts. Because Parliament can only speak through written texts, its work can only be effective when interpreted by such a body (*R. (Cart) v. Upper Tribunal*, [2009] EWHC 3052 (Admin.), [2011] Q.B. 120, at paras. 37-39, per Laws L.J.; *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491, at paras. 189-90 and 208-10). Henry VIII clauses are incompatible with this conception of sovereignty. Henry VIII clauses limit the availability of judicial review by providing no meaningful limits against which a court could review. This is a problem that equally affects the rule of law, a principle to which I now turn.

(2) The Rule of Law

[270] The rule of law is one of the fundamental principles of the Constitution, lying "at the root of our system of government" (*Secession Reference*, at para. 70; see also *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142). It is also expressly recognized in the preamble to the *Canadian Charter of Rights and Freedoms*: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

[271] The rule of law embraces three related principles (*Imperial Tobacco*, at para. 58). First, "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power" (*Manitoba Language Rights*, at p. 748). Second, "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order" (*Manitoba Language Rights*, at p. 749). Third, "the exercise of all public power must find its ultimate source in a legal rule" (*Provincial Judges Reference*, at para. 10). In other words, "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action" (*Secession Reference*, at para. 70).

[272] Even in its most formal sense, the rule of law requires that all legislation be enacted in the manner and form prescribed by law (*Imperial Tobacco*, at para. 60). This includes the requirements that legislation receive three readings in the Senate and

House of Commons and that it receive Royal Assent (*Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, at paras. 37-41). When the Governor in Council amends legislation, it does not follow this prescribed manner and thus violates the rule of law.

[273] There are two additional rule of law concerns with the delegation of legislative power to the executive. The first, as Professor Elmer A. Driedger noted, the "delegation of power to amend a statute is generally regarded as objectionable for the reason that the text of the statute is then not to be found in the statute book" (*The Composition of Legislation: Legislative Forms and Precedents* (2nd rev. ed. 1976), at p. 198). This gives rise to confusion and uncertainty, which are inimical to the rule of law (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 72).

[274] The second additional concern is that Henry VIII clauses endow the executive with authority to act arbitrarily. They do so by permitting the executive to act contrary to the empowering statute, creating an authority without meaningfully enforceable limits and thus an absolute discretion. Dicey articulated the rule of law's concern with preventing arbitrary power:

> [The rule of law] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. [p. 202]

[275] In the Canadian context, Justice Rand's famous reasons in *Roncarelli* also warn against absolute power:

> . . . there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. [p. 140]

[276] The Chief Justice says that the Governor in Council will be bound by the express terms and overall purpose and object of the *GGPPA* (para. 87). I agree with Brown J. when he says that Henry VIII clauses cannot merely be treated as a matter of administrative law (para. 414). My concerns are constitutional in nature because I do not see the Governor in Council as being constrained by meaningful limits that can be enforced through judicial review. For example, s. 168(4) expressly authorizes the Governor in Council to act contrary to the provisions of Part 1. Further, the overall purpose and object of the *Act* is so broad that the only limit on the Governor in Council is to act within the matter of national concern identified by the Chief Justice. When executive action is only limited by the division of powers and not by its empowering statute, then we can no longer call it executive action. Review for constitutional compliance with the division of powers is not enough. When an empowering Act contains a privative clause, the rule of law is not satisfied merely by judicial review for constitutional compliance.

[277] In order to protect the rule of law, and prevent arbitrary conduct, courts have a constitutional duty to judicially review actions of the executive (*Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 21). In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the majority affirmed that "[j]udicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes" (para. 28).

[278] Given that judicial review is constitutionally required, legislation cannot oust review, either expressly or implicitly (*Crevier*, at p. 238; *Dunsmuir*, at para. 31). When the Governor in Council is given the power to amend an Act, or to act in a manner inconsistent with the Act, it cannot be said that they are meaningfully limited by the Act. In the words of Campbell J.:

> This power is constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its original authority.
>
> (*Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 363)

(3) The Separation of Powers

[279] Like parliamentary sovereignty and the rule of law, the separation of powers is "a fundamental principle of the Canadian Constitution" (*Provincial Judges Reference*, at para. 138). Although it is often said that Canada does not have a strict separation of powers, time and time again this Court has recognized the separation of powers as "an essential feature of our constitution", "a cornerstone of our constitutional regime", "[o]ne of the defining features of the Canadian Constitution" and a "backbone of our constitutional system" (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at paras. 52 and 54; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 107; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at paras. 3 and 10).

[280] As an abstract theory, the separation of powers may embody three dimensions: the same persons should not form part of more than one branch, one branch should not control or intervene in the work of another, and one branch should not exercise the functions of another (E. C. S. Wade and G. G. Phillips, *Constitutional Law* (3rd ed. 1946), at p. 18).

[281] In Canada, the first two dimensions of the separation of powers are not always met. For instance, it is well accepted that "the same individuals control both the executive and the legislative branches of government" (*Wells*, at paras. 53-54; see also *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312, at pp. 320-21). However, this does not mean that our Constitution fuses the legislative and executive powers (*Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*,

[1989] 2 S.C.R. 49, at p. 103). Instead, the Constitution of Canada insists on a separation of powers according to the third dimension — the separation of function. In *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, Dickson C.J. described the basic functions of each of the three branches:

> There is in Canada a separation of powers among the three branches of government — the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy. [pp. 469-70]

[282] The separation of powers does not strictly require that all of these functions remain exclusive. Our Constitution permits one branch to exercise some of the functions of another branch, when it does so in a way that respects both roles. These appeals provide a perfect example. We, members of the judiciary, are called upon to provide advice to three Lieutenant Governors in Council on the constitutionality of the *GGPPA* — something that would typically be an executive function (*Secession Reference,* at para. 15). However, our jurisprudence also clearly establishes that "[t]he separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies" (*Provincial Judges Reference*, at para. 139).

[283] In *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, my colleague, Karakatsanis J., confirmed the importance of identifying and protecting each branch's core functions:

> Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. [Emphasis added; paras. 28-29.]

[284] Justice Karakatsanis's reasons aptly articulate one of the normative goals underlying the separation of powers: ensuring that power is allocated according to skillset and institutional capacities. Another reason was provided by McLachlin J. (as she then was) in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, where she emphasized the importance of maintaining the balance of power established between the three branches, finding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389). Maintaining this balance prevents an accumulation of power in any one branch.

[285] The Court's concern for protecting the core functions of each branch from intrusion is perhaps most well developed in the judicial sphere. Grounded in the

judicature provisions of the *Constitution Act, 1867*, both legislative and executive bodies are incapable of intruding upon the core jurisdiction of superior courts or infringing upon the independence of the judiciary (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 2 and 15; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 56; *Criminal Lawyers' Association of Ontario*, at paras. 19 and 26; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31). This core judicial function includes the duty to maintain the rule of law and protect citizens from arbitrary action by supervising state action (*MacMillan Bloedel*, at paras. 32-35; *Crevier*, at pp. 234-38).

[286] There are also well developed doctrines to protect core executive functions from judicial intrusion. For instance, our jurisprudence demonstrates the importance of restraint when reviewing certain exercises of royal prerogative (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Secession Reference*, at paras. 26-28; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 36-37; see also *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 D.L.R. (4th) 737). The doctrine of cabinet privilege similarly serves to protect core executive functions (*Carey v. Ontario*, [1986] 2 S.C.R. 637; *Babcock*, at paras. 18-19 and 60).

[287] The Court has also established limits on judicial interference with essential legislative functions, most notably through acknowledging the existence of

parliamentary privilege over core legislative activities. As Binnie J. said, "[e]ach of the branches of the State is vouchsafed a measure of autonomy from the others"; "[p]arliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected" (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 21; see also *New Brunswick Broadcasting Co.*, at p. 377). Parliamentary privilege provides immunity "necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business" (*Vaid*, at para. 41; see also *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R 687, at paras. 27 and 127).

[288] In addition to respecting the bounds of parliamentary immunity, courts have refrained from imposing procedural fairness requirements on legislating, other than requiring that legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent (*Authorson*, at paras. 37-41). Recently, a majority of this Court held that the duty to consult does not apply to ministers of the Crown engaged in drafting bills, as this is a legislative function: "Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of our democracy" (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 2; see also paras. 117, 122, 148, 163-64 and 167).

[289] Most of these protections are against judicial intrusion. However, the Court has also recognized that the executive cannot interfere with the legislative process in a manner that would restrict the power to enact, amend and repeal legislation, despite the important role played by the executive in the legislative process (*Pan-Canadian Securities Reference*, at para. 53). Chief Justice Lamer noted that "there is a hierarchical relationship between the executive and the legislature, whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory form" (*Provincial Judges Reference*, at para. 139).

[290] The separation of powers equally demands that the core function of enacting, amending and repealing statutes be protected from the executive and remain exclusive to the legislature. Doing so supports the two main normative principles underlying the separation of powers.

[291] First, the legislature is the institution best suited to set policy down into legislation. The constitutionally mandated process in ss. 17 and 91 of the *Constitution Act, 1867*, ensures that the legislation is made in public forums that provide opportunities for substantial examination and debate. The legislative process provides equally for high-level policy debates and line-by-line technical edits. Most importantly, legislating through legislatures requires, by "its very nature, the need to build majorities [and] necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top" (*Secession Reference*, at para. 68).

This is why "the role of the legislature is to decide upon and enunciate policy" (*Fraser*, at p. 470).

[292] Second, limiting the power to enact, amend and repeal legislation to the legislature helps to confine power and prevent an even greater concentration of power in the executive. There is no doubt that the executive branch wields great power in this country. In practice, the executive can control the day-to-day operations of the legislature (*Blaikie*, at p. 320). However, an executive branch with the power to legislate on its own, without the legislature at all, wields a much greater and far more dangerous power. As we have seen above, the legislative process takes place in public before the scrutiny of non-government members and the press. When the government does not control a majority of seats in the legislature, the legislative process can require extensive compromise. In contrast, when Cabinet amends the *GGPPA*, it does so shrouded in cabinet secrecy, free from public scrutiny. There can be no doubt as to "the pre-eminent importance of the House of Commons as 'the grand inquest of the nation'" (*Vaid*, at para. 20).

[293] The Fathers of Confederation and the Framers of the *Constitution Act, 1982*, both recognized the importance of the parliamentary process by requiring that Parliament sit at least once every twelve months (s. 20 of the *British North America Act, 1867* (as enacted) and s. 5 of the *Charter*). There is nothing more core to the legislative power than legislating. When the executive usurps this function, the separation of powers is clearly violated.

IV. Conclusion

[294] When the clear text of ss. 17 and 91 of the *Constitution Act, 1867*, is read in light of the foundational constitutional principles of parliamentary sovereignty, rule of law and separation of powers, I have no doubt that clauses that purport to confer on the executive branch the power to nullify or amend Acts of Parliament are unconstitutional. In addition, the *GGPPA* cannot fall within a matter of national concern defined by minimum standards when such standards are those of the executive, and not those of the Parliament.

[295] Therefore, while I agree with the Chief Justice's formulation of the national concern branch analysis, I do not agree with his application of the law to the facts of this case. As this *Act* is presently drafted, it does not set minimum standards and delegates a legislative power to the executive. Accordingly, while I join the Chief Justice in finding that Parliament has the power to enact constitutionally valid legislation in this realm, I must partially dissent.

The following are the reasons delivered by

BROWN J. —

I. Introduction

[296] With the aim of mitigating climate change, the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 ("*Act*"), implements measures — specifically, carbon pricing (in the case of Part 1 of the *Act*) and the regulation of heavy industry (in the case of Part 2) — to discourage activities that emit greenhouse gases ("GHGs") into the atmosphere.

[297] The issue before us is whether the *Act* is *intra vires* Parliamentary authority. Importantly, the issue is *not* whether Parliament can act to combat climate change. It clearly can — indeed, it can do much of what it seeks to do in the *Act* by, for example, exercising its taxation power under s. 91 of the *Constitution Act, 1867*. Nor is the issue whether Parliament can act to confront this or other existential threats to the country. Again, it clearly can, by relying upon its broad residual power to legislate in response to emergencies for the peace, order, and good government of Canada ("POGG").

[298] In other words, the constitutionality of the scheme that Parliament has enacted in this case does not govern *whether* Parliament can seek to control GHG emissions so as to meet reduction targets. It can. The question before us goes simply to *how* Parliament has chosen to do so — and, in particular, whether it has chosen a means of doing so that is supported by its legislative authority as conferred by the Constitution of Canada. This question properly directs our attention to the structure and operation of the *Act* — features which receive little to no consideration in the majority's reasons — and to the jurisdictional basis upon which the Attorney General of Canada seeks to

uphold it. Again, it is worth stressing — since all parties before us say that much is at stake in the fight against climate change — that Parliament's capacity to contribute meaningfully to that fight *does not* hang on the Court's answer to the reference question.

[299] The Attorney General of Canada urges us to find that the *Act* represents a constitutionally valid exercise by Parliament *not* of the powers it clearly has to address climate change, but of its residual authority to legislate with respect to matters of "national concern" under POGG. The significance of this cannot be overstated. This power — unlike Parliament's authority to legislate in the face of national emergencies — *permanently* vests *exclusive* jurisdiction in Parliament over the matter said to be of national concern. Were this simply the straightforward matter, as the Attorney General of Canada says, of requiring polluters to "pay", the consequences for the division of powers would be minor. But neither the Attorney General nor the majority fairly or completely describes what the *Act* does. In particular, they downplay significantly what the *Act* actually authorizes the Governor in Council — that is, the federal Cabinet — to do, and ignore the detailed regulatory intrusion into matters of provincial jurisdiction authorized by Part 2 of the *Act*. The result is a permanent and significant expansion of federal power at the expense of provincial legislative authority — unsanctioned by our Constitution, and indeed, as I will explain, expressly precluded by it.

[300] The majority accedes to all these things, granting the Attorney General of Canada everything he seeks. But it does not stop there. The majority goes even further,

in substance abandoning and re-writing this Court's jurisprudence on the national concern branch of POGG as stated in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. Specifically, it dilutes the test stated in *Crown Zellerbach*, which required that a national concern exhibit qualities of "singleness, distinctiveness and indivisibility" (p. 432) from a matter falling within provincial legislative authority, by injecting into that test a body of unrelated trade and commerce jurisprudence. The result is a new three-step test. Under this new test, the requirement of "singleness, distinctiveness and indivisibility" is informed by two "principles" that "animat[e]" the inquiry (Chief Justice's reasons, at para. 146). The first of these "animating" principles is two-pronged, and one of those prongs is informed by three "factors" (paras. 147, 151 and 157). The second "animating principle" is to be analyzed by reference to three other requirements (paras. 152-56). To add to the confusion, the inevitable resulting expansion of federal authority under the national concern branch is fortified by the injection of judicial discretion into the scale of impact analysis, by which the scale of impact on provincial jurisdiction is balanced in light of other "interests", which implicitly include the judiciary's view of the *importance* of the matter (paras. 161 and 206). (It is apparently to be assumed that all important matters fall within federal jurisdiction.)

[301] But the true danger in the majority's reasons for judgment does not lie in the blending of trade and commerce jurisprudence with POGG jurisprudence, or in the confusing and confused test that it states. It is in the majority's abandonment of any meaningful constraint on the national concern branch of the POGG power.

[302] I concur with Rowe J.'s reasons and therefore adopt his review of the jurisprudence on the residual POGG power, conferred upon Parliament by the preamble to s. 91 of the *Constitution Act, 1867*. My reasons proceed as follows. First, I will canvass the scheme of the *Act* itself, with a view to explaining its structure and operation so as to characterize its pith and substance, and to classify it among the heads of legislative authority prescribed in the Constitution. In so doing, I will explain why Parliament's reliance on the national concern doctrine to defend the *Act* encounters an insurmountable constitutional problem. The *Act*'s very structure belies any argument that its dominant subject matter relates to a distinctly federal matter, since it applies only where provincial legislatures have not enacted carbon pricing measures, either at all or as stringent as those preferred by the federal Cabinet. In other words, the *Act*'s structure and operation is *premised* on provincial legislatures *having authority* to enact the same scheme. This is fatal to the constitutionality of the *Act* under the POGG national concern branch, since s. 91 states provincial legislative authority is "assigned exclusively" — that is, to the exclusion of Parliament's authority to act. This is a fundamental limiting feature of the federal POGG power for which the majority's reasons do not account.

[303] I will then consider how the Attorneys General of Canada and of British Columbia, seeking to overcome that objection, argue that the imposition of *minimum national standards* is the distinctly federal or national aspect of the matter. But this simply begs the question — minimum national standards *of what*? If the subject of those "minimum national standards" is a matter falling within provincial legislative

authority — which, again, the *Act* by its very structure contemplates — the injection of "minimum national standards" adds nothing. For example, until this Court's judgment from which I now dissent, it would have been no more constitutional for Parliament to adopt "minimum national standards" governing hospital administration, the location or construction of hydroelectric generating facilities, the inflationary effects of intra-provincial trade and commerce (such as wage and price controls), or the exploration and development of non-renewable natural resources. Now, such things are entirely possible (at least, where a judge views them as being "important").

[304] It follows that the *Act* is not a valid exercise of Parliament's residual legislative authority. Nor — though the argument was hardly pursued by the Attorney General of Canada — can the *Act* be upheld as a valid exercise of any other federal head of power, at least not without the benefit of fuller argument than the passing reference contained in the Attorney General's factum. I would therefore conclude that the *Act* is wholly *ultra vires* Parliament.

[305] Having disposed of the reference question by applying this Court's jurisprudence, I will then turn to consider the majority's dilution of the *Crown Zellerbach* test.

II. The *Act*

[306] The *Act*'s preamble describes climate change as a national problem, which cannot be contained within geographic boundaries and requires immediate action. It

therefore states its intention to create "incentives for . . . behavioural change" by implementing a "federal greenhouse gas emissions pricing scheme".

[307] Two distinct regulatory mechanisms are authorized by the *Act*. Part 1 creates a regulatory charge on GHG-emitting fuels, which will increase annually until 2022. This charge is levied against certain producers, distributors and importers, with the expectation that they will pass this charge on to end consumers. In this way, it is expected to change public behaviour, thereby reducing demand for and consumption of GHG-emitting fuels. Subject to a number of exceptions, the charge applies to fuels that are produced, delivered or used in a "listed province", brought into a listed province from another place in Canada, or imported into Canada at a location in a listed province (ss. 17 to 39). The fuel charge currently applies to 22 fuels that emit GHGs when burned, including gasoline, diesel fuel, natural gas and "combustible waste". The fuels are listed in Sch. 2 of the *Act* and are subject to modification by the federal Cabinet.

[308] The second mechanism, created under Part 2, is described as an output-based pricing system ("OBPS"). The structure of the OBPS casts significant doubt on the correctness of the majority's characterization of the entire *Act*'s pith and substance as "establishing minimum national standards of GHG price stringency to reduce GHG emissions" (para. 57). Rather, the OBPS is animated by concerns over industrial competitiveness in *specific* emissions-intensive Canadian industries that compete in international markets, and with the consequent economic and

environmental impacts of "carbon leakage" — the movement of industry to jurisdictions with a lower carbon price. Part 2, therefore, is designed not only "to create incentives for . . . behavioural change", but also to maintain the international competitiveness of *some* emissions-intensive and trade-exposed industries (being those selected by the federal Cabinet) by *exempting* them from the fuel charge established by Part 1, and subjecting them instead to different levels of carbon pricing based on Cabinet's responsiveness to the competitiveness and carbon leakage concerns of that particular industry.

[309] Part 2 achieves its goal by authorizing the federal Cabinet to limit the total emissions that can be produced without charge by an industrial facility. It applies to facilities located in a listed province that either meet the criteria set out in the regulations or are designated by the Minister of the Environment. Facilities subject to the OBPS that operate within their emissions limit receive surplus credits called compliance units which can be sold or banked to offset future emissions. Facilities that exceed their limit must pay an excess emissions charge, remit compliance units, or both.

[310] The emissions limit of a particular facility is calculated by multiplying its volume of production by a factor — in the language of the *Act*, a sector-specific "output-based standard" — set out in the *Output-Based Pricing System Regulations*, SOR/2019-266 ("*Regulations*"). This standard is typically based on a percentage of the national, production-weighted average emissions intensity of the specific industrial

activity in question (a large exception is electricity generation, where the standards are based on whether solid, liquid or gaseous fuels are used). The percentage used to calculate the standard is adjusted based on an assessment of competitiveness and carbon leakage concerns for that particular industrial activity. This assessment is crucial because the cost per tonne of carbon emitted in relation to any given industrial activity is dictated solely by the percentage used to set the output-based standard.

[311] In the result, Part 2 grants the federal Cabinet the power to set carbon costs on an activity-by-activity basis. Schedule 1 of the *Regulations* sets out the standards for an array of different products, from bitumen to potash to pulp, that give rise to different carbon prices for emissions related to that product.

[312] A key feature of the *Act* is that its application is dependent upon whether and how provinces have exercised their legislative authority to reduce GHG emissions. Meaning, the *Act* is designed to operate as a backstop, applying in only those provinces that have not (1) adopted carbon pricing as the means for reducing GHG emissions, (2) to a stringency that meets the federal Cabinet's preferred measure. To allow for this contingent operation, the *Act* grants the federal Cabinet discretion to determine whether it will apply in a given province. (As I will discuss below, this is a significant consideration militating against the *Act*'s constitutionality.) In Part 1, ss. 166(2) and (3) provide that, "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the [federal Cabinet] considers appropriate", Cabinet may designate the listed provinces in which the fuel charge regime will apply,

taking into account "the stringency of provincial pricing mechanisms for greenhouse gas emissions" as the primary factor. In Part 2, ss. 189(1) and (2) authorize Cabinet to designate the backstop jurisdictions in which Part 2 will apply, "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the [federal Cabinet] considers appropriate" taking into account, again, "the stringency of provincial pricing mechanisms for greenhouse gas emissions" as the primary factor.

III. Analysis for Constitutionality

[313] A reviewing court must apply two steps to determine whether an enactment falls within the legislative authority of the enacting body. First, the enactment must be characterized to determine its pith and substance or dominant subject matter. Secondly, the identified subject matter must be classified, with reference to the classes of subjects described in ss. 91 and 92 of the *Constitution Act, 1867* (*Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 30). Each step must be treated distinctly. Characterizing an enactment with reference to the heads of power creates "a danger that the whole exercise will become blurred and overly oriented towards results" (*Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16; see also A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 490). At the same time, however, we cannot lose sight of how these two distinct steps interact. As Professor P. W. Hogg explains in *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at p. 15-6:

> . . . neither of these two steps has any significance by itself. The challenged statute is characterized . . . as in relation to a "matter" (step 1) only to determine whether it is authorized by some head of power in the Constitution. The "classes of subjects" are interpreted (step 2) only to determine which one will accommodate the matter of a particular statute.

[314] The analytical process differs somewhat, however, where, as here, Parliament relies upon the national concern branch of POGG as the source of its authority to legislate. After identifying the pith and substance of the impugned law, and deciding that it does not fall under an enumerated head of power, the reviewing court must then consider whether the matter said to be of national concern satisfies the requirements stated in *Crown Zellerbach*.

A. *Characterization*

[315] The pith and substance of a law has been described as "an abstract of the statute's content", or the law's "dominant purpose", "leading feature", "true nature and character", or "dominant or most important characteristic" (*Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286, citing P. W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 313; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 482). It is well established that the dominant subject matter of an enactment is determined by considering its purpose and effects (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29).

[316] Determining the appropriate breadth by which to characterize the impugned law is essential. The legislation's dominant subject matter must be

characterized precisely enough for it to be associated with a specific class of subjects described in the Constitution's heads of power. Characterizations that are too broad, vague, or general "are unhelpful in that they can be superficially assigned to various heads of powers" (*Desgagnés*, at para. 35; see also *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 190).

(1) Broad Proposed Characterizations

[317] The Attorneys General of Ontario and Alberta describe the *Act*'s pith and substance as relating to the regulation of GHG emissions. I agree with the Attorneys General of Canada and British Columbia that this is too broad because it does not facilitate classification under a federal or provincial head of power. GHG emissions are produced by virtually *all* facets of human activity and can therefore be regulated in innumerable different ways that will correspond to different heads of power. In that sense, identifying "regulating GHG emissions" as the pith and substance of a law suffers from the same deficiency as "regulating the environment" which, as this Court has said, is "not an independent matter of legislation" but rather "a sweeping subject or theme virtually all-pervasive in its legislative implications", that "touch[es] several of the heads of power assigned to the respective levels of government" (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 63-64; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 154, quoting W. R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, at p. 610). Identifying the pith and substance

requires greater specificity in describing *how* the legislation proposes to regulate GHG emissions. Again, the purpose of characterization must be borne in mind: it is to facilitate classification so as to determine whether the Constitution grants the enacting body — in this case, Parliament — legislative authority over the subject matter.

[318] In support of a broad characterization, Ontario says that legislative purpose must not be confused with the means chosen to achieve it, a proposition various parties attribute to this Court's decision in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25 (A.F., Attorney General of Ontario, at para. 35; I.F., Attorney General of New Brunswick (38663 and 38781), at para. 20; I.F., Attorney General of Manitoba (38663 and 38781), at para. 25). But *Ward* simply reinforces the view that greater specificity than "regulating GHG emissions" is required. While the provision at issue in *Ward* imposed a prohibition on the "sale, trade or barter" of whitecoat and blueback seals, to refer to the legislation as prohibiting trade in baby seals was insufficiently precise. The same prohibition might relate to property and trade (authorized by s. 92(13)), or to conserving the economic viability of the seal fishery (authorized by s. 91(12)). It was clear from the broader context, however, that the enactment's purpose was to conserve the seal fishery, and the enactment was therefore authorized by the federal government's fisheries power (paras. 23 and 49). This Court's statement in *Ward* was, accordingly, directed to cases where describing legislation *only* in terms of its means would not accurately capture its dominant subject matter. Nothing in *Ward* requires altogether excluding legislative means from the pith and substance analysis.

[319] Moreover, it will not always be possible to clearly distinguish between means and purpose. The end goal at one level of abstraction may be viewed as the means to some broader goal at another level of abstraction. Here, for example, carbon pricing is the chosen means to generate behavioral change, which is the chosen means to reduce GHG emissions, which is the chosen means to combat climate change. Feasibility and efficacy aside, alternatives exist at each level of abstraction: the government might opt to remove GHGs from the atmosphere to combat climate change; it might prohibit certain products or activities to reduce GHG emissions; and it might reward "green" behaviours to generate behavioral change. It cannot therefore be said, as a general proposition, that the dominant subject matter of an enactment must not refer to the means chosen to implement the legislative purpose. That said, and as I will explain below, to incorporate the legislative means within the pith and substance of a statute will have particular consequences when deciding its constitutionality under the national concern branch of POGG.

[320] Whether one views the stated subject matter as the means or the objective depends, then, on the chosen level of abstraction. And the determinative consideration in identifying an appropriate level of abstraction should be *facilitating the subject matter's classification* among the classes of subjects described in ss. 91 and 92 so far as necessary to resolve the case. If an enactment's subject matter could be classified under different heads of power listed under both ss. 91 and 92, then the subject matter should be identified with more precision until it is clear which single level of authority (as between federal and provincial) may legislate in respect thereof (*Reference re*

Assisted Human Reproduction Act, at para. 190). A sufficiently precise description may well refer to why *and* how the law operates (*Chatterjee*, at para. 16).

(2) Narrow Proposed Characterizations

[321] I turn now to the characterizations advanced by the Attorneys General of Canada and British Columbia in support of their arguments that the *Act* is *intra vires* Parliamentary authority to regulate matters of national concern under POGG.

[322] I observe at the outset that, when Parliament seeks to permanently and exclusively regulate a matter of national concern, one would expect the Attorney General of Canada to have a single, clear, and consistent position about just *what* he thinks Parliament was doing. More particularly, he should be able to readily — and, again, consistently — identify the narrow and distinct matter that the legislation in question addresses. That has not occurred here. Instead, the Attorney General has offered up a vast array of shifting arguments in various courts at various stages in the proceedings. This alone should provoke deep suspicion about the correctness of those arguments.

[323] To assuage these suspicions, the Attorney General of Canada acknowledges that his approach has "evolved", having been "informed" along the way "by the characterizations of [the] courts below" (R.F., at para. 61). So where has this "evolution" brought him? Before this Court, it has at last brought him to the revelation

that the *Act*'s dominant subject matter is "establishing minimum national standards integral to reducing nationwide GHG emissions" (para. 56 (emphasis deleted)).

[324] This is similar to the characterization that the Attorney General of British Columbia successfully urged the Court of Appeal for Saskatchewan to adopt: ". . . 'minimum national standards of stringency for pricing GHG emissions'" (2019 SKCA 40, 440 D.L.R. (4th) 398, at paras. 11 and 431). Before us, British Columbia urged a variation, specifically: ". . . establishing minimum national pricing standards to allocate part of Canada's targets for GHG emissions reduction" (A.F., at para. 2 (emphasis deleted)).

[325] None of these characterizations can be sustained.

[326] The principal difficulty with these submissions is the invocation of "minimum national standards". It adds nothing to the pith and substance of a matter, which is directed *not* to the fact of *a standard*, but to *the subject matter* to which the standard is to be applied. In other words, identifying "minimum national standards" as part of the dominant subject matter begs the very question which the characterization analysis seeks to answer: minimum national standards *of what*?

[327] "Minimum national standards" is a *nothing*. It is an *artifice* — or, as the Attorney General of Alberta puts it, a rhetorical "sleight of hand" (R.F., at para. 44). *Only* federally enacted standards can be both "national" (in the sense that only federal legislation can apply nationwide, while provincial legislative authority cannot extend

beyond its borders) *and* a "minimum" (since, if a provincial standard is different from a corresponding federal standard, the operation of paramountcy ensures that the federal standard will prevail). In the result, using "minimum" and "national" to describe the *Act*'s pith and substance is empty and misleading.

[328] None of this is answered by the majority. Indeed, nowhere does the majority justify the inclusion of "minimum national standards" in its characterization of the pith and substance of the *Act*. Instead, the majority simply and peremptorily expresses its "view" that "the federal government's intention was not to take over the field of regulating GHG emissions, or even that of GHG pricing, but was, rather, to establish minimum national standards of GHG price stringency for GHG emissions", and that "minimum national standards" adds something "essential" to the pith and substance of the *Act* (paras. 65 and 81). The majority also says that the impugned federal legislation in *Hydro-Québec* (which also included a backstop) was not described by this Court as imposing minimum national standards (at para. 33, per Lamer C.J. and Iacobucci J., dissenting, and at paras. 130 and 146, per La Forest J.), because the backstop nature of that legislation was but a "mere feature" — whereas, in this case, the backstop nature of the *Act* is its "main thrust", "dominant characteristic", and "defining feature" (Chief Justice's reasons, at para. 82). Respectfully, the distinction between a legislative structure that operates as a "mere" feature as opposed to a "dominant" or "defining" one is elusive. Indeed, my colleagues appear also to find it so, since they do not explain it. Little in Part 1 or 2 of the *Act* is cited in support for the proposition that, *here*, the backstop model is a "defining", as opposed to a "mere",

feature. We are simply to accept that this is so because the majority declares it to be so, citing *not* the actual statute and what it does, but instead the *Final Report* of the Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms, 2016 (online), two federal reports, and excerpts from debates in the House of Commons (paras. 65-67). While these sources form part of the relevant backdrop, they are not a proxy for serious judicial scrutiny of the *Act* and, in particular, of Part 2 — the slightest attention to which reveals, as I have already described, that it does indeed have the potential to "take over the field of regulating GHG emissions" in the listed industries.

[329] The majority responds to this point by stating that *some* federal legislation — such as the legislation at issue in *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 ("*2011 Securities Reference*"), which allowed provinces to opt-in — does not necessarily apply nationally or create a minimum standard. Here, by contrast, the *Act* "applies in all the provinces at all times" (yet it is not a "blunt unified national system") (Chief Justice's reasons, at para. 81). This, says the majority, somehow legitimizes the inclusion of "minimum national standards" in its description of the *Act*'s pith and substance (para. 81). With respect, this misses the critical point. It is not that *all* federal legislation imposes minimum national standards, but rather that, by operation of paramountcy and the territorial limits of provincial jurisdiction, only Parliament *is capable* of imposing minimum national standards. The inclusion of "minimum national standards" in the pith and substance of a federal statute effectively decides the jurisdictional dispute. While, as I have explained, it can be appropriate to include reference to the legislative means in the pith and substance, it is entirely

inappropriate to short-circuit the analysis by describing the means as something that only federal legislative authority can undertake.

[330] In short, and remarkably, the majority barely acknowledges that this idea of describing the pith and substance of a statute in terms of "minimum national standards" might be the least bit controversial, saying nothing to justify it, either generally or specifically. Indeed, in the face of objections thereto from the parties, and majority and dissenting judgments at the courts of appeal, one can only surmise that the majority does not wish to truly engage the point. This may well be because the device of "minimum national standards" allows the majority to effectively bypass several steps of their diluted reformulation of the test for the national concern branch from *Crown Zellerbach* — a subject to which I return below.

[331] A final point about "minimum national standards". Even if "minimum national standards" represented anything meaningful for our purposes, the fact remains that Part 2 of the *Act* imposes *no* explicit standards, whether "minimum" or "national". Rather, it allows the federal Cabinet to selectively impose an array of carbon prices on an array of different trade-exposed industries, with the stated goal of maintaining their international competitiveness and minimizing carbon leakage.

[332] The Attorney General of Canada's reference to "integral" standards also has no relevance to identifying the *Act*'s pith and substance. Determining whether the standards implemented through the *Act* are "integral" to reducing Canada's GHG emissions would require this Court to consider whether the standards set out in the *Act*

are effective. Yet, as this Court has repeatedly maintained, "the efficacy of the law is not a valid consideration in the pith and substance analysis" (*Ward*, at para. 22). Indeed, "the wisdom or expediency or likely success of a particular policy expressed in legislation is not subject to judicial review" (*Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 425). Whether and to what extent any given standard is integral to reducing Canada's GHG emissions is a matter of policy that has no bearing on the constitutional question facing this Court.

[333] Without "minimum national standards" and "integral" to round out the characterization proposed by the Attorney General of Canada, we are left with "reducing nationwide GHG emissions" which — as a statement of *the goal* of the law without any reference to *the means* proposed to achieve it — obviously lacks the specificity necessary to enable classification. This Court's description of the *Act*'s subject matter should provide "an abstract of [its] content, instancing the subjects or situations to which it applies and the ways it proposes to govern them" (Abel, at p. 490). In order to determine whether the federal government can enact any particular GHG emission "standard of stringency", we must describe, concisely but precisely, how that standard operates.

[334] Turning to the Attorney General of British Columbia's proposed characterization, without "minimum national standards", we are left with "allocat[ing] part of Canada's targets for GHG emissions reduction". However, as the Attorney General of Alberta points out, it is difficult to accept that the *Act* allocates part of

Canada's overall targets when it "neither sets nor allocates any targets" at all (R.F., at para. 45). The *Act* imposes a fuel charge and gives the federal Cabinet policy levers to set carbon prices by industry. This is an odd way to allocate emissions reduction targets.

[335] For these reasons, Canada and British Columbia's proposed characterizations of the *Act*'s pith and substance must be rejected. It is therefore necessary to analyze anew the purpose and effects of the law so as to characterize them appropriately.

(3) Purpose and Effects

[336] There is no real dispute about the *Act*'s purpose. Its broad aim is to reduce Canada's GHG emissions to mitigate climate change. More narrowly, the *Act*'s purpose is to change behaviour. Its preamble states that behavioral change "is necessary for effective action against climate change" and, further, that "the pricing of greenhouse gas emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change". The *Act* refers to Canada having made international commitments to reducing its GHG emissions.

[337] The difficulty with many of the submissions before us, however, including those of the Attorney General of Canada, is that they attempt to characterize the pith and substance of the *Act* as if Parts 1 and 2 were each doing the same thing in the same way. The majority's pith and substance analysis is based on the same premise (para. 71). This is both *inexplicable* and *superficial*. *Inexplicable*, because the two parts

of the *Act* are not remotely similar to each other; Parliament could have set out each Part in its own statute. Indeed, doing so might have prompted the majority to consider the distinct operational features of each Part. And *superficial*, because it pays little attention to the regulations; where regulations have been passed, they can — and, here, *should* — be scrutinized to ascertain the true intent of the legislature (*Reference re Assisted Human Reproduction Act*, at para. 84). While Part 1 of the *Act* increases the cost of producing, delivering, using, or importing fuels that produce GHG emissions (which is expected to be passed on to consumers through an increase in the ultimate retail cost of those fuels), Part 2 does something quite different: it increases the cost of certain industrial activities by charging large facilities for producing GHG emissions over prescribed limits based on their particular industry and production processes. Part 2 also alleviates the impact of carbon pricing on *some* industries, but *not all*: the OBPS covers only the emissions-intensive trade-exposed industries that carry out an activity that the federal Cabinet chooses to list in the regulations. Picking winners and losers in this way is the stuff of industrial policy, not carbon price stringency.

[338] It becomes even more difficult to reconcile Part 2 with the notion of carbon price stringency when considering the effects of the *Regulations* themselves. My colleague Rowe J. has comprehensively reviewed the provisions in the *Act* that empower the federal Cabinet to make regulations, and I endorse his analysis, to which I add this. The current regulations impose varying carbon costs on the industries subject to the OBPS. The present *Regulations* establish, by my count, 78 separate output-based standards across 38 industrial activities. As these output-based standards depend on a

chosen level of stringency (to be decided based on competitiveness and carbon leakage concerns), the output-based standards — and thus the average cost per tonne of GHG emissions — varies for each of these activities. For example, the 2019 Regulatory Impact Analysis Statement indicates that a stringency of 95 percent of the average emissions intensity is prescribed for iron, steel and cement production, which (with an excess emissions charge of $40 per tonne of carbon emissions in 2021) sets an average carbon cost of $2 per tonne; a stringency of 90 percent is prescribed for refineries and petrochemical production, setting an average carbon cost of $4 per tonne; and a stringency of 80 percent is prescribed for mining, potash and bitumen production and upgrading, setting an average carbon cost of $8 per tonne (*Canada Gazette*, Part II, vol. 153, No. 14, July 10, 2019, at pp. 5387-88 and 5391).

[339] I stress Part 2 here because, in analysing the scale and sweep of discretion granted to the federal Cabinet under Part 2 of the *Act*, the majority vastly understates what Part 2 actually does. For example, after referring to the federal Cabinet's power under Part 2 to regulate and issue orders that take it deep into matters of industrial policy, the majority says that, like in Part 1, "no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country" (para. 76). But this ignores the detailed regulation-making powers in Part 2, including the federal Cabinet's discretion to set — on an industry-by-industry basis — output-based pricing standards under the *Regulations*, and to select which industries are exempt from having to pay the Part 1

fuel charge so as to preserve their international competitiveness. Rather than establish minimum national standards, therefore, it seems more correct to say that the *Act* empowers the federal Cabinet to establish variable and inconsistent standards for an array of different industrial activities.

[340] It follows from the foregoing that the pith and substance of Parts 1 and 2 of the *Act* ought to be characterized separately. And it also follows from the foregoing that the pith and substance of Part 1 of the *Act* is the reduction of GHG emissions by raising the cost of fuel. The pith and substance of Part 2 of the *Act* is the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure.

B. *Classification*

[341] I now turn to determining the class of subjects — that is, the heads of power under our Constitution — to which each of the enactment's two dominant subject matters belongs. While the Attorney General of Canada and my colleagues in the majority have rushed directly to consider whether the *Act*'s dominant subject matter fits within the national concern branch of POGG, doing so is unsound as a matter of constitutional methodology: generally, courts should look *first* to the enumerated powers, resorting to the residual POGG authority only if necessary (*Hydro-Québec*, at para. 110, per La Forest J.; see also Hogg, at pp. 17-4 to 17-7; and D. Gibson, "Measuring 'National Dimensions'" (1976), 7 *Man. L.J.* 15, at p. 17).

(1) Provincial Jurisdiction

[342] It must be remembered that the *Act*'s entire scheme is *premised* on the provinces *having* jurisdiction to do precisely what Parliament has presumed to do in the *Act* — that is, to impose carbon pricing through a comparable scheme.

[343] Provincial jurisdiction over property and civil rights authorized by s. 92(13) stands out as the most relevant source of legislative authority for the pith and substance of Parts 1 and 2 of the *Act*. Regulating trade and industrial activity, all within the boundaries of specified provinces, is indisputably captured by this broad head of power, which includes the regulation of business not coming within one of the enumerated federal heads of power, as well as, of course, the law of property and of contracts (Hogg, at pp. 21-2 to 21-3 and 21-8 to 21-10; *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.), at p. 110; Lederman, at pp. 603-4). Indeed, as I have explained, the *Act* operates as a backstop, operating only where provincial legislative authority is not exercised, or not exercised in a manner acceptable to the federal Cabinet.

[344] The majority acknowledges the importance of s. 92(13), emphasizing its importance for Quebec. Ironically, as I shall explain below, that importance is reinforced by *Quebec*'s conspicuous absence from s. 94's provision for the uniformity of laws governing property and civil rights — an important feature of the terms on which Quebec entered Confederation, and which the majority ignores. Further, the majority's meager appreciation of s. 92(13)'s significance is made evident *both* by the

majority's description of it as a tool merely for preserving "regional and cultural diversity" (para. 210), *and* by the hard reality that, under this legislation, the authority of Quebec and the other provinces under s. 92(13) is now subordinate to federal authority. To announce that the new national concern test invented by the majority is both "rigorous" and a "meaningful constraint" on federal power does not make it so (para. 210). With respect, and as I shall also explain, the majority's new test, far from constraining federal authority, instead enables it to encroach on provincial authority, notably that under s. 92(13).

[345] The provincial residuum in s. 92(16), granting authority over all matters of a local or private nature, could also authorise Parts 1 and 2 of the *Act* in the alternative (Hogg, at pp. 21-4 to 21-5).

[346] Part 2 of the *Act*, as a deep foray into industrial policy, also falls within matters of provincial legislative authority granted by s. 92(10) over local works and undertakings. Also relevant to Part 2 of the *Act* — with its emphasis on heavy industrial emitters, trade exposure, and international competitiveness — is s. 92A. This head of power gives the provinces the exclusive jurisdiction to make laws in relation to the exploration, development, conservation, and management of non-renewable natural resources in the province. Though not intended to derogate from the existing powers of Parliament, the resource amendment fortifies the pre-existing provincial powers in this area and gives the provinces indirect taxation powers, and greater control over, their natural resources (W. D. Moull, "Section 92A of the Constitution Act, 1867" (1983),

61 *Can. Bar Rev.* 715, at p. 716; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at pp. 375-77; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 84).

[347] The foregoing identification of several areas of provincial legislative authority over the dominant subject matter of a federal statute should — and, as a matter of this Court's constitutional methodology, *always has* — led this Court to the conclusion that the statute is *ultra vires* Parliament (barring application of the double aspect or ancillary powers doctrines). As McLachlin C.J. wrote for the majority in *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 19,

> [t]he first step in determining the validity of the amendments brought by by-law No. 260 is to identify their dominant characteristic. This is known as the "matter" of the legislation. Once the matter of the legislation has been determined, the next step is to assign this matter to one or more heads of legislative power. If the matter comes within one of the heads of power allocated to the provinces under the *Constitution Act, 1867*, then the impugned law is valid. If it does not, then the court must consider whether the *prima facie* invalid law is saved by the doctrine of ancillary powers. [Emphasis added; citations omitted.]

[348] And so, in this case the identification of several applicable provincial heads of power should truly be the end of the matter. This is because all such heads of power, including those I have just identified as applicable here, are, by the terms of s. 92 (and s. 92A(1)), matters over which provincial legislatures "may exclusively make Laws". And, by the terms of s. 91, the POGG power applies only "in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". While the constitutional text of "not coming within the

Classes of Subjects . . . assigned exclusively to . . . the Provinces" is recounted in passing by my colleagues in the majority, they give it no consideration (Chief Justice's reasons, at para. 89). Instead, they offer up bromides about the need to "maintain the autonomy of the provinces and respect the diversity of Confederation" (paras. 4, 48-50 and 89-90) — which assurances are belied by majority judgment's eliding of clear constitutional text that was intended to maintain that very provincial autonomy and diversity. The objection, therefore, remains unanswered: the *exclusivity* of provincial jurisdiction over matters falling under s. 92 is fundamental to the Canadian brand of federalism, and was a unique and deliberate choice by the makers of our Constitution who were concerned about federal overreach via the POGG power — a concern, until now, shared by this Court.

[349] The language of "peace, order, and good government" (often in the form of "peace, welfare, and good government", or "welfare, peace, and good government") was frequently included in Imperial constituting documents long before the *Constitution Act, 1867* (appearing, for example, in the *Royal Proclamation 1763* (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1); the Commission appointing James Murray, Captain General and Governor in Chief of the Province of Quebec, November 21, 1763 (reproduced in *Sessional Papers*, vol. XLI, 3rd Sess., 10th Parl., 1907, No. 18, at p. 128); the *Quebec Act, 1774* (G.B.), 14 Geo. 3, c. 83 (reproduced in R.S.C. 1985, App. II, No. 2); *An Act for the better regulating the Government of the Province of the Massachuset's Bay in New England* (G.B.), 1774, 14 Geo. 3, c. 45; the *Constitutional Act, 1791* (G.B.), 31 Geo. 3, c. 31 (reproduced in

R.S.C. 1985, App. II, No. 3); *An Act to make temporary Provision for the Government of Lower Canada* (U.K.), 1838, 1 & 2 Vict., c. 9; the *Union Act, 1840* (U.K.), 3 & 4 Vict., c. 35 (reproduced in R.S.C. 1985, App. II, No. 4); *An Act to provide for the Government of British Columbia* (U.K.), 1858, 21 & 22 Vict., c. 99; and the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 63). (See, generally, S. Reid and M. Scott, *Interpretative note on the terms "Peace, order and good government" and "Peace, welfare and good government"*, April 7, 2020 (online).)

[350] What is different, however, about s. 91 of the *Constitution Act, 1867* is the caveat that laws made under the POGG power may "not com[e] within the Classes of Subjects . . . assigned exclusively to . . . the Provinces". While the above-listed constitutional documents all contain *a* caveat, it was to the effect that the law-making power being conferred should not be exercised in a manner inconsistent with the laws of the Imperial Parliament. For example, the *Royal Proclamation* cautioned that laws enacted for the "Peace, Welfare, and good Government" should be "as near as may be agreeable to the Laws of England". But our Constitution imposed a new kind of caveat, by its terms clearly designed to preserve the integrity of provincial legislative authority. And it makes clear that the federal law-making authority for the peace, order, and good government of Canada was intended to be subject to the division of powers. Within their areas of legislative authority, provinces are not only sovereign, but *exclusively so*. Hence the constitutional impossibility of the *Act*'s backstop model: if the provinces *have* jurisdiction to do what the *Act* does — and, that is, again, the very premise of the

Act's scheme — then the *Act* cannot be constitutional under the national concern branch of POGG.

[351] Again, my colleagues in the majority do not grapple with this fundamental objection, despite accepting that the provinces have the jurisdiction under ss. 92(13) and (16) and 92A to do precisely what the *Act* does (para. 197). Instead, they accept the submissions of the Attorneys General of Canada and of British Columbia that *something else* is going on here, that *some aspect* of the *Act* is truly and distinctly national in scope and lies outside provincial jurisdiction which can be regulated by Parliament under the POGG residual authority over matters of national concern. While these submissions are premised on what I have explained is an inadequate description of the pith and substance of the *Act*, I now turn to show that this view is unsustainable on this Court's jurisprudence.

(2) The National Concern Branch of POGG

(a) *Defining the Matter of National Concern*

[352] The Attorneys General of Canada and British Columbia urge us to find that their proposed characterizations of the pith and substance of the *Act* are one and the same as the matters of national concern falling under the POGG power. This point reveals a lack of clarity in the jurisprudence, stemming from the particular way in which the division of powers analysis proceeds under POGG relative to the enumerated heads of power under s. 91. As I have explained, where an enumerated head of power is relied

upon, the pith and substance of the impugned law is identified at the characterization step (for instance, "enhancing public safety by controlling access to firearms through prohibitions and penalties" in *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 4), and that pith and substance is then classified under a head of power or class of subjects (in that case, the criminal law power in s. 91(27)).

[353] The analysis proceeds somewhat differently, however, where, as here, Parliament relies upon the national concern branch of POGG as the source of its authority to legislate. After identifying the pith and substance of the impugned law, and after deciding that it does not fall under an enumerated head of power, the reviewing court must then consider whether the matter said to be of national concern satisfies the requirements stated in *Crown Zellerbach*. If so, the matter is placed under exclusive and permanent federal jurisdiction. The question arises, however, whether the pith and substance of the impugned legislation should or can be *coextensive* with the matter of national concern, or whether the matter of national concern should or can be *broader* than the pith and substance of the legislation. The POGG jurisprudence offers little guidance on this point. The cases have described the matters of national concern both broadly (as in *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292 (aeronautics) and *Ontario Hydro* (atomic energy)) and narrowly (as in *Munro v. National Capital Commission*, [1966] S.C.R. 663 (the development, conservation and improvement of the National Capital Region in accordance with a coherent plan)), depending on the particular question to be resolved. What the cases have not done — with the possible exception of *Crown Zellerbach* — is include, within the description

of the matter of national concern, the *legislative means* of the particular statute under review. (In *Crown Zellerbach*, the matter of national concern is described at p. 436 as both "[m]arine pollution" *and* "the control of marine pollution by the dumping of substances", although later cases have described the matter of national concern identified in *Crown Zellerbach* as only "marine pollution", without the additional reference to legislative means: see *Hydro-Québec*, at para. 115, and *Friends of the Oldman River Society*, at p. 64.)

[354] As a general proposition, if a proposed matter of national concern is described more narrowly — for instance, by including legislative means — it will be easier for that matter to qualify under the test for applying the national concern doctrine stated in *Crown Zellerbach*. This is because, again generally, it is easier to demonstrate that a narrowly defined matter has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. And, of course, the narrower the matter, the less the impact on provincial jurisdiction. The majority accepts the proposition that identifying the matter of national concern is simply a matter of identifying the pith and substance of the statute under review, which can, as here, include legislative means. Indeed, the majority says it *must* be so; one must always be the same as the other (paras. 115-16). But accepting this view effectively confines Parliament to that particular legislative means in responding to the matter of national concern. This would be unprecedented and undesirable. The arguments of the Attorneys General of Canada and of British Columbia illustrate this point.

[355] The Attorney General of Canada urges us to find that the matter of national concern to be recognized under POGG is precisely the same as its proposed pith and substance of the law, namely, "establishing minimum national standards integral to reducing nationwide GHG emissions". The Attorney General of British Columbia similarly urges us to accept the matter of national concern in the same terms as his proposed pith and substance of the law: ". . . establishing minimum national pricing standards to allocate part of Canada's targets for GHG emissions reduction". To be clear, then, each of these submissions couple a description of *the legislative means* (minimum national standards) with *the purpose* of the law.

[356] Considering first the Attorney General of Canada's proposed matter of national concern, I have already explained that it is not a court's place to consider whether regulatory measures are "effective" or "integral". Doing so is no more appropriate at the classification step than it is at the characterization step — and, in any event, the efficacy of legislation is irrelevant to distinguishing an area of distinctly federal jurisdiction from that of provincial jurisdiction. What is of greater significance here is the invocation, common to the proposals of the Attorney General of Canada and the Attorney General of British Columbia, of "minimum national standards". As I have also explained, when used to characterize the pith and substance of the *Act*, this phrase is empty and misleading, and it can be rejected for that reason alone. But reliance upon "minimum national standards" is even less tenable as a proposed matter of national concern. Indeed, its acceptance as such would work pernicious effects on federalism.

[357] By way of explanation, the Attorney General of Canada urges us in his factum to find that a matter formerly under provincial jurisdiction is "transformed" (*how*, he does not say) into a matter of national concern when "minimum national standards" are invoked. This is simply not possible. Were it so, Parliament could unilaterally create an area of distinctly federal jurisdiction from matters that fall within exclusive provincial jurisdiction simply by doing the very thing that exclusive provincial jurisdiction was intended to preclude: legislating a national standard in respect of that matter. So understood, *every* subject matter listed under s. 92 of the *Constitution Act, 1867* could be viewed as having a national component. The possibilities are endless: "minimum national standards" governing hospital and health care administration; "minimum national standards" governing the availability of bilingual municipal services; "minimum national standards" governing the location or construction of hydroelectric generating stations; "minimal national standards" of second-language education in public schools; or "minimum national standards" governing the content of public school courses in 18th century Canadian history.

[358] For this to serve as a basis for recognizing that *some aspect* of an area of provincial jurisdiction is truly and distinctly "national" in scope, and therefore actually lies *outside* provincial jurisdiction, "is to create something out of nothing and to subject every area of provincial jurisdiction to the potential setting of national standards that denude provincial power" (D. Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019), 82 *Sask. L. Rev.* 187, at p. 199). It represents a model of *supervisory* federalism. This is all but acknowledged by my majoritarian colleagues who, in minimizing the

Act's effects on provincial authority, *repeatedly* stress that provinces are "free" to "implement their own GHG pricing mechanisms", to "prescribe any rules for provincial pricing mechanisms", to "design and legislate any GHG pricing system", or to "design any GHG pricing system they choose" — but *then* adding, *every time*, the caveat "**as long as**" (or "**provided**") they are "**sufficiently** stringent" to meet "the federally-designated standards", or "targets" (paras. 27, 61, 65, 72, 79, 81, 178, 179, 183, 186, 200 and 206 (emphasis added)). In other words, the provinces can exercise their jurisdiction however they like, *as long as* they do so in a manner that the federal Cabinet also likes. And yet, "[e]nsuring provincial compliance with Parliament's wishes" is hardly an appropriate basis for recognizing a new matter of national concern (J. Hunter, "Saving the Planet Doesn't Mean You Can't Save the Federation: Greenhouse Gases Are Not a Matter of National Concern" (2021), 100 *S.C.L.R.* (2d) 59, at p. 79).

[359] Much the same can be said about British Columbia's submission that "allocat[ing] part of Canada's targets for GHG emissions reduction" is an appropriate matter of national concern. As I have already explained, this is not an accurate description of the pith and substance of the *Act*. More to the point, however, the notion of allocating national *targets* encounters the same objection as Canada's minimum national *standards*: it is an artifice which, once grafted onto matters that are plainly of provincial jurisdiction (as the backstop scheme of the *Act* itself contemplates) adds nothing. And like minimum national standards, it can be applied to open up any area of provincial jurisdiction to unconstitutional federal intrusion once Parliament decides

to legislate uniform treatment in the form of mandatory, national "targets". In this sense, there is no difference between Parliament legislating national standards and legislating national targets.

[360] British Columbia responds to this concern by raising the provincial inability test, coupled with a submission that, in most areas of provincial jurisdiction, there is no need for Parliament to interfere by enacting national targets. This is because, the argument goes, provincial legislation on such matters — for instance, education — has primarily *intra*-provincial impacts, such that the costs and benefits of the legislature's policy choice are felt principally within the province. Education is therefore said to be unlike GHG emissions, since minimum national standards in education "would not indivisibly address a provincial inability" (A.F., Attorney General of British Columbia, at para. 49).

[361] But this submission misconceives the proper focus of the provincial inability test, a subject to which I will return below. For now, it suffices to observe that the existence of extra-provincial impacts does not mean that uniform legislative treatment is truly *essential* — as is made clear by considering, with reference to *Anti-Inflation*, the extra-provincial inflationary impacts of intra-provincial economic activities. It hardly seems likely that a similarly imaginative argument in that case about imposing "minimum national standards" or "allocating national targets" related to the containment and reduction of inflation would have moved Beetz J. from his conclusion that inflation was inappropriate as a matter of national concern.

[362] More fundamentally, I reject the idea that adding "minimum national standards" or the "allocation of nationwide targets" to a proposed matter creates or identifies a distinctly federal aspect of that matter. On this point, various parties invoked the concept of "systemic risk", borrowed from the securities references — as indeed does the majority (at paras. 176 and 182) — to support a finding that the proposed matter met the requirements of the provincial inability test. In the *2011 Securities Reference*, this Court accepted that federal securities legislation engaged trade as a whole (as is required under the trade and commerce power), but nevertheless found that the law went too far by delving into "detailed regulation of *all* aspects of trading in securities, a matter that has long been viewed as provincial" (para. 114 (emphasis in original)). A more focussed law that was "limited to addressing issues and risk of a *systemic* nature that may represent a material threat to the stability of Canada's financial system" was later upheld in the *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 ("*2018 Securities Reference*") because "the regulation of systemic risk in capital markets goes to promoting the stability of the economy generally, not the stability of one economic sector in particular" (para. 111 (emphasis in original)).

[363] The submission that the proposed matter is suitable as a matter of national concern because it addresses the systemic risks of climate change has superficial appeal. But this ignores fundamental differences between the respective analyses under the POGG national concern doctrine and under the s. 91(2) trade and commerce power. The federal power to regulate trade and commerce has no requirement for singleness,

distinctiveness and indivisibility. On the contrary, subjects like competition law or systemic risk to capital markets can be diffuse and permeate the economy as a whole, and yet still validly fall under the federal trade and commerce power (see, for instance, para. 87 of the *2011 Securities Reference*, which discusses the diffuse nature of the competition law that was at issue in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641). "Systemic risk" is, therefore, an ill-fitting concept to borrow from the s. 91(2) analysis.

[364] Finally, I note that, in advancing an expansive national concern doctrine so as to augment federal power, both the Attorney General of Canada and the majority rush past s. 94 of the *Constitution Act, 1867*, which provides that "the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights". As that section makes clear, the Constitution already contemplates that Parliament might wish to enact uniform laws related to property and civil rights in the provinces, as it does by the *Act*. But s. 94 also imposes certain constraints: it does not apply to Quebec and, in the provinces where it does apply, it requires the consent of the provincial legislatures.

[365] In other words, in bypassing s. 94 so as to embrace their centralized vision of Canadian federalism, both the Attorney General of Canada and the majority would (1) strip Quebec of its protection from federally imposed uniformity of laws relative to property and civil rights, and (2) write out of the Constitution the requirement for provincial consent elsewhere. This deprives the provinces, and Quebec in particular, of

part of the bargain negotiated among the partners, without which "the agreement of the delegates from Canada East . . . could [not] have been obtained" (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 36-37). As the Privy Council recognized more generally in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at p. 361, s. 94 "would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of s. 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole".

[366] It is no simple matter to tinker with the Constitution. This is why that task is left by the amending formula to legislatures, who can deliberate upon the complexities in depth, and not to courts which lack the necessary institutional competencies to navigate those complexities — as here, where, by engorging federal power as it does under the residual POGG power, the majority not only risks doing violence to s. 92 (and, for that matter, to s. 92A), but also trips over s. 94.

[367] This goes to a more fundamental point. As I will discuss below, both the Attorney General of Canada and the majority speak of a "balance" — the Attorney General of striking a "balance of federalism", and the majority of a "federal-provincial balance" (R.F., at para. 69 (emphasis deleted); Chief Justice's reasons, at paras. 102, 117 and 134). But what my colleagues in the majority do not appreciate is that they are *undoing* a balance. And that is because, as difficult as it may be for them to accept, the "balance" that *they* presume to strike, and that *they* would have *the judiciary* strike in

future cases, has *already been struck* by Part VI of the *Constitution Act, 1867* ("Distribution of Legislative Powers"). The role of the courts is *not* to *strike* a balance, but *to maintain and preserve* the balance that is already recorded by our Constitution in its division of powers. As this Court wrote in *Reference re Firearms Act*, "it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power" (para. 48 (emphasis added)). Section 94, like ss. 91 and 92, is part of a larger package that itself, and as a whole, reflects a "balance" that was agreed to by both the federal and provincial levels of government or their colonial predecessors.

[368] Of course, re-balancing may occasionally be desirable or necessary — hence, for example, the negotiations that led to s. 92A, and hence certain particulars of the amending formula. But when that need arises, *if* it arises, it is not in the gift of either the Attorney General of Canada or of the Court to meet it. Indeed, their attempting to do so simply upsets the balance — by, as here, effectively stripping Quebec of an immunity held for over 150 years under the Constitution of Canada, which immunity protected, among other things, Quebec's rights to the use of civil law in private matters, guaranteed nearly 250 years ago by the *Quebec Act*.

[369] For all these reasons, the matters of national concern proposed by the Attorneys General of Canada and British Columbia are constitutionally untenable. While it is unnecessary to resolve here the question of whether a newly recognized matter of national concern under POGG can ever be so narrowly defined to encompass

only the pith and substance of the impugned law (and including the legislative means), I offer the following observations. As noted by Huscroft J.A., in dissent, describing the new matter of national concern so narrowly in effect constitutionalizes the law under review, and the particular means it adopts (2019 ONCA 544, 146 O.R. (3d) 65, at para. 224). It also risks the analysis devolving into results-oriented thinking, which must be avoided in the division of powers analysis (*Chatterjee*, at para. 16). Further, *Crown Zellerbach* suggests that the broader approach is appropriate. Recall that once a matter is recognized to be of national concern under POGG, Parliament is granted an "exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects" (para. 433). This language suggests that, in relation to a matter of national concern, Parliament is granted a scope of jurisdiction — and the ability to employ means — beyond that specifically contemplated by the law under review.

[370] All this said, I decline to conclude that, as a general proposition, it would never be appropriate to describe a matter of national concern so narrowly as to encompass only the law under review and the legislative means it employs. Still, in the case at bar, a broad characterization of the national concern is unavoidable. Defining a matter of national concern that encompasses *both* the reduction of GHG emissions by raising the cost of fuel (Part 1) and the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure (Part 2) requires broad strokes. The legislative means employed by Parts 1 and 2 are mutually distinct. Indeed, each is quite different from the other,

sharing only a purpose: the reduction of GHG emissions. This, and my conclusion stated above that the definition of the matter of national concern should not tie Parliament to a particular legislative means, tend to support the identification of the matter said to be of national concern as the purpose of the *Act*: *the reduction of GHG emissions*. The only remaining question, then, is whether the reduction of GHG emissions satisfies the test stated in *Crown Zellerbach* for a valid national concern.

(b) *Singleness, Distinctiveness and Indivisibility*

[371] "The reduction of GHG emissions" does not meet the requirements of *Crown Zellerbach*. This would be so, even if it were appropriate to consider each of the pith and substance of Parts 1 and 2 as proposed matters of national concern, since the reduction of GHG emissions by raising the cost of fuel (Part 1) and by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure (Part 2) each fail to meet the requirement of distinctiveness. Neither of these matters is distinct from matters falling under provincial jurisdiction under s. 92. I begin, therefore, by considering why the pith and substance of each of Parts 1 and 2, respectively, fail to meet the requirement of distinctiveness (even if they were appropriate matters of national concern). Then, I consider why the proper matter of national concern as I understand it ("the reduction of GHG emissions") fails to meet the requirements of singleness and indivisibility.

(i) <u>The Pith and Substance of Each Part Is Not Distinct</u>

[372] Here again, the backstop model of the *Act* is of significance. The principal difficulty in finding that the reduction of GHG emissions (whether by raising the cost of fuel, or by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure) has the requisite distinctiveness to be recognized as a matter of national concern is illustrated by the very quality of the scheme that Parliament has legislated. Through the *Act*, Parliament encourages provinces to enact substantially *the same* scheme to serve *the same* regulatory purpose of altering behaviour. Again, this demonstrates that Parliament has legislated in respect of a matter that falls within provincial legislative authority, specifically, ss. 92(10) (local works and undertakings), (13) (property and civil rights), (16) (matters of a local nature) and 92A (natural resources). The *Act*'s backstop scheme admits of no other conclusion (Newman, at p. 197). This is much like *Hydro-Québec*, where the legislation contained no opt-out for the provinces, but rather empowered the Governor in Council to exempt provinces that had equivalent regulations in force (para. 57, per Lamer C.J. and Iacobucci J., dissenting, but not on this point). The observations of Lamer C.J. and Iacobucci J. on this point are therefore apposite:

> The s. 34(6) equivalency provision also implicitly undermines the appellant's submission that the provinces are incapable of regulating toxic substances. If the provinces were unable to regulate, there would be even more reason for the federal government not to agree to withdraw from the field. Section 34(6) demonstrates that the broad subject matter of regulating toxic substances, as defined by the Act, is inherently or potentially divisible. [para. 77]

[373] Proponents of the *Act* urge us to find that, even if the *Act* and provincially legislated GHG pricing schemes address the same matter, they each address different

aspects of that matter. This argument rests on the applicability of the double aspect doctrine, whose application here the majority not only accepts but describes as *inevitable* whenever minimum national standards are employed (Chief Justice's reasons, at paras. 125-31). But the majority is simply wrong — the double aspect doctrine has no application here.

[374] The double aspect doctrine arose because "some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 30). It therefore contemplates that "both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various 'aspects' of the 'matter' in question" (para. 30). Whether the doctrine applies to the national concern doctrine of POGG is a question of some controversy, given this Court's statement in *Crown Zellerbach* that Parliament acquires "exclusive jurisdiction of a plenary nature to legislate in relation to" the matter of national concern (p. 433; see, for instance, *Lacombe*, at paras. 26-27). Assuming without deciding, however, that the double aspect doctrine may, in some instances, apply to matters of national concern recognized as such under POGG, it has no application here.

[375] As the provinces clearly have jurisdiction to establish standards of GHG price stringency in the province, this leaves as the only difference between the federal aspect and the provincial aspect "minimum national standards". Obviously, adopting

"minimum national standards" as part of the matter of national concern allows the majority to invoke the double aspect doctrine, since it has defined the matter in terms of something (enacting "national standards") which, as a practical matter, only Parliament could possibly do. And just as obviously, when the matter is defined in terms of something only Parliament could possibly do, *whatever it is* that the provinces are doing *must* be *something different*. This reasoning, however, could easily be applied to create federal "aspects" of all sorts of matters falling within provincial jurisdiction. Indeed, the majority suggests *just that*, acknowledging that whenever the device of "minimum national standards" is used, a double aspect "will inevitably result" (para. 129).

[376] The device of minimum national standards, combined with the double aspect doctrine, artificially meets many aspects of the *Crown Zellerbach* test, as diluted by the majority. By definition, "minimum national standards", being *national*, would presumably, and in every case, qualify as "qualitatively different from matters of provincial concern" and as "predominantly extraprovincial . . . in character" (Chief Justice's reasons, at para. 148). And, of course provinces, being provinces, are *unable* to establish binding minimum national standards (para. 182). Further, because the *Act* leaves the provinces free to adopt their own schemes *as long as* (or *provided*) they meet federal approval, the impact on provincial jurisdiction is "qualified and limited" (paras. 198, 205 and 211). In short, the device of "minimum national standards", where applied, deprives the majority's framework of much of its "exacting" quality.

[377] It is, however, this simple. While the double aspect doctrine "allows for the *concurrent application* of both federal and provincial legislation, . . . it does not create *concurrent jurisdiction*" (*2011 Securities Reference*, at para. 66 (underlining added)). Like the POGG power itself, the double aspect doctrine must be carefully constrained and applied with caution, because its casual and undisciplined application in the majority's reasons runs the near-certain risk that ss. 91 and 92 of the *Constitution Act, 1867* will be merged into a "concurrent field of powers governed solely by the rule of paramountcy of federal legislation" (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 766). It was for this very reason, in *Bell Canada*, that Beetz J. cautioned that the doctrine "must not be [used] to create concurrent fields of jurisdiction . . . in which Parliament and the legislatures may legislate on the same aspect"; rather, it must be applied only "where the multiplicity of aspects is real and not merely nominal" (p. 766 (emphasis in original)).

[378] Nearly all of the parties and intervenor Attorneys General — aside from the Attorneys General of Canada, New Brunswick and British Columbia — expressed concerns about the application of the double aspect doctrine here. The Attorney General of Quebec offers a particularly compelling and constitutionally sound encapsulation of the problem with the majority's invocation of the double aspect doctrine in this case, and of the damage to the federation that will follow. The Attorney General of Quebec — no stranger to carbon pricing and legislative action to mitigate climate change — says that the proposed matter does not contemplate two aspects of the same matter; rather, it contemplates the same aspect of the same matter. And because the provinces

may legislate in this area only where such legislation meets the criteria unilaterally set by the federal government, defining the matter so as to artificially conjure a double aspect effectively amounts to a *transfer of jurisdiction* from the provinces to the federal government. This was, of course, also the point of the majority of the Court of Appeal of Alberta: the *Act* purports to do exactly what *the provinces* can do, and for precisely the same reason (2020 ABCA 74, 3 Alta. L.R. (7th) 1, at para. 209). There are simply no distinctly federal aspects of the reduction of GHG emissions that cannot be divided among the enumerated heads of power. And describing the imposition of "minimum national standards" as the distinctly federal aspect of the matter simply brings us back to the arguments that, as I have already explained, get the Attorney General of Canada nowhere. Since such matters fall squarely within provincial jurisdiction, they cannot be matters of "national concern", given that POGG is a residual power.

(ii) "The Reduction of GHG Emissions" Is Not Single or Indivisible

[379] It is, of course, true that *aspects* of "the reduction of GHG emissions" may be distinct from matters listed in s. 92. Like "inflation" or "the environment", its nature is inherently diffuse, and it therefore would not *entirely* fall within provincial jurisdiction. Aspects of "the reduction of GHG emissions" would likely come within, for instance, exclusive federal powers over trade and commerce, navigation and shipping, and interprovincial or international works and undertakings (ss. 91(2) and (10) and 92(10)).

[380] But this is of no assistance to the majority here. While aspects of "the reduction of GHG emissions" may be distinct from matters falling under s. 92, as a matter of national concern it still fails to meet the *Crown Zellerbach* requirements of singleness and indivisibility. In *Crown Zellerbach*, it was "not simply the possibility or likelihood of the movement of pollutants across [the boundary between the territorial sea and the internal marine waters of a state]", but "the difficulty of ascertaining by visual observation" that boundary that meant uniform legislative treatment was required for marine pollution (p. 437). This proposition could not be clearer. The matter was indivisible in that case *not* because pollutants might cross an invisible boundary; rather, the matter was indivisible because of the difficulty of knowing the source and physical location (federal territorial seas vs. provincial inland waters) of the pollution at any given time, and therefore whose regulatory and penal provisions might apply.

[381] Here, however, the territorial jurisdiction from which GHG emissions are emitted is readily identifiable. The matter is divisible, because whenever fuel is purchased, or an industrial activity is undertaken, no question arises as to physical location and, therefore, no difficulty arises in identifying whose jurisdiction might apply. Responsibility for the reduction of GHG emissions among the provinces can therefore be readily identified for regulation at the source of such emissions. This is not a concern which, absent exclusive federal jurisdiction, the provinces could not address. Rather, both Parliament and the provinces may within their respective spheres of legislative authority "operate in tandem" to reduce GHG emissions (*Hydro-Québec*,

at para. 59). The reduction of GHG emissions therefore lacks the degree of unity required to qualify as an indivisible matter of national concern.

[382] My majoritarian colleagues say that I have overstated the regulatory uncertainty aspect of Le Dain J.'s reasoning in *Crown Zellerbach*. They say that there are many routes to establishing indivisibility (at para. 193), and I agree, as does my colleague Rowe J. (see para. 548). My point is not that regulatory uncertainty is a precondition to finding a matter of national concern. Rather, it is that, where the matter in question otherwise lacks specificity and unity — as is the case here, where the matter under consideration is the reduction of GHG emissions, as opposed to, for instance, the matter in *Munro* — the fact that harms may cross borders is not enough to make out indivisibility. Something more is required, and in *Crown Zellerbach*, that was the regulatory and penal uncertainty stemming from an inability to know the jurisdiction in which the pollution had been dumped (p. 437), since the crane depositing the woodwaste in that case was mobile, fixed as it was on a scow. That uncertainty is absent here, and so relying on cross-border harms is simply not enough to make out indivisibility. The emission of GHGs, whether from a factory or an automobile, can be connected to the source province. GHG emissions are therefore *divisible*. This understood, "nationwide GHG emissions" are nothing more than the sum of provincial and territorial GHG emissions (Hunter, at pp. 75-76).

[383] Of course, uniform legislative treatment in the area of GHG emissions reduction might be *desirable*, as it might assist Canada in meeting its international

commitments in relation to GHG emission targets. But the desirability of uniform treatment is hardly the marker of a matter of national concern. Here, the non-participation of one province does not prevent any other province from reducing its own GHG emissions. While a provincial failure to deal effectively with the control or regulation of GHG emissions may cause more emissions from that province to cross provincial boundaries, that is *precisely* what this Court held was insufficient to meet the requirement of indivisibility in *Crown Zellerbach*. To be clear, even if this *could* be said to meet the provincial inability test — that is, even if *Crown Zellerbach* could be read as understanding "provincial inability" as including a provincial failure to act — my conclusion on this point would not change. This is because, properly understood — and contrary to the framework developed by the majority — the provincial inability test is but one indicium of singleness and indivisibility.

[384] Further, I agree with the majority at the Court of Appeal of Alberta, at para. 324, that

> there is no evidence on this record that anything any one province does or does not do with respect to the regulation of GHG emissions is going to cause any measurable harm to any other province now or in the foreseeable future. . . . The atmosphere that surrounds us all is affected largely by what is being done, or not being done, in other countries. Four large countries or groups of countries, the United States, China, India and the European Union generate, cumulatively, 55.5% of the world's GHG emissions.

[385] Obviously, uniform legislative treatment might be desirable in that it could alleviate concerns about carbon leakage. But, and again as the Court of Appeal of Alberta observed, the evidence on this record of the harms of interprovincial carbon

leakage is equivocal at best. Indeed, it tends to suggest that, in most sectors and for most provincial economic activity, such concerns are insignificant (E. Beale, et al., *Provincial Carbon Pricing and Competitiveness Pressures*, November 2015 (online), at p. II; Working Group on Carbon Pricing Mechanisms, *Final Report*, fn. 23; Sask. C.A. reasons, at para. 155, per Richards C.J.S.). This falls well short of establishing the majority's peremptory assertion that uniform treatment is *essential* to address carbon leakage concerns (paras. 183 and 186). And in the absence of actual evidence on this point, the majority's implicit proposition that Part 2 of the *Act* is *desirable* to address concerns about carbon leakage asks us to judge the *wisdom* of this particular policy choice, something that has no bearing on the analysis.

[386] In sum, the reduction of GHG emissions as a matter of national concern fails to meet the requirements of singleness and indivisibility. Like the containment and reduction of inflation, the reduction of GHG emissions

> is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.
>
> (*Anti-Inflation*, at p. 458)

(c) *Scale of Impact*

[387] Even *were* the reduction of GHG emissions a single and indivisible area of jurisdiction, its impact on provincial jurisdiction would be of a scale that is completely irreconcilable with the division of powers.

[388] The power to legislate to reduce GHG emissions effectively authorizes an array of regulations, "the boundaries of [which] are limited only by the imagination" (Sask. C.A. reasons, at para. 128). It extends to the regulation of any activity that requires carbon-based fuel, including manufacturing, mining, agriculture, and transportation. Indeed, Part 2 of the *Act*, much like the impugned law in the *2011 Securities Reference*, descends into the detailed regulation of industrial GHG emissions reduction by imposing different carbon prices on different industrial activities. As Huscroft J.A. recognized, in dissent, the power to create minimum standards for GHG emissions could potentially authorize minimum standards related to home heating and cooling, public transit, road design and use, fuel efficiency, manufacturing and farming prices (Ont. C.A. reasons, at para. 237).

[389] Unlike previously recognized matters of national concern, including aeronautics, the development and conservation of the national capital region, atomic energy and marine pollution, the power to legislate to reduce GHG emissions has the potential to undo Canada's division of powers. It is in this respect comparable to the broad topics of environmental regulation and inflation, which this Court has expressly refused to recognize as independent legislative subjects. GHG emissions simply cannot be treated as a single regulatory matter, "because no system in which one government

was so powerful would be federal" (D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 *U.T.L.J.* 54, at p. 85).

[390] In an attempt to minimize the scale of impact on provincial jurisdiction, the Attorney General of British Columbia reminds us that the *Act* does not forbid any *activity*, but only increases the *cost* of certain activities. The *Act*, he argues, is not about regulation, but pricing; it does not allow the federal Cabinet to determine *who* may emit GHGs or set *conditions* on how they do it, but rather allows anyone to emit GHGs if they pay for it (A.F., at paras. 19-21). It follows, on this reasoning, that any impact on provincial jurisdiction is minimal, particularly compared to what it might have been had Parliament resorted to its criminal law power, for instance, to prohibit GHG emissions.

[391] The majority adopts this line of argument, describing "establishing minimum national standards of GHG price stringency to reduce GHG emissions" as an exclusively "pricing-based formulation" of the *Act*'s pith and substance (para. 57). As it explains, "the focus of the [*Act*] is on national GHG pricing" (para. 60; see also para. 70). In so concluding, the majority stresses that "the [*Act*] does not require those to whom it applies to perform or refrain from performing specified GHG emitting activities", or "tell industries how they are to operate in order to reduce their GHG emissions" (para. 71). Rather, it says, the *Act* simply "require[s] persons to pay for engaging in specified activities that result in the emission of GHGs" (para. 71) — in other words, "just paying money".

[392] This view ignores two problems. First, "just paying money" is an odd way of describing the impact of a law. The *goal* of the financial charges — "just paying money" — is *to influence behaviour*, in this case both consumer and industrial. And that is precisely the point. As Canada's Ecofiscal Commission observed during oral submissions, Part 2 of the *Act* "uses pricing to achieve its environmental goals" (transcript, day 2, at p. 77). Further, poised as they are to affect the cost of fuel and dictate the viability of emissions-intensive trade-exposed industries, the charges imposed by the *Act* stand to have a profound effect on provincial jurisdiction and the division of powers.

[393] The point is that "just paying money" hardly captures the intended impact of the *Act*, let alone its potential impact. And yet, this is central to the efforts of the *Act*'s proponents, including the majority, to downplay what the law actually does. Indeed, the majority takes matters even further, by stressing how minimally, in its view, the *Act* actually impacts provincial autonomy. Provinces, observes the majority, may still choose any type of carbon pricing regime they wish. "[F]lexibility and support for provincially designed GHG pricing schemes" remain the order of the day, and provinces are "free to design and legislate any GHG pricing system" they wish, "**as long as**", of course, their schemes are "sufficiently stringent" and meet the federally-designated standards (Chief Justice's reasons, at paras. 79 and 200 (emphasis added)). This leads to an impact on provincial jurisdiction that is, in their view, "strictly limited" (para. 200). This, like the flawed idea that the *Act* is just about paying money

— as opposed to the discouragement or prohibition of an activity — informs much of the majority's classification analysis. It is simply unsustainable.

[394] The second problem with the "just paying money" line of defence is that the contrasting degree of potential impact on provincial jurisdiction of a hypothetical law validly promulgated under Parliament's criminal law power, or its taxation power for that matter, has absolutely no bearing on whether another matter should be recognized as a matter of national concern. Contrary to the submissions of the Attorneys General of Canada and British Columbia at the hearing of these appeals, the Constitution does not require provinces to happily accept a severe intrusion on their jurisdiction under POGG simply because Parliament *could* have passed a *criminal* law. Likewise, an intrusion into provincial jurisdiction is no less severe simply because it leaves the provinces with authority to enact *more* stringent regulatory requirements. This argument misses the point of the division of powers analysis, which — *pace* the majority — allows no recourse to balancing or proportionality considerations. The *Constitution Act, 1867* does not permit federal overreach *as long as* it preserves provincial autonomy to the greatest extent possible. It sets out spheres of exclusive jurisdiction. It *divides* powers — *exclusive* powers — between Parliament and the provincial legislatures. And within their sphere of jurisdiction, the provincial legislatures are sovereign, which sovereignty connotes provincial power to act — or not act — as they see fit, not *as long as* they do so in a manner that finds approval at the federal Cabinet table (see H. Cyr, "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014), 23 *Const. Forum* 20, at pp. 21-22). The very idea

of recognizing federal jurisdiction to legislate "minimum national standards" of matters falling within provincial jurisdiction is corrosive of Canadian federalism.

(3) Other Sources of Federal Legislative Authority

[395] While the Attorney General of Canada focused his submissions on the national concern doctrine, at the conclusion of his factum he pleads, in the alternative, that "Part 1 of the *Act* is validly enacted under Parliament's taxation power" and, further, that "the entire *Act* is validly enacted under the emergency branch of Parliament's POGG power, Parliament's criminal law power, or other existing heads of power, as argued by various Interveners" (R.F., at paras. 167-68 (emphasis added)). Yet, no actual *argument* is advanced by the Attorney General on *any* of those potential sources of Parliament's authority, or for that matter on anything other than the national concern branch of POGG. Indeed, that appears to have been the basis upon which Parliament understood itself as proceeding since, when asked during debate about the *Act*'s constitutionality, the reply of the Minister of Environment and Climate Change was to identify that climate change was a "national concern" (*Debates of the Senate*, vol. 150, No. 275, 1st Sess., 42nd Parl., April 2, 2019, at p. 7714 (Hon. Catherine McKenna)). But now, in a storm, any port will apparently do.

[396] Despite the Attorney General's evident lesser degree of commitment here, I now turn to address the various sources of federal authority "argued by various Interveners".

(a) *Gap Branch of POGG*

[397] Several interveners urged us to consider the gap branch of the POGG power as a possible source of federal jurisdiction for the *Act*. For instance, the intervener Athabasca Chipewyan First Nation submitted that the three branches of POGG must be read "fluidly" and that the "scientific newness" of climate change — being a matter unknown at the time of Confederation — should militate in favour of the validity of the *Act*. A version of this idea finds support in academic scholarship. Professor Newman, for instance, suggests that POGG's national concern branch and gap branch are one and the same (pp. 195-96 and fn. 47).

[398] I agree with Rowe J. that the case law does not support a distinction between the "gap" and "national concern" branches of POGG. Regardless of whether the "gap" branch is understood as housing "new" matters that did not exist at the time of Confederation or as requiring a lacuna in the text of the Constitution, all such matters must still pass the national concern test. As such, the scientific newness of climate change has no bearing on my analysis. As I have already explained, resort to this branch of POGG is not possible here, given that the pith and substance of each of Parts 1 and 2 of the *Act* are properly classified under provincial heads of power.

(b) *Emergency Branch of POGG*

[399] The emergency branch of POGG was also proposed as a possible basis for federal authority by several interveners including the David Suzuki Foundation, the

Canadian Labour Congress, the Intergenerational Climate Coalition, the Athabasca Chipewyan First Nation, and the National Association of Women and the Law and Friends of the Earth. It is curious that the majority does not consider this, since its reasons speak in such terms, describing climate change as "an existential challenge[,] a threat of the highest order to the country, and indeed to the world" (para. 167; see also paras. 187, 190, 195 and 206). Further, the emergency branch's requirement of temporariness means that the majority's unconstitutional transfer of jurisdiction from the provinces to Parliament would do less damage to Canadian federalism, and for less time, lasting only until this crisis passes.

[400] It is a problem for the *Act* — although presumably a problem that Parliament could have corrected had it wished to proceed in reliance upon the emergency power — that it does not expressly provide for temporary operation. As I have already recounted, however, the *Act* by its terms is intended to change behaviour. The preamble to the *Act* anticipates what will follow: ". . . increased energy efficiency, . . . the use of cleaner energy, . . . the adoption of cleaner technologies and practices and . . . innovation . . . ." In other words, while the *Act* does not come with a "best before" date, it does contemplate *an end*. And while at the outset of an emergency it will often be difficult or impossible to identify with any precision when it might end, the emergency branch *has* been applied in circumstances where it is reasonably apparent that the emergency will, *at some point,* end. Indeed, the point of action is presumably to do what is necessary to ensure that the emergency *will* end. For that reason, "Invocation of exceptional measures is typically justified on the basis that the

ordinary system is not up to handling the threat and that, once the crisis passes, the usual state of affairs can and will return" (S. Burningham, *"The New Normal": COVID-19 and the Temporary Nature of Emergencies*, June 4, 2020 (online) (emphasis added)).

[401] This is not to suggest that Parliament would have lacked "a rational basis" to act here, as required by the caselaw on the emergency branch. Rather, my point is that the Attorney General has not done the necessary (or any) work to show that Parliament justifiably relied upon its emergency power as a source of its authority. This stands in contrast to *Anti-Inflation*, where Parliament manifested such reliance (by specifying an expiration date), and where the Attorney General of Canada made full argument on the point (pp. 383-84 and 417-18).

[402] I should add that the intervener the David Suzuki Foundation urges us to find that the *Act*'s temporary character is to be found in its preambular references to Canada's commitments under the *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, December 12, 2015, and that those commitments come with the clear deadline of 2030. Hence, the intervener submits, the *Act* implies a 10-year timeline to achieve required reductions, and it urges us to read in that deadline, by designating an end date to the jurisdiction of Parliament to authorize the *Act* (I.F. (38663 and 38781), at para. 36). While this is an intriguing proposition, considering time-delimited jurisdiction in the emergency doctrine analysis would require a departure from this Court's jurisprudence. It would also ask this Court to attempt to

forecast when a given emergency may end, an issue usually left to Parliament (and rightly so, given the relative institutional competencies). The current record before this Court is inadequate to support designating 2030 as a suitable end date, or any other year for that matter, for Parliament to lose legislative competency in this area.

[403] Furthermore, the role of this Court — the Attorney General of Canada's concluding sentences of his factum notwithstanding — is not to root around the Constitution or constitutional doctrine to scrounge up some basis, *any* basis, to rescue federal legislation. (This is particularly so where, as here, the exceptional residual authority of POGG is contemplated and the dominant subject matter of the impugned statute is consigned by our Constitution to the provinces.) The proper question to ask is, therefore, not whether the *Act* is potentially salvageable under the emergency branch of POGG, but rather whether Parliament, in passing the *Act*, did so relying on its legislative authority under the emergency branch of POGG. Both the response of the Minister of Environment and Climate Change to a question about the source of Parliament's authority, and the submissions of the Attorney General of Canada, make clear that it did not.

(c) *Criminal Law*

[404] The criminal law power can be addressed briefly. While the precise scope of this power remains uncertain in this Court's jurisprudence, it is tolerably clear that its exercise requires a legislated prohibition that is accompanied by a penalty and backed by a criminal law purpose (*Reference re Genetic Non-Discrimination Act*, 2020

SCC 17, at para. 67). As I have explained, however, the pith and substance of the *Act* relates to a scheme of monetary disincentives intended to *discourage*, rather than *prohibit*, certain activity. The offences and penalties in the *Act* are incidental to its true regulatory nature and, accordingly, the criminal law power is not applicable.

(d) *Taxation*

[405] The Attorneys General of Saskatchewan and Ontario argue that Part 1 of the *Act* imposes a tax, and ask this Court to conclude that the *Act* violates the principle of no taxation without representation, which principle is guaranteed by s. 53 of the *Constitution Act, 1867* (see *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 71).

[406] Section 91(3) of the *Constitution Act, 1867* authorizes the federal government to raise money by any mode or system of taxation, which provides broad jurisdiction to impose both direct and indirect taxation. But as broad as the taxing authority is, it is "subject to the ordinary principles of classification and colourability that apply to all legislative powers" (Hogg, at p. 31-2 (footnotes omitted)). Not every monetary levy is a tax. While monetary measures that relate in pith and substance to the raising of revenue for federal purposes are classified as taxation (*Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1070; see also *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, at para. 30), other monetary measures are regulatory charges that must be supported by some other head of power (*Westbank*, at para. 23; *Exported Natural Gas Tax*, at p. 1068).

[407] This Court has stated the relevant criteria for distinguishing between a tax and a regulatory charge. One consideration applied in the most recent cases has been that regulatory charges are typically connected to a broader regulatory scheme (see, e.g., *Westbank*, at paras. 44-45; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131, at paras. 30-47). And so here, the Attorneys General of Saskatchewan and Ontario argue that the fuel charge under Part 1 of the *Act* is not connected to a broader regulatory scheme. While that is so, it is not dispositive, since regulatory charges *need not always* be connected to a broader scheme. In particular, there are cases where the charge itself *is* the scheme (*Westbank*, at para. 32).

[408] What *is* dispositive, in my view, is whether the charge is implemented primarily for a regulatory purpose, as opposed to a revenue-raising purpose. If so, the charge should be considered regulatory (*Westbank*, at para. 32; *Exported Natural Gas*, at p. 1070). In *Exported Natural Gas*, this Court concluded that one such regulatory purpose is to generally discourage certain behaviour (p. 1075). While the Attorney General of Ontario argues that we should not be so quick to label charges as regulatory, the conclusion I reach supports Canada's division of powers. It "would afford the Dominion an easy passage into the Provincial domain" were every monetary measure to be regarded as a tax (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355 (P.C.), at p. 367).

[409] As I have explained, the charges imposed by the *Act*, in pith and substance, relate to the regulatory purpose of changing behaviour, for the broader purpose of

reducing GHG emissions. The *Act*'s provisions reveal that it does not relate to the raising of revenue for federal purposes. It is therefore unnecessary to consider s. 53 of the *Constitution Act, 1867*.

(4) Broad Delegation to the Cabinet

[410] As a final comment to my analysis of the constitutionality of the *Act*, I observe that the provinces arguing against the *Act*'s constitutionality placed significant emphasis on the scope of delegated authority found within it. This emphasis is understandable, as the sweep of delegation granted by the *Act* to the Cabinet is breathtakingly broad. Indeed, the *Act* goes so far as to delegate authority to amend portions of the *Act* itself through a Henry VIII clause (s. 168(3) and (4); see also Sask. C.A., at paras. 361-66, per Ottenbreit and Caldwell JJ.A., dissenting). The majority notes this, but then speaks reassuringly of how the federal Cabinet's discretion is constrained by the purposes of the *Act* and specific guidelines in the statute, and how any listing decision by federal Cabinet can be judicially reviewed (paras. 72-76).

[411] But this is an incomplete response. The majority does not mention that failure to comply with the purposes of an enabling statute such as the *Act* would signify *not only* that the impugned regulations are *ultra vires* the enabling statute, but that it may also be repugnant to the division of powers. Nor does the majority explain just how a court is to review regulations for compliance with the division of powers.

[412] Further, the examples given by the majority of how a regulation may fail to conform to the purposes of the *Act* are not enlightening. For example, the majority posits that federal Cabinet "could not list a fuel . . . that does not emit GHGs when burned" (para. 75). That may be so, but what the majority might *also* have wished to consider is the obvious possibility that the federal Cabinet will discriminate against provinces or industries in a way that has nothing to do with "establishing minimum national standards of GHG price stringency to reduce GHG emissions". Indeed, this is a particular risk with Part 2 which, as I have explained, does not exist to establish such standards.

[413] In the absence of useful guidance from the majority on this point, I endorse that provided by Rowe J., both as to the imperative that the division of powers — no less than the purposes of the *Act* — confines the exercise by the federal Cabinet of Parliament's delegated authority, and as to the appropriate methodology for reviewing regulations for compliance with the division of powers.

[414] Further, my brevity on this issue should not be taken as agreement with the majority's response to my colleague Côté J.'s reasons on this point. Indeed, the majority largely misses the point, treating the matter of the Henry VIII clause as simply one of *administrative* law (since regulatory decisions can be judicially reviewed), ignoring the potentially significant *separation of powers* concerns that Côté J. identifies. I see those concerns as raising serious questions which, given my conclusion

on the Attorney General of Canada's reliance on the national concern doctrine, are unnecessary for me to decide here.

IV. Canada's Proposed "Modernization" of *Crown Zellerbach*

[415] While counsel before us did not advance this submission, the Attorney General of Canada urges us in his factum to "modernize" the national concern doctrine under POGG in an effort to make it easier for matters — including the one proposed here — to be recognized under the doctrine. I respond to it here because aspects of the proposal were adopted by my colleagues in the majority.

[416] Instead of speaking about a new matter or a provincial matter that has a national aspect, the Attorney General of Canada speaks of matters having been "transform[ed]" in a way that is "constitutionally significant" (R.F., at para. 69). How a matter is "transformed" — and, who or what does the "transforming" — is not explained. Nor is it explained what "constitutional significance" requires.

[417] This is, I observe with as much regret as astonishment, an unserious submission from the chief law officer of the federal Crown. The Attorney General of Canada has a responsibility to the whole country to support and act within, not ignore or undermine, Canada's federal structure: "Because the [Attorney General] is the chief law officer of a democratic government, she must be a guardian of the rule of law. As such, the [Attorney General] is held to a standard of accountability that is unique, that extends beyond the standard that applies to an ordinary litigant" (F. Hawkins, "Duties,

Conflicts, and Politics in the Litigation Offices of the Attorney General" (2018), 12 *J.P.P.L.* 193, at p. 193). As noted by Professor K. Roach, "[t]he Constitution . . . imposes and entrenches special restraints and obligations on the government as part of the supreme law of the land" ("Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006), 31 *Queen's L.J.* 598, at p. 610).

[418] Federalism is an essential feature of our Constitution. The Attorney General of Canada must defend it, not undermine it by casually and recklessly urging upon this Court some vaguely conceived notion of "transformation", so meaningless as to effectively deprive the provinces of the opportunity to respond substantively to it, but yet so clearly intended to effect the expansion of federal jurisdiction.

[419] Beyond the cant of "transformation", the most we have by way of a concrete proposal from the Attorney General on this point is that a national concern must be "distinctly national", as measured by the provincial inability test borrowed from the general branch of the federal trade and commerce power, and that it must be reconcilable with the division of powers (or, as the Attorney General now calls it, "the balance of federalism"; R.F., at para. 69 (emphasis deleted)).

[420] It is on the first of those considerations — that a national concern must be "distinctly national" — that I wish to focus, since it is embraced by the majority in its dilution of the *Crown Zellerbach* test (para. 177). This abandons this Court's jurisprudence, since — under *Crown Zellerbach* — provincial inability is but one

indicator of singleness, distinctiveness and indivisibility, while under Canada's proposed framework it becomes the singular test for distinctiveness (R.F., at para. 70).

[421] The respective tests for provincial inability, as set down for the national concern branch of POGG in *Crown Zellerbach* and for the trade and commerce power in *General Motors*, are different from each other. In *Crown Zellerbach*, Le Dain J. described the provincial inability test as an inquiry into "the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter", a threshold that would be met "whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament" (p. 432, citing Gibson (1976), at p. 34). In *General Motors*, however, Dickson C.J. described the provincial inability test in the fourth and fifth factors of the analysis under the general branch of the federal trade and commerce power as follows: ". . . the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting" and ". . . the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country" (p. 662).

[422] It is important to note that, despite being released one year after *Crown Zellerbach*, the Court in *General Motors* made *no* reference to *Crown Zellerbach*, or to its test for provincial inability under the national concern doctrine of POGG. Presumably, it did not occur to the Court to do so, since each test has its own aim, distinct from the

other. The *General Motors* test for provincial inability focusses on the prospect of a *legislative scheme* not working unless it is national in scope. By contrast, the *Crown Zellerbach* test for provincial inability is firmly focussed on the *nature of the problem* as being one which cannot be overcome without national action. This is fatal to the Attorney General of Canada's submission. As I have already explained, while this Court held in the *2018 Securities Reference* that legislation aimed at "systemic risk in capital markets" can meet the test for provincial inability under the *General Motors* factors (paras. 111, 113 and 115), it *does not follow* that "systemic risk in capital markets" is a matter sufficiently singular, distinctive and indivisible to make it an appropriately recognized matter of national concern under POGG. Legislation that passes the *General Motors* test can be aimed at a problem that is diffuse — such as the elimination of anti-competitive behaviour — yet still engage trade as a whole.

[423] Provincial inability, as an indicium of singleness, distinctiveness and indivisibility, was intended in *Crown Zellerbach* to confine POGG as a *residual* power by filtering matters that could fit under any enumerated head of power, *including trade and commerce*. The point is that, *by its residual nature*, the national concern branch of POGG must *not include* matters that satisfy the trade and commerce test. Hence, while the control of systemic risk was recognized as a valid federal objective under the trade and commerce power in the *2018 Securities Reference*, it would *not* qualify as a national concern under POGG, failing under "distinctiveness" (since it falls under the trade and commerce power) and "indivisibility" (because of its pervasive and diffuse character).

[424] The Attorney General of Canada's argument on this point is also revealing. The proposed "modernized" framework includes the *General Motors* provincial inability test, squarely aimed at provincial legislative inability, as the sole criterion to determine whether a matter is "distinctly national". And this is because such a framework would support Canada's submission that the provinces acting in concert would be legislatively unable to pass mandatory minimum national standards related to GHG emissions. But such an approach ignores the important statement in *Crown Zellerbach* that the provincial inability test is but "one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine" (p. 434).

[425] As the above analysis suggests, Canada's proposed framework would make it easier for a matter to be recognized as a national concern under POGG whenever minimum national standards are said to be required. The departure from this Court's jurisprudence that Canada proposes — and that the majority pronounces — would therefore enable the federal government to more easily invade provincial jurisdiction, and has the potential to upset the fundamental distribution of legislative power under the Constitution.

[426] As Abella and Karakatsanis JJ. forcefully expressed in their concurring judgment in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the doctrine of "*[s]tare decisis* places significant limits on this Court's ability to overturn its precedents" (para. 255). While the Court was divided in *Vavilov* about

whether those strictures were satisfied, the point is that horizontal *stare decisis* promotes certainty and predictability in the development of the law, contributes to the integrity of the judicial process and safeguards this Court's institutional legitimacy (paras. 260-61). If this applies to our statements of the law governing the standard by which judges review the decisions of administrative tribunals, it surely applies to our precedents on adjudicating the division of powers under the Constitution.

[427] In my view, the high threshold for departing from the long-established principles set down in *Crown Zellerbach* is not met here. And putting even that determinative consideration aside, at the very least, and for the sake of doctrinal clarity, I say with respect that the majority should acknowledge that it is completely re-writing the framework for the national concern branch of POGG. Instead, it insists upon linking its novel framework to *Crown Zellerbach*, as if its reasons represent *not* the confusing and confused eliding of the constraints of *Crown Zellerbach* that I will now demonstrate them to be, but as something of an inevitable and even obvious exegesis. I turn, then, to the majority's framework.

V. The Majority's Dilution of *Crown Zellerbach*

[428] The majority accepts aspects of the Attorney General of Canada's proposal to "modernize" the national concern doctrine, but takes it further still. And so — although this appears nowhere in this Court's judgment in *Crown Zellerbach* — the majority divines from that judgment, at paras. 142-66, the following "three-step process" (para. 132):

1) **Threshold question**: is the matter of sufficient concern to Canada as a whole to warrant consideration under the doctrine?

2) **Singleness, distinctiveness and indivisibility**: as this is not a "readily applicable legal test", the two "principles" that follow must be satisfied (para. 146).

    a. First, the matter must be "***specific and identifiable***" and "***qualitatively different*** from matters of provincial concern" (para. 146 (emphasis added)).

        Three factors or considerations may inform whether something is "qualitatively different":

        i. Whether "the matter is predominantly extraprovincial and international in its nature or its effects" (para. 151);

        ii. Whether international agreements related to the matter exist; and

        iii. Whether "the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces" (para. 151).

    b. Secondly, federal jurisdiction should be recognized "only where the evidence establishes ***provincial inability*** to deal with the matter" (para. 152).

        Three factors must be present:

        i. The "legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting" (para. 152);

        ii. The "failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country" (para. 152); and

        iii. A "province's failure to deal with the matter must have grave extraprovincial consequences" (para. 153).

3) **Scale of impact**: this requires the court to balance the intrusion on provincial autonomy against the impact on other interests that will be affected if federal jurisdiction is not granted.

[429] As will be apparent from the above, the majority has accepted Canada's proposal that principles from the trade and commerce jurisprudence ought to be adopted into the national concern analysis. But the majority adds additional elements that were previously considered irrelevant to the national concern analysis. I will discuss each of them in turn.

A. *"Threshold Question": Whether the Matter Is of Sufficient Concern to Canada as a Whole*

[430] The majority's new framework requires a reviewing court to ask whether "the matter is of sufficient concern to Canada as a whole to warrant consideration under the doctrine", which, we are told "invites a common-sense inquiry into the national importance of the proposed matter" (para. 142). While framed as "a threshold question", I observe that the importance of the matter implicitly permeates the entire analysis, reappearing in the majority's discussion of "scale of impact", where that step of the test is understood as an exercise in balancing "competing interests" (paras. 142 and 160).

[431] My colleague Rowe J. addresses why importance should not be a relevant consideration under "singleness, distinctiveness and indivisibility". It therefore suffices for me to stress two points here.

[432] First, the majority reasons appear to suffer from the misconception that, if a matter is *important*, it follows that it is a matter for Parliament and the federal

government. This is remarkably dismissive of provincial jurisdiction. I agree with Professor Gibson, who says:

> If importance of the subject matter is the measure of "national dimensions" there can be little hope for federalism in Canada's future. Since there are very few functions of government which are not of great importance, to grant federal jurisdiction over all such functions would be to make the supposedly autonomous provincial legislatures mere "tenants at sufferance" of the federal Parliament.
>
> ((1976), at p. 31)

[433] Secondly, in considering the importance of the matter urged by the Attorney General of Canada, the majority emphasizes that carbon pricing is "a necessary tool", an "essential elemen[t]", and a "critical measure" (paras. 169-70). But these considerations have no bearing on the division of powers. I acknowledge that the majority might be taken as responding to this point by positioning this as only a "threshold" question. Even so understood, however, the majority's analysis allows the efficacy or wisdom of a policy choice to colour the analysis that follows. It is, in effect, a backdoor to injecting into the division of powers framework the judiciary's views of such matters. In a literal and dangerous sense, this risks *politicizing* the judiciary, pulling it (as here) into expressing views *not* on the *constitutionality* of one side or another on deeply contentious policy questions within the federation, but on their *merits*.

B. *Singleness, Distinctiveness and Indivisibility*

[434] The majority explains that the phrase "singleness, distinctiveness and indivisibility" does not articulate a "readily applicable legal test" (para. 146). It should, the majority says, therefore be understood in light of two "animating" principles: ". . . first, federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter" (para. 157).

(1) The First Principle: "A Specific and Identifiable Matter That Is Qualitatively Different From Matters of Provincial Concern"

[435] Under the principle that singleness, distinctiveness and indivisibility will require "a specific and identifiable matter that is qualitatively different from matters of provincial concern", the majority identifies three factors "that properly inform th[e] analysis" of whether something is "qualitatively different" (paras. 146-47).

[436] The first factor is "whether [the matter] is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects" (para. 148). It is far from clear what my colleagues in the majority understand by a matter's "inherent nature". They appear to equate it with a matter's "character and implications" (para. 173). But the meaning of a matter's "implications" is not explained (aside from a reference to "serious effects that can cross provincial boundaries", at para. 148). And identifying a matter's "predominantly extraprovincial and international

. . . character" by considering its "inherent nature" appears to veer into presupposing the answer to the very question that the framework is intended to address: whether the matter is a national concern. None of this is helpful.

[437] The second factor is whether international agreements related to the matter exist (para. 149). This, as Rowe J. makes plain, undermines *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.). Further, it serves as no constraint whatsoever on the recognition of a national concern. That is, while *the absence* of international agreements will not militate against recognition of a national concern, *the presence* of such agreements — depending on their content — may *support* recognition of a national concern.

[438] The third factor is "whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces" (para. 151). Here, the majority says that this factor is satisfied, because the *Act* works "on a distinctly national basis" — echoing the language urged upon us by the Attorney General of Canada — in establishing minimum national standards to meet Canada's obligations under the *Paris Agreement*, which constitutes a federal role in pricing that is qualitatively different from matters of provincial concern (para. 177).

[439] In other words, the majority says that "minimum national standards" can qualify as a national concern under POGG because, *inter alia*, they work in a *national* way. But this simply illustrates how the concept of minimum national standards has been employed to create a federal aspect of the matter out of thin air. *How else*, after

all, *would* national standards work, if not *nationally*? This consideration adds nothing to the analysis, and therefore achieves nothing except to facilitate the recognition of Parliament's legislative authority over a matter simply by casting Parliament as doing something that Parliament almost always does: legislating in a *national* way, by creating minimum *national* standards.

[440] None of this supports the majority's reference to having developed an "exacting" test with "meaningful barrier[s]" (para. 208). Rather, and as I have already observed, it is a departure from *Crown Zellerbach* that operates not to *constrain* the recognition of POGG matters, but effectively to *facilitate* it via the artifice of "minimum national standards".

[441] In its dilution of the national concern test, the majority has lost sight of what that test is supposed to achieve: the identification of matters that are *distinctive* (being different from those falling under any other enumerated power, and thus beyond the constitutional powers of the provinces to address), and *indivisible* (being a matter for which responsibility cannot be divided between Parliament and the provinces). While the majority's "principle" of "qualitativ[e] differen[ce] from matters of provincial concern" (para. 146) echoes *Crown Zellerbach*'s requirement of *distinctiveness*, its three "factors" in effect adulterate that requirement to the point that there is no principle left. Almost any provincial head of power is open to federal intrusion simply by recasting the federal matter as one of "minimum national standards".

[442] This leaves, of course, *Crown Zellerbach*'s requirement of *indivisibility* — which is nowhere accounted for in the majority's dilution. While the majority does caution that "the matter must not be an aggregate of provincial matters" and insists that the "requirement of indivisibility is given effect through [the two] principles" set out in their framework (at paras. 150 and 158), this does not capture the concerns of Beetz J. in *Anti-Inflation*. In that case, Beetz J. explained that matters like inflation are aggregates of subjects coming under federal *and* provincial jurisdiction, and that they lack a degree of unity that makes them indivisible. The point is that many matters, like inflation, are qualitatively *distinct* from provincial heads of power, but they still do not qualify as a national concern under POGG because they are not *indivisible*, since they can be divided between both orders of government. Yet, and as Rowe J. explains, the majority now allows for such matters to be subsumed under federal jurisdiction as a national concern, thereby discarding Beetz J.'s careful, compelling and (until now) important judgment in *Anti-Inflation*.

(2) The Second Principle: "Federal Jurisdiction Should Be Found to Exist Only Where the Evidence Establishes Provincial Inability to Deal With the Matter"

[443] The majority says that "federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter" (para. 152). The "starting point" for this analysis, says the majority, is the understanding of provincial inability stated in the fourth and fifth indicia from the *General Motors* test (para. 152). To this, they add that "a province's failure to deal with the matter must

have grave extraprovincial consequences" (para. 153). These three factors must be satisfied to meet the criterion of provincial inability, which is now a necessary but insufficient condition for the recognition of a matter of national concern (para. 156).

[444] I have already described the problem with using principles from the trade and commerce jurisprudence in the national concern analysis in responding to the submissions on this point from the Attorney General of Canada, which is that reliance on the test governing the federal trade and commerce power is inappropriate; the tests for provincial inability are different, and the point of the provincial inability analysis was — before now — to filter out matters that could fit under any enumerated head of power, so that POGG would be truly residual. But there are other problems with this "principle", as stated by the majority.

[445] First, by forcing trade and commerce jurisprudence into the national concern test, the majority requires constitutional incapacity to establish provincial inability (para. 182). The majority analogizes to the *2018 Securities Reference*, in which provincial legislation addressing systemic risk was considered unsustainable because of the ability of the provinces to withdraw at any time. But it will always be the case that provinces are unable to fetter themselves against future legislative action. This requirement is therefore meaningless.

[446] Secondly, in discussing the final requirement, the need for "grave extraprovincial consequences", the majority furnishes examples which are indeed grave, including serious harm to human life, contagious disease, and arms trafficking

(paras. 153-55). But the majority fails to link those grave consequences to provincial inability, properly understood. And this is because the majority does not appear to appreciate that the extra-provincial effects must be such that all or part of the matter is beyond the scope of provinces' legislative authority under s. 92 to address, whether independently or in tandem.

[447] Finally, the majority also stresses the requirement of "grave extraprovincial consequences" as demonstrating the "exacting" nature of its test (paras. 155, 208-9 and 211). But this standard is peremptory, almost uselessly subjective and susceptible to change (as the majority's description of the extra-provincial harm in *Munro* as "meaningful" makes clear (para. 154)). And far from *constraining* federal intrusion, this standard effectively *invites* it into other areas of provincial jurisdiction whose exercise could also cause "grave extraprovincial consequences", such as public health and pandemic response (*pace* the majority's reference to "one province's failure to deal with health care", at para. 209), the management of provincial public lands, the construction of hydroelectric dams, the development and management of non-renewable and forestry resources, the inflationary effects of intra-provincial trade and commerce (including the regulation of wages and prices) and the management of prisons. Simply put, the *gravity* of the extra-provincial consequences should not and (until now) has not dictated the outcome of the provincial inability test.

[448] For my part, rather than dilute *Crown Zellerbach* so as to assure the *Act*'s constitutionality, I consider myself bound by its understanding of provincial inability.

The reason why is illustrated by this Court's decision in *Anti-Inflation*. While controlling inflation could undoubtedly meet aspects of the provincial inability test — in the sense that part of the matter is beyond the scope of provincial legislative authority to address — this Court held that controlling inflation does not qualify as a matter of national concern, because it is *divisible* ("an aggregate of several subjects", at p. 458). In other words, it is possible for a matter to be characterized by provincial inability, while still failing to satisfy the requirement of singleness, distinctiveness and indivisibility. This surely means that, where extra-provincial effects are such that all or part of a matter is beyond provincial legislative power to address, this is an *indicator* — but no more — that the matter *may* be distinct from provincial jurisdiction and have extra-provincial aspects that are indivisible from its local and private aspects. In other words, the insight of *Crown Zellerbach* obtains: consistent with the residual nature of POGG, federal usurpation of what was formerly within provincial jurisdiction is possible only where a matter has become distinct from what the provinces can do, and yet cannot be separated from what the provinces can do. In such a case, resort to POGG, and in particular its national concern branch, is necessary to preserve the exhaustiveness of the division of powers.

C. *Scale of Impact*

[449] The final step in the majority's diluted reformulation of the test for national concern requires the reviewing court to determine "whether the matter's scale of impact on provincial jurisdiction is acceptable having regard to the impact on the interests that

will be affected if Parliament is unable to constitutionally address the matter at a national level" (para. 196). The "impact on provincial jurisdiction" is considered, then weighed against other "interests", which requires the court to "balance competing interests" (para. 160). This is yet another departure from *Crown Zellerbach*, in which this Court said that a matter of national concern must have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" (p. 432). Curiously, while the majority cites to this passage, it then abandons it, seeking to reconcile the impact on provincial jurisdiction *not* with *the division of powers*, but with *the importance* that the reviewing judge ascribes to other "interests" (para. 206).

[450] The judicial role in federalism disputes is properly confined to identifying the boundaries set by the Constitution that separate federal from provincial jurisdiction. In the context of considering the "scale of impact", this entails looking to the scope of provincial powers affected and the impact on the relative autonomy of Parliament *and* provinces. It also requires carefully considering the contours of the matter said to be of national concern, as it is only where the matter has "ascertainable and reasonable limits" that it can be said to have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power" (*Crown Zellerbach*, at pp. 432 and 438). Determining the contours of jurisdiction and the effects of legislation is what courts do. The role of the judiciary, properly understood, does *not* extend to evaluating the importance of other interests that could be affected if the provinces are not supervised in the exercise of their jurisdiction. That is the stuff of policy-making,

not adjudication. This distinction, which appears to elude the majority, was once thought uncontroversial at this Court (see *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 136).

[451] But the real problem with my colleagues' scale of impact analysis is their significant understatement of the intrusion into provincial jurisdiction effected by the *Act*. It will be recalled that the majority finds that the impact on provincial jurisdiction is limited, in part because the "impact on the provinces' freedom to legislate is minimal" and "strictly limited", since provinces "are free to design and legislate any GHG pricing system as long as it meets minimum national standards of price stringency" (paras. 199-200 (emphasis added)). As I have noted, this ignores the detailed industrial regulations authorized by Part 2 of the *Act*. But it also ignores that the federal benchmark is *not static*, and can be set to an increasingly stringent level so as to correspondingly narrow provincial jurisdiction in the field. It is only by ignoring such things that the majority is able to claim that the federal power that it recognizes here is "significantly less intrusive than [that recognized] in *Crown Zellerbach*" (para. 201).

[452] More fundamentally, and even if federalism *were* a thing whose terms were not constitutionally enshrined but could instead be judicially balanced, the majority's overall approach is not one of balance. Rather, the majority puts its thumb heavily on the federal side of the scale — by legitimating as a national concern the device of "minimum national standards" on matters of importance that otherwise fall within

provincial jurisdiction, and by insisting that doing so still preserves provincial autonomy (*as long as* it is exercised in accordance with federal priorities). Parliament now knows how to ensure that the balance will always tip its way, whenever provinces choose to exercise their legislative authority in a way that impedes the federal agenda.

[453] Even the Attorney General of Canada was not so bold as to ask for a weighted scale, much less a redefined framework that accounts for other interests that should have no bearing on the division of powers. And yet, the majority has given him just that.

VI. Conclusion

[454] The *Act*'s subject matter falls squarely within provincial jurisdiction. It cannot be supported by any source of federal legislative authority, and it is therefore *ultra vires* Parliament. This Court, a self-proclaimed "guardian of the constitution" should condemn, not endorse, the Attorney General of Canada's leveraging of the importance of climate change — and the relative popularity of Parliament's chosen policy response — to fundamentally alter the division of powers analysis under ss. 91 and 92 of the *Constitution Act, 1867* and, ultimately, the division of powers itself (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155).

[455] The majority's reasons for judgment are momentous, and their implications should be fully and soberly comprehended. This Court once maintained that the Constitution, underpinned as it is by the principle of federalism, "demands respect for

the constitutional division of powers" (*2011 Securities Reference*, at para. 61; see also *Reference re Secession of Quebec*, at paras. 56 and 58). But in its unfortunate judgment, the majority discards that constitutionally faithful principle for a new, distinctly hierarchical and supervisory model of Canadian federalism, with two defining characteristics: (1) the subjection of provincial legislative authority to Parliament's overriding authority to establish "national standards" of how such authority may be exercised; and (2) the replacement of the constitutionally mandated *division* of powers with a judicially struck *balance* of power, which balance must account for other "interests".

[456] No province, and not even Parliament itself, ever agreed to — or even contemplated — either of these features. This is a model of federalism that rejects our Constitution and re-writes the rules of Confederation. Its implications go far beyond the *Act*, opening the door to federal intrusion — by way of the imposition of national standards — into *all* areas of provincial jurisdiction, including intra-provincial trade and commerce, health, and the management of natural resources. It is bound to lead to serious tensions in the federation. And all for no good reason, since Parliament could have achieved its goals in constitutionally valid ways. I dissent.

The following are the reasons delivered by

ROWE J. —

[457] The national concern doctrine is a residual power of last resort. I have come to this view through a close reading of *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and the cases that preceded it. Faithful adherence to the doctrine leads inexorably to the conclusion that the national concern branch of the "Peace, Order, and good Government" ("POGG") power cannot be the basis for the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 ("*Act*").

[458] My focus is mainly doctrinal. To attain the objectives sought by the federal structure, and for courts to be accountable to the public in how they exercise their power as umpires in federalism disputes, doctrinal coherence, clarity and predictability regarding the division of powers are essential (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 23; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at para. 3).

[459] First, I discuss the principle of federalism and the division of powers: the starting point for a complete understanding of the national concern doctrine. Second, I discuss the residual and circumscribed nature of the POGG power, rooted in s. 91 of the *Constitution Act, 1867*. While some commentators refer to the existence of three branches of POGG — gap, national concern, and emergency — in my view, the case law does not support a distinction between "gap" and "national concern", nor is such a distinction useful. Rather, what commentators refer to as "gap" and "national concern" is better understood as one manifestation of the cumulatively exhaustive nature of the division of powers, and the residual nature of POGG. Third, I apply this understanding

to the national concern test set out in *Crown Zellerbach*, and interpret the concepts of "singleness, distinctiveness and indivisibility", "provincial inability" and "scale of impact on provincial jurisdiction" accordingly (p. 432). The national concern doctrine applies only to matters that are distinct from those falling under provincial jurisdiction and that cannot be distributed between the existing powers of both orders of government. In addition, their recognition under POGG cannot upset the federal balance. Fourth, I compare this approach to the approach urged on us by the Attorney General of Canada. Finally, I address an entirely distinct matter: the methodology for reviewing regulations for compliance with the division of powers and how it may apply to regulations made under the *Act*. In the result, for these reasons and those of Justice Brown, which I adopt, the legislation is *ultra vires* in whole.

I. Federalism and the Division of Powers

[460] This case requires a careful consideration of one of the fundamental underlying principles animating the Canadian Constitution: federalism (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32). The "primary textual expression" of the principle of federalism can be found in the division of powers effected mainly by ss. 91 and 92 of the *Constitution Act, 1867* (*Secession Reference*, at para. 47; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 ("*Reference re GNDA*"), at para. 20).

[461] An essential characteristic of the distribution of powers is its exhaustiveness, which precludes legislative voids (*Reference re Same-Sex Marriage*,

2004 SCC 79, [2004] 3 S.C.R. 698, at para. 34; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 44). Exhaustiveness reconciles parliamentary sovereignty and federalism: it ensures that there is no subject matter which cannot be legislated upon and that Canada, as a whole, is fully sovereign.

[462] The principle of federalism pursues some well-known objectives: "to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good" (*Canadian Western Bank*, at para. 22). The distribution of powers, in turn, was not random; rather, it was designed to achieve these objectives. It accommodates diversity between provinces — by allocating considerable powers to provincial legislatures to allow them pursue their own interests — and their desire for unity — by granting powers to Parliament when they share a common interest (*Secession Reference*, at paras. 58-59; *Reference re GNDA*, at para. 21). The federal structure protects the separate identities of the provinces from being subsumed under a unitary state.

[463] The federal structure was an essential condition for Confederation. Many provinces would not have supported the project of Confederation without the adoption of a federal form (*Secession Reference*, at para. 37; see also *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.) ("*Labour Conventions*"), at pp. 351-53). In other words, "[w]ithout federalism, Canada could not have formed or endured" (*Newfoundland and Labrador (Attorney General) v.*

Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020 SCC 4, at para. 240, per Brown and Rowe JJ., dissenting). Consequently, courts interpreting the division of powers must be careful not "to dim or to whittle down" the provisions of the *Constitution Act, 1867*, and its underlying values, or "impose a new and different contract upon the federating bodies" through an exercise of interpretation (*In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 (P.C.) ("*Aeronautics Reference*"), at p. 70).

[464] The Canadian federation guarantees the autonomy of both orders of government within their spheres of jurisdiction. Their relationship is one of coordination between equal partners, not subordination (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 ("*Securities Reference*"), at para. 71; see also *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.), at pp. 442-43). The guarantee of provincial autonomy to facilitate the pursuit of collective goals has particular salience for a province like Quebec, "where the majority of the population is French-speaking, and which possesses a distinct culture" (*Secession Reference*, at para. 59; see also *Labour Conventions*, at pp. 351-52).

[465] Autonomy, rather than subordination, entails that provinces have the right to "legislate for themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific" (*Labour Conventions*, at p. 352). As Professor Pigeon (as he then was) explained:

> The true concept of autonomy is thus like the true concept of freedom. It implies limitations, but it also implies free movement within the area bounded by the limitations: one no longer enjoys freedom when free to move in one direction only. It should therefore be realized that autonomy means the right of being different, of acting differently. This is what freedom means for the individual; it is also what it must mean for provincial legislatures and governments. There is no longer any real autonomy for them to the extent that they are actually compelled, economically or otherwise, to act according to a specified pattern. Just as freedom means for the individual the right of choosing his own objective so long as it is not illegal, autonomy means for a province the privilege of defining its own policies. [Emphasis added.]
>
> ("The Meaning of Provincial Autonomy" (1951), 29 *Can. Bar Rev.* 1126, at pp. 1132-33)

[466] Thus, federalism recognizes that "there may be different and equally legitimate majorities in different provinces and territories and at the federal level" (*Secession Reference*, at para. 66).

[467] Embracing differences between the provinces also has instrumental value. Allocating powers to the provinces may produce policies tailored to local realities, since provinces are "closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 3; see also D. Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019), 82 *Sask. L. Rev.* 187, at pp. 192-93). In addition, provinces can serve as "social laborator[ies]" when they enact innovative legislative policies that can be "tested" at the local level (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)),

vol. 1, at s. 5.2, referring to *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), at p. 311, per Brandeis J.).

[468] The judiciary is charged with delimiting the sovereignties of both orders of government, guided by the "lodestar" of the principle of federalism (*Secession Reference*, at para. 56; *Securities Reference*, at para. 55). More specifically, in *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, this Court explained that "[t]he tension between the centre and the regions is regulated by the concept of jurisdictional balance" (para. 78 (emphasis added)).

[469] Division of powers disputes must be resolved in a way that reconciles unity and diversity. This cannot be achieved by merely determining which order of government "is thought to be best placed to legislate regarding the matter in question" (*Securities Reference*, at para. 90). Functional effectiveness is often erroneously equated with centralization and uniformity and eclipses the value of regional diversity (see, e.g., J. Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003), 28 *Queen's L.J.* 411). As Professor Beetz (as he then was) explained:

> [TRANSLATION] As a result, Quebec jurists can only be suspicious of the argument that, for example, legislative authority must be commensurate with the problem to be resolved. They find, first of all, that this is not a legal argument, but a political and functional reason to amend the constitution if necessary. Next, they find, from a political standpoint, that it is a permanent argument, one that is favorable to a concentration of powers in the federal government, since the problems to be resolved will obviously not stop increasing in intensity, in complexity and in their ramifications. [Emphasis added; footnote omitted.]

("Les Attitudes changeantes du Québec à l'endroit de la Constitution de 1867", in P.-A. Crépeau and C. B. Macpherson, eds., *The Future of Canadian Federalism* (1965), 113, at p. 120)

[470] Rather than the functional approach, Professor Beetz argued for [TRANSLATION] "further development and clarification of concepts, [and for] analytical jurisprudence" (p. 120). This is consistent with the view that at every step of the analysis, courts must assess "constitutional compliance, not policy desirability" (*Comeau*, at para. 83).

[471] In recent years, this Court has adopted a flexible, cooperative conception of the division of powers. This approach accommodates overlap between valid exercises of federal and provincial authority and encourages intergovernmental cooperation (*Reference re GNDA*, at para. 22; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 18).

[472] Cooperative federalism, however, cannot override the division of powers or "make *ultra vires* legislation *intra vires*" (*Reference re Pan-Canadian Securities Regulation*, at para. 18; see also *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 39). Moreover, while it encourages cooperation between orders of government, it does not impose it (J.-F. Gaudreault-DesBiens and J. Poirier, "From Dualism to Cooperative Federalism and Back? Evolving and Competing Conceptions of Canadian Federalism", in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian*

Constitution (2017), 391, at p. 391; *Securities Reference*, at paras. 132-33). Finally, precise and stable definitions of the powers of the two orders of government are an essential precondition to cooperative federalism. Without them, the "respective bargaining positions of the two levels of government will be too uncertain for federal-provincial agreements to be reached" (W. R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, at p. 616).

[473] Respect for the principle of federalism is essential in deciding these appeals. This Court is called to determine, primarily, if the *Act* can be upheld as an exercise of Parliament's authority to enact laws under the national concern doctrine. This involves consideration of the purposes sought by the choice of a federal structure, the logic of the distribution of powers, and a careful examination of the jurisdictional balance between both orders of government.

II. POGG Is Residual and Circumscribed

[474] The Attorney General of Canada seeks to uphold the *Act* as a valid exercise of Parliament's jurisdiction under the national concern doctrine of its "Peace, Order, and good Government" power. The exhaustive nature of the division of powers, discussed above, means that matters that do not come within the enumerated classes must fit somewhere. This is dealt with by two residual clauses: one federal, and one provincial.

[475] The federal residual clause, which I refer to as the "Peace, Order, and good Government" or "POGG" power, comes from the opening words of s. 91 of the *Constitution Act, 1867*:

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say . . . .

[476] The provincial residual clause is s. 92(16) of the *Constitution Act, 1867*:

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> . . .
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

[477] Collectively, the federal and provincial residual clauses ensure that the division of powers is exhaustive. The role of POGG is thus limited to instances where the matter does not fall under any enumerated heads and cannot be distributed among existing heads of powers. Notably, by the operation of s. 92(16), POGG does not apply to matters of a "merely local or private Nature". This residual and circumscribed

understanding of the POGG power informs my understanding of the national concern test. I justify this understanding of POGG first, through a close reading of the text of ss. 91 and 92, and second, through a close reading of the case law.

[478] In the analysis that follows, there are two points which could be seen as unorthodox. The first relates to residual authority in the division of powers. It is commonly accepted that POGG is a grant of residual authority to Parliament. What is less widely accepted is that s. 92(16) is a residual grant of authority to provincial legislatures. My view is that both provisions confer residual authority, as I will explain below. The second point is that, properly read, the jurisprudence supports a view of POGG as having two branches, "national concern" and "emergency". The (third) "gap" branch constitutes part of "national concern", which is Parliament's general residual power. I would underline that my analysis of the *Crown Zellerbach* framework would be the same even if there is only one residual authority (POGG) and even if there are three branches to POGG ("national concern", "gap" and "emergency"). Thus, my conclusions are in no way dependent on these two points. Nor do these two points affect my critique of the augmentation and extension of "national concern" urged on this Court by the Attorney General of Canada.

A. *A Close Reading of Sections 91 and 92*

[479] While the statement of the heads of power set out in 1867 could not contemplate the changes in technology and society that would follow, that statement was exhaustive. The heads of power must be given meaning in a changing world; a

living tree capable of growth and development but grounded in natural and fixed limits (*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at pp. 135-37; see also *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 45). This is accomplished through a flexible, progressive interpretation of the division of powers, but one that begins with and is constrained by the "natural limits of the text" (*Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57, [2014] 2 S.C.R. 805, at para. 20, quoting *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 94; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, at paras. 8-13).

(1) POGG Is Residual to Section 92

[480] The wording of s. 91 provides textual support for the view that the POGG power is residual to s. 92. Section 91 confers the power to legislate for peace, order and good government "in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". As Professor Lysyk points out, it does *not* confer a power to legislate "in relation to peace, order and good government" ("Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979), 57 *Can. Bar Rev.* 531, at p. 541 (emphasis in original deleted)). Rather, the power is to legislate "in relation to matters" that do not fall under any provincial, enumerated head of power (p. 541 (emphasis added; emphasis in original deleted)):

> In other words, Parliament is not authorized to legislate in relation to a matter caught by the provincial categories simply because it might in some sense be thought to qualify as contributing toward the "peace, order and good government of Canada". [p. 542]

[481] Further, as Professor Gibson explains, every conferral of provincial legislative jurisdiction is qualified by words such as "in the Province", including s. 92(16). The result is that the POGG power is limited to only those matters that are *not* of a provincial nature; in other words, it confers Parliament jurisdiction over matters with a "national dimension" ("Measuring 'National Dimensions'" (1976), 7 *Man. L.J.* 15, at p. 18).

[482] Thus, focusing on "peace, order, and good government" is "unproductive", because it provides little assistance in drawing the line between provincial and federal areas of competence. In addition, it "tends to draw attention away from the central question pointed to by the introductory clause, namely, whether the matter to which an enactment relates is one 'not coming within' the classes of subjects assigned exclusively to provincial legislatures" (Lysyk, at p. 534; see also J. Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005), 38 *U.B.C. L. Rev.* 353, at pp. 358-59).

[483] A general power to legislate "in relation to peace, order and good government" would also be incompatible with the intention to create a robust sphere of provincial jurisdiction to protect the autonomy of the provinces. Section 92(13), in particular, grants the provinces jurisdiction over "Property and Civil Rights in the

Province", which was understood as "descriptive of the full range of civil law, as opposed to criminal law" (Lysyk, at p. 544). In *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.), Sir Montague Smith similarly observed that the words of s. 92(13) were "sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract" (p. 110). He held that there is no reason for holding that these words are not used in their "largest sense" in s. 92(13) (p. 111).

[484] As a result, the general POGG power does not confer authority to Parliament to enact laws of a local or private nature, or related to "property and civil rights" under the guise of "peace, order, and good government". As Lord Watson observed in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348 (P.C.) ("*Local Prohibition*"), at pp. 360-61:

> . . . the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures. [Emphasis added.]

(2) POGG Should Be Understood as Residual to the Enumerated Heads of Section 91

[485] While case law has consistently held that POGG is residual to the *provincial* enumerated heads, this Court's approach to whether it is residual to the *federal* enumerated heads is not so clear.

[486] Some early cases treat the POGG power as residual to both the provincial and federal enumerated heads of power. For example, in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.), Viscount Haldane said that courts should first ask whether the subject matter falls within s. 92. If it does, the court asks whether it also falls under s. 91. Only if the subject "falls within neither of the sets of enumerated heads" would POGG be considered (p. 406 (emphasis added)).

[487] However, some commentators have claimed that POGG is not residual to the enumerated federal heads of power because the enumerated federal heads are only illustrative of "peace, order, and good government" (see, e.g., B. Laskin, '"Peace, Order and Good Government' Re-Examined" (1947), 25 *Can. Bar Rev.* 1054, at p. 1057).

[488] Moreover, in some cases this Court has held that a matter may fall within the POGG power *or* another enumerated federal head of power (see, e.g., *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, which concluded that nuclear power fell *either* under the declaratory undertaking power (s. 92(10)(*c*)) *or* national concern; *In re Regulation and Control of Radio Communication in Canada*,

[1932] A.C. 304 (P.C.) ("*Radio Reference*"), which concluded that the matter could fall under the POGG power or the interprovincial undertakings power (s. 92(10)(*a*)); and *Aeronautics Reference*, which appeared to conclude that the matter fell under both s. 132 and the POGG power). While there is nothing wrong with making alternative findings, these cases could be read as indicating that it is possible for a matter to fall *both* within the POGG power *and* within a federal enumerated head of power at the same time.

[489] In my view, this approach is wrong. I agree with Professor Hogg that the POGG power is residual to the enumerated provincial *and* federal heads of power, and that "matters which come within enumerated federal or provincial heads of power should be located in those enumerated heads, and the office of the p.o.g.g. power is to accommodate the matters which do not come within any of the enumerated federal or provincial heads" (s. 17.1). Contrary to Professor Laskin's view (as he then was), I do not understand a number of the enumerated heads of power assigned to Parliament, such as its power over copyrights (s. 91(23)), to be merely examples of a broad power to legislate for peace, order, and good government. Rather, many had to be specifically enumerated to avoid falling under the large scope of provincial jurisdiction over "property and civil rights" (s. 92(13)) (Leclair (2005), at pp. 355-57; Hogg, at s. 17.1; Lysyk, at p. 539).

[490] There is no reason to hold that a matter falls under POGG when it comes within an enumerated head of jurisdiction. As Professor Hogg explains, the normal

process of constitutional interpretation, like the interpretation of any statute or contract, is to rely first on a more specific provision before resorting to a more general one (s. 17.1). Resort to the general over the specific improperly treats the specific as redundant. Moreover, as Professor Abel argues, the more specific will usually be more defined and less contentious, and courts should not waste time arguing about the outer limits of the more general and diffuse when it is not necessary. In doing so, they would avoid the difficult question of whether a matter is of a "merely local or private" nature or if it has reached a national dimension so as to fall under POGG ("The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at pp. 510-12).

[491] When we are classifying the subject matter of an enactment, we are therefore *first* trying to classify it among the exclusive heads of power assigned to the federal and provincial legislatures. If the matter cannot fit within any enumerated head, *only then* may resort be had to the federal residual clause. This methodology helps ensure that the federal residual power cannot be used as a tool to upset the balance of federalism by stripping away provincial powers.

(3) The Parallel Structure of the Provincial and Federal Residual Clauses Supports a Narrow Understanding of POGG

[492] The federal residual clause has typically been seen as the sole residual power, such that all matters "not coming within" those assigned to the federal and provincial legislatures come within federal power (Hogg, at s. 17.1). However, there is a strong case for viewing the opening words of s. 91 and s. 92(16) as setting out a

"parallel structure of complementary federal and provincial residua" (Leclair (2005), at p. 355 (emphasis added)).

[493] There is much to be said for the theory that the two sections "complement and modify each other", with the federal residuum dealing with matters "of a general character" and the provincial residuum encompassing matters "of a merely local or private nature" (Lysyk, at pp. 534 and 536-38). Indeed, the two sections have been said to strike a "careful balance . . . with matters potentially regulated at the federal level already within the enumerated provincial powers or ultimately covered within this last clause on matters of local concern" (Newman, at p. 192). Professors Hogg and Wright similarly say:

> . . . there is a plausible argument that the *Constitution Act, 1867* includes not one, but two complementary residuary powers. This argument, in turn, strengthens the view that the *Act*, as drafted, was intended to form the foundation for a federal system that is less centralized than many English-Canadian commentators have supposed. [Footnote omitted.]
>
> ("Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" (2005), 38 *U.B.C. L. Rev.* 329, at p. 338)

[494] As the Attorney General of Quebec argues in this case, the scope of s. 92(16) must be interpreted as a counterbalance to the introductory paragraph of s. 91 to reflect the constitutional principle that both Parliament and provincial legislatures must be seen as equals. Accordingly, when determining if a matter falls under POGG, it is relevant to consider if it is of a "merely local and private nature" such that it would

fall under s. 92(16) (see H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at pp. 599-600).

[495] There is also support for this understanding of the relationship between the POGG power and s. 92(16) in the case law. In *Local Prohibition*, at p. 365, Lord Watson explains:

> In s. 92, No. 16 appears to [their Lordships] to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated. [Emphasis added.]
>
> (See also *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at p. 700.)

[496] In *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, this Court also addressed the residual nature of s. 92(16), and explained that "[h]ead 16 contains what may be called the residuary power of the Province . . . and it is within that residue that the autonomy of the Province in local matters, so far as it might be affected by trade regulation, is to be preserved" (p. 212). More recently in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, McLachlin C.J. stated that s. 92(16) along with s. 92(13) are "often seen as sources of residual jurisdiction", and LeBel and Deschamps JJ. stated that s. 92(16) "can also be regarded as a partial residual jurisdiction" (paras. 134 and 264; see also *R. v. Hauser*, [1979] 1 S.C.R. 984; and *Schneider v. The Queen*, [1982] 2 S.C.R. 112).

[497] The parallel structure of the residual clauses contributes to the balance of powers within the Confederation and ensures that, as society changes, more and more matters are not enveloped exclusively within federal competence (Lysyk, at p. 534; Newman, at p. 192). Accordingly, the residual scope of the POGG power is narrowed by s. 92(16), which applies to matters that are of a local and private nature even if they do not come within any other enumerated head of power.

[498] For clarity, this understanding of the relationship between s. 92(16) and POGG differs from the understanding of the Court of Appeal of Alberta majority. In my view, POGG is residual to all enumerated provincial heads of power, including s. 92(16). Matters that formerly fell under *any* enumerated provincial head of power can come to extend beyond provincial competence and, where the *Crown Zellerbach* test is met, come within POGG.

B. *A Close Reading of the Case Law*

[499] A review of POGG case law reveals that courts have long struggled to define its contours in a way that preserves the division of powers. The result has been doctrinal confusion and categories that lack clarity. Many commentators speak of three separate POGG branches: emergency, national concern and gap. Professor Hogg explains that matters falling under the "gap" branch are not just "new" in the sense that they do not come within any enumerated head of power, but rather "depend upon a lacuna or gap in the text of the Constitution", where "the Constitution recognizes certain topics as being classes of subjects for distribution-of-power purposes, but fails

to deal completely with each topic" (s. 17.2). Though the terminology between commentators differs, the schema is similar (see, e.g., G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), at c. 6; P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 264; Brun, Tremblay and Brouillet, at p. 584).

[500] In my view, the POGG jurisprudence should be read as signaling the existence of just two branches: a general residual power and the emergency power. What some commentators have named "gap" and "national concern" are simply manifestations of the exhaustive nature of the division of powers, and the residual nature of the POGG power. Matters that do not come within any enumerated head of power or cannot be distributed among multiple heads of power must fit somewhere, and they belong under POGG when they pass the *Crown Zellerbach* test. A close reading of *Crown Zellerbach* reveals that the test set out in that case applies to both "national concern" and "gap" cases, and this affinity between "gap" and "national concern" informs my understanding of that test.

(1) The Early Development of the POGG Power

[501] From the beginning, courts have treated the POGG power as *residual*, only relevant where a matter does not come within the enumerated classes of subjects. The early cases reveal no distinction between "gap" and "national concern", but rather a distinction between a general residual power and the emergency power. In either instance, the courts emphasize that POGG is a category of last resort, and the

importance of keeping the doctrine circumscribed and narrow, so as to properly preserve the sphere of provincial jurisdiction.

[502] The earliest cases of *Parsons* and *Russell* treated s. 91 and POGG essentially as one: if a matter did not come within a s. 92 head of power, it fell somewhere within s. 91 (*Parsons*, at p. 109; *Russell v. The Queen* (1882), 7 App. Cas. 829 (P.C.), at pp. 836-37). In *Russell*, Sir Montague Smith upheld the *Canada Temperance Act*, noting that temperance was a subject "of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it" (p. 841 (emphasis added)).

[503] In *Local Prohibition*, Lord Watson upheld a provincial local-option temperance scheme quite similar to the federal one in *Russell*, under s. 92(13) or (16). While noting that there may be matters not coming within the enumerated heads of s. 91 or 92 that fell under federal power, Lord Watson cautioned that such non-enumerated matters "ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance" and should not trench upon provincial subjects at the risk of destroying provincial autonomy (p. 360). He then made the frequently cited statement:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and

> has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. [Emphasis added; p. 361.]

[504] Following *Local Prohibition*, the Privy Council, per Viscount Haldane, ignored this passage and the national concern idea for many years. Instead, POGG was seen as encompassing only emergencies (Hogg, at s. 17.4(a); *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695 (P.C.), at pp. 703-6; *Snider*, at pp. 405-6 and 412). These cases represent the first scaling back of national concern. At the same time, they illustrate that the courts have long been concerned with ensuring provincial legislatures did not lose their powers.

[505] In 1931, national concern seemed to resurface in the *Aeronautics Reference*, which reiterated that matters can attain "such dimensions as to affect the body politic of the Dominion" (p. 72). Ultimately, the Privy Council held that aeronautics fell within federal jurisdiction, essentially under s. 132 of the *British North America Act, 1867* (the treaty power). In the *Radio Reference*, Viscount Dunedin held that Parliament had jurisdiction to regulate radio communication based on both the interprovincial undertaking power and POGG. He noted that the *British North America Act, 1867*, was silent on the ability of Canada (as opposed to the "British Empire" in s. 132) to enter treaties and thus did not authorize treaty-implementing legislation. POGG therefore filled what appeared to be a gap.

[506] Next, a series of "new deal" cases in 1937 reverted to the idea that POGG applied only to emergencies (see Hogg, at s. 17.4(a)). Among these was the *Labour*

Conventions case, in which Lord Atkin held that neither the *Aeronautics Reference* nor the *Radio Reference* stood for the proposition that legislation to perform a treaty was an exclusively federal power. For division of powers purposes, there was "no such thing as treaty legislation as such" (p. 351); rather, provinces could legislate over aspects of treaties falling under s. 92 and Parliament over aspects falling under s. 91.

[507] National concern re-emerged in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 (P.C.). Viscount Simon held that *Russell* was not based on the emergency branch and that POGG was *not* confined to emergencies and could encompass matters of "concern of the Dominion as a whole" (p. 205).

[508] As the foregoing discussion demonstrates, early POGG cases suffered from a series of twists and turns, with various "national concern" statements infusing them at various points. As I read the above cases, the common theme is this: courts rely on POGG to give effect to the exhaustive nature of the division of powers, but courts have always been cautious to guard provincial jurisdiction and ensure POGG does not become a vehicle for federal overreach. With this backdrop, I turn to *Crown Zellerbach* and its survey of the modern case law on POGG.

(2) The Modern Development of the POGG Power and the "National Concern" Test from *Crown Zellerbach*

[509] In *Crown Zellerbach*, Le Dain J. set out the modern "national concern" test. A close reading of *Crown Zellerbach* and the cases on which Le Dain J. relies reveals

that his test applies both to what commentators refer to as "national concern" cases and "gap" cases: both are manifestations of the exhaustive nature of the division of powers and the residual nature of the POGG power. Both types of cases must have the requisite "singleness, distinctiveness and indivisibility" and must have a "scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" (p. 432).

[510] In *Crown Zellerbach*, Le Dain J. surveys a number of POGG cases. The first one of note for our purposes is *Canada Temperance Federation*, where Viscount Simon set out the following formulation of the test:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. [Emphasis added; footnotes omitted.]
>
> (*Canada Temperance Federation*, at p. 205, as cited in *Crown Zellerbach*, at pp. 423-24.)

Here, we have the *Aeronautics Reference* and the *Radio Reference* being cited as examples of "national concern" cases.

[511] Applying *Canada Temperance Federation*, this Court held that aeronautics fell under POGG apart from any question of a treaty power (as in *Aeronautics*

Reference) and that legislation establishing the National Capital Commission could be upheld under POGG (*Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Munro v. National Capital Commission*, [1966] S.C.R. 663).

[512] Le Dain J. then reviews *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, a case which provided important statements on both the emergency branch and the national concern branch. In *Anti-Inflation*, Laskin C.J., writing for a majority on this point, upheld the federal *Anti-Inflation Act* under the emergency branch of POGG. Although he wrote in dissent on the emergency power, Beetz J.'s reasons on national concern attracted a majority (p. 437).

[513] Beetz J. noted that national concern leads to exclusive, permanent federal competence and expressed serious concerns about a fundamental shift in the division of powers arising from recognizing inflation as a matter of national concern, as various provincial matters could be transferred to Parliament. In his view, if inflation were recognized as a matter of national concern, "a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly" (p. 445; see also p. 444).

[514] In *Anti-Inflation*, at p. 457, Beetz J. appears to have grouped what some commentators would call "gap" and "national concern" cases together, and understood them to be motivated by the same underlying logic:

> In my view, the incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, the development, conservation and improvement of the National Capital Region are clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern. [Emphasis added.]

[515] This statement groups together the incorporation of federal companies and radio (referring to *Parsons* and *Radio Reference*, cases commentators typically characterize as "gap" cases) with "conservation and improvement of the National Capital Region" and aeronautics (referring to *Munro* and *Johannesson*, cases commentators typically characterize as "national concern" cases) (Régimbald and Newman, at paras. 6.5 and 6.21; Hogg, at ss. 17.2 and 17.3).

[516] Beetz J. understood each of these subject matters as not falling within any enumerated head *and* as being "of national concern" (p. 457). Beetz J. goes on to explain, at p. 458, that such matters must not be

> an aggregate but ha[ve] a degree of unity that [makes them] indivisible, an identity which [makes them] distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enable[s] Parliament to touch on provincial matters ha[s] also to be taken into consideration before they [are] recognized as federal matters . . . . [Emphasis added.]

[517] These constraints apply *both* to "national concern" cases *and* to the cases some commentators understand to be "gap" cases. They allow courts to ascertain whether the matter is of a truly national dimension (rather than local) and whether it

has sufficient unity to be recognized as a matter under POGG rather than subdivided among existing heads of jurisdiction. I note that Beetz J. expressed that he was "much indebted" (p. 452) to an article by Professor Le Dain (as he then was) for his doctrinal statement on POGG (see G. Le Dain, "Sir Lyman Duff and the Constitution" (1974), 12 *Osgoode Hall L.J.* 261).

[518] Later in *Crown Zellerbach*, Le Dain J. refers to *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, where Estey J. illustrated the range of federal jurisdiction under POGG, characterizing the POGG doctrine as falling into three categories:

> . . . (a) the cases "basing the federal competence on the existence of a national emergency"; (b) the cases in which "federal competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of a merely local or private nature", of which aeronautics and radio were cited as examples; and (c) the cases in which "the subject matter 'goes beyond local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole'", citing *Canada Temperance Federation*.
> [Emphasis added.]
>
> (*Crown Zellerbach*, at p. 428, citing *Labatt*, at pp. 944-45.)

[519] Here, Estey J. (at p. 944) has characterized aeronautics and radio as examples of matters which "did not exist at the time of Confederation" and "cannot be put into the class of matters of merely local or private nature" (category "b" above), unlike Viscount Simon in *Canada Temperance Federation*, who saw these cases as examples of national concern in the traditional sense (category "c" above). This is

indicative of a relationship or overlap between both categories, which Le Dain J. later reconciles.

[520] Le Dain J. then cites Dickson J.'s dissenting reasons in *R. v. Wetmore*, [1983] 2 S.C.R. 284, who read *Anti-Inflation* and *Labatt* as establishing *two* branches: an emergency branch and a general residual branch, the second of which could be sub-divided into categories "b" and "c" from *Labatt*:

> In the *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, Beetz J., whose judgment on this point commanded majority support, reviewed the extensive jurisprudence on the subject and concluded that the peace, order and good government power should be confined to justifying (i) temporary legislation dealing with a national emergency (p. 459) and (ii) legislation dealing with "distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern" (p. 457). In the *Labatt* case, *supra*, at pp. 944-45, Estey J. divided this second heading into (i) areas in which the federal competence arises because the subject matter did not exist at the time of Confederation and cannot be classified as of a merely local and private nature and (ii) areas where the subject matter "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole". This last category is the one enunciated by Viscount Simon in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193, at p. 205. The one preceding it formed the basis of the majority decision in *Hauser* that the *Narcotic Control Act*, R.S.C. 1970, c. N-1, came under the peace, order and good government power as dealing with "a genuinely new problem which did not exist at the time of Confederation". [Emphasis added.]
>
> (*Wetmore*, at pp. 294-95, cited in *Crown Zellerbach*, at p. 430.)

[521] Le Dain J. did not draw a distinction between "gap" and "national concern" cases. Rather, he appeared to understand the two non-emergency POGG categories set

out in *Labatt* as falling under a general, residual branch of the POGG power, to which the following national concern test applies:

> From this survey of the opinion expressed in this Court concerning the national concern doctrine of the federal peace, order and good government power I draw the following conclusions as to what now appears to be firmly established:
>
> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
>
> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
>
> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter. [Emphasis added.]
>
> (*Crown Zellerbach*, at pp. 431-32)

[522] On my reading, Le Dain J. subsumed all non-emergency POGG cases into one test, which is "separate and distinct from the national emergency doctrine" but applies to both "new matters which did not exist at Confederation" *and* "to matters which, although originally matters of a local or private nature in a province, have since,

in the absence of national emergency, become matters of national concern". The requirements of singleness, distinctiveness and indivisibility and an assessment of the scale of impact on provincial jurisdiction apply for a matter to qualify as a matter of national concern "in either sense".

[523] Therefore, while some commentary speaks of "emergency", "gap" and "national concern" as three separate branches, in my view it is more accurate having regard to the case law to say there are two branches: emergency and a general residual power, to which the national concern test applies.

[524] This is consistent with Beetz J.'s approach in *Anti-Inflation* and the view Le Dain J. expressed when he wrote on POGG as a professor. Indeed, he seemed to view all non-emergency POGG cases as subsumed under the "general power", which was decidedly residual:

> . . . the issue with respect to the general power, where reliance cannot be placed on the notion of emergency, is to determine what are to be considered to be single, indivisible matters of national interest and concern lying outside the specific heads of jurisdiction in sections 91 and 92.
>
> (Le Dain, at p. 293; see also Lederman, at p. 606.)

[525] Le Dain J.'s view as a professor and Beetz J.'s reasons in *Anti-Inflation* should inform the interpretation of the test set out in *Crown Zellerbach*, as subsuming "gap" and "national concern". This reading of *Crown Zellerbach* is also shared by some commentators. Dwight Newman says that POGG "applies only in the context of what

would otherwise be a gap in the structure" and "the case law does not support the three-branch description of [POGG]" (pp. 200-201).

[526] If "national concern" and "gap" are understood as separate, it is easy to mistakenly understand "gap" as the sole residual power, and to fail to appreciate the residual nature of "national concern". Rather, what some commentators call "gap" and "national concern" have the same underlying logic. They are both manifestations of the exhaustive nature of the division of powers, and the residual nature of POGG. This close affinity between "gap" and "national concern" is crucial to a proper understanding of the *Crown Zellerbach* test: all matters of national concern must fill a kind of "gap" in the sense that they do not fit under the enumerated heads, and, conversely, all matters that do not fit under the enumerated heads must still pass the national concern test to be within federal jurisdiction. Historical newness is irrelevant in ascertaining the existence of a constitutional "gap". Le Dain J. is clear in *Crown Zellerbach* that the test he sets out applies to historically new matters *and* matters that have come to extend beyond provincial competence and "become" matters of national concern. When I say that the matter must fill a kind of "gap", I simply mean that the matter does not fall under any enumerated head of power, and cannot be divided between multiple enumerated powers.

[527] As I explain below, "singleness, distinctiveness and indivisibility", "provincial inability", and "scale of impact" should be understood so as to give effect to the residual nature of the POGG power, and filter out any matter that could fall under

an enumerated head of power, including matters that are of a "merely local or private Nature" falling under s. 92(16), and matters that could be distributed among multiple heads.

[528] I pause here to note that the emergency branch, too, can and should be understood as residual to the enumerated heads of power. Viscount Haldane, the architect of the emergency doctrine, "employed expressions which suggest a temporary transcending of the confines of the provincial heads of power" (Lysyk, at p. 549). Cases invoking the emergency branch indicate that in an emergency, a new aspect of government business arises that extends beyond provincial competency (*Fort Frances*, at p. 705; *Snider*, at p. 412; see also Lysyk, at pp. 548-51). For clarity, the fact that the emergency branch should also be understood as residual does not mean matters classified as emergencies need to pass the "national concern" test set out in *Crown Zellerbach*. Indeed, Le Dain J. specifically clarified that "[t]he national concern doctrine is separate and distinct from the national emergency doctrine" (p. 431).

(3) Going Forward

[529] The arc of the POGG jurisprudence has been an effort to navigate such that the division of powers is collectively exhaustive, in a way that respects provincial jurisdiction. The national concern doctrine, when properly applied, plays an essential role in achieving this. Matters that do not come within one of the enumerated heads of jurisdiction and that cannot be separated and shared between the enumerated heads of jurisdiction of both orders of government, do not fit comfortably within the division of

powers. In order to maintain exhaustiveness, such matters fall under the general residual power of Parliament by virtue of their "distinctiveness" from matters under provincial jurisdiction and their "indivisibility" between various heads of jurisdiction. But when the doctrine is improperly applied, POGG ceases to be residual in nature. When that is so, it can become an instrument to enhance federal and correspondingly decrease provincial authority.

[530] The POGG case law reviewed above is at times amorphous and difficult to organize, but one common denominator runs throughout: courts must be careful in recognizing matters of national concern and heed the consistent warnings from the case law, because the national concern branch has great potential to upset the division of powers (*Local Prohibition*, at p. 361; *Canada Temperance Federation*, at pp. 205-6; see also *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at paras. 67, 110 and 115).

[531] Once a matter is qualified as "of national concern", Parliament has exclusive jurisdiction over the matter, including its intra-provincial aspects (*Crown Zellerbach*, at p. 433). Thus, as the Attorney General of Quebec argued, an expansive interpretation of the doctrine can threaten the fundamental structure of federalism and unduly restrain provincial legislature's law-making authority. It would allow Parliament to acquire exclusive jurisdiction over matters that fall squarely within provincial jurisdiction and flatten regional differences, including Quebec's ability to retain exclusive control over [TRANSLATION] "all powers deemed essential to the

survival and flourishing of its distinct cultural identity" (E. Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (2005), at p. 299).

[532] Courts should never *start* a division of powers analysis by looking to the federal residual power (Gibson (1976), at p. 18). This approach helps guard against an unwarranted and artificial expansion of federal jurisdiction. While the national concern doctrine allows courts to recognize Parliament's jurisdiction over matters that used to fall under provincial jurisdiction, there is no corresponding transfer of matters that are no longer of national interest to the provinces (Brun, Tremblay and Brouillet, at pp. 589-91). Rather, recognizing a matter of national concern has the effect of "adding by judicial process new matters or new classes of matters to the federal list of powers", which "would belong to Parliament permanently" (*Anti-Inflation*, at pp. 444 and 458). Therefore, to preserve the federal balance, courts should treat POGG as a power of last resort.

[533] Some more recent case law from this Court recognizes this. For example, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, this Court declined to uphold federal legislation under the POGG power and stated that "the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867*" (p. 65 (emphasis added); see also *Hydro-Québec*, at paras. 109-10).

[534] My view of the national concern test gives effect to this truly residual understanding of POGG. The scope of the national concern doctrine must be limited to

matters that cannot fall under other heads of jurisdiction and that cannot be distributed among multiple heads, thus filling a constitutional gap. Accordingly, the doctrine only applies to matters which are truly of "national concern", as opposed to matters of a "merely local or private nature" that fall under s. 92(16).

III. The National Concern Doctrine

A. *Singleness, Distinctiveness, Indivisibility*

[535] In *Crown Zellerbach*, Le Dain J. explained that "[f]or a matter to qualify as a matter of national concern . . . it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" (p. 432). A close reading of Le Dain J.'s reasons in *Crown Zellerbach* and of Beetz J.'s influential reasons in *Anti-Inflation* reveal that "singleness, distinctiveness and indivisibility" should be understood purposively, as a way to identify matters that are beyond the powers of the provinces, and cannot be divided between both orders of government, which must fall under the general federal residual power in order to fill a constitutional gap.

[536] Beetz J.'s reasons in *Anti-Inflation* are an essential starting point to understand how matters can qualify as of "national concern". Beetz J. explained that matters of national concern have only been recognized "in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds

of form" (p. 458 (emphasis added)). The matter at issue in *Anti-Inflation*, the "containment and reduction of inflation", did not meet such requirements:

> It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory. [p. 458]

[537] In *Crown Zellerbach*, Le Dain J. noted that the majority of the Court in *Anti-Inflation* "held that the national concern doctrine applied, in the absence of national emergency, to single, indivisible matters which did not fall within any of the specified heads of provincial or federal legislative jurisdiction" and referred to Beetz J.'s reasons extensively (pp. 426-27). Thus, it appears that Le Dain J. understood *Anti-Inflation* as standing for the proposition that the national concern doctrine applies when two conditions are met: first, the matter does not fall within (i.e. it is distinct from) the enumerated heads of jurisdiction and, second, it is single and indivisible.

[538] The issue in *Crown Zellerbach* was whether "marine pollution" could qualify as a matter of national concern. More specifically, the question was whether "the control of pollution by the dumping of substances in marine waters, including provincial marine waters, is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other provincial waters" (p. 436 (emphasis added)). Le Dain J. proceeded in two steps, in line with *Anti-Inflation*. First, he determined that marine pollution was sufficiently distinct from the pollution of other provincial waters because of the distinction between salt and fresh water. Second, he

determined that the distinction was sufficient to conclude that marine pollution was a single and indivisible matter.

[539] These cases demonstrate that the requirements of "singleness, distinctiveness and indivisibility" serve the purpose of identifying matters that are truly residual in two ways. That is, the matter must be "distinct" from provincial matters *and* must be incapable of division between both orders of government such that it must be entrusted solely to Parliament. These requirements give effect to the general residual power of Parliament under POGG and ensure that there is no jurisdictional gap in the division of powers. They apply to both "new matters" and to matters which, although originally falling under provincial jurisdiction, have come to extend beyond the powers of the province and, due to indivisibility, must be entrusted exclusively to Parliament.

(1) Importance Is Irrelevant

[540] Given the residual nature of POGG, the importance of a matter has nothing to do with whether it is a matter of national concern. In the *Insurance Reference* case, the Supreme Court and the Judicial Committee of the Privy Council made plain that the importance of a subject did not mean that it had attained a national dimension so as to transfer matters from provincial to federal authority (*In re "Insurance Act, 1910"* (1913), 48 S.C.R. 260, at p. 304, aff'd *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 (P.C.), at p. 597, cited in Le Dain, at pp. 276-78; see also *Anti-Inflation*, at pp. 446-50). The role of the general residual power is to maintain the exhaustiveness of the division of powers, not to centralize "important"

matters that can be legislated upon by the provinces or by both orders of government. This would severely undermine the principle of federalism (Gibson (1976), at p. 31; see also Hogg, at s. 17.3(b)). For instance, provinces have jurisdiction to legislate in relation to education and the national concern doctrine cannot displace such authority simply because of the importance of the matter.

(2) Distinctiveness

[541] First, the impugned matter must be distinct from matters falling under the enumerated heads of s. 92 (*Anti-Inflation*, at p. 457). This will be met when the matter is beyond provincial reach, including because of the limitation of provincial jurisdiction to matters "in the Province" (see Gibson (1976), at p. 18). This inquiry includes consideration of the provincial residuum: if the matter is of a "merely local or private Nature", it would fall under s. 92(16).

[542] For example, federal legislation regulating the insurance business could not be sustained under POGG because it was not distinct from provincial matters. Provincial legislatures could have enacted legislation "substantially identical" under their authority to make laws in relation to civil rights and matters of local interest, under ss. 92(13) and 92(16) (*In re "Insurance Act, 1910"*, at pp. 302-3, per Duff J.). Similarly, "[t]he brewing and labelling of beer and light beer" did not transcend the provincial authorities' powers so as to give rise to a matter of national concern. On the contrary, Estey J. noted that there had been "legislative action duly taken in this field by the provinces" (*Labatt*, at p. 945).

[543] By contrast, marine pollution was found to be sufficiently distinct from pollution in other provincial waters, which fall under provincial jurisdiction (*Crown Zellerbach*, at pp. 436-38). Likewise, the subject of aeronautics was found to "transcen[d] provincial legislative boundaries" (*Johannesson*, at p. 309, per Kerwin J.).

[544] I would add that the matter must also be distinct from matters falling under federal jurisdiction, as POGG is purely residual. Of course, since division of powers disputes typically pertain to the boundaries between provincial and federal jurisdiction, in practice, distinctiveness is mainly considered with respect to provincial powers.

(3) Singleness and Indivisibility

[545] Second, as the Attorney General of Quebec correctly argued, even if the matter does not come within an enumerated head of power, it must be single and indivisible to fall under POGG rather than an aggregate that can be broken down and distributed to enumerated heads of jurisdiction (Lederman, at pp. 604-5). In other words, the fact that provinces are unable to deal with a matter is insufficient to conclude that it falls under POGG. The nature of the matter must be such that it cannot be shared between both orders of government and that it must be entrusted to Parliament, exclusively, to avoid a jurisdictional vacuum. This will be the case when the matter has a degree of unity and specificity that makes it indivisible or where the intra-provincial and extra-provincial aspects of the matter are inextricably interrelated (*Anti-Inflation*, at p. 458; *Crown Zellerbach*, at p. 434).

[546] For instance, diffuse matters such as "inflation", "labour relations" and "the environment" are distinct from matters falling under s. 92; they are not of a "merely local or private Nature" (s. 92(16)) and cannot be fully regulated by the province. However, they cannot be assigned to Parliament exclusively since they are divisible aggregates of several subjects cutting across provincial and federal jurisdiction (*Anti-Inflation*, at p. 458; *Oldman River*, at pp. 63-64). They do not have a singleness such that they must be regulated exclusively by Parliament to avoid a jurisdictional gap.

[547] Such general categories should be viewed as "outside the system . . . [and] subdivided into appropriate parts so that necessary legislative action can be taken by some combination of both federal and provincial statutes" (Lederman, at p. 616; see also D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 *U.T.L.J.* 54, at p. 85, cited in *Oldman River*, at p. 63). This is not a flaw of federalism, since we ought to reject the view that "there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem" (*Crown Zellerbach*, at p. 434). Rather, these matters are properly dealt with through federal-provincial agreements, what Professor Lederman calls "[t]he essence of co-operative federalism" (p. 616). Accordingly, resort to the general federal residual power is not necessary to preserve the exhaustiveness of the division of powers.

[548] This Court has found that certain matters have the requisite singleness and indivisibility to fall under the general federal residual power rather than be distributed

between federal and provincial heads of powers. For instance, the conservation of the National Capital Region was, by nature, a specific matter with a degree of unity that made it indivisible (*Anti-Inflation*, at pp. 457-58; *Munro*, at pp. 671-72). In *Crown Zellerbach*, the majority of this Court found that marine pollution was a single and indivisible matter in part because "the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions" (p. 437). The interrelatedness of the intra-provincial and extra-provincial aspects of the matter was such that marine pollution could not be shared between both orders of government if it were to be regulated. On this view, if it did not fall under the general federal residual power, neither Parliament nor provincial legislatures could have effectively legislated upon marine pollution, which would be inconsistent with the exhaustive division of powers.

[549] Singleness and indivisibility are thus means to determine whether the matter truly lies outside the enumerated heads or if it is merely a "new nam[e]" applied to "old legislative purposes" that can be distributed among existing heads of jurisdiction (Le Dain, at p. 293).

B. *Provincial Inability*

[550] In *Crown Zellerbach*, Le Dain J. held that in evaluating whether the matter has a singleness, distinctiveness and indivisibility, "it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with

the control or regulation of the intra-provincial aspects of the matter" (p. 432). This factor is known as the "provincial inability" test.

[551] Once again, it is essential to look at the genesis of the provincial inability inquiry to understand what it sought to accomplish and its role in the national concern doctrine. The provincial inability inquiry has been designed to control the centralization of powers and to limit the extension of the national concern doctrine to matters that are "beyond the power of the provinces to deal with" and that must be legislated upon by Parliament, exclusively (Gibson (1976), at pp. 33-34 (emphasis deleted); see also Leclair (2005), at p. 361; *Crown Zellerbach*, at pp. 432-33).

[552] In *Labatt*, this Court held that matters would meet this "test" when interprovincial cooperation is realistically impossible because "the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces" (p. 945, citing P. W. Hogg, *Constitutional Law of Canada* (1977), at p. 261). In such cases, the matter is effectively beyond the power of the provinces to deal with it.

[553] This background sheds light on the purpose of the concept of provincial inability: to help identify potential jurisdictional voids or gaps, which may indicate that a matter has a national dimension so as to fall under POGG to ensure the division of powers is exhaustive. The underlying purpose of the provincial inability inquiry is essential to understanding its iteration in *Crown Zellerbach*.

(1) Extra-Provincial Effects Are Relevant to, But Not Determinative of, Provincial Inability

[554] First, "extra-provincial effects", on their own, are insufficient to satisfy the "provincial inability" test. Rather, the extra-provincial effects must be such that the matter, or part of the matter, is beyond the powers of the provinces to deal with on their own or in tandem.

[555] I acknowledge that this is not the only way to read *Crown Zellerbach*. Read in isolation, Le Dain J.'s reasons could suggest that provincial inability is met whenever there are considerable effects on extra-provincial interests of a provincial failure to deal effectively with the intra-provincial aspects of the matter. In my view, this understanding cannot be correct. Understood this way, provinces would be "unable" to legislate with respect to many matters that were expressly entrusted to them. For example, if a province did not deal effectively with the administration of justice in the province (s. 92(14)), this may have grave consequences for residents of other provinces — the absence of any criminal prosecutions in an entire province would surely have spillover effects for neighbouring provinces. However, I would not say that this mere possibility makes all provinces "unable" to administer justice in the province.

[556] Clearly, some extra-provincial effects are compatible with provincial jurisdiction, considering that, under the federal structure, provinces can adversely affect extra-provincial interests if they are acting within their sphere of jurisdiction (Brun, Tremblay and Brouillet, at pp. 592-93; Hogg, at s. 13.3(c)). If the pith and substance of

provincial legislation comes within the classes of subjects assigned to the provinces, incidental or ancillary extra-provincial effects are irrelevant to its validity (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at paras. 23, 24 and 38; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 28). Given the potential displacement of provincial authority, courts should have a "strong empirical base" for concluding that the extra-provincial effects are such that the matter is beyond the powers of the provinces to deal with on their own or in tandem (K. Swinton, "Federalism under Fire: The Role of the Supreme Court of Canada" (1992), 55 *Law & Contemp. Probs.* 121, at p. 136; Leclair (2005), at p. 370).

[557] Evidence that provinces are not cooperating, even combined with the presence of extra-provincial effects, is also insufficient to make out provincial inability. Provinces are sovereign within their sphere of jurisdiction and can legitimately choose different policies than other provinces. The sovereign and democratic will of provincial legislatures entitles them to agree or disagree that uniformity of laws is a desirable goal, and to change their mind in the future (*Reference re Pan-Canadian Securities Regulation*, at para. 69; Hogg, at s. 17.3(b)). Moreover, since the possibility of one or more provinces not cooperating is always hypothetically present, such lax criteria would be ineffective protection for provincial jurisdiction (E. Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011), 54 *S.C.L.R.* (2d) 601, at pp. 620-21). It is worth repeating that striking a balance between diversity and uniformity is precisely why the Canadian constitution has a

federal structure. In certain fields, the *Constitution Act, 1867*, places diversity and the right to provincial difference above uniformity. This is not a defect of our Constitution, it is a strength.

(2) Provincial Inability Is Relevant to, But Not Determinative of, "Singleness, Distinctiveness and Indivisibility"

[558] Second, the residual role of the national concern doctrine explains why Le Dain J. in *Crown Zellerbach* indicated that the "provincial inability" test is only a "factor" to evaluate whether a subject matter has the required singleness, distinctiveness and indivisibility.

[559] Many matters are "beyond the power of the provinces to deal with" but do not meet the requirements of singleness, distinctiveness and indivisibility, and are therefore not matters of national concern. Obviously, matters that fall squarely within federal jurisdiction are one example (i.e. currency and coinage, the postal service, etc.). This is also the case when matters are mere divisible aggregates that span provincial and federal jurisdiction (*Anti-Inflation*, at p. 458; Brouillet (2011), at p. 619). For instance, there is no denying that the containment of inflation is "beyond the power of the provinces to deal with", since it involves measures that fall squarely under federal jurisdiction, such as central banking measures relating to the rate of interest (*Anti-Inflation*, at p. 452). This does not mean that the containment of inflation has the required singleness and indivisibility to qualify as a matter of national concern since it can be divided and distributed to both orders of government. Since there is no

constitutional gap, there is no need for the national concern doctrine to be applied such that the entire matter comes under federal jurisdiction.

[560] Provincial inability is no more than Le Dain J. says it is in *Crown Zellerbach*: an indicium of "singleness, distinctiveness and indivisibility". Extra-provincial effects resulting in provincial inability may indicate that the matter is not of a local or private nature (i.e. "distinct" from provincial matters), or is not separable from the local and private aspects of the matter (i.e. "indivisible" or "single"). This will be the case where the extra- and intra-provincial aspects of a matter are interrelated and inseparable (*Crown Zellerbach*, at p. 434). This makes sense. In line with the residual role of POGG, federal authority over what was formerly within provincial competence is only justified where a matter has become distinct from what the provinces can do, and cannot be shared between orders of government because of its indivisibility. In such a case, reliance on POGG is the only way to maintain the exhaustiveness of the division of powers. Otherwise, there would be a jurisdictional void — if the federal Parliament did not have jurisdiction over such a matter, no one would.

C. *Scale of Impact*

[561] When determining if a matter can pass muster as a subject matter falling under POGG, the final step is to consider whether it has "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" (*Crown Zellerbach*, at p. 432). If the "singleness, distinctiveness

and indivisibility" inquiry has been carried out correctly such that reliance on POGG is necessary to avoid a jurisdictional vacuum, then the scale of impact will necessarily be reconcilable with the division of powers. This stage of the test should therefore be understood as a "check" or "litmus test", rather than as an independent requirement. The evaluation of the scale of impact on the federal balance illustrates the need for caution when determining whether a new permanent head of exclusive power should, in effect, be added to the federal list of powers (*Anti-Inflation*, at p. 444).

[562] This prong of the test requires courts to determine whether recognizing the proposed new federal power would be compatible with the federal structure. It does *not* ask whether the importance of the proposed new federal power *outweighs* the infringement on provincial jurisdiction. Importance is irrelevant because it does not indicate whether there is a jurisdictional gap that must be filled with the general residual power. Important matters can and should be dealt with by the provinces. Further, assessing importance requires courts to assess the desirability of certain policies, something which is not their role.

[563] Rather, the notion of scale of impact on the fundamental distribution of powers is a manifestation of the principle of federalism. As this Court held in *Comeau*, this principle "requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests" (para. 78). Professor Brouillet explains that the idea of preserving a "federal balance" ought to be a principled exercise, animated by the values underlying federalism:

> The search for a federal balance aims at keeping an equilibrium between the values of unity and diversity, whose first legal expression is laid down in the distribution of powers between the levels of government. The value of unity will be essentially preserved if the autonomy of the central government is protected, as the value of diversity will be maintained if the federated units are free from interference from the central government in the exercise of their exclusive legislative powers. [Emphasis added.]
>
> ("The Federal Principle and the 2005 Balance of Powers in Canada" (2006), 34 *S.C.L.R.* (2d) 307, at pp. 311-12)

[564] If ubiquitous, all-pervasive matters, such as "the containment and reduction of inflation", fell under POGG, they would authorize federal action that would have a radical effect on the federal balance as they would "render most provincial powers nugatory" (*Anti-Inflation*, at p. 458). Rather, the matter must be of a sufficiently narrow and specific nature to be consistent with the value of diversity and the autonomy of provincial governments to set their own priorities and come up with policies tailored to their unique needs (*Securities Reference*, at para. 73).

[565] Moreover, the fact that some matters were not assigned exclusively to either Parliament or the provincial legislatures, and instead are shared between both orders of government, must be given effect. This must not be disturbed through constitutional interpretation. In *Hydro-Québec*, at para. 59, Lamer C.J. and Iacobucci J., dissenting, but not on this point, made this clear in relation to the "environment" as a subject matter:

> *A decision by the framers of the Constitution not to give one level of government exclusive control over a subject matter should, in our opinion, act as a signal that the two levels of government are meant to operate in tandem with regard to that subject matter. One level should not be allowed*

> *to take over the field so as to completely dwarf the presence of the other*. This does not mean that no regulation will be permissible, but wholesale regulatory authority of the type envisaged by the Act is, in our view, inconsistent with the shared nature of jurisdiction over the environment. As La Forest J. noted in his dissenting reasons in *Crown Zellerbach*, at p. 455, "environmental pollution alone [i.e. as a subject matter of legislative authority] is itself all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable." [Underlining in original; italics added.]

[566] Although the modern conception of federalism is flexible and accommodates overlapping jurisdiction, courts must be careful not to let the double aspect doctrine undermine the scale of impact inquiry by suggesting that provinces retain ample means to regulate the matter. The double aspect doctrine recognizes that the same fact situation or "matter" may possess both federal and provincial aspects, which means that both orders of government can legislate from their respective perspective (*Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 84; *Canadian Western Bank*, at para. 30). For example, the prohibition of driving while intoxicated can be enacted by Parliament under its power over criminal law, while provinces can legislate regarding the suspension of driving licenses for highway safety reasons, likely under their power over "property and civil rights" (*O'Grady v. Sparling*, [1960] S.C.R. 804; *Mann v. The Queen*, [1966] S.C.R. 238).

[567] The role of the double aspect doctrine is simply to explain how similar rules in otherwise valid provincial and federal laws can apply simultaneously, "when the contrast between the relative importance of the two features is not so sharp" (*Rogers Communications*, at para. 50, citing W. R. Lederman, "Classification of Laws and the

British North America Act", in *The Courts and the Canadian Constitution* (1964), 177, at p. 193; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 182). Thus, while this doctrine "allows for the *concurrent application* of both federal and provincial legislation, . . . it does not create *concurrent jurisdiction* over a matter" (*Securities Reference*, at para. 66 (emphasis in original)).

[568] As its name indicates, the doctrine only applies when a subject matter has multiple aspects, some that may be regulated under provincial jurisdiction, and some under federal jurisdiction. It is "neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction" and does not allow Parliament and provincial legislatures to legislate on the "*same* aspect" of the matter (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 766, per Beetz J. (emphasis in original)). As Professors Brouillet and Ryder write, "an unbridled application of the doctrine would undermine the principle of exclusiveness that forms the foundation of the distribution of powers in Canada" ("Key Doctrines in Canadian Legal Federalism", in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 415, at p. 423).

[569] Moreover, the double aspect doctrine must be applied carefully, since increasing overlap between provincial and federal competence can severely disrupt the federal balance. Under the paramountcy doctrine, "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency" (*Saskatchewan*

(Attorney General) v. Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 15; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 11). The combined operation of the doctrines of double aspect and federal paramountcy can have profound implications for the federal structure and for provincial autonomy. I note that Quebec scholars have warned about the particular effects of an unrestrained application of the double aspect doctrine on the province's exclusive jurisdiction. To quote Professor Patenaude:

> [TRANSLATION] It is because of section 92, subsection 13, that Quebecers are governed by a distinct private law system adapted to the specificity of their culture. Any weakening of the rule of [provincial] exclusiveness signifies a possibility for the federal Parliament, in which Francophones are in the minority, to legislate, pre-eminently, in fields the framers had entrusted exclusively to the Parliament of Quebecers. . . . Quebecers cannot accept that fields of jurisdiction over which they have exclusive control can, under the guise of the aspect doctrine, pass into the sphere in which federal jurisdiction has priority of application. [Emphasis added.]
>
> ("L'érosion graduelle de la règle de l'étanchéité: une nouvelle menace à l'autonomie du Québec" (1979), 20 *C. de D.* 229, at p. 234; see also G. Rémillard, "Souveraineté et fédéralisme" (1979), 20 *C. de D.* 237, at p. 242.)

[570] As Professor Hogg explained, "[i]f in a nation paramount central power completely overlapped regional power, then that nation would not be federal . . . . It is only where overlapping of power is incomplete, or the scope of central control is limited, that we have a federal system" (s. 5.1(a); see also *Bell Canada*, at p. 766). When Professor Hogg wrote that the "nation would not be federal", he did not mean that provinces would cease to exist. Rather, he meant that where provinces become

subordinate units, the nation is no longer federal in its nature. In other words, supervisory federalism isn't federalism at all.

[571] In para. 139, the Chief Justice says that my description of national concern (referred to as "two-step") is not reflective of the jurisprudence, noting *Munro* and *Crown Zellerbach*. He concludes by saying: "In those cases, this Court did not proceed by way of a two-step search for a jurisdictional vacuum; rather, it applied the national concern test to identify matters of inherent national concern." In reply, first, I would say that aside from a few shining beacons of clarity and coherence, notably Beetz J. in *Anti-Inflation*, the jurisprudence on national concern has been unclear, even obscure. Second, I do not agree that my description of national concern is not consistent with the jurisprudence while that of the Chief Justice is so. Neither he nor I simply apply precedent. Rather, each of us in different ways makes sense of what was written before. The two-step approach I adopt reflects the methodology Le Dain J. set out and applied in *Crown Zellerbach*, as I have indicated throughout. Third, the difference is not how faithfully we each adhere to a tortuous case law, but rather how we each conceive of the purpose of the national concern doctrine. For me, it is to give effect to federal residual authority over matters not otherwise assigned under the enumerated heads of power and that cannot be divided between both orders of government. For the Chief Justice it is akin to a debenture, with POGG being a general federal authority that floats over that of the provinces, and crystalizes into exclusive federal jurisdiction when a matter of "inherent national concern" is recognized. These views are fundamentally different, but neither follows directly from the case law.

[572] The Chief Justice also takes issue with my account of the national concern test. I agree that our understandings of POGG are fundamentally different. Mine is that POGG confers residual authority, by which I mean authority to legislate in relation to only those matters which would otherwise fall into a jurisdictional vacuum. As such, it can only be the basis of jurisdiction for matters that do not come within heads of power listed in ss. 91 and 92, and *cannot be divided between them*. Such residual authority is necessary to ensure that the division of powers is exhaustive. To put it in the simplest terms, the matters falling under the competence conferred on Parliament by s. 91 and that conferred on the legislatures of the provinces by s. 92, or any combination of the two, by definition, cannot come within a residual authority.

[573] Therein lies the conceptual difference that the Chief Justice highlights. In his framework, POGG is a primary source of authority conferred on Parliament in relation to "matters of inherent national concern" (para. 139). Moreover, it is a source of authority that can be used to deal with federal "aspects" of matters under enumerated powers within the exclusive jurisdiction of provincial legislatures. Thus, he states at para. 130: ". . . where Canada is empowered to impose a minimum national standard, a double aspect situation arises: federal and provincial laws apply concurrently, but the federal law is paramount."

[574] By means of "minimum national standards", a federal aspect is *generated,* and this federal aspect can be used as a basis to supervise provinces in the exercise of their authority. This is not residual authority. It is the antithesis of residual authority,

as it would operate to encroach on jurisdiction conferred on the provinces. Most respectfully, I disagree.

D. *Conclusion*

[575] The national concern doctrine must be applied with caution in light of its residual role and its potential to upset the division of powers. If the doctrine is not strictly applied so as to limit it to ensuring that the division of powers is exhaustive, the federal nature of the Constitution would "disappear not gradually but rapidly" (*Anti-Inflation*, at p. 445).

IV. The Attorney General of Canada's Expansive Approach Lacks Caution

[576] Repeated warnings about the misuse of the "national concern" power, notably by Beetz J. in *Anti-Inflation*, were all but ignored by the Attorney General of Canada in his submissions before this Court. The Attorney General of Canada did not seek to rely on the federal enumerated powers, notably taxation or trade and commerce, as the basis for the constitutionality of the *Act*. He did not set forth national concern as an alternative basis. Nor did he rely on the emergency branch, which confers Parliament temporary, rather than permanent, authority. (In a "throw-away" submission, the Attorney General of Canada made passing reference to these potential grounds and referred the Court to the submissions of certain interveners.) This was audacious as national concern has been recognized repeatedly as being a threat to the distribution of powers that is at the heart of the Confederation bargain. Further, the Attorney General

of Canada's proposed national concern test would considerably extend the doctrine, despite this Court's call for caution when considering a doctrine that "inevitably raises profound issues respecting the federal structure of our Constitution" (*Hydro-Québec*, at para. 110). I would reject this doctrinal expansion of national concern. I do so for two reasons. First, it departs in a marked and unjustified way from the jurisprudence of this Court. And, second, if adopted, it will provide a broad and open pathway for further incursions into what has been exclusive provincial jurisdiction.

A. *Becoming a Matter of National Concern*

[577] The Attorney General of Canada argues in his factum (at para. 2) that the pith and substance of the *Act* of "establishing minimum national standards integral to reducing nationwide [greenhouse gas] emissions" has attained national dimensions because of its importance and the existential threat that climate change poses. This reasoning misstates what it means to attain national dimensions. A matter has attained national dimensions when it has the requisite singleness, distinctiveness and indivisibility such that it cannot fit under any enumerated head or be divided among multiple enumerated heads, and a scale of impact on provincial jurisdiction that is reconcilable with the division of powers, as explained above. How important a matter is does not determine which order of government has jurisdiction. While the seriousness or the immediacy of the threat that climate change poses may be relevant to an argument under the emergency branch, it has no place in the national concern

analysis, which is "separate and distinct from the national emergency doctrine" (*Crown Zellerbach*, at p. 431; see also *Anti-Inflation*, at p. 425).

[578] Similarly, the Attorney General of Canada also says that the presence of international agreements indicates that the matter is of national concern. This argument is not only inconsistent with the residual nature of POGG, it also undermines almost nine decades of jurisprudence beginning with the *Labour Conventions* case, which held that the federal government does not gain legislative competence by virtue of entering into international agreements. Rather, the federal government and the provinces must cooperate to implement international agreements that relate to matters within provincial jurisdiction. What is urged on us by the Attorney General of Canada is a means — indirect, but no less significant thereby — for the federal Cabinet to expand the competence of Parliament by the exercise of its authority in respect of foreign relations.

B. *Singleness, Distinctiveness and Indivisibility*

[579] The treatment of "singleness, distinctiveness and indivisibility" by the Attorney General of Canada conflates key elements of the test, skipping over — I would go so far as to say denying the existence of — what should be important limits on federal jurisdiction. Interpreting such limits out of existence will have profound implications for the future on issues having nothing to do with climate change.

[580] On distinctiveness, the Attorney General of Canada argues in his factum that "the subject matter and the *Act* target a distinct type of pollutant with indisputable

persistence, atmospheric diffusion, harmful effects and interprovincial aspects" (para. 88). While the distinctiveness of greenhouse gases ("GHGs") from other types of gases may be relevant to the distinctiveness inquiry, it is only relevant insofar as the regulation of GHGs is outside of or "distinct from" provincial competence, which the Attorney General of Canada fails to adequately explain. The distinctiveness requirement is inherently incompatible with the backstop nature of the *Act*, which contemplates that some or all provinces could implement GHG pricing schemes that accord with standards set (from time to time) by the federal Cabinet, thereby avoiding the triggering of federal intervention. Lamer C.J. and Iacobucci J. make a similar point in their dissenting reasons in *Hydro-Québec*, at paras. 57 and 77. In that case, "equivalency provisions" which allowed the Governor in Council to exempt a province from the scheme if the province had equivalent regulations in force led them to reject the argument that the provinces were unable to regulate toxic substances.

[581] The Attorney General of Canada glosses over the problems with its distinctiveness argument through a proposed "modernized" national concern test that draws on the trade and commerce power jurisprudence and focuses on its version of provincial inability. This new test urged on us by the Attorney General of Canada does away with many of the requirements of "singleness, distinctiveness and indivisibility", and simply asks is the matter "distinctly national" (para. 69). The Attorney General of Canada says this should be assessed using the provincial inability test. He says it is "more than an indicium of distinctiveness, it is the test for distinctiveness" (para. 70). In effect, the Attorney General of Canada's proposition collapses "singleness,

distinctiveness and indivisibility" into "provincial inability" — despite Le Dain J.'s caution that "provincial inability" should be only *one* indicium in determining whether a matter meets the singleness, distinctiveness and indivisibility requirements (*Crown Zellerbach*, at p. 434).

[582] This approach fails to give effect to the residual nature of the POGG power. It ignores Beetz J.'s caution that an aggregate of provincial and federal matters is not sufficiently distinctive and too pervasive to justify the creation of (what amounts to) a new head of power under national concern (*Anti-Inflation*, at p. 458). This is exacerbated by the Attorney General of Canada's reliance on the trade and commerce power jurisprudence to understand the "provincial inability" test. There is no reason why the national concern test should be informed by tests for enumerated heads of power, because the national concern test is directed towards matters that would not pass those tests. If a matter comes with "trade and commerce" or another enumerated power, then it cannot also be a matter of "national concern" if POGG is a residual power.

[583] The result is that something like the "containment and reduction of inflation", which Beetz J., with majority support on this point, held did not pass muster in *Anti-Inflation*, may pass the Attorney General of Canada's proposed "modernized" test. This is so because, even though such a matter could be divided between provincial and federal enumerated heads of power rendering it "divisible", the provinces, on their own or in tandem, would be unable to fully deal with it, and the failure of one province to act would endanger the interests of other provinces. This example illustrates how the

Attorney General of Canada's proposal increases — I would go so far as to say transforms — the scope of the "national concern" branch under POGG.

[584] The device of "minimum national standards" makes wider still the pathway for enhancement of federal jurisdiction. The Attorney General of Canada argues that the provincial inability test is met, in part, because "no single province or territory can constitutionally legislate minimum national standards" (para. 101). But "by means of minimum national standards" could be applied to *any* matter, the same way "by means of the federal government" could be applied to any matter. If it could be applied to any matter, then it adds nothing meaningful to the description of a matter and has no place. Including "minimum national standards" in the matter of national concern short-circuits the analysis and opens the door to federal "minimum standards" with respect to other areas of provincial jurisdiction, artificially expanding federal capacity to legislate in what have been until now matters coming within provincial jurisdiction. This device undermines federalism by replacing provincial autonomy in the exercise of its jurisdiction with the exercise of such jurisdiction made permanently subject to federal supervision.

[585] Further, the Attorney General of Canada fails to identify extra-provincial effects that would be relevant to provincial inability. The Attorney General of Canada points to carbon leakage (interprovincial competition resulting from businesses relocating from jurisdictions with more strict climate policies to jurisdictions with less strict climate policies), but this is not the kind of extra-provincial effects that make the

provinces unable to deal with the matter, on their own or in tandem. An imaginative lawyer can almost always find some effects of provincial measures outside the province (Swinton, at p. 126). This is not enough to put all or part of a matter beyond the power of the provinces to deal with. If it were, the provinces would be "unable" to legislate in many areas of provincial jurisdiction.

[586] The Attorney General of Canada departs from this Court's jurisprudence in treating "provincial inability" and extra-provincial effects as more than an indicator, and losing sight of what it is supposed to be indicating: singleness, distinctiveness and indivisibility, which give effect to the residual nature of POGG. Extra-provincial effects leading to provincial inability to deal with all or part of a matter can constitute *one step* towards singleness, distinctiveness and indivisibility. In treating provincial inability as determinative, the Attorney General of Canada reframes the national concern test so as to expand the scope of POGG beyond its proper residual nature.

[587] In effect, the Attorney General of Canada's "modernized" test does away with "singleness, distinctiveness and indivisibility" by understanding these concepts in terms of (his version of) "provincial inability". It then renders "provincial inability" meaningless by defining the matter in terms "minimum national standards", something no province can do. By this logical sleight of hand, "provincial inability" exists whenever Parliament provides for "minimum national standards".

C. *Scale of Impact*

[588] The Attorney General of Canada suggests that the scale of impact on provincial jurisdiction of the *Act* is reconcilable with the distribution of powers, in part because of the backstop mechanism. He argues in his factum that the *Act* respects provincial jurisdiction because it provides provinces with the "flexibility" to implement their own GHG pricing systems and "fills in gaps" where the provincial pricing systems do not meet the "minimum national standards" (para. 6). This is presented as "cooperative" federalism.

[589] These conclusions are based on a highly centralized understanding of federalism. The *Act* leaves room for provincial jurisdiction only insofar as the decision of the province conforms to the will of Parliament and the federal Cabinet. Indeed, this is the whole point. It would not be a minimum national standard if it were possible to drop below that standard or ask to be measured by a different yardstick. Given the number of activities and industries that produce GHG emissions, the *Act*'s scale of impact on provincial jurisdiction would be "so pervasive that it knows no bounds" (*Anti-Inflation*, at p. 458).

[590] While provincial authority would remain nominally intact, in reality it would become subject to oversight by the federal Cabinet through the exercise of its ability to invoke "minimum national standards" that would override provincial measures. But provinces are not "simple agents for implementing national policies but rather . . . veritable laboratories for the development of solutions adapted to local realities" (A. Bélanger, "Canadian Federalism in the Context of Combatting Climate

Change" (2011), 20 *Const. Forum* 21, at p. 27). The *Act* is not an exercise in cooperative federalism. Rather, it is the means to enforce supervisory federalism.

[591] As the Attorney General of Quebec points out, even provincial schemes that, at a given time, meet the federal benchmark would never be secure from federal displacement; as a result, the continued application and consistent operation of provincial schemes would be less predictable. This is especially the case considering that minimum national standards could be elevated to a level that completely subsumes provincial schemes. The *Act* effectively undermines the predictability, stability and integrity of provincial regulatory schemes. Exercise of provincial authority would be permanently contingent on the federal Cabinet's discretion.

[592] The reasoning of the Attorney General of Canada turns provincial autonomy on its head. It also suggests that Parliament could enact "minimum national standards" for a panoply of areas within provincial jurisdiction, and thereby create a federal "aspect" of multiple provincial matters. This has implications far beyond this legislation; these implications permanently alter the Confederation bargain.

[593] The double aspect doctrine does not cure this problem. The double aspect doctrine allows the same fact situation to "be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power" (*Desgagnés Transport*, at para. 84). The problem here is that the federal matter has been defined in terms of the extent to which it can limit the provinces' discretion to legislate: the backstop mechanism. This is not two aspects of the same fact situation. It is one aspect,

and it gives the federal government the upper hand and the final say. But, that is what "minimum national standards" are intended to do.

[594] In conclusion, I would reject the Attorney General of Canada's proposed expansion of the national concern doctrine and, for the reasons of my colleague Brown J., conclude that Parliament did not have jurisdiction to enact the *Act* under its general residual power. However, given that the majority has concluded that Parliament has the power to enact the *Act*, I want to emphasize that this conclusion does not extend to the regulations made under the *Act*.

V. The Constitutionality of Regulations Made Under the *Act* Are a Matter for Another Day

[595] The *Act* confers exceptionally broad authority on the Governor in Council to create policy in the regulations, particularly under Part 2. Although the majority has decided to uphold the *Act*, the *regulations* are not before this Court, and may well be challenged in future cases. I take this opportunity to clarify the appropriate methodology for reviewing regulations facially enacted pursuant to a constitutional statute for compliance with the division of powers, and how this methodology may apply to regulations made under the *Act*. In short, the federal power when applied in the regulations must be limited to the matter of national concern in which the *Act* is grounded: establishing minimum national standards of price stringency to reduce GHG emissions. To establish "minimum national standards", any differences in treatment between industries or provinces in the regulations must be justified with respect to

"price stringency to reduce GHG emissions" (Chief Justice's reasons, at para. 207). Regulations that have the effect of favouring or imposing unequal burdens on certain provinces and industries in a manner that cannot be so justified would be *ultra vires* the division of powers.

A. *Regulations Purportedly Enacted Under a Constitutional Act Can Be Unconstitutional*

[596] It is possible for a statute to be *intra vires*, and yet for regulations facially enacted under that statute to be *ultra vires* on division of powers grounds. One way to see this is that such regulations are not properly *intra vires* the Act, insofar as they are not consistent with the purpose for which the Act was upheld (even if facially they are within the Act's wording). In *Reference re Assisted Human Reproduction Act*, McLachlin C.J. assessed whether an Act was valid under the federal criminal law power, and explained that "[a]ny regulations passed under the enabling statute will be valid only insofar as they further valid criminal law goals, and they will be subject to challenge to the extent that they do not" (para. 84). As long as the regulations made under an Act reflect and further the purposes for which the Act was held to be constitutional, such regulatory schemes remain "securely anchored" in the Act and *intra vires* (para. 85).

[597] Certain regulation-making powers are more likely to give rise to regulations that may overstep the bounds of the division of powers than others. For example, the power to make regulations that define the mere details of a valid scheme

are unlikely to affect the division of powers. Broader regulatory powers are cause for greater concern. In such cases, [TRANSLATION] "[t]he regulatory authority, which must then itself consider the limits of the power so granted, is more likely to make regulations that will be found to be unconstitutional, whereas the enabling Act, owing to the generality of the language used and to the presumption of validity of laws, will avoid such a finding" (P. Garant, with P. Garant and J. Garant, *Droit administratif* (7th ed. 2017), at p. 290).

[598] In this case, the *Act* delegates substantial authority to the Governor in Council to make regulations. The *Act*, and especially Part 2, could be described as "framework" or "skeletal" legislation, in the sense that much of its content is given effect by means of the regulations. In the context of framework legislation, the risk of regulations using their powers in a manner that is beyond their constitutional competence is particularly high. While the validity of the regulations the Governor in Council has made, or will make in the future, is a matter for another day, I offer some guidance on the proper methodology for reviewing the constitutionality of such regulations.

[599] At para. 220 of his reasons, the Chief Justice writes: "My colleague Rowe J. has taken this opportunity to propose a methodology for assessing the constitutionality of regulations made under the *GGPPA*. . . . [H]is speculative concern that such regulations could be used to further industrial favouritism is neither necessary nor desirable." This legislation is an instrument not only of environmental policy, but

also industrial policy. By design, regulations under Part 2 will have impacts that vary by enterprise, sector and region. These regulations will affect the viability, for example, of natural resource industries that need to generate power at remote locations or heavy industries that require intense heat, like making cement or smelting ore. By contrast, they will have little effect on industries that are either not power-intensive (like finance) or where production is electrified (like manufacturing). While the primary purpose of the legislation is environmental protection, Part 2 is premised on tailoring the impact of emissions reduction by reference, inter alia, to economic considerations (G. Bishop, *Living Tree or Invasive Species? Critical Questions for the Constitutionality of Federal Carbon Pricing* (2019), C.D. Howe Institute Commentary 559). Issues as to whether regulations veer too deeply into industrial policy, thus calling into question the regulations' constitutionality, will inevitably arise.

B. *Methodology for Evaluating the Constitutionality of Regulations*

[600] An administrative decision to enact regulations is, presumptively, reviewed solely for "reasonableness", unless there is a reason to rebut that presumption. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, this Court made clear that there is no separate "jurisdictional questions" category of correctness review that would rebut the presumption, even for delegated legislation (paras. 65-66). *Vavilov* also adopted the view that "[w]here [the legislature] has established a clear line, the [administrative decision maker] cannot go beyond it; and where [the legislature] has established an ambiguous line, the [decision maker] can go no further

than the ambiguity will fairly allow" (para. 68, quoting *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 307).

[601] One way that the presumption of reasonableness can be rebutted, however, is when the constitutionality of a provision is in issue, including a challenge based on the division of powers (*Vavilov*, at para. 55). As *Vavilov* explained, at para. 56:

> A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

Where the reason for which regulations are said to be *ultra vires* their enabling statute is *because* they are *ultra vires* the division of powers, this raises a constitutional question. As the standard of review may depend on the nature of the challenge and the relief sought, I will say no more about it here.

[602] As for methodology, the review of *regulation* for compliance with the division of powers follows the same structure as the review of *legislation* for compliance with the division of powers. In both cases, one must characterize the measure and then classify it. This Court explained the process for analyzing the constitutionality of subordinate legislation, specifically a municipal by-law, in *Rogers Communications*, at para. 36:

> In analyzing the pith and substance of the notice of a reserve, the Court must consider both its purpose and its effects: *Goodwin*, at para. 21; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 63-64; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at paras. 20-22. The purpose of a municipal measure, like that of a law, is determined by examining both intrinsic evidence, such as the preamble or the general purposes stated in the resolution authorizing the measure, and extrinsic evidence, such as that of the circumstances in which the measure was adopted: *Lacombe*, at paras. 20-22; *COPA*, at para. 18; *Canadian Western Bank*, at para. 27. As for the effects of a municipal measure, they are determined by considering both the legal ramifications of the words used and the practical consequences of the application of the measure: *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 482-83.

[603] Analyzing the pith and substance of the municipal measure at issue above is done in the same way as it is for the pith and substance of a statute. Regulations are no different (D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at topic 13:3210; see also *Labatt*; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292; *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160, 398 D.L.R. (4th) 91; *Oldman River*). The underlying logic is the same: Parliament cannot via statute exercise power it does not have, and so it cannot delegate power that it does not have. Scrutiny for compliance with the division of powers can be no less, simply because Parliament has chosen to give effect to its authority through a delegate who is empowered to make regulations. A division of powers analysis begins with pith and substance, and pith and substance begins with purpose and effect.

[604] In considering purpose, courts can and should consider both intrinsic and extrinsic evidence (see, e.g., *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 20; see also *Rogers Communications*, at para. 36, per Wagner and Côté JJ., and at paras. 100-104, per Gascon J., concurring). However, certain empowering provisions are more likely than others to generate extrinsic evidence. Empowering provisions of cities, where bylaws are passed after public debate, almost always generate extrinsic evidence. *Rogers Communications* is an example. Similarly, empowering provisions that place a duty to give reasons on an administrative decision-maker can also be adequately reviewed for constitutionality. Regulations directed to an individual or specific site, as opposed to regulations of general application, may attract a duty of procedural fairness (Brown and Evans, at topic 7:2331).

[605] Where, however, there is no public debate and no duty to give reasons, there is no guarantee that extrinsic evidence will be created. Without such extrinsic evidence, a court's ability to effectively adjudicate the boundaries of federal and provincial powers may be made more difficult. This will generally arise with regulation-making powers.

[606] This problem is particularly pernicious where the Governor in Council is empowered to make regulations. As Cabinet deliberates in secret, submissions to it are protected from disclosure and it gives no reasons for its decisions. It is very nearly a total black box. Further, it has been said that it is not the function of a court to

investigate the "motives" of Cabinet (Brown and Evans, at topic 15:3262; *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106).

[607] It is clear that courts have the power to review the *vires* of subordinate legislation, even where it is promulgated by the Governor in Council, where the basis for the review is that the subordinate legislation is *ultra vires* on division of powers grounds. As noted, Parliament cannot delegate power that it does not have. This is fundamental. While there may be evidentiary hurdles to identify the purpose of the regulations, where a review of the validity of a regulation turns on whether or not it is *ultra vires* the division of powers, courts remain tasked with ascertaining the pith and substance. Courts may consider extrinsic evidence in assessing the *vires* of an Order in Council, and have found Orders in Council to be invalid on the basis of extrinsic evidence of purpose (see *Heppner v. Province of Alberta* (1977), 6 A.R. 154 (S.C. (App. Div.)), at paras. 27-43). Where available, documents such as a Regulatory Impact Analysis Statement may provide extrinsic evidence of the purpose of a regulation (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at paras. 156-57). Where there is no extrinsic evidence of purpose, courts must infer the purpose as best they can from the language of the regulation itself, and ascertain the pith and substance using that in conjunction with the effects of the regulation. The legal and practical effects of the regulations will thus likely be highly relevant to determine their pith and substance and their validity in light of federal jurisdiction over "establishing minimum national standards of GHG price stringency to reduce GHG emissions" (Chief Justice's reasons, at para. 207).

C. *Empowering Provisions Under the Act*

[608] I discuss a few key regulation-empowering provisions in the *Act*, and how such regulations may interact with the methodology set out above. The overall scheme of the *Act* has been explained by my colleague Brown J., and I need not repeat it here. As regulations made under the *Act* are not before us, I make only general observations.

(1) Part 1

[609] In Part 1 of the *Act*, ss. 166-168 provide the regulation granting powers. Section 166(1)(a), in combination with other sections, empowers the Governor in Council to make regulations prescribing who pays the fuel charge (and under what conditions), who is exempt from the fuel charge (and under what conditions), and the amount of the fuel charge in certain conditions (see ss. 26, 27, 40(3), 41(2), 46(3) and 48). Section 166(1)(e) gives the Governor in Council the power to make regulations "distinguishing among any class of persons, provinces, areas, facilities, property, activities, fuels, substances, materials or things". These provisions have clear potential for use that is within federal competence over establishing minimum national standards of price stringency to reduce GHG emissions. The Governor in Council could distinguish between provinces, industries, fuels, etc. if the distinction is justified in light of the goal of reducing greenhouse gas emissions, for example, by taking into account the risk of international carbon leakage and the relative effectiveness of the pricing standard on GHG emissions. Regulations that differentiate between industries on such bases may fall within the matter of national concern in which the *Act* is grounded.

However, the potential for "playing favourites" for reasons that have nothing to do with establishing minimum national standards of price stringency to reduce GHG emissions is obvious. Moreover, even if regulations are enacted without such favouritism, they could have the effect of unduly disadvantaging certain provinces or industries in a way that is incompatible with "establishing minimum national standards of GHG price stringency to reduce GHG emissions". Such regulations would be unconstitutional, even though the provisions that facially empower them are valid.

[610] Sections 166(2) and 166(3) give the Governor in Council the power to amend the list of provinces and areas to which Part 1 of the *Act* applies taking into account the stringency of provincial pricing mechanisms for GHG emissions as the primary factor. Although the *Act* does not define "stringency", the Governor in Council's decision to list or not list a province is nonetheless constrained by the limits of "establishing minimum national standards of GHG price stringency to reduce GHG emissions". Similar provisions exist in Part 2 as well.

[611] Section 166(4) gives the Governor in Council the power to change the fuel charge for an individual fuel, on a per-region basis. Section 168 allows the Governor in Council to make regulations in relation to the fuel charge system. Section 168(3) provides the power to modify "this Part" through regulations, and s. 168(4) allows regulations made under "this Part in respect of the fuel charge system" to prevail over "this Part" in case of conflict. This is the so-called "Henry VIII" clause. There is similar

potential for abuse or unconstitutional effects in the exercise of these empowering provisions as there is in those described above.

(2) Part 2

[612] Part 2 delegates even more of the details to the regulations, and contains even more potential for overstepping the bounds of the division of powers. Part 2 of the *Act* creates a per-facility emissions limit. This creates the potential for improper differential treatment of facilities through the regulations.

[613] Key to the operation of Part 2 is s. 192. This section gives the Governor in Council 17 explicit regulation-making powers, including the power to make regulations respecting covered facilities and when they cease to be covered facilities (s. 192(b)) and respecting the circumstances under which greenhouse gases are deemed to have been emitted by a facility (s. 192(i)). Section 192(g) is particularly important, as it allows the Governor in Council to make regulations "respecting greenhouse gas emissions limits". Section 192(g) gives the Governor in Council power to create a scheme that defines the emissions limits: these are not otherwise defined in the statute. The only stated restriction on the Governor in Council here is that the regulations must be "for the purposes of this Division". Although the Division does not have a stated purpose, it is titled "Pricing Mechanism for Greenhouse Gas Emissions".

[614] This power to set per-facility emissions limits is at the heart of Part 2 of the *Act*, and it could support a wide variety of regulations. Given, however, that the *Act* is

a "per-facility" scheme, the statute contemplates that the Governor in Council will create regulations that do not treat all covered facilities identically. This gives rise to the possibility of differences in treatment between industries that have nothing to do with the effectiveness of GHG emissions pricing in those industries. This would be inconsistent with "establishing minimum national standards of GHG price stringency to reduce GHG emissions". Regulations that impose different treatment of facilities and industries must be justified in light of federal jurisdiction over this matter, or they will exceed the powers Parliament could validly delegate to the Governor in Council.

[615] The regulations, no less than the legislation under which they are enacted, must constitute an exercise of authority that is within federal competence. If they are not, they will be *ultra vires* the division of powers and, thereby, void in law.

VI. Conclusion

[616] A patient and careful examination of the doctrine reveals that POGG should be, and was always intended to be, a residual and circumscribed power of last resort that preserves the exhaustiveness of the division of powers. It is only available where no enumerated head of power, or combination of enumerated heads of power, is available. The approach of the Attorney General of Canada reflects a troubling misinterpretation of and departure from *Crown Zellerbach* and the doctrine that preceded it. For these reasons, and those of Justice Brown which I adopt, the *Greenhouse Gas Pollution Pricing Act* is *ultra vires* in whole and the reference questions are answered in the affirmative. Accordingly, I would allow the appeals of

the Attorney General of Saskatchewan and the Attorney General of Ontario and I would dismiss the appeal of the Attorney General of British Columbia.

Appeals of the Attorney General of Saskatchewan and of the Attorney General of Ontario dismissed and appeal of the Attorney General of British Columbia allowed, CÔTÉ J. *dissenting in part and* BROWN *and* ROWE JJ. *dissenting.*

Solicitors for the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina; MLT Aikins, Regina.

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Solicitors for the Attorney General of Canada: Attorney General of Canada, Winnipeg; Borden Ladner Gervais, Ottawa.

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

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Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the interveners the Saskatchewan Power Corporation and SaskEnergy Incorporated: McKercher, Saskatoon.

Solicitors for the intervener the Oceans North Conservation Society: Arvay Finlay, Vancouver.

Solicitor for the intervener the Assembly of First Nations: Assembly of First Nations, Ottawa.

Solicitors for the intervener the Canadian Taxpayers Federation: Crease Harman, Victoria.

Solicitor for the intervener Canada's Ecofiscal Commission: University of Ottawa, Ottawa.

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Solicitors for the intervener the Thunderchild First Nation: McKercher, Saskatoon.

SUPREME COURT OF CANADA

CITATION: R. *v.* Sullivan, 2022 SCC 19

APPEAL HEARD: October 12, 2021
JUDGMENT RENDERED: May 13, 2022
DOCKET: 39270

BETWEEN:

Her Majesty The Queen
Appellant

and

David Sullivan
Respondent

AND BETWEEN:

Her Majesty The Queen
Appellant / Respondent on application for leave to cross-appeal

and

Thomas Chan
Respondent / Applicant on application for leave to cross-appeal

- and -

Attorney General of Canada, Attorney General of Quebec, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, British Columbia Civil Liberties Association, Empowerment Council, Systemic Advocates in Addictions and Mental Health, Criminal Lawyers' Association (Ontario), Canadian Civil

Liberties Association, Women's Legal Education and Action Fund Inc. and Advocates for the Rule of Law
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: (paras. 1 to 99)	Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Jamal JJ. concurring)

Her Majesty The Queen *Appellant*

v.

David Sullivan *Respondent*

- and -

Her Majesty The Queen *Appellant / Respondent on application for leave to cross-appeal*

v.

Thomas Chan *Respondent / Applicant on application for leave to cross-appeal*

and

Attorney General of Canada,
Attorney General of Quebec,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
British Columbia Civil Liberties Association,
Empowerment Council, Systemic Advocates in Addictions and Mental Health,
Criminal Lawyers' Association (Ontario),
Canadian Civil Liberties Association,
Women's Legal Education and Action Fund Inc. and
Advocates for the Rule of Law *Interveners*

Indexed as: R. *v.* Sullivan

2022 SCC 19

File No.: 39270.

2021: October 12; 2022: May 13.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Fundamental justice — Presumption of innocence — Reasonable limits — Section 33.1 of Criminal Code preventing accused from raising common law defence of self-induced intoxication akin to automatism — Whether s. 33.1 violates principles of fundamental justice or presumption of innocence — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d) — Criminal Code, R.S.C. 1985, c. C-46, s. 33.1.

Constitutional law — Remedy — Declaration of invalidity — Whether declaration of unconstitutionality issued by superior court pursuant to s. 52(1) of Constitution Act, 1982, can be considered binding on courts of coordinate jurisdiction.

Criminal law — Appeals — Appeals to Supreme Court of Canada — Jurisdiction — Accused convicted of indictable offence at trial — Court of Appeal setting aside conviction and ordering new trial — Crown bringing appeal to Supreme Court of Canada — Accused applying for leave to cross-appeal order of new trial and requesting stay — Whether Court has jurisdiction to hear accused's appeal — Criminal Code, R.S.C. 1985, c. C-46, s. 691.

After having voluntarily taken an overdose of a prescription drug and falling into an impaired state, S attacked his mother with a knife and injured her gravely. He was charged with several offences, including aggravated assault and assault with a weapon. In unrelated circumstances, C fell into an impaired state after he voluntarily ingested magic mushrooms containing a drug called psilocybin. He attacked his father with a knife and killed him, and seriously injured his father's partner. C was tried for manslaughter and aggravated assault. Both S and C argued at their respective trials that their state of intoxication was so extreme that their actions were involuntary and could not be the basis of a guilty verdict for the violent offences of general intent brought against them. C also argued that an underlying brain injury was the significant contributing cause of his psychosis, rather than his intoxication alone, such that he was not criminally responsible.

In the case of S, the trial judge accepted that S was acting involuntarily but decided that the defence of extreme intoxication akin to automatism was not available by virtue of s. 33.1 of the *Criminal Code*. S was convicted of the two assault charges.

The trial judge in C's case dismissed C's constitutional challenge to s. 33.1, during which C had argued that previous decisions of the same court that declared s. 33.1 unconstitutional were binding on the trial judge. C's brain trauma was held to be a mental disorder but not the cause of C's incapacity, which was the result of the voluntary ingestion of magic mushrooms. C was convicted of manslaughter and aggravated assault.

The Court of Appeal heard appeals by S and C together and held that s. 33.1 violates ss. 7 and 11(d) of the *Charter* and is not saved by s. 1. S and C were therefore entitled to raise the defence of automatism. The Court of Appeal also addressed the issue of whether the trial judge in C's case was bound by precedent of a court of coordinate jurisdiction in the province to accept the unconstitutionality of s. 33.1. It held that the ordinary rules of *stare decisis* apply when superior courts in first instance consider whether to follow previous declarations of unconstitutionality. The trial judge was correct to decide that he was not bound by previous decisions and entitled to consider the issue afresh. In the result, S's convictions were set aside and acquittals entered. The Court of Appeal ordered a new trial for C because no finding of fact had been made in respect of non-mental disorder automatism. The Crown appeals to the Court from the Court of Appeal's decision in respect of both S and C, and C applies for leave to cross-appeal the order of a new trial, seeking an acquittal or, in the alternative, a stay of proceedings.

Held: The appeals should be dismissed. C's application for leave to cross-appeal should be quashed for want of jurisdiction.

In the companion appeal of *R. v. Brown*, 2022 SCC 18, the Court concludes that s. 33.1 violates the *Charter* and is of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. That conclusion is applicable to the Crown's appeals in the present cases. In the result, given that s. 33.1 is of no force or effect, S is entitled to acquittals. He established that he was intoxicated to the point of automatism and the trial judge found that he was acting involuntarily. As for C, the Court of Appeal's order for a new trial should be upheld. C may avail himself of the defence of non-mental disorder automatism at a new trial, should it be applicable on the facts.

The ordinary rules of horizontal *stare decisis* and judicial comity apply to declarations of unconstitutionality issued by superior courts within the same province. A decision may not be binding if it is distinguishable on its facts or the court had no practical way of knowing it existed. If it is binding, a trial court may only depart if one or more of the exceptions set out in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.), apply.

Accordingly, a trial judge is not strictly bound by a prior declaration by a court of coordinate jurisdiction by virtue of s. 52(1) of the *Constitution Act, 1982*. A s. 52(1) declaration of unconstitutionality reflects an ordinary judicial task of determining a question of law. Determining whether an impugned law is inconsistent with the provisions of the Constitution and, if so, whether and to what extent the law is

of no force or effect is no different than other questions of law decided outside the constitutional context. Judges cannot in a literal sense strike down legislation when they review the consistency of the law with the Constitution under s. 52(1). A declaration of unconstitutionality simply refutes the presumption of constitutionality; it does not alter the terms of the statute. Questions of law are governed by the normal rules and conventions that constrain courts in the performance of their judicial tasks, including applying the ordinary principles of *stare decisis*. A judicial declaration made under s. 52(1) by a superior court is therefore binding on other courts within the confines of the law relating to precedent.

The principle of constitutional supremacy cannot dominate the analysis of s. 52(1) to the exclusion of other constitutional principles. The legal effect of a s. 52(1) declaration by a superior court must be defined with reference to constitutional supremacy, the rule of law, and federalism. Pursuant to s. 96 of the *Constitution Act, 1867*, superior courts operating within a province only have powers within the province. Federalism prevents a s. 52(1) declaration issued within one province from binding courts throughout the country. Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province and a constitutional ruling will bind lower courts through vertical *stare decisis*. *Stare decisis* is the appropriate framework to apply to litigation of constitutional issues, because it balances stability and predictability against correctness and the orderly development of the law. The Crown may consider an appeal when faced with conflicting trial decisions relating to a law on which the prosecution continues to rely, but is not bound to appeal declarations of

unconstitutionality in criminal matters. However desirable uniform treatment of the substantive criminal law might be within or even across provinces, a decision to appeal remains within the discretion of the relevant attorney general, to be decided in keeping with its authority to pursue the public interest and the constitutional and practical constraints relating to its office.

Varying standards have been invoked to define when departure from prior precedent is appropriate, for example if it is plainly wrong, when there is good reason for doing so or in extraordinary circumstances. These qualitative tags are susceptible of extending to almost any circumstance and do not provide precise guidance. These terms should no longer be used. Judicial comity as well as the rule of law principles supporting *stare decisis* mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances: the rationale of the earlier decision has been undermined by subsequent appellate decisions; some binding authority in case law or some relevant statute was not considered; or the earlier decision was not fully considered, for example if it was taken in exigent circumstances. Where a judge is faced with conflicting authority on the constitutionality of legislation, the judge must follow the most recent authority unless one or more of these three criteria are met. These criteria do not detract from the narrow circumstances in which a lower court may depart from binding vertical precedent.

An application of the doctrine of horizontal *stare decisis* to C's case illustrates how these criteria should work in practice. *R. v. Dunn* (1999), 28 C.R. (5th) 295, did not engage with an earlier Ontario decision that upheld the constitutionality of s. 33.1 and *Dunn* did not apply the criteria to determine whether it was permissible to depart from that precedent; therefore it was a decision *per incuriam* and did not need to be followed. The earlier decision considered the appropriate statutes and authorities in reaching the conclusion that s. 33.1 infringed ss. 7 and 11(d) of the *Charter* but was upheld under s. 1 and there is no indication that it was rendered in exigent circumstances. Therefore, that decision should have been followed by the trial judge in the constitutional ruling in C's case. On appeal, however, the Court of Appeal was not bound to follow any first instance superior court decision.

There is no statutory route for C to appeal the Court of Appeal's order of a new trial. Section 695 of the *Criminal Code* does not provide the Court with the jurisdiction to hear a cross-appeal by C. Sections 691 and 692 of the *Criminal Code* set out the jurisdiction of the Court to hear criminal appeals brought by criminal accused and represent the whole of an accused's express statutory right to appeal when their conviction has been affirmed or their acquittal set aside by the Court of Appeal. In cases like C's, where an accused, having been convicted of an indictable offence at trial, is granted a new trial, s. 691 does not provide a route of appeal to the Court. As for a stay of proceedings, it may only be granted in the clearest of cases, where prejudice to an accused's rights or to the judicial system is irreparable and cannot be

remedied. The record before the Court is insufficient to conclude that C's right to a fair trial is prejudiced.

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By Kasirer J.

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québécois v. Saguenay (City), 2015 SCC 16, [2015] 2 S.C.R. 3; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Ontario (Attorney General) v. G*, 2020 SCC 38; *R. v. Albashir*, 2021 SCC 48; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Wolf v. The Queen*, [1975] 2 S.C.R. 107; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; *Parent v. Guimond*, 2016 QCCA 159; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *R. v. McCann*, 2015 ONCA 451; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. Dunn*, 156 O.A.C. 27; *R. v. Jensen* (2005), 74 O.R. (3d) 561; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Green*, 2021 ONSC 2826; *R. v. Kehler*, 2009 MBPC 29, 242 Man. R. (2d) 4; *R. v. Wolverine and Bernard* (1987), 59 Sask. R. 22; *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988, 4 B.C.L.R. (6th) 370; *R. v. Hinse*, [1995] 4 S.C.R. 597; *R. v. Shea*, 2010 SCC 26, [2010] 2 S.C.R. 17; *Saumur v. Recorder's Court (Quebec)*, [1947] S.C.R. 492; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *R. v. O'Connor*, [1995] 4 S.C.R. 411.

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APPEAL and APPLICATION FOR LEAVE TO CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Watt, Lauwers and Paciocco JJ.A.), 2020 ONCA 333, 151 O.R. (3d) 353, 387 C.C.C. (3d) 304, 63 C.R. (7th) 77, 462 C.R.R. (2d) 231, [2020] O.J. No. 2452 (QL), 2020 CarswellOnt 7645 (WL Can.), setting aside the convictions for manslaughter and aggravated assault entered by Boswell J., 2018 ONSC 7158, [2018] O.J. No. 6459 (QL), 2018 CarswellOnt 20662 (WL Can.), and ordering a new trial. Appeal dismissed and application for leave to cross-appeal quashed.

Joan Barrett, *Michael Perlin* and *Jeffrey Wyngaarden*, for the appellant/respondent on application for leave to cross-appeal.

Stephanie DiGiuseppe and *Karen Heath*, for the respondent David Sullivan.

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Sylvain Leboeuf and *Jean-Vincent Lacroix*, for the intervener the Attorney General of Quebec.

Ami Kotler, for the intervener the Attorney General of Manitoba.

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Noah Wernikowski, for the intervener the Attorney General of Saskatchewan.

Deborah J. Alford, for the intervener the Attorney General of Alberta.

Jeremy Opolsky, *Paul Daly*, *Jake Babad* and *Julie Lowenstein*, for the intervener the British Columbia Civil Liberties Association.

Carter Martell, *Anita Szigeti*, *Sarah Rankin* and *Maya Kotob*, for the intervener the Empowerment Council, Systemic Advocates in Addictions and Mental Health.

Lindsay Daviau and *Deepa Negandhi*, for the intervener the Criminal Lawyers' Association (Ontario).

Eric S. Neubauer, for the intervener the Canadian Civil Liberties Association.

Megan Stephens and *Lara Kinkartz*, for the intervener the Women's Legal Education and Action Fund Inc.

Connor Bildfell and *Asher Honickman*, for the intervener the Advocates for the Rule of Law.

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

[1] After having voluntarily taken an overdose of a prescription drug and falling into an impaired state, David Sullivan attacked his mother with a knife and injured her gravely. He was charged with several offences, including aggravated assault and assault with a weapon. In unrelated circumstances, Thomas Chan also fell into an impaired state after he voluntarily ingested "magic mushrooms" containing a drug called psilocybin. Mr. Chan attacked his father with a knife and killed him and seriously injured his father's partner. He was tried for manslaughter and aggravated assault.

[2] In their different circumstances, both Mr. Sullivan and Mr. Chan argued at their respective trials that their state of intoxication was so extreme that their actions were involuntary and could not be the basis of a guilty verdict for the violent offences of general intent brought against them. Mr. Chan argued in particular that an underlying brain injury was the significant contributing cause of his psychosis, rather than his

intoxication alone, such that he was not criminally responsible pursuant to s. 16 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[3] In the case of Mr. Sullivan, the trial judge accepted the accused was acting involuntarily but decided that the defence of extreme intoxication akin to automatism was not available by virtue of s. 33.1 of the *Criminal Code*. Mr. Sullivan was convicted of the two assault charges. In the case of Mr. Chan, the trial judge dismissed a constitutional challenge to s. 33.1. Mr. Chan's brain trauma was held to be a mental disorder, but not the cause of the incapacity, which was the result of the voluntary ingestion of magic mushrooms. The trial judge in his case rejected his argument under s. 16. He was convicted of manslaughter and aggravated assault.

[4] Their appeals were heard together. The Court of Appeal for Ontario held that s. 33.1 violated ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and was not saved by s. 1. As a result, both Mr. Sullivan and Mr. Chan were entitled to raise the defence of automatism. Based on the findings at his trial, Mr. Sullivan's convictions were set aside and acquittals entered. The Court of Appeal ordered a new trial for Mr. Chan because no finding of fact had been made in respect of non-mental disorder automatism in his case. The Crown has appealed both the decisions for Mr. Sullivan and Mr. Chan to this Court.

[5] In *R. v. Brown*, 2022 SCC 18, released concurrently with the reasons for judgment in these appeals, I conclude that s. 33.1 violates the *Charter* and is of no force

or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. That conclusion is equally applicable to the Crown's appeals in the cases at bar.

[6] As respondent, Mr. Sullivan has raised an issue relating to the character and force of a s. 52(1) declaration of unconstitutionality issued by a superior court. He argued before us that the trial judge had been bound by a previous declaration by a superior court judge in the province that held s. 33.1 to be of no force and effect. The issue raised by Mr. Sullivan provides an opportunity to clarify whether a declaration made under s. 52(1) binds the courts of coordinate jurisdiction in future cases due to the principle of constitutional supremacy, or whether the ordinary rules of horizontal *stare decisis* apply. As I shall endeavour to explain, *stare decisis* does apply and the trial judge was only bound to that limited extent on the question of the constitutionality of s. 33.1. The right approach can be stated plainly. Superior courts at first instance may not be bound if the prior decision is distinguishable on its facts or if the court had no practical way of knowing that the earlier decision existed. Otherwise, the decision is binding and the judge may only depart from it if one or more of the exceptions helpfully explained in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.), apply.

[7] In the result, I would dismiss the Crown's appeal in the case of Mr. Sullivan and confirm the acquittals entered by the Court of Appeal.

[8] As respondent in his appeal before this Court, Mr. Chan seeks leave to cross-appeal and, if granted, he asks that we substitute an acquittal for the order of a

new trial. I would reject Mr. Chan's arguments on this point. In my view, Mr. Chan's application for leave to cross-appeal must be quashed for want of jurisdiction. I would reject his alternative argument that this Court order a stay of proceedings in respect of the very serious violent charges brought against Mr. Chan because the requirements for a stay have not been made out. In the result, I would confirm the Court of Appeal's order of a new trial.

II. Background

A. *David Sullivan*

[9] All parties agree that Mr. Sullivan attacked his mother during an episode of drug-induced psychosis during which he had no voluntary control over his actions. Mr. Sullivan, then 43 years old, lived with his mother in a condominium unit. He has a history of mental illness and substance abuse. Evidence adduced at trial indicated that in the three months before the attack, he was convinced that the planet would be invaded by aliens that were already present in their condominium.

[10] Mr. Sullivan had been prescribed bupropion (under the name Wellbutrin) to help him quit smoking. Psychosis is a side effect of the drug. He had experienced psychosis from Wellbutrin at least once before, shortly before the events in this case. The evening prior to the attack, he ingested 30 to 80 Wellbutrin tablets in a suicide attempt. The drugs prompted a psychotic episode during which time, in the early hours of the morning, he woke his mother and told her an alien was in the living room. She

followed him into the area and, while she was there, Mr. Sullivan went into the kitchen, took two knives, and stabbed his mother six times. She suffered serious injuries, including residual nerve damage that was slow to heal. She died before trial of unrelated causes.

[11] Several neighbours saw Mr. Sullivan acting erratically outside of the building after the attack. Agitated when the police arrived, Mr. Sullivan was talking about Jesus, the devil, and aliens. He was taken to the hospital, where he had multiple seizures. The psychotic episode resolved itself within a few days. At trial, a forensic psychiatrist gave evidence that Mr. Sullivan was likely experiencing a bupropion-induced psychosis at the time of the attack on his mother.

B. *Thomas Chan*

[12] Thomas Chan violently attacked his father and his father's partner with a knife. Mr. Chan's father later died from his injuries. The father's partner was gravely and permanently injured.

[13] After returning home from a bar where they had consumed several alcoholic drinks earlier that evening, Mr. Chan and his friends decided to take magic mushrooms. Mr. Chan had consumed mushrooms before and enjoyed the experience. He ingested an initial dose and when he failed to feel the same effects as his friends, he took a second dose. Towards the end of the night, he began acting erratically. Frightened, he went upstairs where he woke up his mother, mother's boyfriend, and

sister. Mr. Chan then left the home wearing only a pair of pants. His family and friends pursued him as he ran towards his father's home a short distance away. Mr. Chan broke into his father's house through a window even though he normally gained entry through finger-print recognition on a home security system.

[14] Once inside, he confronted his father in the kitchen and did not appear to recognize him. He shouted that he was God and that his father was Satan. He proceeded to stab his father repeatedly. He then stabbed his father's partner. When police arrived, he complied with their demands, although at one point he struggled with what a police officer described as "super-strength".

III. Proceedings Below

A. *David Sullivan*

Ontario Superior Court of Justice, [2016] O.J. No. 6847 (QL), 2016 CarswellOnt 21197 (WL Can.) (Salmers J.)

[15] At trial, the parties agreed, and the trial judge accepted, that Mr. Sullivan was acting involuntarily when he stabbed his mother. The trial judge found that Mr. Sullivan experienced a state of non-mental disorder automatism, attributable to his ingestion of Wellbutrin. His state was caused by a drug for which psychosis is a known side-effect.

[16] The Crown said s. 33.1 applied because Mr. Sullivan's psychosis was self-induced and therefore could not be the basis for a defence that he lacked the general intent or voluntariness for the crimes of assault. There was disagreement about whether Mr. Sullivan's consumption of Wellbutrin was voluntary. Section 33.1 would only preclude the automatism defence if intoxication was "self-induced". The trial judge found that Mr. Sullivan's intoxication was voluntary and that he knew or ought to have known that Wellbutrin would cause him to be impaired. Section 33.1 was applied. He was found guilty of aggravated assault, assault with a weapon, and four counts of breach of a non-communication order. It bears noting that Mr. Sullivan did not contest the constitutionality of s. 33.1 at trial. He received a global sentence of five years.

B. *Thomas Chan*

(1) Constitutional Ruling, 2018 ONSC 3849, 365 C.C.C. (3d) 376 (Boswell J.)

[17] Mr. Chan challenged the constitutionality of s. 33.1 in a pre-trial application, arguing in particular that the trial judge was bound by previous decisions of the same court, notably *R. v. Dunn* (1999), 28 C.R. (5th) 295 (Ont. C.J. (Gen. Div.)), and *R. v. Fleming*, 2010 ONSC 8022, which found s. 33.1 to be unconstitutional.

[18] Boswell J. considered whether, by reason of the doctrine of horizontal *stare decisis*, he was bound by a constitutional declaration by another judge of the superior court in the province that s. 33.1 was of no force or effect because it was inconsistent with the *Charter*. Relying on *R. v. Scarlett*, 2013 ONSC 562, the trial judge held that

he was not so bound. Decisions from courts of coordinate jurisdiction should be followed in the absence of cogent reasons to depart therefrom. A court is bound unless the previous decision is "plainly wrong" (paras. 55-56). The trial judge reasoned that the case law on the constitutionality of s. 33.1 was "considerably unsettled" (para. 58). Although all courts had agreed that s. 33.1 violated ss. 7 and 11(d) of the *Charter*, courts were divided on whether it could be saved under s. 1. As a result, Boswell J. did not "feel constrained to follow one school of thought more than the other" (*ibid.*). In addition, none of the earlier constitutional decisions had had the benefit of the judgment of the Court in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, on the relationship between ss. 7 and 1 (para. 58). He concluded that he was free to reconsider the question afresh.

[19] The trial judge then went on to decide that s. 33.1 violated ss. 7 and 11(d) of the *Charter* but was saved under s. 1.

(2) Judgment on the Merits, 2018 ONSC 7158 (Boswell J.)

[20] With the defence of automatism precluded by operation of s. 33.1, Mr. Chan argued that he was not criminally responsible by reason of brain trauma which, alone or in connection with the effect of the intoxicant, amounted to mental disorder under s. 16. The parties disagreed about whether Mr. Chan was suffering from a brain injury and, if so, whether it played a part in his violent conduct. Mr. Chan argued that but for the brain injury, he would not have been psychotic from consuming the mushrooms. The Crown argued that the primary cause of Mr. Chan's psychosis was

his voluntary consumption of the mushrooms. The trial judge was required to consider, first, whether Mr. Chan was suffering from a mental disorder at the time of the offence and, second, if that mental disorder rendered him incapable of appreciating the nature and quality of his actions, or incapable of knowing they were wrong.

[21] Mr. Chan did not satisfy the applicable requirements under s. 16. The evidence disclosed a mild traumatic brain injury. The trial judge could not conclusively say that the brain injury rendered Mr. Chan incapable of appreciating the nature and quality of his actions or of knowing they were wrong. The progression of his psychosis suggested that the ingestion of psilocybin was the primary cause of Mr. Chan's impaired state. The judge found that "Mr. Chan experienced a sudden onset of psychosis that coincided directly with the ingestion and absorption of magic mushrooms". While the trial judge found that Mr. Chan "was incapacitated by the effects of the drugs he consumed", I note that he made no specific finding that Mr. Chan was in a state of self-induced intoxication akin to non-mental disorder automatism.

[22] Mr. Chan was convicted of manslaughter and aggravated assault. He was later sentenced to a global sentence of five years, reduced to three and a half years after credit reductions (2019 ONSC 1400).

(3) Application to Re-open Constitutional Challenge, 2019 ONSC 783, 428 C.R.R. (2d) 81 (Boswell J.)

[23] After sentencing, Mr. Chan applied to re-open the case to re-argue the constitutional issue. He said that *R. v. McCaw*, 2018 ONSC 3464, 48 C.R. (7th) 359, which had been rendered subsequently, declared s. 33.1 unconstitutional and therefore presented a renewed opportunity to consider the question. In *McCaw*, Spies J. said she was bound by *Dunn*. Spies J. held that once a provision is declared unconstitutional, it is invalid and "off the books" (para. 76) for all future cases by operation of s. 52(1) and as directed in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96. In other words, judges of concurrent jurisdiction are bound by a declaration of unconstitutionality. On that basis, argued Mr. Chan, the trial judge had been bound by the prior declaration of unconstitutionality in *Dunn* when he considered the application of s. 33.1 here.

[24] Boswell J. dismissed Mr. Chan's application to re-open the case. *McCaw* was not an accurate statement of the law. Relying on *Spruce Mills*, a proper understanding of the rule of horizontal *stare decisis* is that relevant decisions of the same level of court should be followed as a matter of judicial comity, unless there are compelling reasons that justify departing therefrom. *Spruce Mills* set out three criteria for departure, which were summarized correctly, in his view, by Strathy J. in *Scarlett* as "plainly wrong" (para. 41).

[25] For Boswell J., *McCaw* misinterpreted the statements by McLachlin C.J. in *Ferguson* that an unconstitutional law is "effectively removed from the statute books" (para. 65). McLachlin C.J. did not express the view that judges of coordinate jurisdiction could not review or reconsider an order striking down a provision under

s. 52. *Ferguson* was not about horizontal *stare decisis*. Boswell J. preferred Strathy J.'s reading of *Ferguson*, which acknowledged the *erga omnes* ("against all" or, as is sometimes said, "against the world") character of a declaration of unconstitutionality but did not extend that effect to courts of coordinate jurisdiction. The question remained as to whether the prior ruling is plainly wrong and there are salient reasons for correcting the error. With respect to *Dunn*, there were good reasons to depart from precedent. The s. 1 analysis was plainly wrong; *Bedford* had changed the relationship between ss. 7 and 1. Moreover there were inconsistent rulings on the matter of the constitutionality of s. 33.1 across the country.

C. *Court of Appeal for Ontario, 2020 ONCA 333, 151 O.R. (3d) 353 (Paciocco J.A., Watt J.A. concurring; Lauwers J.A. concurring in the result)*

[26] The Court of Appeal allowed the appeals and held that s. 33.1 is unconstitutional and of no force or effect. The Court of Appeal's judgment on this point is reviewed in *Brown* and need not be recounted here in detail. For the purposes of this case, I need only note that Paciocco J.A.'s careful reasoning on ss. 7 and 11(d) has been affirmed in *Brown*. In addition, although my own justification analysis differs from that of Paciocco and Lauwers JJ.A., I agree with their ultimate conclusion: s. 33.1 cannot be saved by s. 1. Their conclusion that s. 33.1 is inconsistent with the *Charter* and of no force or effect is equally applicable in these two appeals.

[27] Speaking for the Court on this point, Paciocco J.A. addressed the issue of whether the trial judge in Mr. Chan's case was bound by precedent of a court of coordinate jurisdiction in the province to accept the unconstitutionality of s. 33.1.

[28] In his view, the ordinary rules of *stare decisis* apply when superior courts in first instance consider whether to follow previous declarations of unconstitutionality made by the same court. He distinguished several cases that purported to stand for the proposition that a declaration is binding on other superior court judges unless successfully appealed by the Crown (paras. 34-35, referring to *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; and *Ferguson*). These cases made statements to the effect that a provision inconsistent with the Constitution "is invalid from the moment it is enacted" in all future cases and is "effectively removed from the statute books" (*Martin*, at paras. 28 and 31; see *Ferguson*, at para. 65; *Hislop*, at para. 82). Paciocco J.A. read these cases as describing the effect of s. 52(1) declarations rendered by the Supreme Court because it is the apex court in Canada. They did not oust the principles of *stare decisis* generally nor did they pertain to declarations made by lower courts.

[29] If all s. 52(1) declarations were binding, wrote Paciocco J.A., accuracy would be compromised. For example, if three superior court judges in succession upheld a provision, but a fourth judge's ruling declared it to be of no force and effect, only the fourth judge's ruling would take hold within a province absent an appeal by

the Crown. The development of the law would be "driven by coincidence" rather than by the "quality of the judicial ruling" (para. 37).

[30] The principles in *Spruce Mills* and *Scarlett* were affirmed. Applied to the context of s. 52(1) declarations of unconstitutionality, a superior court judge faced with a prior judgment of a court of coordinate jurisdiction should apply that precedent and treat the provision as having no force or effect unless, by exception to the principle of horizontal *stare decisis*, the earlier decision is plainly wrong. The trial judge was correct to decide that he was not bound by *Dunn* and entitled to consider the issue afresh.

[31] Having declared s. 33.1 unconstitutional and of no force or effect, Paciocco J.A. entered acquittals for Mr. Sullivan on his assault charges. Mr. Chan was entitled to a new trial, but not acquittals. The trial judge made no finding that Mr. Chan was acting involuntarily. Instead, the trial judge rejected Mr. Chan's claim that he should be found not criminally responsible, a claim that does not require the establishment of automatism. Mr. Chan should have the opportunity to invoke the defence of non-mental automatism and lead evidence in that regard at a new trial.

IV. Issues

[32] As noted, the Crown appeals on the constitutionality of s. 33.1 cannot succeed for the reasons stated in *Brown*. The Court of Appeal correctly concluded that s. 33.1 infringes ss. 7 and 11(d) and cannot be saved under s. 1.

[33] There are two remaining issues in these appeals:

1. On what basis can a declaration issued by a superior court pursuant to s. 52(1) of the *Constitution Act, 1982* be considered binding on courts of coordinate jurisdiction?

2. Does the Court have jurisdiction to hear Mr. Chan's cross-appeal? If so, is he entitled to an acquittal? If not, is he nevertheless entitled to a stay of proceedings?

[34] For the reasons that follow, I conclude on the first issue that the ordinary rules of *stare decisis* and judicial comity apply to declarations of unconstitutionality issued by superior courts within the same province. On the second issue, I conclude the Court lacks jurisdiction to hear the cross-appeal. I would not order a stay. The Court of Appeal's order for a new trial for Mr. Chan should be upheld, as should the acquittals it entered for Mr. Sullivan.

V. Analysis

A. *Section 52(1) Declarations of Unconstitutionality and Horizontal Stare Decisis*

[35] Presented in the General Part of the *Constitution Act, 1982* under the heading "Primacy of Constitution of Canada", s. 52(1) provides:

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

[36] The parties disagree on the rules that apply after a superior court declares a law inconsistent with the *Charter* and thus of no force or effect pursuant to s. 52(1).

[37] Mr. Sullivan observes that at the time he was convicted at trial, s. 33.1 had already been declared of no force and effect by other judges of the superior court in the province of Ontario. He recalls that starting in *Dunn*, in 1999, four separate superior court judgments were rendered "striking [s. 33.1] down" (R.F., at para. 85). Mr. Sullivan says that a declaration issued by a court of coordinate jurisdiction under s. 52(1) of the *Constitution Act, 1982* invalidates the law for all future cases. In deciding the contrary, the trial judge in Mr. Chan's case and the Court of Appeal failed to recognize the effect on the law of the declaration issued under s. 52(1). Paciocco J.A., writing for a unanimous court on this point in appeal, erred in deciding that the matter is governed by the ordinary principles of *stare decisis* and by adopting the test of judicial comity explained in *Scarlett* and *Spruce Mills*.

[38] Mr. Sullivan, along with a number of interveners, submit that a superior court only "discovers" that a law is unconstitutional when it issues a declaration pursuant to s. 52(1) — the law becomes of no force or effect through the operation of s. 52(1). He relies on statements from this Court which characterize a s. 52(1) declaration as rendering the law "null and void", a finding which applies "for all future cases" and that the law is unenforceable because it is "effectively removed from the

statute books" (*Martin*, at para. 31; *Ferguson*, at para. 65, *Hislop*, at para. 82). Consistent with those statements, says Mr. Sullivan, when a superior court issues a s. 52(1) declaration of unconstitutionality, the impugned provision is nullified both prospectively and retrospectively. The intervener British Columbia Civil Liberties Association argues further that, by its nature, a s. 52(1) declaration by a superior court has universal effect beyond the parties "for all Canadians" and thus must bind courts across the country. The intervener Advocates for the Rule of Law adds that a s. 52(1) declaration derives its force from the Constitution and that permitting the government to relitigate a law's constitutionality after it has been declared of no force or effect would be inconsistent with the Constitution's remedial scheme. Finally, the Canadian Civil Liberties Association intervenes to warn of the potential undermining of the rule of law and consequential unpredictability if the ordinary rules of *stare decisis* apply.

[39] Although it argues that the Court of Appeal made no mistake in holding that the ordinary rules of *stare decisis* apply here, the Crown recalls that the matter is technically moot. Even if the trial judges were obliged to follow *Dunn*, this Court is not so bound and the lower courts' failure to do so has no practical impact on the outcome of these appeals. But, says the Crown, the question raised by Mr. Sullivan should still be decided.

[40] I agree that the matter can and should be decided here (*Rules of the Supreme Court of Canada*, SOR/2002-156, r. 29(3); *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at paras. 18-26). The question is one of public importance to the conduct

of constitutional litigation in courts of first instance in Canada. Moreover the question was carefully considered by the courts below and, in this Court, has been addressed by the parties with additional submissions on either side of the question by interveners.

[41] On the substance of the matter, the Crown argues that while s. 52(1) declarations are *erga omnes* in nature, they do not necessarily stand as authority for all future cases to be decided of coordinate jurisdiction or bind across the country. Mr. Sullivan's approach compromises the rule of law by allowing for erroneous findings of unconstitutionality to stand. The rules of *stare decisis* provide the flexibility needed to balance finality with correctness.

[42] The Attorneys General of British Columbia, Quebec and Canada intervene in support of the Crown's position. British Columbia submits that a s. 52(1) declaration should be reconsidered only where there is palpable and overriding error or where the threshold in *Bedford* is met. Quebec argues the "plainly wrong" standard should be qualified; a previous decision should only be set aside where there is a new question of law or a change in the situation or evidence that leads to materially different circumstances. Canada observes that disagreement between lower courts helpfully generates considered opinions upon which appellate courts can rely for their own reasoning.

[43] For the reasons that follow, I agree with the Crown that the trial judge was not strictly bound by the prior declaration by a court of coordinate jurisdiction by virtue of s. 52(1). In my respectful view, Mr. Sullivan's understanding of the effect of a

declaration under s. 52(1) is mistaken. A s. 52(1) declaration of unconstitutionality reflects an ordinary judicial task of determining a question of law, in this case with respect to the consistency of a law with the requirements of the *Charter*. Questions of law are governed by the normal rules and conventions that constrain courts in the performance of their judicial tasks.

[44] In the result, I agree with the conclusion reached by Paciocco J.A. that the ordinary principles of *stare decisis* govern the manner in which a declaration issued by a court under s. 52(1) affects how courts of coordinate jurisdiction in the province should decide future cases raising the same issue. I would however clarify the situations when a superior court may depart from a prior judgment of a court of coordinate jurisdiction. The standard is not that the prior decision was "plainly wrong". A superior court judge in first instance should follow prior decisions made by their own court on all questions of law, including questions of constitutional law, unless one or more of the exceptions in *Spruce Mills* are met.

(1) Section 52(1) Declarations of Unconstitutionality Reflect the Exercise of Judicial Power to Decide Questions of Law

[45] I start with a simple point: in issuing a declaration that a law is inconsistent with the Constitution and thus of no force or effect, a judge is exercising an ordinary judicial power to determine a question of law. Given the nature of the power they exercise, judges cannot in a literal sense "strike down legislation" when they review the consistency of the law with the Constitution under s. 52(1). Mr. Sullivan

misconstrues the power of judges when he says that the effect of a declaration of unconstitutionality is that the impugned law is removed from the statute books going forward. In our law, legislatures have the power to remove laws from the statute books, or to modify those statutes, not judges (see D. Pinard, "De l'inhabilité des juges à modifier le texte des lois déclarées inconstitutionnelles", in P. Taillon, E. Brouillet and A. Binette, eds., *Un regard québécois sur le droit constitutionnel: Mélanges en l'honneur d'Henri Brun et de Guy Tremblay* (2016), 329, at p. 342). Professor Pinard convincingly frames this judicial power as one grounded in legal interpretation and recalls the distinction, that she rightly says is sometimes neglected, between legal rules and the textual expression of those rules. Judges, in their interpretative task as it bears on statutory law under s. 52(1), have no power to [TRANSLATION] "alter the text of rules of written law" (p. 329, fn. 2 (emphasis deleted)). She writes:

> [TRANSLATION] Judicial review for constitutionality concerns the impugned rule, not the text of written law that expresses the rule. The necessary legislative reworking, if any, will only be done after the judgment of unconstitutionality, by the relevant legislature. [p. 347]

[46] Contrary to what Mr. Sullivan suggests, while s. 33.1 was declared to be inconsistent with the Constitution and of no force or effect in *Dunn*, it was not, by the effect of that judgment, "struck from the books". As I seek to explain below, when this Court in *Ferguson* stated that a law is effectively removed from the statute books, it was not speaking in literal terms. The effect of the judicial declaration in this case, where s. 33.1 is considered to be inconsistent with the Constitution, is not to annul the law but, as the French text of s. 52(1) makes especially plain, to declare that it is

"*inopérante*" (see M.-A. Gervais, "Les impasses théoriques et pratiques du contrôle de constitutionnalité canadien" (2021), 66 *McGill L.J.* 509, at p. 521, at fn. 45, citing P.-A. Côté, "La préséance de la Charte canadienne des droits et libertés" (1984), 18 *R.J.T.* 105, at pp. 108-10; see also F. Gélinas, "La primauté du droit et les effets d'une loi inconstitutionnelle" (1988), 67 *Can. Bar Rev.* 455, at pp. 463-64).

[47] A second equally simple point flows from the first and also appears to have been neglected by Mr. Sullivan. In authorizing a competent judge to issue a declaration under s. 52(1), the *Constitution Act, 1982* also invites the court to decide an ordinary question of law, albeit one with constitutional implications. Specifically, s. 52(1) asks the court to determine whether the impugned law is "inconsistent with the provisions of the Constitution" and, if so, to measure "the extent of this inconsistency" to decide whether and to what extent the law is of no force or effect. To do so, the court interprets the impugned law and interprets the Constitution. In Mr. Chan's case, the trial judge was called upon to determine whether there was an inconsistency between the *Charter* and s. 33.1. To decide that, he had to resolve the legal question relating to the meaning of ss. 7, 11(d) and 1 of the *Charter* and the meaning of s. 33.1.

[48] Notwithstanding the heady constitutional context, these are ordinary judicial tasks raising questions of law. Under s. 52(1) of the *Constitution Act, 1982*, courts are called upon to resolve conflicts between the Constitution and ordinary statutes (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 746). Properly understood, the supremacy clause refers to the hierarchy of laws in the

constitutional order. Superior courts are empowered to determine whether a provision is inconsistent with the Constitution in accordance with this hierarchy. These questions of law are no different than other questions of law decided outside the constitutional context (A. Marcotte, "A Question of Law: (Formal) Declarations of Invalidity and the Doctrine of Stare Decisis" (2021), 42 *N.J.C.L.* 1, at p. 9). Judicial review of legislation on federalism or *Charter* grounds has been described as a "normal judicial task" similar to the "interpretation of a statute" (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at §5-21; R. Leckey, *Bills of Rights in the Common Law* (2015), at p. 55). As judicial review of legislation is an ordinary judicial task consisting of the determination of a question of law, the legal effects of the declaration of unconstitutionality that results should be governed by the ordinary rules of *stare decisis* (Marcotte, at p. 21). In its effect, a declaration of unconstitutionality simply refutes the presumption of constitutionality by deciding that the impugned provisions are inconsistent with the Constitution and therefore of no force or effect. It does not alter the terms of the statute (see, e.g., *R. v. P. (J.)* (2003), 67 O.R. (3d) 321 (C.A.), at para. 31; Gervais, at pp. 535-38).

[49] Having indicated my view that a s. 52(1) declaration of unconstitutionality is an ordinary judicial task that involves resolving a question of law rather than an expression of the authority of a superior court to alter the statute book, I now turn to the legal nature and effect of a s. 52(1) declaration beyond the parties to litigation.

(2) *Stare Decisis* Governs Declarations of Unconstitutionality

[50] Mr. Sullivan argues that an unconstitutional law is invalid from the moment it was first enacted, due to the operation of s. 52(1) and the principle of constitutional supremacy. In effect, s. 52(1) renders a law invalid or "null and void" retrospectively and prospectively. As a result, when a superior court "discovers" that legislation is unconstitutional, absent an appeal, the legislation is null and void for all future cases. In support of this argument, he points specifically to the judgment of Spies J. in *McCaw* who decided she was bound by a previous judgment of her court in *Dunn* declaring that s. 33.1 was unconstitutional where the Crown had chosen not to appeal. Spies J. relied specifically on *Ferguson* for this conclusion: "To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books" (*Ferguson*, at para. 65, cited by Spies J. in *McCaw*, at para. 60).

[51] I respectfully disagree.

[52] Understanding the comments of this Court in *Ferguson* requires the reader to recall the context in which that case was rendered. The Court rejected the argument, in connection with the application of mandatory minimum sentences, that individual exemptions be granted by judges from otherwise unconstitutional laws. McLachlin C.J. sought to underscore, in understandably strong language, that a s. 52(1) declaration did not operate on a case-by-case remedial basis as would a constitutional remedy available under s. 24(1) of the *Charter*, but instead that the issuing court's declaration that the law was of no force or effect was applicable *erga omnes*. The impugned legislation was

not to be applied, as a matter of course, to some litigants and not others according to judicial discretion (see *Ferguson*, at para. 35).

[53] That said, *Ferguson* does not change the fact that the declaration remains an exercise of judicial power by which a judge determines a question of law. As such, the determination of that question of law is binding *erga omnes* as a matter precedent, according to the ordinary rules of *stare decisis*, and not because that law has been truly removed from the statute books (see H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. I.54). Judges, of course, do not have that latter power. To suggest that, by its use of a figure of speech, this Court lost sight of this is, in my view, a mistaken reading of the case. I note that some scholars have similarly commented upon the formulation of the observations in *Ferguson* and like observations made by this Court as to the effect of a s. 52(1) declaration (see, e.g., Marcotte, at pp. 13-14 and 16-17; Pinard, at p. 349). Indeed *Ferguson* points to a plain understanding that the declaration issued under s. 52(1) is the exercise of judicial power that has an *erga omnes* vocation. I read the occasional references to s. 52(1) as judgments *in rem* in the cases (see, e.g., *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181, at para. 27), in the same way. A judgment *in rem* applies beyond the immediate parties but, ultimately, even in the context of a s. 52(1) declaration, it remains a judgment: an exercise of judicial power that determines a question of law (*Coquitlam (City) v. Construction Aggregates Ltd.* (1998), 65 B.C.L.R. (3d) 275 (S.C.), at paras. 11-17, aff'd 2000 BCCA 301, 75 B.C.L.R. (3d) 350, leave to appeal dismissed, [2001] 1 S.C.R. ix, cited in Marcotte, at p. 14, fn. 64; see also L. Sarna, *The Law of*

Declaratory Judgments (4th ed. 2016), at p. 158). It is binding precedent, to be sure, but within the proper limits of the doctrine of *stare decisis*.

[54] I am thus content to read *Ferguson* as a useful figure of speech rather than take what the Court said in literal terms. McLachlin C.J. sought to show, in connection with the dispute as to remedy before the Court in that case, that under s. 52(1), as opposed to s. 24(1) of the *Charter*, the law was unconstitutional *erga omnes* and not on a case-by-case basis. At a technical level, it is true that the explanation for that is rooted in s. 52(1), as other cases have suggested. But ultimately, that effect requires the exercise of judicial power to declare the law to be unconstitutional. And the exercise of that power requires the judge to make a determination of an ordinary question of law: by interpreting the impugned law and the relevant provisions of the Constitution, whether the impugned law is inconsistent with Canada's supreme law. If so, then the law is, of course, of no force or effect for all future cases, insofar as that judicial declaration made under s. 52(1) by a superior court is binding on other courts and within the right confines of the law relating to precedent. Other decisions of this Court that use the language of "striking out" or "striking down" or "severing" statutory text should be understood in a similarly figurative manner, rendering the text merely inoperative pursuant to s. 52(1) as opposed to altering or repealing the text in the literal sense (see *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 94, and *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, at para. 67, cited in Pinard, at pp. 331-34; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 695; Gervais, at p. 530; see also *Windsor (City) v. Canadian Transit*

Co., 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 70; *R. v. Lloyd*, 2016 SCC 130, [2016] 1 S.C.R. 13, at para. 15; P. W. Hogg and A. A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75, at p. 100).

[55] Similarly, the principle from *Martin* that the "invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1)" must be understood in its entire context (para. 28). *Martin* concerned the ability of administrative tribunals to consider the constitutionality of provisions of their enabling statutes (para. 27). Gonthier J. determined that an administrative tribunal empowered to consider and decide questions of law through its enabling statute must also have the power to determine a provision's consistency with the *Charter* because its constitutionality is a question of law (K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 6:3). Such a determination is not binding on future decision-makers (paras. 28 and 31). Importantly, Gonthier J. added that only through "obtaining a formal declaration of invalidity by a [superior] court can a litigant establish the general invalidity of a legislative provision for all future cases" (para. 31), a point taken up in later cases of this Court (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 153; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257, at paras. 43-44; *Ontario (Attorney General) v. G*, 2020 SCC 38, at para. 88). In other words, it is the constitutional determination of a superior court judge that binds future decision makers (*R. v. Albashir*, 2021 SCC 48, at paras. 64-65). The inconsistency spoken to in s. 52(1) is revealed through litigation,

specifically the judgment that declares the inoperability of the impugned law. The doctrine of *stare decisis* extends the effect of that judgment beyond the parties to the case, *erga omnes* within the province at least — subject to the limits of the doctrine itself. The issue in these appeals concerns the binding nature of such a judgment, and, in my view, consonant with our jurisprudence, a s. 52(1) declaration establishes unconstitutionality "for all future cases" through the authority of the judgment that makes that declaration. I agree with Paciocco J.A., at para. 34 of the judgment in appeal, that Gonthier J. was not seeking to alter the principles of *stare decisis* in *Martin*.

[56] I add that this explanation does not reduce the declaration to an individual remedy, as some interveners suggest. While it is true that *stare decisis* pertains to the reasons given by a court and a s. 52(1) declaration is a remedy, the reasons explain the status of the impugned law in terms of its consistency with the Constitution. The constitutional status of the law is, as I say, a question of law. The scope of the legal reasoning extends beyond the individual claimant, with effect beyond the parties flowing from the binding character of the judgment as a matter of precedent (*Albashir*, at para. 65). The granting of a personal remedy under s. 24(1), in contrast, is a highly factual exercise, involving the application of law to a specific context — that someone has obtained a s. 24(1) remedy in a case says very little about whether a subsequent claimant is entitled to the same relief (*Ferguson*, at paras. 59-61; *Albashir*, at para. 65).

[57] In other words, in *McCaw*, Spies J. was right to conclude she was not free to ignore prior decisions but, with respect, she arrived at that conclusion for what

appears to be the wrong reason (para. 76). It was right to say that, in considering whether to follow *Dunn*, the court was obliged to consider s. 33.1 as having been declared, by a judge of her court, as unconstitutional. But the result of that declaration was not that s. 33.1 was "off the books" (it remains of course on the books until Parliament chooses to remove it) (para. 76). Spies J. was bound to follow precedent because as a matter of horizontal *stare decisis*, *Dunn* was binding on courts of coordinate jurisdiction in the province as a matter of judicial comity, unless an exception to horizontal *stare decisis* was established. It was true that s. 33.1 was of no force and effect. It was true that the declaration in *Dunn* applied not just to the parties in that case but to all future cases. But, with respect, it was wrong to say that "judicial comity has no relevance to the issue before me" (*McCaw*, at para. 76). If she had concluded that *Dunn* had been rendered *per incuriam* ("through carelessness" or "by inadvertence"), for example, it would not have been binding on the court in *McCaw* based on the ordinary rules of *stare decisis* as interpreted in *Spruce Mills*. Indeed, as suggested by this Court in *Martin*, Spies J. could not apply an invalid law. It is certainly true, as suggested in *Ferguson*, that she had "no discretion" to do so (para. 35). Yet Spies J. was bound, as a matter of precedent, by the prior judgment of a court of coordinate jurisdiction to consider s. 33.1 to be unconstitutional, insofar as the doctrine of horizontal *stare decisis* so required.

[58] By contrast, in Mr. Chan's case, Boswell J. decided, as a matter of discerning applicable and binding precedent, that *Dunn* did not bind him. While he may have erred in respect of his explanation as to why *Dunn* was not binding, he was right

to consider the matter from the point of view of binding precedent and the doctrine of horizontal *stare decisis*.

[59] I would add — and here I likely part company with the Court of Appeal in the present case — that the same principles apply to judicial declarations made by this Court under s. 52(1). I respectfully disagree with the view that, as the apex court in the Canadian judicial system, the Supreme Court of Canada is invested with a special mandate to strike laws from the books. The judges of this Court are judges, not legislators. If it is true that the declarations of this Court under s. 52(1) have a qualitatively different effect than declarations made by judges of other courts, it is on the basis of vertical *stare decisis* — the idea that other courts are bound to follow precedent set by higher judicial authority — and not because the Constitution has invested the judges of this Court with a power that is in some way non-judicial (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, for a related expression of this same idea).

(3) The Role of Federalism and the Rule of Law

[60] The principle of constitutional supremacy cannot dominate the analysis of s. 52(1) to the exclusion of other constitutional principles. Mr. Sullivan points to the idea that an unconstitutional law is invalid from the moment it is enacted. But the strict enforcement of such a principle "cannot easily be reconciled with modern constitutional law" (*Albashir*, at para. 40). Instead, it is subject to a number of exceptions and s. 52(1) must be read "in light of all constitutional principles" (*Albashir*, at paras. 40 and 42; *G*, at para. 88). In *Albashir*, my colleague Karakatsanis J. explained

that declarations of unconstitutionality are generally retrospective, consistent with the notion that a law is unconstitutional from its enactment. However, other constitutional principles may require a purely prospective declaration of unconstitutionality or a suspended declaration. Similarly, the legal effect of a s. 52(1) declaration by a superior court must be defined with reference to constitutional supremacy, the rule of law, and federalism.

[61] It is often said there are four fundamental organizing precepts of the Constitution: federalism, democracy, constitutionalism and the rule of law and respect for minorities (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 32, 43 and 49). Of particular importance in the context of s. 52(1), the principle of constitutional supremacy must be balanced against federalism and the rule of law (see *Albashir*, at paras. 30 and 34). This point has been neglected by Mr. Sullivan and some of the interveners who argue that a declaration of unconstitutionality has the effect of rendering a law null and void as "against the world" without regard for the territorial limits of the administration of justice within a province. Yet even in *McCaw*, Spies J. understood that effect to be limited to the province (para. 77). Author Mark Mancini acknowledges that this is linked to a proper understanding of s. 96 of the *Constitution Act, 1867*, which explains that because superior courts operating "within the province" only have powers within the province, courts of one province are not bound by decisions of courts of another province ("Declarations of Invalidity in Superior Courts" (2019), 28:3 *Const. Forum* 31, at p. 35, relying on *Wolf v. The Queen*, [1975] 2 S.C.R. 107; see also Gervais, at p. 561; Brun, Tremblay and Brouillet, at para. I.106). I agree.

[62] Federalism prevents a s. 52(1) declaration issued within one province from binding courts throughout the country: indeed, to allow a declaration of unconstitutionality issued by a superior court in British Columbia to bind a superior court, much less an appellate court, in Quebec or Alberta would be wholly inconsistent with our constitutional structure (see, e.g., *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 70). It cannot be the case that the supremacy clause compels this outcome, through the simple operation of s. 52(1) (see C.A. reasons, at para. 35). I understand this to be a major obstacle to Mr. Sullivan's argument, not just as a matter of the territorial scope of the effect of s. 52(1) declarations, but in respect of the theoretical basis for arguing why and how they would operate outside the confines of the ordinary rules of *stare decisis*. If the provision of s. 33.1 was truly "off the books" because a s. 52(1) declaration resulted in it being considered null and void, it is hard to explain why — not least from the perspective of the accused in another province — it would be null and void in one part of the country and not another.

[63] The better view is that s. 33.1 is not null and void, but inoperative by reason of a determination of law made by a judge. That determination is binding, within the province, unless there is valid reason to depart from it. The accused is free to make that argument and a court of coordinate jurisdiction is not irretrievably bound by the prior decision within the province. Needless to say, the declaration of unconstitutionality made by a superior court in one province may be followed in another province because it is persuasive (see, e.g., *Parent v. Guimond*, 2016 QCCA 159, at paras. 11 et seq. (CanLII); Brun, Tremblay and Brouillet, at para. I.105). Thus, I reject the arguments

from Mr. Sullivan and the interveners that a s. 52(1) declaration is of such a unique legal character that, once a declaration is issued anywhere in the country, its effect is that the impugned legislation is "no longer in the system" from coast to coast. Instead, a s. 52(1) declaration is the end-result of a judge's ability to resolve questions of law and should be observed by courts of coordinate jurisdiction within the province as a matter of *stare decisis*: nothing more or less.

[64] It follows there is no supplementary power held by courts when issuing a declaration of unconstitutionality beyond the strictures imposed by the rules of *stare decisis*. Precedent requires judges to examine prior judicial decisions, examine the *ratio decidendi* in order to determine whether the *ratio* is binding or distinguishable and, if binding, whether the precedent must be followed or departed from (see M. Rowe and L. Katz, "A Practical Guide to *Stare Decisis*" (2020), 41 *Windsor Rev. Legal Soc. Issues* 1, at pp. 8-12; D. Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2006), 32 *Man. L.J.* 135, at p. 141; see also *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 71). Adherence to precedent furthers basic rule of law values such as consistency, certainty, fairness, predictability, and sound judicial administration (*Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 137; *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.), at paras. 118-21). It helps ensure judges decide cases based on shared and general norms, rather than personal predilection or intuition (J. Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2012), 111 *Mich. L. Rev.* 1, at pp. 22-23). The rule of law itself

has constitutional status, recognized in the preamble of the *Charter*. It "lie[s] at the root of [Canada's] system of government" (*Reference re Secession of Quebec*, at paras. 32 and 70).

[65] Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province, and applies to a ruling on the constitutionality of legislation as it does to any other legal issue decided by a court, if the ruling is binding. While not strictly binding in the same way as vertical *stare decisis*, decisions of the same court should be followed as a matter of judicial comity, as well as for the reasons supporting *stare decisis* generally (Parkes, at p. 158). A constitutional ruling by any court will, of course, bind lower courts through vertical *stare decisis*.

[66] *Stare decisis* brings important benefits to constitutional adjudication that balance predictability and consistency with changing social circumstances and the need for correctness. As Robert J. Sharpe has observed, an incorrect constitutional decision by a court is more difficult to repair and may require legislative intervention (*Good Judgment: Making Judicial Decisions* (2018)). It would be unwise for a single trial judge in a province to bind all other trial judges. It is better to revisit precedent than to allow it to perpetuate an injustice (Sharpe, at pp. 165-68). Were s. 52(1) declarations strictly binding for all future cases, none of these benefits would be realized and our constitutional law would ossify. It is for these reasons that McLachlin C.J. asserted that "*stare decisis* is not a straitjacket that condemns the law to stasis" (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 44). Horizontal *stare*

decisis attempts to balance stability and predictability against correctness and the orderly development of the law.

[67] In the absence of the supporting theory of *stare decisis*, *res judicata* on its own is not a helpful lens through which to analyse s. 52(1) declarations. *Res judicata* estops relitigation of disputed facts and disputed mixed questions of fact and law (B. Garner et al., *The Law of Judicial Precedent* (2016), at p. 374). The formal requirements of the two main branches of *res judicata*, cause of action and issue estoppel, will not be met in cases relitigating the constitutionality of a provision, for the simple reason that the parties will not be the same and neither will the facts. I acknowledge that courts also have inherent ability to prevent an abuse of process, which prevents relitigation of an issue where the strict test for *res judicata* is not met, in order to "[preserve] the integrity of the court's process" (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 42).

[68] *Stare decisis* is the better framework to apply to litigation of constitutional issues, as it better guards against the relitigation of law, whereas *res judicata* guards against the relitigation of facts. First, abuse of process is not confined within a province and applying it to relitigation of the constitutionality of legislation would require a court to consider whether the parties are estopped from arguing the issue because a court in another jurisdiction has already decided on it. Even more remarkably, applying abuse of process to these types of cases would require a court of appeal to consider whether it should hear an appeal where a trial court in another province has already ruled on the

constitutionality of an issue. Second, *stare decisis* and the test from *Spruce Mills* serve as a better guide for trial judges to determine whether to depart from horizontal precedent. At its core, this question relates to the rule of law and judicial comity. Applying abuse of process would unnecessarily confuse this analysis. Finally, courts must adjudicate constitutional issues — applying abuse of process or *res judicata* would prevent a court from even considering new constitutional arguments or issues. This would be unwise and would undermine constitutional supremacy. It would also prevent the courts from adapting to changing social circumstances, a fundamental feature of our constitutional order.

[69] Lastly, I note that some have been critical of the fact that the constitutional status of s. 33.1 has remained unsettled before trial courts across the country more than twenty years after its enactment by reason, in part, of a lack of appeals by the prosecution. Section 33.1 was declared unconstitutional by several trial courts in different provinces and upheld in others over this period. Notwithstanding declarations of unconstitutionality by trial courts, the Crown continued to rely on the provision in subsequent cases. One intervener before us suggested that the Crown must appeal declarations of unconstitutionality at the first opportunity or accept the lower court's conclusion for all future cases. In the legal literature, some have said that it is unacceptable, in respect of federal legislation, for a provision to be unconstitutional in one province and not in another, or for a law to be applied inconsistently within a province because its constitutionality remains unsettled.

[70] While one might well expect the authorities to consider an appeal when faced with conflicting trial decisions relating to a law on which the prosecution continues to rely, I respectfully disagree with the view that the relevant attorney general is bound to appeal declarations of unconstitutionality in criminal matters such as these. It is true that when put on notice that the constitutionality of a provision has been challenged, the attorney general has the "opportunity" to defend the impugned law and appeal a declaration of unconstitutionality where an appeal does lie (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 19; see also *R. v. McCann*, 2015 ONCA 451, at para. 6 (CanLII)). Yet however desirable uniform treatment of the substantive criminal law might be within or even across provinces, the decision to appeal remains within the discretion of the attorney general, who acts independently in deciding the question, in keeping with its authority to pursue the public interest (see, e.g., M. Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009), 34 *Queen's L.J.* 813, at pp. 819 and 825; K. Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006), 31 *Queen's L.J.* 598, at pp. 608-10, citing J. Ll. J. Edwards, *The Law Officers of the Crown* (1964), at p. 228).

[71] Barring an abuse of that authority, the attorney general is not answerable for the exercise of its discretion in such matters before the courts (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 44 and 46). The attorney general might well choose not to appeal a declaration of unconstitutionality, for example, if it felt that the matter is insufficiently developed in the decided cases for proper consideration by an

appeal court or that a conviction would best be left alone. For example, there was no appeal from the constitutional ruling in *Dunn* notwithstanding an appeal from sentence (see, e.g., *R. v. Dunn* (2002), 156 O.A.C. 27 (C.A.); see also *R. v. Jensen* (2005), 74 O.R. (3d) 561 (C.A.)). That said, unsettled constitutional law, "and the uncertainty and unpredictability that [can] result", may of course be a matter of serious consequence (*Ferguson*, at para. 72, cited in *Nur*, at para. 91).

[72] Before us, it was argued that the peculiar circumstances of this case highlight that the constitutional status of s. 33.1 remained unsettled for a significant period of time. It is not, of course, the role of this Court to instruct the Attorney General of Canada in the exercise of its prosecutorial discretion or the other tools it has at its disposal in the exercise of its charge. I do note that the Attorney General of Canada itself has written that "the Attorney General may conclude that it is in the public interest to appeal a *Charter* decision to the Supreme Court of Canada in order to allow for a pan-Canadian determination of the legislation's constitutionality, as well as a pan-Canadian interpretation of the relevant *Charter* right" (Department of Justice Canada, *Principles Guiding the Attorney General of Canada in Charter Litigation* (2017), at p. 10). In making these comments, I acknowledge the constitutional and practical constraints on the office of the attorney general in the pursuit of its role as the "protector of the public interest" in the proper functioning of the criminal justice system (see, e.g., *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983, at para. 27-28; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616).

(4) Proper Approach to Horizontal *Stare Decisis*

[73] Horizontal *stare decisis* applies to decisions of the same level of court. The framework that guides the application of horizontal *stare decisis* for superior courts at first instance is found in *Spruce Mills*, described by Wilson J. as follows (at p. 592):

> . . . I will only go against a judgment of another Judge of this Court if:
> (a) Subsequent decisions have affected the validity of the impugned judgment;
> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
> (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[74] The *Spruce Mills* criteria have been followed in numerous cases across Canada. However, the analytical framework has, at times, been blurred and the criteria have occasionally been of difficult application. Varying standards have been invoked to define when departure from prior precedent is appropriate. For example, some have held that a prior decision can be ignored if it is "plainly wrong" (*R. v. Green*, 2021 ONSC 2826, at paras. 9 and 24 (CanLII)), when there is "good reason" for doing so (*R. v. Kehler*, 2009 MBPC 29, 242 Man. R. (2d) 4, at para. 42), or in "extraordinary circumstances" (*R. v. Wolverine and Bernard* (1987), 59 Sask. R. 22 (Q.B.), at para. 6). The standards of "plainly wrong", "good reason", and "extraordinary circumstances" are qualitative tags susceptible of extending to almost any circumstance and do not provide the same precise guidance that *Spruce Mills* does (see S. Kerwin, "*Stare Decisis* in the B.C. Supreme Court: Revisiting *Hansard Spruce Mills*" (2004), 62

Advocate 541, at p. 543, fn. 33). These terms should no longer be used. In particular, the phrase "plainly wrong" is a subjective term and suggests that a judge may depart from binding precedent if they disagree with it — mere personal disagreement between two judges is not a sufficient basis to depart from binding precedent. The institutional consistency and predictability rationales of *stare decisis* are undermined by standards that enable difference in a single judge's opinion to determine whether precedent should be followed. It is also not the case that a court can decide a question of law afresh where there are conflicting decisions.

[75] The principle of judicial comity — that judges treat fellow judges' decisions with courtesy and consideration — as well as the rule of law principles supporting *stare decisis* mean that prior decisions should be followed unless the *Spruce Mills* criteria are met. Correctly stated and applied, the *Spruce Mills* criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-handed development of the law. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;

2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or

3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[76] First, a judge need not follow a prior decision where the authority of the prior decision has been undermined by subsequent decisions. This may arise in a situation where a decision has been overruled by, or is necessarily inconsistent with, a decision by a higher court (see Rowe and Katz, at p. 18, citing Kerwin, at p. 542).

[77] Second, a judge can depart from a decision where it was reached without considering a relevant statute or binding authority. In other words, the decision was made *per incuriam*, or by inadvertence, a circumstance generally understood to be "rare" (see, e.g., *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988, 4 B.C.L.R. (6th) 370, at para. 132). The standard to find a decision *per incuriam* is well-known: the court failed to consider some authority such that, had it done so, it would have come to a different decision because the inadvertence is shown to have struck at the essence of the decision. It cannot merely be an instance in which an authority was not mentioned in the reasons; it must be shown that the missing authority affected the judgment (Rowe and Katz, at p. 19).

[78] Third and finally, a judge may depart where the exigencies of the trial required an immediate decision without the opportunity to consult authority fully and thus the decision was not fully considered. An unconsidered judgment is not binding on other judges (Rowe and Katz, at p. 18, citing *Spruce Mills*, at p. 592).

[79] These criteria define when a superior court at first instance may depart from binding judgment issued by a court of coordinate jurisdiction and apply equally to a prior ruling on the constitutionality of legislation. Where, as here, a judge is faced with conflicting authority on the constitutionality of legislation, the judge must follow the most recent authority unless the criteria above are met. In such a situation, the judge must, in determining whether the prior decision was taken *per incuriam*, consider whether the analysis failed to consider a binding authority or statute relevant to the legal question.

[80] To be plain: these criteria do not detract from the narrow circumstances outlined in *Bedford*, at paras. 42-45, describing when a lower court may depart from binding vertical precedent.

[81] I will now turn to whether it was appropriate for the trial judge in Mr. Chan's case to depart from *Dunn* and decide the constitutionality of s. 33.1 afresh.

[82] Application of the doctrine of horizontal *stare decisis* in Mr. Chan's case illustrates how the *Spruce Mills* criteria should work in practice. At the time of Boswell J.'s constitutional ruling, there were four known decisions from the Ontario Superior Court, three of which held that s. 33.1 was unconstitutional. The most recent of these was *Fleming*. *Fleming* relied wholly on *Dunn* and, as a result, it is most appropriate to apply the *Spruce Mills* criteria to *Dunn*.

[83] Boswell J. cited the correct principles from *Spruce Mills* but, respectfully, erred in applying them. First, he concluded that he "[did] not feel constrained to follow one school of thought more than the other" because trial courts across the country had expressed different views on the constitutionality of s. 33.1 (para. 58). The conventions of horizontal *stare decisis* apply within the province and so the trial judge was required to consider the *Spruce Mills* criteria with specific reference to previous rulings within Ontario. The presence of conflicting decisions is not a reason to sidestep the *Spruce Mills* analysis. Second, in the Application to Re-open the Constitutional Challenge, he concluded that *McCaw* — which held that it was bound by *Dunn* — was "plainly wrong" (paras. 14 and 34). The "plainly wrong" standard no longer adequately summarizes the whole of the applicable *Spruce Mills* criteria.

[84] Instead, Boswell J. should have looked to the substance of *Dunn* to determine whether it had been overruled by a higher court, had been decided *per incuriam*, or had been taken in exigent circumstances. That would have revealed that *Dunn* did not engage whatsoever with the earlier Ontario decision in *R. v. Decaire*, [1998] O.J. No. 6339 (QL) (C.J. (Gen. Div.)), that upheld the constitutionality of s. 33.1. Since *Dunn* did not apply the *Spruce Mills* criteria to determine whether it was permissible to depart from *Decaire*, *Dunn* was a decision *per incuriam* and did not need to be followed. The trial judge should have then reviewed the substance of *Decaire* to determine whether that decision should be followed based on the *Spruce Mills* criteria. That would have revealed that *Decaire* considered the appropriate statutes and authorities in reaching the conclusion that s. 33.1 infringed ss. 7 and 11(d) of the

Charter but was upheld under s. 1. There is also no indication that *Decaire* was rendered in exigent circumstances. The trial judge therefore should have followed *Decaire* in the constitutional ruling. Of course, on appeal, the Court of Appeal was not bound to follow *Decaire* or any other first instance superior court decision.

[85] Finally, it bears recalling that *McCaw* was decided shortly after the constitutional ruling in Mr. Chan's case. The court in *McCaw* did not have the benefit of Boswell J.'s reasons in Mr. Chan's case for upholding s. 33.1, as the pre-trial constitutional decision had not yet been published while awaiting possible jury deliberations (Application to Re-Open Constitutional Challenge, at para. 9). In circumstances such as this, where a court had no practical way of knowing that the earlier decision existed, the judgment will not bind a subsequent court, unless it has been brought to the court's attention or the court is otherwise aware of it (see Kerwin, at p. 551).

[86] To summarize, a court is required by the principles of judicial comity and horizontal *stare decisis* to follow a binding prior decision of the same court in the province. A decision may not be binding if it is distinguishable on its facts or the court has no practical way of knowing it existed. If it is binding, a trial court may only depart if one or more of the *Spruce Mills* exceptions apply.

[87] I will now turn to Mr. Chan's cross-appeal.

B. *Is There Jurisdiction to Hear Mr. Chan's Cross-Appeal?*

[88] Mr. Chan argued in his application for leave to cross-appeal that s. 695 of the *Criminal Code* provides this Court with the jurisdiction to hear his cross-appeal, which allows it to make any order that a court of appeal "might have made". He points to *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, where this Court granted leave to an accused's cross-appeal and entered an acquittal in place of a new trial. I disagree. In my view, his application for leave to cross-appeal should be quashed for want of jurisdiction.

[89] Sections 691 and 692 of the *Criminal Code* set out the jurisdiction of this Court to hear criminal appeals brought by criminal accused. An accused may appeal where their conviction for an indictable offence has been confirmed by the Court of Appeal (s. 691(1)) or where acquittal at trial has been set aside by the Court of Appeal (s. 691(2)). Sections 691(1) and (2), along with s. 692 (which has no bearing on this case), represent the whole of an accused's express statutory right to appeal when their conviction has been affirmed or their acquittal set aside by a Court of Appeal. In circumstances like those of Mr. Chan, where an accused, having been convicted of an indictable offence at trial, is granted a new trial, s. 691 does not provide a route of appeal to this Court.

[90] There is no other statutory route for Mr. Chan to appeal the Court of Appeal's order of a new trial. Section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, which does give this Court jurisdiction to hear an appeal of a final order of a

Court of Appeal, cannot ground jurisdiction for a cross-appeal by Mr. Chan because s. 40(3) precludes it:

> **(3)** No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or *setting aside* or affirming *a conviction* or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

In other words, where a person is convicted of an indictable offence but subsequently has that conviction set aside, there is no right of appeal to this Court under s. 40 (see *R. v. Hinse*, [1995] 4 S.C.R. 597, at para. 18). The combined effect of s. 40(3) and ss. 691 and 692 "excludes many criminal appeals from the ambit of s. 40(1)" (*R. v. Shea*, 2010 SCC 26, [2010] 2 S.C.R. 17, at para. 3, per Cromwell J.).

[91] Respectfully, *J.F.* does not assist Mr. Chan. The parties in *J.F.* did not make submissions on whether the accused in that case had jurisdiction to cross-appeal. Where a case is heard but jurisdiction is not discussed, the case is not an authority that the Court has jurisdiction (*Saumur v. Recorder's Court (Quebec)*, [1947] S.C.R. 492, at pp. 497-98). It is well understood that this Court's jurisdiction is statutory — a prior decision of this Court which did not address jurisdiction cannot displace clear statutory language (*Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53).

[92] During oral argument, counsel for Mr. Chan also referred the Court to *R. v. Warsing*, [1998] 3 S.C.R. 579. In that case, the Court held that the British Columbia Court of Appeal did not have jurisdiction to order a limited new trial on the issue of not

criminally responsible on account of mental disorder because it would have restricted the accused's right to control his defence. This Court ordered a full new trial instead. *Warsing* is distinguishable here because it did not substitute an order for a new trial for an acquittal — it maintained the same order but varied the scope of the new trial. On the specific question of whether this Court has jurisdiction to hear a cross-appeal, *Warsing* is also distinguishable on the basis that no cross-appeal was filed. It was appropriate for the Court to rely on s. 695(1) in that case because it had jurisdiction to hear the appeal and it was merely varying the order which the Court of Appeal ought to have made. As s. 695(1) provides, this Court "may, on an appeal under this Part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment".

C. *Disposition of the Appeals*

(1) Mr. Chan

[93] Given the lack of jurisdiction to substitute an acquittal, it would be unwise to comment further on the substance of Mr. Chan's application to cross-appeal. Since this Court has held that s. 33.1 is unconstitutional and of no force or effect in *Brown*, Mr. Chan may avail himself of the defence of non-mental disorder automatism, should it be applicable on the facts. He will have the opportunity to lead evidence in that regard.

[94] Counsel for Mr. Chan submitted in oral argument that a stay of proceedings is warranted if there is no jurisdiction to hear the cross-appeal (transcript, at p. 154). If a retrial occurs, Mr. Chan argued, the Crown will very likely take the position that Mr. Chan is not criminally responsible by reason of a mental disorder — a position the prosecution forcefully opposed at his first trial. The evidence he led at his first trial to support the finding that he was not criminally responsible under s. 16, including highly personal evidence of his concussions, learning disabilities, and depression, would be used against him in his retrial. He argues that it is fundamentally unfair.

[95] Assuming without deciding that a stay could be ordered in such circumstances, I would decline to do so here. There is an insufficient record before the Court to order a stay of proceedings. I am unable to conclude, based on the nature of the proceedings below, that a stay is warranted. I hasten to add that a future trial judge may find otherwise if the evidence put forward and the nature of the proceedings warrant. A stay of proceedings may only be granted in the "clearest of cases", where prejudice to an accused's rights or to the judicial system is irreparable and cannot be remedied (*R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 52; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31, both quoting *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 68 and 82). The test for a stay has three components: 1) there must be prejudice to an accused's fair trial right or to the integrity of the justice system that will be perpetuated or aggravated through a trial or its outcome; 2) there must be no alternative remedy capable of remedying the prejudice; 3) where it is unclear whether a stay is warranted after the first two steps, the court must balance the interests in favour of a

stay against the interest that society has in having a final decision on the merits (*Babos*, at para. 32).

[96] Mr. Chan's arguments with respect to the prejudice he might suffer relate to a future trial, not the proceedings below. I am unable to conclude, on the record before the Court, that Mr. Chan's right to a fair trial has been prejudiced. A trial judge is best positioned to determine whether such prejudice arises in the future and, if it does, what the appropriate remedy may be (*O'Connor*, at paras. 68 and 82). For example, a trial judge would be capable of excluding evidence if the Crown sought to marshal it in a prejudicial manner.

[97] I add that it remains an open question whether it would be in the public interest to proceed with Mr. Chan's prosecution again, or whether there is a reasonable prospect of conviction. This case is, to use the words of the trial judge, a tragic case with a tragic result. It is also true that Mr. Chan has been charged with serious violent crimes. The final decision on how to proceed rests with the Crown and in my view, this Court is not best placed to consider the matter further.

(2) Mr. Sullivan

[98] The trial judge found that Mr. Sullivan was acting involuntarily when he attacked his mother. The common law compels an acquittal in such an instance. He was nevertheless found guilty, due to the operation of s. 33.1. The Court of Appeal declared that s. 33.1 is of no force or effect, set aside the conviction, and substituted an acquittal.

As I concluded in *Brown*, the Court of Appeal was correct that s. 33.1 is unconstitutional. Mr. Sullivan established at trial that he was intoxicated to the point of automatism owing to his Wellbutrin overdose. Given that s. 33.1 is of no force or effect, I would confirm the conclusion of the Court of Appeal that Mr. Sullivan is entitled to acquittals.

VI. Conclusion

[99] I would dismiss the appeals. The application for leave to cross-appeal by Mr. Chan should be quashed for want of jurisdiction. In the result, I would confirm Mr. Sullivan's acquittals and the order of a new trial for Mr. Chan.

Appeals dismissed and application for leave to cross-appeal quashed.

Solicitor for the appellant/respondent on application for leave to cross-appeal: Attorney General of Ontario, Toronto.

Solicitors for the respondent David Sullivan: Ruby Shiller Enenajor DiGiuseppe, Toronto.

Solicitors for the respondent/applicant on application for leave to cross-appeal Thomas Chan: Henein Hutchison, Toronto.

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

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

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Edmonton.

Solicitors for the intervener the British Columbia Civil Liberties Association: Torys, Toronto; University of Ottawa, Faculty of Law, Ottawa.

Solicitors for the intervener the Empowerment Council, Systemic Advocates in Addictions and Mental Health: Martell Defence, Toronto; Anita Szigeti Advocates, Toronto; McKay Ferg, Calgary.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Rosen & Company, Toronto; Brauti Thorning, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Neubauer Law, Toronto.

Solicitors for the intervener the Women's Legal Education and Action Fund Inc.: Megan Stephens Law, Toronto; WeirFoulds, Toronto.

Solicitors for the intervener the Advocates for the Rule of Law: McCarthy Tétrault, Vancouver; Jordan Honickman Barristers, Toronto.

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*Feb. 10.
*June 23.

THE VILLAGE OF KELLIHER (DEFENDANT) ..... APPELLANT;

AND

A. C. SMITH (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Municipal corporations—Councillor of municipality injured while operating municipality's fire extinguisher—Responsibility for injury—Degree of care—Duty of municipality—Duty of councillor operating the machine—Liability—Volenti non fit injuria—Doctrine of Rylands v. Fletcher—Expert evidence—Charge to jury—Jury's findings.

Plaintiff, as a councillor of defendant village, acting under authority of a village by-law, took charge of operation of its chemical fire extinguisher at a fire, turned the crank which broke the sulphuric acid bottle (to generate pressure) and was severely injured by an explosion, which occurred because the bolt holding in place the covering of the sulphuric acid chamber was not screwed down. The extinguisher had been kept in a pool room. The village council had appointed the village constable as "fire chief," and required him to keep the extinguisher "in proper working shape." Plaintiff sued the village for damages. The jury found that plaintiff's injury was caused by defendant's negligence in "not having their fire extinguisher properly inspected and kept in perfect working order"; that plaintiff was guilty of contributory negligence "only to the fact that he was a councillor on the date of the fire, but not negligent in the operation of the fire extinguisher at the time of the fire." The Court of Appeal

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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for Saskatchewan (25 Sask. L.R. 65), reversing judgment of Taylor J. (24 Sask. L.R. 198), gave judgment to plaintiff for damages. Defendant appealed.

Held (Duff and Newcombe JJ. dissenting) that the appeal should be dismissed.

Per Rinfret, Lamont and Cannon JJ.: It was for the jury, on all the evidence, to say whether the proper inference to be drawn was that the acid chamber covering was loose because the fire chief had failed to tighten the bolt when he had last recharged the extinguisher or to inspect it properly afterwards, or that some third person had unscrewed the bolt (as to interference by a third person, the onus was on defendant to establish it, or at least to shew such probability that the jury would infer it: *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640). Also the question of plaintiff's negligence was one of fact for the jury; it was for them to say whether or not, in his operation of the extinguisher, he had failed to exercise the care which a reasonably prudent and careful man would have exercised in like circumstances. Unless plaintiff had reason to suspect that the fire chief had not done his duty as to inspection, the jury was entitled to find plaintiff not guilty of negligence in assuming that he had. There was evidence from which the jury might find that plaintiff's injuries were caused by negligence of defendant, and also that plaintiff's conduct in operation of the extinguisher was free from want of care. The maxim *volenti non fit injuria* did not apply; plaintiff, who was unaware that the covering was not properly fastened, neither appreciated the danger he was running nor voluntarily incurred the risk (*C.P.R.* v. *Fréchette*, [1915] A.C. 871, at 880, cited). The first part of the jury's finding as to contributory negligence, viewed in the light of the circumstances and the judge's charge, meant that the only negligence of which they found plaintiff guilty was that he shared with his fellow councillors in their representative capacity in not seeing to it that the extinguisher was duly inspected and kept fit for immediate use. As to this, it has long been established law that a person is not liable in his individual capacity for a tort committed in his corporate capacity (*Mill* v. *Hawker*, L.R. 9 Ex. 309, at 321, and other cases cited). The objections by defendant to the judge's charge to the jury were not maintainable. Taken as a whole, it did not direct that there was an absolute duty on defendant to keep its extinguisher from doing harm (Doctrine of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, discussed, and held not to apply, the extinguisher having been brought to the village for common protection of the corporation and its citizens as individuals; *Rickards* v. *Lothian*, [1913] A.C. 263, at 280; *Hess* v. *Greenway*, 48 D.L.R. 630, cited), but impressed upon them that the only basis on which defendant could be charged with liability was negligence; his direction that the care to be observed by defendant must be commensurate with the danger of harm involved, was a proper one. His direction to disregard the evidence of one F., an inspector for the fire commissioner of the province, to the effect that one operating the extinguisher should see that the covering was tight before breaking the acid bottle, was unobjectionable, as the elements did not exist to justify its admission as expert evidence, and the jury were as capable as the witness of forming a correct judgment as to plaintiff's acts.

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Per Duff and Newcombe JJ. (dissenting): The risk of escape of the liquid to the injury of persons in proximity was one which it was the absolute duty, in point of law, of any person working the machine, to avoid, if reasonably possible. Plaintiff knew of the danger if the covering were not tight, and to ascertain and correct the condition was a simple and quick operation. It was the duty of the municipality, at the time of actual operation, not to release the acid without first seeing that the covering was securely fastened. The acts of plaintiff in his operation of the machine were the acts of the municipality, and its said duty was equally his duty; he owed a duty to it to see that the responsibility resting upon it, in respect of the precautions to be observed in working the machine, were, so far as reasonably possible, discharged. He was not entitled to assume that, because of instructions given to the "fire chief," the covering was tight, in view of the facts (known to plaintiff) that the machine had been exposed in a place open to the public, that it could be made unsafe very easily, that, by reason of the fire chief's other duties, a periodical inspection was the utmost that could be expected, and in view of possibility of neglect by the fire chief, the simple nature of the precaution required at the moment of operation, and the magnitude of the danger. The direct and proximate cause of plaintiff's injuries was his own neglect. Further, there were errors in the charge to the jury, as to the extent of defendant's duty, and in withdrawing from the jury F.'s evidence as to the proper, known and recognized method of working the machine; which errors in the charge, were the action not to be dismissed, would be ground for a new trial.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1).

The action was for damages for personal injuries sustained by the plaintiff through the explosion of one of the defendant's chemical fire extinguishers, the operation of which extinguisher the plaintiff (who was a member of the council of the defendant village) had taken charge of at a fire, the cause of the accident being, so plaintiff alleged, the defendant's negligence. The trial judge, Taylor J., on certain findings of the jury and his construction thereof and his view of the law bearing on the matters involved, dismissed the action (2). The plaintiff appealed, and the defendant cross-appealed (against certain findings of the jury as perverse and on other contentions). The Court of Appeal (1) allowed the plaintiff's appeal and dismissed the defendant's cross-appeal, set aside the judgment below and directed that judgment be entered for the plaintiff for the amount awarded by the jury ($1,250.26 for special damages,

(1) 25 Sask. L.R. 65; [1930] 2 W.W.R. 638.

(2) 24 Sask. L.R. 198; [1929] 3 W.W.R. 655.

and $5,200 for general damages; no appeal was taken as to the amount assessed). The material facts of the case, the findings of the jury, and the issues in question, are sufficiently stated in the judgments now reported.

The appeal to this Court was dismissed with costs, Duff and Newcombe JJ. dissenting.

P. H. Gordon, K.C., for the appellant.

P. M. Anderson, K.C., for the respondent.

The judgment of the majority of the court (Rinfret, Lamont and Cannon JJ.) was delivered by

LAMONT, J.—This is an appeal from a judgment of the Court of Appeal of Saskatchewan (1) in favour of the plaintiff in an action for damages for personal injuries sustained by him through the explosion of one of the defendant's chemical fire extinguishers at a fire which occurred in the Village of Kelliher on the evening of December 22, 1927. The defendant's extinguisher consists of a forty gallon cylindrical tank on wheels to which a hose is attached. Attached to it also is a framework whereby the machine can be pushed or pulled as required. Towards the rear end but inset in the top of the tank in a separate chamber is a glass bottle of sulphuric acid holding about three pints. This chamber is covered with an iron dome covering, convex in shape. Over this dome is an iron circular band which is bolted to the tank. Through the centre of this band is an iron screw bolt which when screwed down tight holds the iron dome firmly in its place so that no gas or liquid can come out of the top of the sulphuric acid chamber. The tank is filled with a solution of water and bicarbonate of soda. To put the extinguisher in operation at a fire the sulphuric acid bottle has to be broken. This is done by turning a crank on the outside of the tank which causes a hammer on the inside to strike it. The acid then mingles with the solution in the tank and generates a high pressure of carbonic acid gas which forces the mixture through the nozzle of the hose upon the fire and smothers it. The extinguisher was kept in the village pool room because it was a central place and was always warm in winter.

(1) 25 Sask. L.R. 65; [1930] 2 W.W.R. 638.

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About eight o'clock on the evening of December 22, 1927, an alarm of fire was given in Kelliher, and the plaintiff, who was a general merchant and also a member of the village council, ran to the pool room and, with a Mr. Wilson, got one of the two extinguishers owned by the defendant and pulled it to the fire. Having got it in place, the plaintiff turned the crank and broke the sulphuric acid bottle to generate pressure. In a few seconds the dome covering of the sulphuric acid chamber blew off and a stream of sulphuric acid struck the plaintiff in the face, burning him severely and practically destroying his eyesight. The dome blew off because the iron bolt for holding it in place had not been screwed down. This was shewn by the fact that the threads on the bolt had not been injured. It was the duty of the fire chief, H. G. Clark, to keep the extinguishers in good working order.

At the trial the plaintiff's contention was that his injuries were caused by the failure of the defendant to maintain the extinguisher in a safe and proper condition for use; while the defendant contended that the explosion was due to the plaintiff's want of care, (*a*) in attempting to operate the extinguisher without first seeing that the bolt which held the dome cover in place had been screwed down tight, and (*b*) in that he and his fellow councillors had not kept the extinguisher in proper condition for use. The defendant also set up that the plaintiff was well aware of the danger, and voluntarily accepted the risk. The material questions, and the answers of the jury thereto, are as follows:—

Q. 1. Was the injury to the plaintiff on the 22nd December, 1927, caused by the negligence of the defendants?—A. Yes.

Q. 2. If so, in what did such negligence consist? Give particulars.—A. For not having their fire extinguisher properly inspected and kept in perfect working order.

Q. 3. Do you find the plaintiff guilty of contributory negligence?—A. Yes.

Q. 4. If so, in what did such contributory negligence consist? Give particulars.—A. Only to the fact that he was a councillor on the date of the fire but not negligent in the operation of the fire extinguisher at the time of the fire.

On these findings the trial judge dismissed the action (1).

The plaintiff appealed to the Court of Appeal and the defendant served notice of cross appeal stating that on the hearing it would contend that there was no evidence upon

(1) 24 Sask. L.R. 198; [1929] 3 W.W.R. 655.

which a jury could reasonably find that the defendant was guilty of negligence, nor could they reasonably absolve the plaintiff from contributory negligence in his operation of the extinguisher at the fire, and that their answers on both points were perverse. The notice further stated that the defendant would contend that the maxim *volenti non fit injuria* should be applied in this case. The Court of Appeal allowed the plaintiff's appeal and dismissed the cross appeal (1). From that judgment this appeal is brought.

Before us counsel for the defendant again advanced the argument that the answers of the jury to Question 2, and the latter part of their answer to Question 4, were perverse and contrary to the evidence; and he stressed the fact that the extinguisher was kept in a place open to the public, any one of whom might have unscrewed the bolt which holds in place the iron dome.

The jury had before them the fact that the defendant had brought to the village as a fire fighting apparatus this chemical extinguisher which was a highly dangerous instrumentality unless care was taken to keep the dome covering of the sulphuric acid chamber tightly fastened. They knew that the extinguishers were kept in the pool room and that the defendant intended and expected its citizens, on hearing an alarm of fire, to go to the pool room and get the extinguishers and take them to the fire where they were to be used in fighting the flames. To be effective for that purpose the extinguishers were required to be in a condition in which they could be immediately and safely operated. In his charge the trial judge instructed the jury that if the municipality keeps a machine which is dangerous, or potentially dangerous, it assumes the responsibility of keeping it from doing harm; that if the machine is kept to be used at fires and there is an extra danger in its use, then there is upon the municipality so providing it a duty to take precautions to avoid that danger and that the duty was commensurate with the danger involved. The council recognized its obligation in this respect and had notified the fire chief that it was his duty to "keep the extinguishers in proper working shape". The jury had also before them the fact that, in August, the fire chief had recharged the extinguishers, which necessitated taking the dome covering

(1) 25 Sask. L.R. 65; [1930] 2 W.W.R. 638.

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off the sulphuric acid chamber, and that neither extinguisher had thereafter been used until the fire in question. The fire chief in his evidence stated that he knew the bolt had been screwed down after the extinguisher had been recharged or he would not have left it. This the jury may have thought was reasoning rather than recollection, at any rate it was for them to say whether or not they would accept the evidence. They had also before them conclusive evidence that when the other extinguisher was taken to the fire the wheel that opens the valve which permits the mixture to flow through the hose was stuck fast and could not be turned. This fact alone was evidence that there had been no proper inspection of the extinguishers and entitled the jury, if they thought fit, to reject the evidence of the fire chief and the overseer that they had inspected the extinguishers a few days before the fire and that everything was in good order. There was also the fact that, although for years the extinguishers had been kept in the pool room, no one had ever improperly interfered with them. It was for the jury, on all the evidence, to say whether the proper inference to be drawn was that the dome covering was loose because the fire chief had failed to tighten the bolt when he recharged the tank or to properly inspect the extinguishers afterwards, or that some third person had unscrewed the bolt, which is the only other explanation suggested. As to interference by a third person, the onus was on the defendant to establish it or at least to shew such a probability of its having taken place that the jury would infer that it had. *Dominion Natural Gas Co* v. *Collins* (1).

On the question of the plaintiff's contributory negligence, the jury had before them an account of the acts of the plaintiff shewing just what he did and how he did it. They had also his testimony that he saw nothing to indicate that the dome covering was loose or to direct his attention to it, and that he assumed the fire chief had obeyed the council's instructions and kept the extinguishers in proper working order. With all these facts before them it was the duty of the jury to say whether or not, in his operation of the extinguisher, the plaintiff had failed to exercise the care which a reasonably prudent and careful man would have exercised in like circumstances.

(1) [1909] A.C. 640.

For the defendant it was pointed out that there was in force a village by-law which enacted that "the overseer of the village, or in his absence any member of the council, whom failing, the fire inspector, shall be the director of operations at" a fire, and it was urged that this imposed upon the plaintiff the duty of making sure that the extinguisher was in a condition in which it could be used with safety before putting it in operation. The by-law does not in terms require a councillor directing operations at a fire to make an inspection of the extinguisher before putting it in operation. That was the duty of the fire chief, and unless the plaintiff had some reason to suspect that the fire chief had not done his duty the jury were entitled to find that he was not guilty of negligence in assuming that he had. Furthermore, it must not be forgotten that in taking charge of the extinguisher at the fire the plaintiff was fulfilling an obligation imposed upon him in his official capacity by the by-law. In the absence, therefore, of a statutory provision making a councillor individually responsible for the failure of the fire chief to obey his instructions, which the by-law does not do, or casting on a councillor the duty of personal inspection of the extinguishers, the whole question of the plaintiff's negligence was a question of fact for the jury. I, therefore, agree with the Court of Appeal that there was evidence from which the jury might find, not only that the plaintiff's injuries were caused by the negligence of the defendant, but that the conduct of the plaintiff in his operation of the extinguisher at the fire was free from any want of care on his part.

The argument of the defendant's counsel that this was a proper case for the application of the maxim *volenti non fit injuria*, cannot be supported. In *C.P.R.* v. *Fréchette* (1), the Privy Council held that to establish this defence it must be shewn, (1) that the plaintiff clearly knew and appreciated the nature and character of the risk he ran, and (2) that he voluntarily incurred it. In the present case the plaintiff was not aware that the dome covering was not properly fastened and, therefore, he neither appreciated the danger he was running nor voluntarily incurred the risk.

As far as the matters before the Court of Appeal are concerned there is only one question which, in my opinion,

(1) [1915] A.C. 871, at 880.

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requires consideration, and that is: what did the jury mean by their finding that the plaintiff was guilty of contributory negligence "only to the fact that he was a councillor on the date of the fire"? Their express finding that he was "not negligent in the operation of the fire extinguisher at the time of the fire" shews that the negligence of which they found him guilty as a councillor did not include any want of care on his part in his operation of the extinguisher from the moment it reached the scene of the fire. From that moment he is absolved from any charge of contributory negligence. With negligence on the part of the plaintiff in the operation of the extinguisher excluded, the answer of the jury is, to my mind, intelligible, and their meaning reasonably clear viewed in the light of the circumstances and the instructions given to them. By their answers to the first two questions they had found the defendant guilty of negligence causing the plaintiff's injuries. The defendant could only act through its council. The negligence of the defendant was, therefore, the negligence of its council. In his charge the trial judge said:—

> Some things are more dangerous than other things and if it is highly dangerous, very dangerous, the law imposes on the municipality the duty to protect against that danger. They cannot escape the duty that is put upon them by simply delegating it to someone else. It is insufficient to pass a resolution requiring someone or some persons to inspect the machinery and let it go at that.

This the jury would understand referred to the direction of the council to the fire chief to keep the extinguishers in good working order which the fire chief admitted involved the duty of an inspection. By reason of this direction the jury knew that the defendant village could not escape liability on the ground that the council directed the fire chief to perform a duty which the law cast upon the council itself. What the jury meant, therefore, by their answer, in my opinion, was that the only negligence of which they found the plaintiff guilty was that which he shared with his fellow councillors in their representative capacity in not seeing to it that the extinguishers were duly inspected and kept fit for immediate use. At first sight it might seem that the jury by finding the plaintiff guilty of negligence as a councillor "on the date of the fire," had in mind some specific dereliction of duty by him as councillor on that date. I do not think, however, that the words mean, or were intended to mean, anything more than that the plain-

tiff was, on the day of the fire, a councillor and, as such, he had failed to see that the duty resting on the council had been performed. That this was the jury's meaning seems established by the fact that, once negligence in the operation of the extinguisher was eliminated, there was no negligence of which the plaintiff, under the circumstances, could be guilty except a breach of duty in his representative capacity, and it has long been established law that a person is not liable in his individual capacity for a tort committed in his corporate capacity.

In *Mill* v. *Hawker* (1), Kelly, C.B., said:—

> I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is ultra vires, and is not, and cannot be in contemplation of law, a corporate act at all.

See also *Mahoney* v. *Guelph* (2); *Harman* v. *Tappenden* (3).

The only other contention made was that there should be a new trial, because the trial judge failed to properly direct the jury in three material particulars:—

(*a*) that he instructed them that the law imposed upon the defendant the duty of keeping and maintaining at all times the fire extinguisher in a safe and proper condition at their peril;

(*b*) that he failed to instruct them as to the degree of care to be exercised by the plaintiff in handling the extinguisher; and

(*c*) that he directed them to disregard the evidence of Johnson and Furby as to the way of operating the extinguisher.

These objections had been taken at the trial although a new trial was not asked for in the court below.

The portion of the charge objected to under (*a*) reads:—

> Persons having highly dangerous articles assume the responsibility of keeping them safe. It was the duty of the defendants to maintain the same, to maintain the fire extinguisher, "in a safe and proper condition for use and operation as required." As it is put in one case "they are bound to keep it secure at their peril."

It was contended that, by the use of the words "at their peril", the trial judge instructed the jury that there

(1) (1874) L.R. 9 Ex. 309, at 321. (2) (1918) 43 Ont. L.R. 313.
(3) (1801) 1 East, 555; 102 E.R. 214.

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was an absolute duty resting upon the defendant to keep its extinguisher from causing harm, and that the law did not impose such an onerous duty but only imposed the duty of using a reasonable, or at most, a high degree of care. I do not think the doctrine of *Rylands* v. *Fletcher* (1) has any application to a case like the present. That rule provides that any person who, for his own purposes, brings on his land or keeps or collects there anything likely to do mischief if it escapes, keeps it at his peril. If it escapes and does harm to others, the owner is responsible independently of the existence of either wrongful intent or negligence on his part. The rule, however, only applies where the dangerous agency is kept by the defendant for his own purposes. It, therefore, has no application where, as here, the extinguisher was brought to the village for the common protection of the corporation and its citizens as individuals. *Rickards* v. *Lothian* (2); *Hess* v. *Greenway* (3). Although the trial judge, in instructing the jury as to the degree of care required from the defendant, did use a phrase which, if it stood alone, might be understood as imposing liability without any negligence on the defendant's part, a perusal of his charge makes it very clear that he impressed upon the jury that the only basis upon which the defendant could be charged with liability was negligence on its part—that is that the defendant village through its council had failed to observe that degree of care which a careful and prudent man would have observed under the circumstances. He told the jury that the care which it was the defendant's duty to observe must be commensurate with the danger of harm involved. This, in my opinion, was a proper direction. It may be that the use of a particular instrumentality might be attended with such extraordinary risk that the only care commensurate with the danger would be such care as operates to prevent injury. In my opinion this objection cannot be maintained.

The portion of the charge referred to in (*b*) reads:—

> When it comes to the standard of duty to be observed by the plaintiff to guide you in determining whether he has been guilty of contributory negligence or not it is not so easy to put it into words. He was bound to use such care as a reasonable and prudent man in like circum-

(1) (1868) L.R. 3 H.L. 330. (2) [1913] A.C. 263, at 280.
(3) (1919) 48 D.L.R. 630.

stances would use, such care as a reasonable and prudent man in the circumstances would observe. You are the judges of that standard.

To this Mr. Gordon, counsel for the defendant, states his objection in the following language:—

I think your lordship should have informed them what a reasonable and prudent man would have done with full knowledge of the danger that he was encountering in breaking the bottle.

As the plaintiff was unaware of the special danger he was encountering through the dome covering not being fastened, I do not see that the trial judge could have been more explicit on this point than he was without invading the province of the jury. In *Sherman & Redfield on the Law of Negligence*, 6th ed., par. 53, page 105, the learned author says:—

There are no abstract rules, defining so clearly the duties of men, under all circumstances, that the court can state them without passing upon any question of fact. The extent of the defendant's duty is to be determined by a consideration of all the surrounding circumstances. The law imposes duties upon men, according to the circumstances in which they are called to act. And though the law defines the duty, the question, whether the circumstances exist which impose that duty upon a particular person, is one of fact. In very many cases the law gives no better definition of negligence than the want of such care as men of ordinary prudence or good men of business would use under similar circumstances. Of course, this raises a question of fact as to what men of this character usually do under the same circumstances. This is a point upon which a jury have a right to pass, even though no evidence of the usage were given; for they may properly determine the question by referring to their own experience and observation. Indeed, they must do so; since expert evidence on such points is usually not admissible.

The instruction to disregard the testimony of Johnson and Furby, complained of under (*c*), had reference to the opinion each expressed that, in operating an extinguisher such as the defendant had, it was the duty of the operator to ascertain if the dome covering was properly fastened before breaking the bottle of sulphuric acid. Johnson was the village blacksmith, and Furby was an inspector for the fire commissioner for the province, whose duty it was to go to the various cities, towns and villages to see if the fire equipment of each was in order. In effect what these witnesses were being asked was whether or not the plaintiff, in operating the extinguisher the way he did, had been guilty of negligence which contributed to his injuries. This was surely the province of the jury. It was contended that the testimony was admissible because the witnesses were experts. In *Beven on Negligence*, 4th ed., at page 141, the author says:—

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To justify the admission of expert testimony two elements must coexist:

(1) The subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.

(2) The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.

In my opinion, the jury were just as capable as the witnesses of forming a correct judgment as to the plaintiff's acts, and the evidence does not disclose that either of the witnesses had ever operated a similar fire extinguisher. The object of expert evidence is to explain the effect of facts of which otherwise no coherent rendering can be given. *Carter* v. *Boehm* (1).

I would dismiss the appeal with costs.

The judgment of Duff and Newcombe JJ., dissenting, was delivered by

DUFF, J.—This is one of those cases in which the plaintiff's sufferings evoke naturally the compassion and sympathy of everybody, and I add, without the least hesitation, having considered the circumstances fully in every one of their aspects, in my own mind, a feeling of profound regret that the village community, represented by the appellant municipality, should have thought it right that his claim for compensation should be considered and determined on strictly legal principles. The duty of this court, however, is a rigorous one; here, the claim must be investigated and decided dispassionately, as matter of legal right.

The respondent was severely injured, having (*inter alia*) his sight gravely impaired, through the escape from a "chemical" fire extinguisher of liquid under high pressure heavily charged with sulphuric acid.

For the sake of clearness, it is convenient here to describe the fire extinguisher. The extinguisher, which is of a design in common use, consists of a cylindrical tank carried on a frame between two wheels about three feet high. At one end there is a handle used to pull or push it when required. At the same end is a leg or prop to hold the tank in a horizontal position. At the top of the tank and at the end nearest the handle is an opening through

(1) (1766) 1 Sm. L.C., 13th ed., 546, notes at page 561.

which the extinguisher is charged. The tank is first filled with a solution of water and bicarbonate of soda. Inside the opening is a cage in which is placed a bottle of sulphuric acid. Over the opening there is a metal dome held firmly in position by a screw-bolt which is screwed into the opening. A lever passes through the top of the screw-bolt, by which it can be tightened or loosened readily by hand. As to this end of the tank, set in the centre of it, there is a handle that, when pulled, throws up a hammer which breaks the bottle containing the sulphuric acid, which then becomes mixed with the solution of bicarbonate of soda. Carbonic acid gas is developed and the pressure of the gas forces the solution through a hose connected with the tank. There is also a pressure gauge and valve which must be opened to enable the liquid to escape. The pressure indicated on the valve is as high as 200 pounds.

The respondent was one of the village councillors, and, a fire having broken out in the village, he was (in execution of his duty as he conceived it) in charge of the extinguisher at the scene of the fire, when he was injured.

The respondent says that he pulled the handle attached to the hammer, breaking the bottle of sulphuric acid, and called upon a bystander to open the valve connected with the hose, which he says was done, when the metal dome was forced from its place and a jet of liquid emerged which struck him in the face. There was no dispute that the dome could not have been firmly screwed into its place or that the escape of the liquid was due to this.

His claim against the appellants was based upon a charge of negligence. The duty, stated in general terms, in which he alleged the municipality had failed, is accurately defined in the finding of the jury, as a duty to have "their fire extinguisher properly inspected and kept in perfect working order". The particular matter in which the municipality is alleged to have made default (the matter intended to be designated by the finding of the jury) was the failure at all times "to keep the cap closed"—to quote the words of the trial judge. The jury found in favour of the respondent, and an appeal to the Court of Appeal of Saskatchewan was dismissed (1).

(1) 25 Sask. L.R. 65; [1930] 2 W.W.R. 638.

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Before proceeding to comment upon the legal contentions, it is essential to make plain the actual position of the respondent and to outline the steps taken by the municipality for the care of the two fire extinguishers which it possessed. The village had statutory authority to "make provision for protection against fire"—I am quoting the summary of the legislation given by the trial judge in his charge. Acting in part, no doubt, under that authority, the council had passed a by-law containing this clause:—

43. The Overseer of the Village, or in his absence any member of the council, whom failing, the fire inspector, shall be the director of operations at, and regulate the conduct of all persons assisting in the suppression or extinguishment of fires, and he may call upon any person present at any fire to render every assistance in his power to suppress and extinguish the same.

The learned trial judge instructed the jury that the council had exceeded its powers in professing to make it obligatory upon councillors to perform the duties prescribed in section 43. As to that, I express no opinion, and it may be that the direction has no bearing upon this appeal. At all events, in the view I take upon other aspects of the case, the point is unimportant. The by-law does clearly authorize the councillors, in the contingency defined, to take charge (to direct operations and to regulate the conduct of persons assisting); and to that extent it is clearly *intra vires*. The respondent in what he did acted upon the authority embodied in the by-law. That is left beyond doubt by his own evidence.

Q. When you four men were over there was there any one taking charge of this?—A. I did.

Q. Why did you?—A. I was the only councillor present.

Q. What authority as councillor did you have to do this?—A. Well, I have authority from the by-law.

Q. What by-law?—A. By-law No. 34, Fire by-law.

Mr. ANDERSON: I would like to put that by-law in as an exhibit.

His LORDSHIP: I would like to know if he was familiar with that by-law.

Mr. ANDERSON: Were you familiar with that by-law?—A. I was.

His LORDSHIP: How and when? It may be most material. How and when?

Q. Were you familiar with that by-law before the time of this accident?—A. Yes, I was.

Q. Do you remember what year it was passed in?—A. 1926.

Q. How did you familiarize yourself with it?—A. Well, I was on the council. When I went into the council it was the natural thing to go into the by-laws and read them up.

Q. And you did familiarize yourself with by-law No. 34?—A. Yes.

The municipality had no proper place of its own where the extinguishers could be stored; and they were kept in a pool room, where, it is admitted, they were accessible to the public. There was a great deal of discussion at the trial as to the duties of one Clarke, who is generally referred to as the fire chief. In point of fact, Clarke was, and had been for years, the village constable charged with the duties incident to that office, as well as the duties of caretaker of the rink, receiving a wage of $30 a month. In 1927, he complained to the council that he had not access to a number of hand extinguishers which were left in the custody of individuals in their houses, and asked for authority to inspect them. A by-law was passed appointing him Fire Chief and he was then instructed by the village overseer and the plaintiff, to quote the plaintiff's evidence, "to look after these fire extinguishers and see they were kept in proper working order and kept in some safe place". No additional wage was attached to the new office, and admittedly there was no intention to change the place of storage of the fire extinguishers with which we are concerned. It was the duty of Clarke, from time to time, to recharge the extinguishers; and they had been recharged on some day in the late summer or early fall.

The learned trial judge held, and so instructed the jury, that the appellants were under a legal obligation "to maintain this extinguisher in a safe and proper condition for use and operation as required." They were bound, he said, "to keep it secure at their peril." This obligation included, he held, the specific legal duty "to keep the cap closed." In the Court of Appeal, the duty of the appellants, by Mackenzie J.A., is described in the terms of the jury's finding to have the extinguishers "kept in perfect working order." This view he grounds apparently upon "the emergency conditions under which such apparatus must often necessarily be used" * * *

There can be no question as to how the accident happened, in that the metal cap covering the chamber was loose and so permitted the expulsion of the acid upon its release from the chamber. It is denied that it became loose when the extinguisher was taken to the fire. It must therefore have become loose while it was being kept in the poolroom. The council, however, had appointed Clarks as fire chief for the very purpose of keeping it in proper working order. Therefore Clarke must have been derelict in his duty and so have rendered the defendant liable.

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Turgeon J.A. puts the case in a rather different way. He says:

> The defendant corporation, in order to secure its own property and the property of its citizens against the spread of fire, purchased this extinguisher and kept it, ready for use, in a place accessible to the public; and it was intended and desired that the public, in case of fire, should take the extinguisher, convey it to the place required, and operate it. Admittedly, the extinguisher contains a dangerous substance, sulphuric acid, and is sure, or almost sure, to cause a serious accident, when operated, unless it is in perfect condition; that is, unless (for the purposes of this case) the metal cap above referred to is firmly bolted down.
>
> * * * * *
>
> In these circumstances, and assuming that the jury accepted this evidence, which they had the right to do, I think that the least that can be said concerning the defendants' liability is that they were under obligation to take all reasonable precautions to keep this machine in safe condition, having regard to the dangerous nature of its contents and to the fact that, when wanted, it would be wanted in a hurry and that the call for its use might come at any moment of the day or night, and considering also that it was lodged in a place accessible in daytime to many people, uncovered, and unprotected in any manner from the curious and the meddlesome, and that it might be made unsafe very easily, by a simple turn of the wrench.

In view of the course of the trial, and the expressions of opinion just quoted, it is important to recall that on this appeal we are only concerned with negligence causing the injury to the respondent, negligence, to quote the phrase of Lord Cairns, *dans locum injuriae;* and that the appellants can be held responsible to the respondent, in law, only for breach of some duty owing to him which they have violated, and the violation of which was the direct cause of the harm of which he complains. We are not now to consider the rules or principles which might come into play, if somebody, with no express authority from the appellants, had taken possession of this machine and in ignorance of the working of it had, through his ignorance or unskilfulness, been the cause of an injury to a bystander. In such a case, we should have to investigate the question of the responsibility of the appellants for the acts of the person working the machine. There is evidence in the by-law before us, that such a procedure was not contemplated by the municipality; and whether the municipality did order its affairs in such a way as to preclude it from disputing responsibility in such circumstances, is a question which might involve debatable issues of law and fact. Had the unskilled person who had assumed the responsibility, in

his ignorance, of working the machine, been himself injured, a further question, still, might arise. These points are not now before us.

The respondent, throughout the occurrences, was acting, as he says, under the authority vested in him as councillor. The machine when under his control was under the control of the municipality, his acts were the acts of the municipality—in taking the machine to the scene of the fire, in releasing the sulphuric acid, and setting up the pressure which was the immediate agency in expelling the liquid that so grievously disfigured him. This last mentioned act was the decisive, the effective act, and, to repeat, it was the act of the municipality, as well as that of the respondent.

Now, as regards third parties, the responsibility of the municipality for the consequences of this act is indisputable. A great deal is said, in the charge and in the judgments, about the importance of keeping the metal cap always securely fastened in preparation for any sudden emergency requiring the employment of the extinguisher. But whatever may be said about that, it is self-evident that the necessity of that precaution could never be so palpable as at the very moment when the machine is to be put into operation. There can be no room for argument upon the point that at that moment, it was the duty of the municipality to see that the dome was securely fastened.

One must visualize the situation in the concrete. Several persons were in close proximity to the machine. All these were exposed to the danger of the gravest injury if the solution in the tank, instead of being forced through the hose, were expelled through the aperture intended to be sealed up by the metal dome. The risk of the escape of this liquid was a risk, which it was the absolute duty, in point of law, of any person working the machine, to avoid, if reasonably possible. Moreover, in point of fact, there was no necessity, no sort of excuse, even, for incurring such a risk. We have not here the case of a pressing emergency, in which some desirable precaution could only be observed at the cost of dangerous or even inconvenient delay or of serious loss of efficiency. To ascertain whether the tank was securely closed, and if not, to screw in the cover, and make the machine absolutely safe, was the work

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of an instant only, and of course an operation of the very simplest character. It was therefore, plainly, the duty of the municipality not to incur the wholly needless and useless risk of the liquid escaping, by releasing the sulphuric acid without first seeing that the covering was securely fastened.

This was equally the duty of the respondent. He was engaged personally in working the machine. He was cognizant of all the facts. He says he knew and appreciated the character of the risk.

Q. You knew exactly how these things functioned at the time of the accident?—A. I did.

* * * * *

Q. You knew you had to direct operations?—A. I did.

* * * * *

Q. You did not forget the dangerous machine you were handling at all did you?—A. I don't think so.

* * * * *

Q. You were of course aware that the cap holding down the sulphuric acid would have to be tight or there would be danger?—A. Certainly.

* * * * *

I shall presently comment upon the excuse the respondent proffers. At this point, I wish to emphasize again the fact that the respondent had assumed charge of the machine under the authority given by the by-law, that is to say, he had assumed the duty of "director of operations" on behalf of the municipality. In this capacity, he was bound to see that the responsibility resting upon the municipality, in respect of the precautions to be observed in working the machine, were, so far as reasonably possible, discharged. That duty he owed to the municipality.

The respondent's justification for his heedless act is that the "fire chief" had been instructed to keep the extinguishers in good order and he assumed that he had done his duty.

I do not desire to speak with severity, but I cannot forbear observing that unless we are to put out of sight completely the considerations just mentioned, it is difficult to take this explanation seriously. The respondent knew, as everybody did, that the extinguishers were kept in a place open to the public by day, "uncovered, and unprotected in any manner from the curious and the meddlesome, and that it might be made unsafe very easily by a simple turn of the wrench", to quote Turgeon, J.A.; he knew, of course,

none better, that the village constable, the caretaker of the rink, receiving a wage of $30 a month, who acted as "fire chief", was not intended to keep these machines under constant guard; that consistently with due attention to his other duties, a periodical inspection was the utmost that could be expected from him; and the respondent himself says that Clarke would have discharged his duty by inspection once a month.

It seems unnecessary to say that the danger which attended the working of the machine depended upon the state of the tank, not in the previous month or week or day, but upon its state at the moment; and that the duty of the respondent to take precautions, was a duty to be exercised with reference to the conditions of the moment, and not to those of some anterior time.

Reverting to the excuse advanced, I do not accept the argument that, in any relevant sense the respondent was entitled "to assume" that Clarke "had done his duty". Having regard to the magnitude of the danger to which the unsuspecting bystanders were exposed, if the cap was not securely fastened, the respondent was not acting reasonably in taking it for granted, as a fact governing his actions, that Clarke, in exercising his functions, had been at all times free from the common human faults of inattention, forgetfulness or even neglect; ordinary care involves, in the circumstances in which the respondent was acting, the highest degree of care; he was not proceeding conformably to that standard in staking the safety of the bystanders upon the assumption which he puts forward as his excuse. But let us put this aside. Let us suppose that Clarke had performed every duty expected of him in his capacity as "fire chief"; that he had examined the extinguisher, not within the preceding month (according to the notion of the respondent as to his duty), but within the preceding week, or for that matter, within the preceding twenty-four hours, and that, in fact, he had left the cap securely fastened; and let us suppose, furthermore, that this was known to the respondent. I do not agree that in such circumstances, knowing also, as the respondent did, that the machine had, in the meantime, to quote Turgeon, J.A., again, been exposed in a place open to the public "uncovered, and unprotected in any manner from the curious

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and the meddlesome", and that it might have been "made unsafe very easily" by a touch of the hand—I am unable to agree that such knowledge would have afforded an answer to a claim by Martin, for example, whose clothes were ruined, and who only escaped disfigurement because the respondent's body served him as a shield.

Having regard to the ease with which the cap could be loosened, and the risk, so vividly described by Turgeon, J.A., of its being found in that condition, and the simple nature of the precaution required, a finding exonerating the respondent from responsibility in face of such a claim could not, in my judgment, be sustained as reasonable.

The direct and proximate cause of the respondent's painful injuries was, I regret to say, his own neglect.

This is sufficient to dispose of the appeal. But I cannot take leave of the case without commenting upon another aspect. The learned trial judge told the jury:—

> The by-law makes him a director of operations, but in terms the by-law does not require him to check over the machinery to see that it is in good order. He was entitled to assume, unless he had a good reason to know, such a good reason that he ought to know to the contrary, he was entitled to assume that the municipality had performed its duty to have this machine in safe and proper condition for use and operation. The duty was imposed upon them by law to do so, and he was entitled as all men are entitled to assume that they had performed their duty.

Unfortunately, the case, perhaps, has become a little obscured by the use of vague general language to describe a simple concrete matter. The controversy at the trial turned, as it now turns, upon the responsibility for the act by which, on the occasion of the fire, the sulphuric acid was released and became mixed with the solution of bicarbonate of soda, at a moment when the simple precaution (to securely fasten the metal dome) known by everybody to be essential, had not been observed.

The passage quoted would, in light of the preceding passages in the charge, convey to the jury the idea that the law imposed upon the municipality the duty to see that, at all times, whether the tank was in use or not in use, the dome was so fastened, and that the respondent was entitled to assume this duty had been performed. Neither the respondent, nor anybody, supposed for a moment that such a duty rested upon the municipality; and the respondent knew that the municipality had made no pretence of performing such a duty.

In laying down such a rule for the guidance of the jury, the learned judge was plainly wrong; and the mischief could not be corrected by some not very precise observations as to what the respondent might be presumed to know as to the practice.

The learned judge quite failed to make it plain to the jury, as he should have done, that, as regards precautions, the critical moment was the moment when the bottle was broken, and that, in the circumstances, the duty, not to break the bottle in the absence of the obvious precaution, was a duty of the most imperative character.

The learned judge also gravely erred in rejecting the evidence of Mr. Furby, an inspector for the fire commissioner of the province. The learned judge had, as we have seen, instructed the jury that it was the duty of the municipality, a duty imposed by law, to have the machine at all times "in safe and proper condition for use and operation." The negligence imputed by the jury to the appellants was "in not having" the extinguisher "kept in perfect working order." It is plain from this answer that the charge had created, in the minds of the jury, the impression that the duty defined by the learned judge in respect of the maintenance of the machine, was a duty owing to the respondent, in the circumstances in which the respondent took possession of the machine; and, further, that this duty involved the obligation to have the metal dome fastened tight at that moment. I pass over the question as to the character of the duty (if any), as to the condition of the machine at that moment, owing by the municipality to the respondent. Even if the rule were accepted, as the jury understood the learned judge to have laid it down, viz., that the municipality was under an obligation to keep the extinguisher "in perfect working order," it is not open to dispute, on that hypothesis, the jury should have been instructed that, in passing upon the question whether the obligation had been performed, they should consider very carefully whether the extinguisher was not in fact "in perfect working order" or "in safe and proper condition for use and operation." The learned judge ought also to have told the jury that in considering that question, they must take into account the ordinary and proper method of working the machine. Obviously, it would be difficult to say

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whether or not the machine was in perfect working order without knowing how the machine was to be worked.

I find myself quite at a loss to conceive on what ground the evidence of the inspector for the fire commissioner could properly be withdrawn from the attention of the jury. The proper method of working the machine, he explained, is not to break the bottle until after the exit into the hose is opened and the metal dome securely fastened. He explained that instruction to this effect is regularly given to the fire chiefs in the cities, towns and villages of the province, as well as to councillors. This was evidence, not merely as to the proper method of working the machine, but evidence, also, as to the known and recognized method of working it, and it ought not to have been withdrawn from the jury. The jury should have been told that, if that evidence was accepted, they could not properly find that the machine was not " in perfect working order " when it came into the hands of the respondent.

It is clear to me, as I have already said, that the respondent's claim fails, because his injuries were due, not to the violation of any duty which the municipality owed to him, but to his own neglect to perform his duty to the bystanders and the municipality; but, for the reasons that I have just given, it is equally plain that if the action were not to be dismissed, there must be a new trial on account of the errors into which the learned trial judge fell in his charge to the jury.

The appeal should be allowed and the action dismissed. The appellants would perhaps consider whether they should ask for costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gordon & Gordon.*

Solicitors for the respondent: *Anderson, Bayne & Co.*

Her Majesty The Queen *Appellant*;

and

Robert Mark Abbey *Respondent*.

File No.: 16589.

1981: December 16; 1982: July 22.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Defence of insanity — Hypomania — Accused knew actions to be wrong — Delusion that immune from punishment if caught — Whether or not accused rendered incapable of appreciating the nature and quality of his act — Criminal Code, R.S.C. 1970, c. C-34, s. 16.

Evidence — Hearsay — Whether or not trial judge erred in treating as factual the hearsay evidence on which expert opinion based.

Respondent was found not guilty on account of insanity, of importing cocaine into Canada and of unlawful possession of cocaine for the purpose of trafficking. A hypomaniac, respondent knew he was doing wrong but believed that, if caught, he would not be punished. The trial judge found that respondent's incapacity to appreciate the nature and quality of his acts met the test of s. 16(2), and more particularly, that he did not "appreciate" the consequences of punishment associated with the commission of the offence. This appeal is from a judgment of the British Columbia Court of Appeal upholding the verdict reached by the trial judge.

Held: The appeal should be allowed.

The defence of insanity was not open to respondent. Accused's failure, because of his delusions, to appreciate the penal sanctions attaching to the crime did not bring him within the ambit of the first arm of the insanity defence. The requirement that the accused be able to perceive the consequences of the physical act is a restatement, specific to the defence of insanity, of the principle of *mens rea* as a requisite element in the commission of a crime. The mental element must be proved with respect to all circumstances, and consequences, that form part of the *actus reus*. Punishment is not an *element* of the crime itself, but may be the *result* of the commission of the criminal act. "Wrong", used in the second half of s. 16(2), means wrong according to

Sa Majesté La Reine *Appelante*;

et

Robert Mark Abbey *Intimé*.

N° du greffe: 16589.

1981: 16 décembre; 1982: 22 juillet.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard et Lamer.

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

Droit criminel — Défense d'aliénation mentale — Hypomanie — Actes que l'accusé savait mauvais — Illusion d'une immunité contre toute peine — L'accusé était-il incapable de juger la nature et la qualité de son acte? — Code criminel, S.R.C. 1970, chap. C-34, art. 16.

Preuve — Ouï-dire — Le juge du procès a-t-il commis une erreur en traitant comme des faits les éléments de preuve par ouï-dire sur lesquels était fondée l'opinion de l'expert?

Accusé d'importation de cocaïne au Canada et de possession illégale de cocaïne en vue d'en faire le trafic, l'intimé a été déclaré non coupable pour cause d'aliénation mentale. Victime d'hypomanie, il savait que ce qu'il faisait était mauvais, mais croyait que, si on l'y prenait, il resterait impuni. Le juge du procès a conclu que l'incapacité de l'intimé de juger la nature et la qualité de ses actes satisfaisait au critère énoncé au par. 16(2) et, plus particulièrement, qu'il «ne se rendait pas compte» des conséquences pénales liées à la perpétration de l'infraction. Le pourvoi attaque un arrêt de la Cour d'appel de la Colombie-Britannique qui a maintenu le verdict rendu par le juge du procès.

Arrêt: Le pourvoi est accueilli.

L'intimé ne peut invoquer la défense d'aliénation mentale. Son incapacité, en raison d'hallucinations, de se rendre compte des sanctions pénales dont l'infraction est assortie ne fait pas jouer en sa faveur le premier volet de la défense d'aliénation mentale. L'exigence que l'accusé soit capable de percevoir les conséquences de l'acte matériel constitue une réitération, propre à la défense d'aliénation mentale, du principe de la *mens rea* en tant qu'élément nécessaire de la perpétration d'un crime. Il faut prouver l'existence de l'élément mental relativement à toutes les circonstances et à toutes les conséquences qui font partie de l'*actus reus*. La peine n'est pas un *élément* du crime lui-même, mais elle peut être le *résultat* de la perpétration de l'acte criminel. Le mot «mau-

law, and as it has been established that respondent's act was forbidden by law, respondent's inability to "appreciate" the penal consequences was irrelevant to the question of legal sanity.

Irresistible impulse does not exist as a defence but may be symptomatic of a disease of the mind giving rise to a defence of insanity. The trial judge's comments were made in the context of his consideration of the insanity defence and specifically rejected a defence of diminished responsibility.

The trial judge erred in accepting as factual much of the hearsay evidence related by an expert in the course of giving his opinion. The expert's opinion, however, was admissible even if based on second-hand evidence, for that opinion is not determinative of an issue but a question of fact to be accepted or rejected as the judge or jury see fit.

Cooper v. The Queen, [1980] 1 S.C.R. 1149; *Schwartz v. The Queen*, [1977] 1 S.C.R. 673; *R. v. Borg*, [1969] S.C.R. 551, considered; *R. v. Barnier*, [1980] 1 S.C.R. 1124; *Kjeldsen v. The Queen*, [1981] 2 S.C.R. 617; *Codere* (1916), 12 Cr. App. R. 21; *R. v. Harrop* (1940), 74 C.C.C. 228; *R. v. Crook* (1979), 1 Sask. R. 273; *R. v. Rabey* (1977), 37 C.C.C. (2d) 461; *R. v. Creighton* (1908), 14 C.C.C. 349; *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965; *Turner* (1974), 60 Crim. App. R. 80; *Wilband v. The Queen*, [1967] S.C.R. 14; *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49; *R. v. Rosik*, [1971] 2 O.R. 47; *Phillion v. The Queen*, [1978] 1 S.C.R. 18; *R. v. Perras* (1972), 8 C.C.C. (2d) 209, referred to.

APPEAL from a judgment of the British Columbia Court of Appeal (1981), 60 C.C.C. (2d) 49, 21 C.R. (3d) 63, 29 B.C.L.R. 212, dismissing an appeal from a judgment of Spencer C.C.J. finding respondent not guilty on account of insanity. Appeal allowed.

Eugene G. Ewaschuk, Q.C., and *S. David Frankel*, for the appellant.

Josiah Wood, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—Robert Mark Abbey was tried by a judge sitting alone on two charges (i) importing

vais» employé dans la seconde partie du par. 16(2) signifie mauvais selon la loi, et vu qu'il est établi que l'intimé a commis un acte illégal, son incapacité de «juger» les conséquences pénales n'a aucun rapport avec la question de l'aliénation mentale au sens de la loi.

L'impulsion irrésistible ne constitue pas un moyen de défense, mais elle peut être symptomatique d'une maladie mentale donnant lieu à une défense d'aliénation mentale. Le juge du procès a fait ses observations dans le cadre de son étude de la défense d'aliénation mentale et il a formellement rejeté l'existence d'une défense de responsabilité atténuée.

Le juge du procès a commis une erreur en acceptant comme des faits une bonne partie des éléments de preuve par ouï-dire relatés par un expert au cours de son témoignage. L'opinion de l'expert est toutefois recevable, même si elle est fondée sur un ouï-dire, car cette opinion n'est pas déterminante, étant au contraire une question de fait que le juge ou le jury sont libres d'accepter ou de rejeter.

Jurisprudence: arrêts examinés: *Cooper c. La Reine*, [1980] 1 R.C.S. 1149; *Schwartz c. La Reine*, [1977] 1 R.C.S. 673; *R. c. Borg* , [1969] R.C.S. 551; arrêts mentionnés: *R. c. Barnier*, [1980] 1 R.C.S. 1124; *Kjeldsen c. La Reine*, [1981] 2 R.C.S. 617; *Codere* (1916), 12 Cr. App. R. 21; *R. v. Harrop* (1940), 74 C.C.C. 228; *R. v. Crook* (1979), 1 Sask. R. 273; *R. v. Rabey* (1977), 37 C.C.C. (2d) 461; *R. v. Creighton* (1908), 14 C.C.C. 349; *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965; *Turner* (1974), 60 Crim. App. R. 80; *Wilband c. La Reine*, [1967] R.C.S. 14; *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49; *R. v. Rosik*, [1971] 2 O.R. 47; *Phillion c. La Reine*, [1978] 1 R.C.S. 18; *R. v. Perras* (1972), 8 C.C.C. (2d) 209.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1981), 60 C.C.C. (2d) 49, 21 C.R. (3d) 63, 29 B.C.L.R. 212, qui a rejeté un appel contre un jugement par lequel le juge Spencer de la Cour de comté a déclaré l'intimé non coupable pour cause d'aliénation mentale. Pourvoi accueilli.

Eugene G. Ewaschuk, c.r., et *S. David Frankel*, pour l'appelante.

Josiah Wood, pour l'intimé.

Version française du jugement de la Cour rendu par

LE JUGE DICKSON—Robert Mark Abbey a subi son procès devant un juge siégeant seul relative-

cocaine into Canada and (ii) unlawful possession of cocaine for the purpose of trafficking. His sole defence was that he was insane at the material time. The trial judge gave effect to that defence. He found Abbey not guilty on account of insanity and the Court of Appeal of British Columbia dismissed a Crown appeal. The matter has now, by leave, reached this Court.

I

The Facts and History of the Case

The facts surrounding the commission of the offence are not in dispute. Pursuant to s. 582 of the *Criminal Code* Abbey admitted, amongst others, the following facts alleged against him, for the purpose of dispensing with proof. On Sunday, May 13, 1979, Abbey arrived at the Vancouver International Airport on C.P. Air Flight No. 421 from Lima, Peru. He entered Canada carrying a brown shoulder bag containing two clear plastic bags the contents of which weighed 5.5 ounces and analyzed to be approximately 50 per cent pure cocaine. After disembarkation, Abbey proceeded directly to the Canada Customs primary counter where he presented his passport and a signed customs declaration. He then obtained his suitcase from a baggage carousel and proceeded to the Customs secondary counter. Abbey placed the suitcase and shoulder bag on the counter. The Customs Inspector looked into the shoulder bag and observed a camera case and underneath it two plastic bags of white powder, the cocaine. The following conversation ensued between the Customs Inspector, Jung, and Abbey:

Jung: (holding the two plastic bags of white powder). "What is it?"

Abbey: "You got me."

Jung: "What is it?"

Abbey: "It's coke."

R.C.M.P. Constable Giesbrecht arrived on the scene:

ment à deux accusations, savoir (i) importation de cocaïne au Canada et (ii) possession illégale de cocaïne en vue d'en faire le trafic. Il a invoqué comme seul moyen de défense l'aliénation mentale à l'époque en question. Le juge du procès a retenu ce moyen. Il a déclaré Abbey non coupable pour cause d'aliénation mentale et la Cour d'appel de la Colombie-Britannique a rejeté l'appel du ministère public. L'affaire est maintenant soumise à cette Cour, avec l'autorisation de cette dernière.

I

Les faits et l'historique de la cause

Les faits entourant la perpétration de l'infraction sont incontestés. Conformément à l'art. 582 du *Code criminel*, Abbey a notamment reconnu les faits suivants allégués contre lui afin de dispenser d'en faire la preuve. Le dimanche 13 mai 1979, Abbey est arrivé à l'aéroport international de Vancouver à bord du vol n° 421 de C.P. Air en provenance de Lima au Pérou. Quand il est entré au Canada, il portait un sac à bandoulière brun qui contenait deux sacs en plastique transparent dont le contenu, qui pesait 5.5 onces, était, comme l'a révélé une analyse, de la cocaïne pure à environ 50 pour cent. Une fois descendu de l'avion, Abbey s'est rendu directement au comptoir d'examen primaire de Douanes Canada, où il a présenté son passeport et signé une déclaration en douane. Il est alors allé chercher sa valise qui se trouvait sur un distributeur circulaire et s'est rendu au comptoir d'examen secondaire des douanes. Abbey a déposé la valise et le sac à bandoulière sur le comptoir. Le douanier a fouillé le sac à bandoulière et remarqué un étui pour appareil photographique et, en-dessous, deux sacs en plastique qui contenaient de la poudre blanche, savoir la cocaïne. La conversation suivante a alors eu lieu entre le douanier qui s'appelait Jung, et Abbey:

[TRADUCTION]

Jung: (tenant les deux sacs en plastique contenant la poudre blanche). «Qu'est-ce que c'est?»

Abbey: «Je suis fait.»

Jung: «Qu'est-ce que c'est?»

Abbey: «C'est de la «coke».»

L'agent Giesbrecht de la G.R.C. est arrivé sur les lieux:

Giesbrecht: (indicating the brown shoulder bag). "What's in here?"

Abbey: "Naturally cocaine."

Giesbrecht: "How much?"

Abbey: "130 to 150 grams."

Giesbrecht: "You need not say anything, however, anything you do say may be given in evidence. You understand this?"

Giesbrecht: "What's the white powder?"

Abbey: "Cocaine."

Giesbrecht: "You brought the cocaine into the country?"

Abbey: "Yes."

Giesbrecht: (indicating the brown shoulder bag). "Did you bring this suitcase into the country?"

Abbey: "Yes."

Later in the day Abbey gave the police a signed statement in which he said that in the last two weeks of April, 1979, while still in Canada, he had received $900 from three individuals on the express understanding that he would purchase 13 grams of cocaine for them in Peru. The two plastic bags contained 158.7 grams of cocaine, the "street value" of which was $76,320, if cut to 13 per cent purity, or $18,150 if sold, uncut, by the ounce. It was a profit venture. In his statement to police which was submitted in evidence, Abbey was asked if there were anything he would like to say with respect to the importation of cocaine. He replied:

It was just there. I've been down there many times and when you see it for five dollars. I was going to school and [*sic*] the Philippines and it was the perfect way to have a perfect year. I can't believe I did it.

As I have said, the only defence raised was s. 16(2) of the *Criminal Code*, insanity. Section 16 of the *Code* reads:

16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.

[TRADUCTION]

Giesbrecht: (pointant le sac à bandoulière brun). «Qu'y a-t-il là-dedans?»

Abbey: «De la cocaïne, naturellement.»

Giesbrecht: «Combien?»

Abbey: «De 130 à 150 grammes.»

Giesbrecht: «Vous n'êtes pas tenu de dire quoi que ce soit, mais tout ce que vous direz peut servir de preuve. Comprenez-vous cela?»

Giesbrecht: «C'est quoi la poudre blanche?»

Abbey: «De la cocaïne.»

Giesbrecht: «Vous avez importé la cocaïne au pays?»

Abbey: «Oui.»

Giesbrecht: (pointant le sac à bandoulière brun). «Avez-vous apporté cette valise au pays?»

Abbey: «Oui.»

Plus tard dans la journée, Abbey a fait à la police une déclaration signée dans laquelle il affirmait qu'au cours des deux dernières semaines d'avril 1979, alors qu'il était encore au Canada, il avait reçu $900 de trois individus à la condition expresse qu'il achète pour eux 13 grammes de cocaïne au Pérou. Les deux sacs en plastique contenaient 158.7 grammes de cocaïne dont la «valeur de revente» était de $76,320, si elle était réduite à 13 pour cent de pureté, ou de $18,150 si elle était vendue intégralement à l'once. Il s'agissait d'une entreprise à but lucratif. Lorsqu'il faisait sa déclaration à la police, laquelle déclaration a été présentée en preuve, on a demandé à Abbey s'il voulait dire quoi que ce soit concernant l'importation de la cocaïne. Il a répondu:

[TRADUCTION] Elle était tout simplement là. J'ai souvent voyagé là-bas et quand on la voit à cinq dollars. J'étais étudiant et j'allais faire un voyage aux Philippines et c'était le moyen parfait d'avoir une année parfaite. Je n'arrive pas à croire que je l'ai fait.

Comme je l'ai déjà dit, le seul moyen de défense qu'on a invoqué est le par. 16(2) du *Code criminel*, savoir l'aliénation mentale. L'article 16 du *Code* se lit comme suit:

16. (1) Nul ne doit être déclaré coupable d'une infraction à l'égard d'un acte ou d'une omission de sa part alors qu'il était aliéné.

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

As witnesses, the Crown called the customs inspectors and R.C.M.P. officers who searched and questioned Abbey at the airport. They said that Abbey appeared "normal" in their dealings with him. Abbey did not testify. The defence called only one witness, Dr. Vallance, a psychiatrist. In rebuttal the Crown called another psychiatrist, Dr. Eaves. No other witnesses gave testimony.

Dr. Vallance testified that he first saw Abbey approximately 10 weeks after the commission of the offence. Dr. Vallance's testimony was based on his interviews with Abbey, his interviews with Abbey's mother, his review of a medical report prepared by another psychiatrist, and his discussions with other doctors who were involved in treating Abbey. In particular, Dr. Vallance relied on Abbey's description of the events surrounding his trip to South America as indicative of his mental state at the material time. Dr. Vallance's opinion was that Abbey, at all material times, was suffering from a disease of the mind, a manic illness, known as hypomania. While Abbey appreciated that he was bringing cocaine into Canada and knew that what he was doing was wrong, he believed that, if caught, he would not be punished. Dr. Vallance said:

He had a considerable disturbance of mood. He had delusional ideas. He had hallucinatory experiences. It's difficult under circumstances like that to fully appreciate what you are doing, particularly when the feelings and delusional ideas are tangled up with what you are doing. If you feel that you are for some delusional idea inordinately powerful or safe then that impairs good

(2) Aux fins du présent article, une personne est aliénée lorsqu'elle est dans un état d'imbécillité naturelle ou atteinte de maladie mentale à un point qui la rend incapable de juger la nature et la qualité d'un acte ou d'une omission, ou de savoir qu'un acte ou une omission est mauvais.

(3) Une personne qui a des hallucinations sur un point particulier, mais qui est saine d'esprit à d'autres égards, ne doit pas être acquittée pour le motif d'aliénation mentale, à moins que les hallucinations ne lui aient fait croire à l'existence d'un état de choses qui, s'il eût existé, aurait justifié ou excusé son acte ou omission.

(4) Jusqu'à preuve du contraire, chacun est présumé être et avoir été sain d'esprit.

Le ministère public a cité comme témoins les douaniers et les agents de la G.R.C. qui avaient fouillé et interrogé Abbey à l'aéroport. Ils ont affirmé que Abbey semblait «normal» lorsqu'ils avaient eu affaire à lui. Abbey n'a pas témoigné. La défense n'a cité qu'un seul témoin, le Dr Vallance, un psychiatre. Le ministère public a répliqué en faisant témoigner un autre psychiatre, le Dr Eaves. Il s'agit là des seuls témoignages rendus.

Le Dr Vallance a témoigné avoir vu Abbey pour la première fois environ 10 semaines après la perpétration de l'infraction. Son témoignage se fondait sur ses entrevues avec Abbey et avec la mère de ce dernier, sur son examen d'un rapport médical rédigé par un autre psychiatre et sur ses entretiens avec d'autres médecins qui soignaient Abbey. Le Dr Vallance a notamment jugé que la description qu'a donnée Abbey des événements entourant son voyage en Amérique du Sud donnait une idée de son état mental à l'époque pertinente. Selon le Dr Vallance, Abbey souffrait en tout temps pertinent d'une maladie mentale, d'une manie connue sous le nom d'hypomanie. Abbey se rendait compte qu'il importait de la cocaïne au Canada et il savait que cela était mauvais, mais il croyait que, si on l'y prenait, il resterait impuni. Le Dr Vallance a dit:

[TRADUCTION] Il était d'humeur très instable. Il avait des illusions. Il avait des hallucinations. Il est difficile dans des circonstances pareilles de bien se rendre compte de ce qu'on fait, surtout lorsque les sentiments et les illusions viennent se mêler à ses actes. Si, en raison d'une illusion quelconque, on croit jouir d'une puissance ou d'une sécurité illimitées, cela nuit au jugement. Je

judgment. I am sure he had some appreciation of what he was doing.

Dr Vallance further testified that, while Abbey was not rendered totally incapable of appreciating the nature and quality of his acts by reason of the disease of mind from which he suffered, there was a degree of impairment of judgment. He had the feeling that he was being looked after by some outside force that was feeding him strength and that no harm would come to him and even if he did get caught it did not matter because somehow he would be looked after. Dr. Vallance made reference to Abbey's delusional belief that he was committed to a particular path of action which he could not change and his further delusional idea, while in Lima, Peru, that he had "astro-travelled" back to Vancouver already and that in getting on the plane in Lima to fly home he was simply having the body follow where the "rest" had already gone.

Dr. Eaves, in rebuttal, was of the opinion that the disease of the mind experienced by Abbey, hypomania, would "not be substantially enough to render him incapable of appreciating the nature and quality of his actions . . . not to know that his actions were wrong".

The trial judge found that Abbey suffered from a disease of the mind. This was common ground. Both doctors agreed, however, that Abbey knew what he was doing and he knew that it was wrong. They disagreed on their assessment of the degree of Abbey's capability as of May 13, 1979. The judge found that disease of the mind incapacitated his ability to appreciate the nature and quality of his acts to the degree required to meet the test of s. 16(2). More particularly, Abbey did not "appreciate" the consequences of punishment associated with the commission of the offence. After referring to the decision of this Court in *Cooper v. The Queen*, [1980] 1 S.C.R. 1149, the trial judge did find that Abbey "had the capacity to appreciate the nature of the act of importing and of possessing the Cocaine". He continued:

> As I understand the evidence and the submissions of counsel, the Accused had the capacity to appreciate the nature of the act of importing and of possessing the

suis certain qu'il se rendait compte jusqu'à un certain point de ce qu'il faisait.

Le Dr Vallance a en outre témoigné que, si la maladie mentale d'Abbey ne le rendait pas tout à fait incapable de juger la nature et la qualité de ses actes, il n'en demeurait pas moins que son jugement en souffrait jusqu'à un certain point. Il avait l'impression qu'une puissance extérieure quelconque prenait soin de lui et lui donnait de la force, qu'aucun mal ne lui arriverait et que, même s'il se faisait attraper, c'était sans importance parce que d'une manière ou d'une autre il serait protégé. Le Dr Vallance a fait mention de l'illusion d'Abbey selon laquelle il était irrévocablement engagé dans une voie particulière et d'une autre illusion qu'il avait, savoir que, lorsqu'il était à Lima au Pérou, son esprit s'était déjà transporté à Vancouver et qu'en montant à bord de l'avion à Lima pour retourner chez lui, il faisait simplement faire au corps le voyage que le «reste» avait déjà fait.

Le Dr Eaves, en guise de réfutation, a exprimé l'avis que la maladie mentale dont souffrait Abbey, savoir l'hypomanie, [TRADUCTION] «ne suffisait pas au fond pour le rendre incapable de juger la nature et la qualité de ses actes . . . de savoir que ceux-ci étaient mauvais».

Le juge du procès a conclu qu'Abbey souffrait d'une maladie mentale. On reconnaît cela de part et d'autre. Les deux médecins étaient cependant d'accord pour dire qu'Abbey savait ce qu'il faisait et qu'il savait que c'était mauvais. C'est sur le degré de la capacité d'Abbey au 13 mai 1979 que leurs évaluations ne concordent pas. Le juge a conclu qu'une maladie mentale le rendait à ce point incapable de juger la nature et la qualité de ses actes qu'il satisfaisait au critère énoncé au par. 16(2). Plus particulièrement, Abbey «ne se rendait pas compte» des conséquences pénales liées à la perpétration de l'infraction. Après s'être référé à l'arrêt de cette Cour, *Cooper c. La Reine*, [1980] 1 R.C.S. 1149, le juge du procès a conclu qu'Abbey [TRADUCTION] «avait la capacité de juger la nature des actes qui consistent à importer et à avoir en sa possession de la cocaïne». Il a ajouté:

> [TRADUCTION] Si je comprends bien la preuve et les arguments de l'avocat, l'accusé avait la capacité de juger la nature des actes qui consistent à importer et à avoir

Cocaine. He also had the capacity to appreciate the immediate consequences of those acts. That is to say that they were illegal; that he should not commit them overtly; that if he succeeded he must then deliver some of the Cocaine to his friends who gave him the money for it, and find someone through another friend who would buy the rest at a large profit to himself. He had the capability, in that sense, of analysing the knowledge of what he was about, and he—in using the word "analysing" I adopt the definition given by Mr. Justice Estey in the Supreme Court of Canada decision, *Regina v. Barnier* (1980) 2 W.W.R. 659.

The trial judge, however, did not stop there. He went on to consider "whether the law requires that an accused also be able to appreciate, in the sense of which I have read from Mr. Justice Estey's decision, the consequences that may be personal to him. That is to say, the consequence of punishment."

In finding Abbey not guilty by reason of insanity the judge concluded that "one, who like Abbey suffers from the delusion that he is protected from punishment by some mysterious external force which comes to him, as described in the evidence of Dr. Vallance, has his ability to appreciate the nature and quality of his acts incapacitated to the degree required to meet the test of Section 16, Subsection 2. He is, by disease of the mind, deprived of the ability to assess an important consequence of his act. He is deprived of the effect of the penal sanctions . . . ."

The Crown appealed, contending that the trial judge had erred in law in directing himself to the law applicable to the defence of insanity. The appeal was dismissed.

The Crown has now appealed to this Court, on the grounds raised in the British Columbia Court of Appeal:

1) The trial judge erred in holding that a person who by reason of a disease of the mind does not "appreciate" the personal penal consequences of his actions is insane within the meaning of Section 16(2) of the *Criminal Code*.

en sa possession de la cocaïne. Il avait également la capacité de juger les conséquences immédiates de ces actes. C'est-à-dire qu'il s'agissait d'actes illégaux, qu'il ne devrait pas les commettre ouvertement, que s'il réussissait il devrait alors livrer une partie de la cocaïne à ses amis qui lui avaient donné l'argent pour l'acheter, et, par l'intermédiaire d'un autre ami, trouver quelqu'un qui lui achèterait le reste, ce qui lui permettrait de réaliser un profit considérable. Il avait la capacité, en ce sens qu'il était capable d'analyser la connaissance de ce qu'il allait faire, et il — lorsque j'emploie le mot «analyser», je fais mienne la définition que donne le juge Estey de la Cour suprême du Canada dans l'arrêt *R. c. Barnier*, (1980), 2 W.W.R. 659.

Le juge du procès ne s'est toutefois pas arrêté là. Il a poursuivi en examinant la question [TRADUCTION] «de savoir si la loi exige qu'un accusé soit également capable de juger, au sens de l'extrait des motifs du juge Estey que j'ai lu, les conséquences qui peuvent le toucher personnellement, c'est-à-dire les conséquences pénales.»

En déclarant Abbey non coupable pour cause d'aliénation mentale, le juge a conclu que [TRADUCTION] «quelqu'un qui, comme Abbey, est en proie à l'illusion qu'il est protégé contre toute peine par quelque puissance extérieure mystérieuse qui se manifeste à lui, comme le décrit le témoignage du Dr Vallance, est à ce point incapable de juger la nature et la qualité de ses actes qu'il satisfait au critère énoncé au par. 16(2). Il est, en raison d'une maladie mentale, dépourvu de la capacité d'apprécier une conséquence importante de son acte. Les sanctions pénales n'ont aucun effet sur lui . . . »

Le ministère public a interjeté appel en faisant valoir que le juge du procès avait commis une erreur de droit en se référant au droit applicable à la défense d'aliénation mentale. L'appel a été rejeté.

Le ministère public se pourvoit maintenant devant cette Cour en invoquant les moyens soulevés en Cour d'appel de la Colombie-Britannique:

[TRADUCTION] 1) Le juge du procès a commis une erreur en statuant qu'une personne qui, en raison d'une maladie mentale, «ne se rend pas compte» des conséquences pénales personnelles de ses actes, est aliénée au sens du par. 16(2) du *Code criminel*.

2) The trial judge erred in giving effect to a defence of "irresistible impulse".

3) The trial judge misdirected himself with respect to the use which could be made of "hearsay" evidence introduced during the testimony of the psychiatrists who were called as witnesses.

II

Consequences

The First Arm of Section 16(2)

The question raised in the first ground of appeal is therefore whether "appreciation of the nature and quality of an act" is limited to appreciation of the physical consequences of the act or also includes appreciation of the penal consequences to the accused. Taggart J.A., speaking for the Court of Appeal, said that *Cooper v. The Queen*, *supra*, and *R. v. Barnier*, [1980] 1 S.C.R. 1124 made it clear that there is a distinction between "know" and "appreciate" and that the words "appreciate the nature and quality of his acts" connote more than a mere knowledge of the physical nature of the acts being committed. With respect, I agree. The British Columbia Court failed, however, to deal with the question of what it is an accused must fail to "appreciate" before he can be found to be legally insane. The Court simply accepted the trial judge's conclusion that somebody who, because of a disease of the mind, has the delusion that he is protected from punishment by some mysterious external force, is incapacitated from appreciating the nature and quality of his acts.

The defence of insanity in s. 16(2) of the *Criminal Code* has received lengthy consideration by this Court in several recent judgments: *Cooper v. The Queen*, *supra*, *R. v. Barnier*, *supra*, and, most recently, *Kjeldsen v. The Queen*, [1981] 2 S.C.R. 617. As stated in *Cooper v. The Queen*, at p. 1152, s. 16(2) of the *Criminal Code* "does not set out a test of insanity but, rather the criteria to be taken into account in determining criminal responsibility." With some hesitation the trial judge came to the conclusion that:

2) Le juge du procès a commis une erreur en retenant une défense d'«impulsion irrésistible».

3) Le juge du procès a commis une erreur quant à l'utilisation qui pouvait être faite de la preuve par «ouï-dire» produite au cours des témoignages des psychiatres cités comme témoins.

II

Les conséquences

Le premier volet du par. 16(2)

La question que pose le premier moyen d'appel est donc de savoir si «l'appréciation de la nature et de la qualité d'un acte» se limite aux conséquences matérielles de l'acte ou s'il porte également sur ses conséquences pénales pour l'accusé. Le juge Taggart, parlant au nom de la Cour d'appel, a affirmé qu'il se dégage nettement des arrêts *Cooper c. La Reine*, précité, et *R. c. Barnier*, [1980] 1 R.C.S. 1124, qu'il y a une différence entre le mot «savoir» et le mot «juger» et que l'expression «juger la nature et la qualité de ses actes» connote plus qu'une simple connaissance de la nature matérielle des actes qu'on accomplit. Avec égards, je suis d'accord. Il y a cependant une question que la Cour d'appel de la Colombie-Britannique a omis d'examiner, savoir qu'est-ce qu'un accusé doit ne pas «juger» pour que l'on puisse conclure qu'il est un aliéné au sens de la loi. La Cour s'est contentée de faire sienne la conclusion du juge du procès voulant que quelqu'un qui, en raison d'une maladie mentale, a l'illusion que quelque puissance extérieure mystérieuse le protège contre toute peine, est incapable de juger la nature et la qualité de ses actes.

La défense d'aliénation mentale énoncée au par. 16(2) du *Code criminel* a fait l'objet d'une étude approfondie par cette Cour dans plusieurs arrêts récents: *Cooper c. La Reine*, précité; *R. c. Barnier*, précité, et le plus récent, *Kjeldsen c. La Reine*, [1981] 2 R.C.S. 617. Comme on le dit dans l'arrêt *Cooper c. La Reine*, à la p. 1152, le par. 16(2) du *Code criminel* «n'énonce pas un critère d'aliénation mentale mais, plutôt, les critères dont il faut tenir compte pour déterminer la responsabilité criminelle.» Le juge du procès en est venu, non sans hésitation, à la conclusion que:

. . . one, who like Abbey suffers from the delusion that he is protected from punishment by some mysterious external force which comes to him, as described in the evidence of Dr. Vallance, has his ability to appreciate the nature and quality of his acts incapacitated to the degree required to meet the test of Section 16, Subsection 2. He is, by disease of the mind, deprived of the ability to assess an important consequence of his act. He is deprived of the effect of the penal sanctions in restraining him from the commission of a crime as it should restrain us all.

With respect, the trial judge has confused the "ability to perceive the consequences, impact and results of a physical act" (*Cooper v. The Queen*, at p. 1162) with a belief, however unjustified, that the legal sanction imposed for the commission of the prohibited act, the "legal consequences", was somehow inapplicable to him. The delusion under which Abbey was supposedly labouring was that he would not get caught, or, if caught, would benefit from some undefined immunity to prosecution. Such a delusion by no means brings him under the first arm of the insanity test in s. 16(2) of the *Criminal Code* as developed in the recent cases.

According to s. 16(2) a person is insane when he has a disease of the mind to an extent that renders him incapable of

(i) appreciating the nature and quality of an act,

or

(ii) knowing that an act is wrong.

As the recent decisions dealing with s. 16(2) have noted, the wording in the *Criminal Code* is slightly different than in the English *M'Naghten* rules which are the inspiration for the section. The concern of the recent cases has been to set the limits for the defence, limits which are broader than those in the *M'Naghten* rules. The *M'Naghten* rules, under what is termed the first arm of the test, require the accused to be incapable of knowing the nature and quality of his act. As has been pointed out by the commentators, a narrow literal interpretation of this test is such that "nobody is hardly ever really mad enough to be within it"

[TRADUCTION] . . . quelqu'un qui, comme Abbey, est en proie à l'illusion qu'il est protégé contre toute peine par quelque puissance extérieure mystérieuse qui se manifeste à lui, comme le décrit le témoignage du Dr Vallance, est à ce point incapable de juger la nature et la qualité de ses actes qu'il satisfait au critère énoncé au par. 16(2). Il est, en raison d'une maladie mentale, dépourvu de la capacité d'apprécier une conséquence importante de son acte. Les sanctions pénales n'ont aucun effet sur lui et ne l'empêchent donc pas de commettre un crime, alors que ce doit être leur effet sur nous tous.

Avec égards, le juge du procès a confondu la «capacité de percevoir les conséquences, les répercussions et les résultats d'un acte matériel» (*Cooper c. La Reine*, à la p. 1162) avec la croyance, si injustifiée soit-elle, que pour une raison ou pour une autre la sanction qu'impose la loi pour la perpétration de l'acte interdit, c'est-à-dire les «conséquences légales», ne s'applique pas à lui. L'illusion dont Abbey aurait été victime était qu'il ne se ferait pas attraper ou que, s'il était attrapé, il bénéficierait de quelque vague immunité contre des poursuites. Pareille illusion ne fait nullement jouer en sa faveur le premier volet du critère de l'aliénation mentale qui figure au par. 16(2) du *Code criminel* et qui a été interprété dans les arrêts récents.

Aux termes du par. 16(2), une personne est aliénée lorsqu'elle est atteinte de maladie mentale à un point qui la rend incapable

(i) de juger la nature et la qualité d'un acte,

ou

(ii) de savoir qu'un acte est mauvais.

Comme il se dégage des arrêts récents portant sur le par. 16(2), la formulation qui se trouve dans le *Code criminel* diffère légèrement de celle des règles *M'Naghten* de l'Angleterre dont s'inspire ce paragraphe. Dans les arrêts récents, on s'est attaché à fixer des limites à ce moyen de défense et ces limites sont plus larges que celles établies par les règles *M'Naghten*. Les règles *M'Naghten*, aux termes de ce qu'on appelle le premier volet du critère, exigent que l'accusé soit incapable de savoir quelles sont la nature et la qualité de son acte. Comme l'ont fait remarquer les commentateurs, si on donne à ce critère une interprétation

(Baron Bramwell quoted by G.A. Martin in "Insanity as a Defence" (1966), 8 Crim. L.Q. 240, at p. 243).

As the Court said in *Cooper v. The Queen* at p. 1161:

> To "know" the nature and quality of an act may mean merely to be aware of the physical act, while to "appreciate" may involve estimation and understanding of the consequences of that act. In the case of the appellant, as an example, in using his hands to choke the deceased, he may well have known the nature and quality of that physical act of choking. It is entirely different to suggest, however, that in performing the physical act of choking, he was able to appreciate its nature and quality in the sense of being aware that it could lead to or result in her death.

It is the use of the word "consequences" in this context which, unfortunately, led the trial judge astray. "Consequences" in *Cooper v. The Queen*, *R. v. Barnier* and *Kjeldsen v. The Queen* refer to the physical consequences of the act. All three cases were murder cases, violent crimes in which there was a victim who suffered the "consequences" of the accused's actions.

> The requirement, unique to Canada, is that of perception, an ability to perceive the consequences, impact, and results of a physical act. An accused may be aware of the physical character of his action (i.e., in choking) without necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of a human being. This is simply a restatement, specific to the defence of insanity, of the principle that *mens rea*, or intention as to the consequences of an act, is a requisite element in the commission of a crime [*Cooper v. The Queen*, at pp. 1162-63].

In *Schwartz v. The Queen*, [1977] 1 S.C.R. 673, Mr. Justice Martland said at p. 700:

> The *Codere* case, in my opinion correctly, decided that "nature and quality" dealt with the physical character of the act. If, therefore, a person who has committed a crime did not, by reason of disease of the mind, know what he was doing, he is not to be convicted, because it really was not his act.

littérale stricte, [TRADUCTION] «personne ne sera jamais vraiment assez aliéné pour y satisfaire» (Baron Bramwell, cité par G.A. Martin dans «Insanity as a Defence» (1966), 8 Crim. L.Q. 240, à la p. 243).

Comme l'a dit la Cour dans l'arrêt *Cooper c. La Reine*, à la p. 1161:

> «Connaître» la nature et la qualité d'un acte peut signifier simplement être conscient de l'acte matériel, alors que «juger» peut comprendre l'appréciation et la compréhension des conséquences de cet acte. Dans le cas de l'appelant, par exemple, en se servant de ses mains pour étrangler la victime, il peut bien avoir connu la qualité et la nature de cet acte matériel qu'est la strangulation. Il est tout à fait différent, cependant, de prétendre qu'en accomplissant l'acte de strangulation, il était capable d'en juger la nature et la qualité au sens d'être conscient que cela pouvait entraîner ou causer la mort.

C'est l'emploi du mot «conséquences» dans ce contexte qui, malheureusement, a induit en erreur le juge du procès. Le mot «conséquences» dans les arrêts *Cooper c. La Reine*, *R. c. Barnier* et *Kjeldsen c. La Reine* renvoie aux conséquences matérielles de l'acte. Dans chacune de ces affaires il y avait un meurtre, un crime violent dont la victime avait subi les «conséquences» des actes de l'accusé.

> L'exigence, propre au Canada, est celle de la perception, une capacité de percevoir les conséquences, les répercussions et les résultats d'un acte matériel. Un accusé peut être conscient de l'aspect matériel de son acte (c.-à-d., la strangulation) sans nécessairement pouvoir juger que, par sa nature et sa qualité, cet acte entraînera la mort d'un être humain. Il s'agit simplement d'une réitération, propre à la défense d'aliénation mentale, du principe que la mens rea, ou l'intention relativement aux conséquences d'un acte, est un élément nécessaire dans la perpétration d'un crime [*Cooper c. La Reine*, aux pp. 1162 et 1163].

Dans l'arrêt *Schwartz c. La Reine*, [1977] 1 R.C.S. 673, le juge Martland affirme, à la p. 700:

> Dans l'arrêt *Codere*, on a décidé, à juste titre à mon avis, que les mots «nature et qualité» visent l'aspect matériel de l'acte. Par conséquent, si une personne qui a commis un crime ne savait pas ce qu'elle faisait, en raison d'une maladie mentale, elle ne doit pas être déclarée coupable, parce que ce n'était pas vraiment son acte.

In *Codere* (1916), 12 Cr. App. R. 21 (C.C.A.), Reading L.C.J. considered the application of the *M'Naghten* rules at pp. 26-27 and in particular the expression "nature and quality of the act":

> It is said that "quality" is to be regarded as characterising the moral, as contrasted with the physical, aspect of the deed. The Court cannot agree with that view of the meaning of the words "nature and quality." The Court is of opinion that in using the language "nature and quality" the judges were only dealing with the physical character of the act, and were not intending to distinguish between the physical and moral aspects of the act. That is the law as it has been laid down by judges in many directions to juries, and as the Court understands it to be at the present time.

See also *R. v. Harrop* (1940), 74 C.C.C. 228 (Man. C.A.), at p. 230; *R. v. Crook* (1979), 1 Sask. R. 273 (Sask. C.A.), at p. 303.

Although there is some controversy in academic circles, I adopt the more traditional view espoused by Glanville Williams (*Criminal Law, The General Part*, 2nd ed. (1961), para. 166, at p. 525) that a delusion falling under the "first arm" of the insanity defence negatives an element of the crime, the *mens rea*. It may also, as Martin J.A. pointed out in *R. v. Rabey* (1977), 37 C.C.C. (2d) 461, notwithstanding the existence of *mens rea* in the formal sense of intention, foresight, or knowledge with respect to the *actus reus*, exempt from liability if the criteria of insanity are met. As the Court observed in *Cooper* the requirement that the accused be able to perceive the consequences of a physical act is a restatement, specific to the defence of insanity, of the principle of *mens rea*, or intention as to the consequences of an act, as a requisite element in the commission of a crime. The mental element must be proved with respect to all circumstances, and consequences, that form part of the *actus reus*. As the Crown in this case correctly points out, "While punishment may be a result of the commission of a criminal act it is not an element of the crime itself". A delusion which renders an accused "incapable of appreciating the nature and quality of his act" goes to the *mens rea* of the offence and brings into operation the "first arm" of s. 16(2): he is not guilty by reason of insanity. A delusion which renders an accused

Dans l'arrêt *Codere* (1916), 12 Cr. App. R. 21 (C.C.A.), le lord juge en chef Reading a étudié l'application des règles *M'Naghten*, aux pp. 26 et 27, en portant une attention particulière à l'expression «nature et qualité de l'acte»:

> [TRADUCTION] On dit qu'il faut interpréter le mot «qualité» comme marquant l'aspect moral, par opposition à matériel, de l'acte. La Cour ne peut partager cet avis quant au sens des mots «nature et qualité». La Cour estime qu'en employant les termes «nature et qualité», les juges ne visaient que l'aspect matériel de l'acte et qu'ils n'avaient pas l'intention de faire une distinction entre ses aspects matériel et moral. Voilà le principe de droit que les juges ont établi dans de nombreux exposés au jury, et si la Cour comprend bien, c'est encore ce principe qui s'applique aujourd'hui.

Voir aussi les arrêts *R. v. Harrop* (1940), 74 C.C.C. 228 (C.A. Man.), à la p. 230; *R. v. Crook* (1979), 1 Sask. R. 273 (C.A. Sask.), à la p. 303.

Bien que la question fasse l'objet d'une certaine controverse dans les milieux universitaires, j'adopte le point de vue plus traditionnel adopté par Glanville Williams (*Criminal Law, The General Part*, 2e éd. (1961), par. 166, à la p. 525), selon lequel une hallucination qui relève du «premier volet» de la défense d'aliénation mentale neutralise un élément du crime, savoir la *mens rea*. Comme l'a fait remarquer le juge Martin dans l'arrêt *R. v. Rabey* (1977), 37 C.C.C. (2d) 461, nonobstant l'existence de la *mens rea* au sens formel d'intention, de prévision ou de connaissance relativement à l'*actus reus*, pareille hallucination peut également dégager de toute responsabilité si elle satisfait aux critères de l'aliénation mentale. Comme cette Cour l'a souligné dans l'arrêt *Cooper*, l'exigence que l'accusé soit capable de percevoir les conséquences d'un acte matériel constitue une réitération, propre à la défense d'aliénation mentale, du principe de la *mens rea*, ou de l'intention relativement aux conséquences d'un acte, en tant qu'élément nécessaire de la perpétration d'un crime. Il faut prouver l'existence de l'élément mental relativement à toutes les circonstances et à toutes les conséquences qui font partie de l'*actus reus*. Comme le ministère public le fait remarquer avec raison en l'espèce, [TRADUCTION] «Si la peine peut être un résultat de la perpétration d'un acte criminel, elle ne constitue pas pour autant un

incapable of appreciating that the penal sanctions attaching to the commission of the crime are applicable to him does not go to the *mens rea* of the offence, does not render him incapable of appreciating the nature and quality of the act, and does not bring into operation the "first arm" of the insanity defence.

Abbey was charged with importing and trafficking in cocaine. There is no dispute as to the fact that he carried cocaine into the country. In his statement to police, it was his admitted intention to import cocaine for the purposes of trafficking. In other words, Abbey appreciated that the *actus reus* of each of the offences charged was being committed. Both the psychiatrist called for the defence, and the psychiatrist who testified on behalf of the Crown, stated that Abbey appreciated the nature and quality of his act. The judge erred, in my view, in going on to say that a failure to appreciate the penal sanctions ("consequence of punishment") brought the accused within the ambit of the "first arm" of the insanity defence of s. 16(2).

The Second Arm of Section 16(2)

Should the question of "personal penal consequences" be relevant at all, it is more appropriately discussed within the context of the second arm of s. 16(2) *i.e.* "knowing that an act . . . is wrong". Glanville Williams in his *Criminal Law, The General Part, supra*, at p. 478 says:

> It has been determined that this phrase [nature and quality] refers to the physical character of the act, not its legal quality; legal right and wrong are cared for by the second question . . . [citing *Codere, supra*, at p. 27].

This Court having decided in *Schwartz v. The Queen, supra*, that "wrong" means wrong according to law, and it being established that Abbey

élément du crime lui-même». Une hallucination qui rend un accusé «incapable de juger la nature et la qualité» de son acte relève de la *mens rea* relative à l'infraction et entraîne l'application du «premier volet» du par. 16(2): il est non coupable pour cause d'aliénation mentale. Une hallucination qui rend un accusé incapable de se rendre compte que les sanctions pénales qui se rattachent à la perpétration du crime s'appliquent à lui, par contre, ne relève pas de la *mens rea* relative à l'infraction, ne le rend pas incapable de juger la nature et la qualité de l'acte et n'entraîne pas l'application du «premier volet» de la défense d'aliénation mentale.

Abbey a été accusé d'importation et de trafic de cocaïne. Le fait qu'il soit entré au pays avec de la cocaïne ne fait l'objet d'aucune contestation. Dans sa déclaration à la police, il a avoué avoir eu l'intention d'importer de la cocaïne pour en faire le trafic. En d'autres termes, Abbey s'était rendu compte qu'il commettait l'*actus reus* de chacune des infractions dont il était accusé. Le psychiatre cité pour la défense et celui qui a témoigné pour le compte du ministère public ont tous deux déclaré qu'Abbey se rendait compte de la nature et de la qualité de son acte. A mon avis, le juge a commis une erreur en ajoutant que, puisque l'accusé ne se rendait pas compte des sanctions pénales («les conséquences pénales»), il tombait dans le champ d'application du «premier volet» de la défense d'aliénation mentale énoncée au par. 16(2).

Le second volet du par. 16(2)

Dans la mesure où la question des «conséquences pénales personnelles» peut être pertinente, il convient davantage de l'examiner dans le contexte du second volet du par. 16(2), c.-à-d. «savoir qu'un acte . . . est mauvais». Glanville Williams dans son ouvrage *Criminal Law, The General Part*, précité, affirme à la p. 478:

> [TRADUCTION] On a décidé que cette expression [nature et qualité] vise l'aspect matériel de l'acte et non pas sa qualité juridique; c'est la seconde question qui porte sur le bien et le mal au point de vue juridique . . . [l'auteur cite l'arrêt *Codere*, précité, à la p. 27].

Vu que dans l'affaire *Schwartz c. La Reine*, précitée, cette Cour a décidé que le mot «mauvais» signifie mauvais selon la loi, et vu qu'il est établi

knew his act was "wrong", his inability to "appreciate" the penal consequences is really irrelevant to the question of legal insanity. There seems to be no doubt on the evidence, and on the judge's findings, that Abbey knew that he was doing an act forbidden by law.

With respect, the trial judge homogenized the first and second arms of s. 16(2), collapsing the one into the other in, for example, the following passage from his judgment:

> As I understood the evidence and the submission of counsel, the Accused had the capacity to appreciate the nature of the act of importing and of possessing the Cocaine. He also had the capacity to appreciate the immediate consequences of those acts. That is to say that they were illegal; that he should not commit them overtly. . . .

The second arm of s. 16(2) is concerned with cognitive capabilities, with knowledge, and not with appreciation of consequences. Section 16(2) speaks in terms of knowledge of wrongness, not appreciation of wrongness. One must, I think, draw a distinction between what might be termed "result" crimes and what might be termed "knowledge" crimes. In respect of the former it is correct to speak of appreciation of consequences. The capacity to appreciate the nature and quality of his act refers to the physical character of the act. It requires both an appreciation of the factors involved, and sufficient mental capacity to measure and foresee the consequences of the conduct.

With respect, however, to the second arm of s. 16(2), knowledge that it is wrong, Martland J. set out the test in the *Schwartz* case at p. 701:

> In brief, it is my opinion that the effect of s. 16(2) is to provide protection to a person suffering from disease of the mind who has committed a crime if, in committing the crime, he did not appreciate what he was doing, or, if he did have that appreciation, he did not know that he was committing a crime.

In a note on *Schwartz v. The Queen, supra*, entitled "Section 16 and 'Wrong' ", 18 Cr.L.Q. 413, Professor Mewett submits that the question that

qu'Abbey savait que son acte était «mauvais», son incapacité de «juger» les conséquences pénales est vraiment sans rapport avec la question de l'aliénation mentale au sens de la loi. D'après la preuve et les conclusions du juge, il paraît ne faire aucun doute qu'Abbey savait qu'il commettait un acte contraire à la loi.

Avec égards, le juge du procès a fusionné les deux volets du par. 16(2), mélangeant l'un à l'autre, comme il le fait par exemple dans le passage suivant tiré de son jugement:

> [TRADUCTION] Si je comprends bien la preuve et les arguments de l'avocat, l'accusé avait la capacité de juger la nature des actes qui consistent à importer et à avoir en sa possession de la cocaïne. Il avait également la capacité de juger les conséquences immédiates de ces actes. C'est-à-dire qu'il s'agissait d'actes illégaux, qu'il ne devrait pas les commettre ouvertement . . .

Le second volet du par. 16(2) vise la faculté cognitive, c'est-à-dire la connaissance et non pas l'appréciation des conséquences. Le paragraphe 16(2) porte sur la connaissance du caractère mauvais d'un acte et non sur l'appréciation de son caractère mauvais. Il faut, je crois, faire la distinction entre ce qu'on peut appeler les crimes de «résultat» et ce qu'on peut appeler les crimes de «connaissance». Pour ce qui est des premiers, on peut à bon droit parler de l'appréciation des conséquences. La capacité de juger la nature et la qualité d'un acte se rapporte à l'aspect matériel de cet acte. Cela exige à la fois qu'on se rende compte de ce que l'acte comporte et qu'on ait une capacité mentale suffisante pour pouvoir mesurer et prévoir les conséquences de la conduite adoptée.

Toutefois, quant au second volet du par. 16(2), c'est-à-dire la connaissance que l'acte est mauvais, le juge Martland a énoncé le critère applicable dans l'arrêt *Schwartz*, à la p. 701:

> En bref, je suis d'avis que l'effet du par. 16(2) est de protéger une personne souffrant d'aliénation mentale, qui a commis un crime, si, en commettant le crime, elle ne se rendait pas compte de ce qu'elle faisait ou, si, s'en rendant compte, elle ne savait pas qu'elle commettait un crime.

Dans une note sur l'arrêt *Schwartz c. La Reine*, précité, intitulée «Section 16 and «Wrong»», 18 Cr.L.Q. 413, le professeur Mewett soutient que la

ought to be asked is "whether the accused, because of a disease of the mind (first hurdle) was rendered incapable (second hurdle) of knowing that this act was something that he ought not to do (third hurdle)" (at p. 415). If he was capable of knowing that an act was contrary to law, and that he ought not to do an act contrary to law, then, in the opinion of Professor Mewett, the defence should not apply.

When one is considering the legal aspects of a crime such as the importation of a narcotic the principal inquiry should be directed not to appreciation of physical consequences but to knowledge of wrongness. The trial judge said, "This man knew it was a crime, knew there was penalty, but by delusion believed himself protected." Counsel for Abbey said in argument that he had to accept the fact that he could not bring Abbey's state of mind into the second half of s. 16(2). On these findings, in my opinion, the defence of insanity was not open to Abbey.

I agree with the submission of counsel for the Crown that s. 16(3) of the *Code* can be of no assistance to Abbey as his delusion could not in any way "justify" or "excuse" his actions. In any event, any defence which could be raised under subsection (3) could also be raised under subsection (2). See the *McRuer Report* [*Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases*, (1956)], p. 36.

I am of the view that the trial judge erred in law in holding that a person who by reason of disease of the mind does not "appreciate" the penal consequences of his actions is insane within the meaning of s. 16(2) of the *Criminal Code*.

III

Irresistible Impulse

The second ground of appeal is the submission that the trial judge erred in giving effect to a defence of "irresistible impulse". The submission rests upon the following passage from the judg-

question que l'on doit poser est de savoir [TRADUCTION] «si une maladie mentale (première étape) a rendu l'accusé incapable (deuxième étape) de savoir qu'il ne devait pas accomplir cet acte (troisième étape)» (à la p. 415). S'il était capable de savoir qu'un acte était contraire à la loi et qu'il ne devait pas accomplir un acte contraire à la loi, alors, de l'avis du professeur Mewett, ce moyen de défense ne peut être invoqué.

L'étude des aspects juridiques d'un crime comme l'importation d'un stupéfiant doit surtout porter sur la connaissance du caractère mauvais et non pas sur l'appréciation des conséquences matérielles. Le juge du procès a dit: [TRADUCTION] «Cet homme savait que c'était un crime et qu'il y avait une peine, mais, en raison d'une hallucination, il se croyait protégé». L'avocat d'Abbey a affirmé, au cours des plaidoiries, qu'il devait reconnaître que la seconde moitié du par. 16(2) ne pouvait pas s'appliquer à l'état d'esprit d'Abbey. Vu ces conclusions, j'estime qu'Abbey ne pouvait invoquer la défense d'aliénation mentale.

Je suis d'accord avec le substitut du procureur général qui a soutenu que le par. 16(3) du *Code* ne peut être d'aucun secours à Abbey, puisque son hallucination ne pouvait en aucune manière «justifier» ou «excuser» ses actes. Quoi qu'il en soit, tout moyen de défense qui peut être invoqué en vertu du par. (3), peut l'être également en vertu du par. (2). Voir le *Rapport McRuer* [*Rapport de la Commission royale chargée d'étudier la défense d'aliénation mentale en matière criminelle*, (1956)], à la p. 36.

Je suis d'avis que le juge du procès a commis une erreur de droit en statuant que celui qui, en raison d'une maladie mentale, «ne se rend pas compte» des conséquences pénales de ses actes, est un aliéné mental au sens du par. 16(2) du *Code criminel*.

III

L'impulsion irrésistible

Comme deuxième moyen d'appel, on fait valoir que le juge du procès a commis une erreur en retenant une défense d'«impulsion irrésistible». Cette prétention repose sur le passage suivant tiré

ment at trial, and in particular the words "he believed himself irrevocably committed":

I must also note a second question closely connected with the delusion I have already discussed. It involves the delusion which I find existed with Abbey and which also satisfies the test of Section 16, Subsection 2, that while he was in Peru he thought he should not go through with the importing and possession of Cocaine, but he believed himself irrevocably committed to it. That was not in the sense that having arranged with his friends he was bound to honour the arrangement, but in the sense that he was committed to a path of action which he was, by reason of a force acting upon him, powerless to change.

The Crown maintains that the trial judge found that this "second delusion" independently of any other delusions, rendered Abbey legally insane. Such a finding, the Crown contends, gives effect to a defence not recognized in Canadian law, that of irresistible impulse. What was said by Cartwright C.J. in *R. v. Borg*, [1969] S.C.R. 551, is cited in support of this proposition.

There is no issue here at all. Both the majority and minority opinions in *R. v. Borg* deny the existence of a defence, as such, of irresistible impulse. Both the majority and minority opinions in *Borg*, however, recognize that irresistible impulse may be a symptom or manifestation of a disease of the mind which may give rise to a defence of insanity.

When an accused pleads insanity there is a sense in which it is true to say that irresistible impulse of itself is not a defence. However, there are two senses in which it is not true to say that irresistible impulse of itself is not a defence.

There is no legal presumption of insanity merely from the existence of an irresistible impulse. If an accused presents no medical evidence of disease of the mind but merely pleads that he was acting under an irresistible impulse, a jury is not entitled to infer that the man was insane. In that sense irresistible impulse is not of itself a defence. However, if there is medical evidence of disease of the mind as there was here and yet the only symptoms of that disease of the mind are irresistible impulses, the

des motifs de jugement prononcés au procès, et particulièrement sur les mots [TRADUCTION] «il s'y croyait irrévocablement tenu»:

[TRADUCTION] Je dois également porter mon attention sur une seconde question étroitement liée à l'hallucination dont j'ai déjà parlé. Il s'agit de l'hallucination dont j'ai conclu qu'Abbey était victime et qui satisfait également au critère du par. 16(2), savoir qu'alors qu'il se trouvait au Pérou, l'idée lui est venue qu'il ne devrait pas se livrer aux actes qui consistent à importer et à avoir en sa possession de la cocaïne, mais il s'y croyait irrévocablement tenu, non pas en ce sens qu'ayant pris un engagement avec ses amis, il était obligé d'honorer cet engagement, mais en ce sens qu'il s'était engagé dans une voie qu'il était impuissant à quitter en raison d'une puissance qui s'exerçait sur lui.

Selon la prétention du ministère public, le juge du procès a conclu que cette «seconde hallucination», indépendamment de toute autre, faisait d'Abbey un aliéné mental au sens de la loi. Cette conclusion, prétend le ministère public, équivaut à retenir un moyen de défense que le droit canadien ne reconnaît pas, savoir l'impulsion irrésistible. On cite à l'appui de cet argument ce qu'a dit le juge en chef Cartwright dans l'arrêt *R. c. Borg*, [1969] R.C.S. 551.

Il s'agit là d'une question qui ne se pose pas en l'espèce. Les avis tant de la majorité que de la minorité dans l'arrêt *R. c. Borg*, tout en niant que l'impulsion irrésistible constitue en soi un moyen de défense, reconnaissent toutefois qu'elle peut être un symptôme ou une manifestation d'une maladie mentale pouvant donner lieu à une défense d'aliénation mentale.

[TRADUCTION] Quand un accusé plaide l'aliénation mentale, il est vrai dans un sens que l'impulsion irrésistible ne constitue pas en soi une défense. Mais, dans deux autres sens, ce n'est pas vrai.

En droit, la simple existence d'une impulsion irrésistible ne crée pas une présomption d'aliénation mentale. Si un accusé ne présente aucune preuve médicale de maladie mentale, mais se contente de plaider qu'il agissait sous le coup d'une impulsion irrésistible, un jury ne peut à bon droit conclure qu'il était dans un état d'aliénation mentale. C'est en ce sens que l'impulsion irrésistible ne constitue pas en soi un moyen de défense. Si toutefois il y a une preuve médicale de l'existence

jury may conclude that the accused is insane [*per* Hall J., at p. 570].

There is no error in the trial judgment in this respect. The trial judge did not give effect to an independent defence of irresistible impulse. His comments with respect to the "second delusion" were made in the context of his consideration of the insanity defence. He specifically rejected the existence of a defence of diminished responsibility in Canada.

I agree with the British Columbia Court of Appeal that the reasons of the trial judge should be understood in the sense that Abbey suffered from a disease of the mind which resulted in two delusions; the first was that some mysterious external force would protect him from punishment; the second that he believed himself irrevocably committed to the course of action of importing cocaine; and that these delusions taken together rendered him incapable of appreciating the nature and quality of his acts. The trial judge did not equate the "delusion" with a defence of irresistible impulse and, that being the case, such authorities as *R. v. Borg, supra*, *R. v. Creighton* (1908), 14 C.C.C. 349 and other authorities to a similar effect cited by Crown counsel have no application to the case at bar.

IV

Hearsay Evidence

As a third ground of appeal the Crown contends that the trial judge misdirected himself with respect to the use which could be made of hearsay evidence introduced during the testimony of the psychiatrists who were called as witnesses.

Dr. Vallance testified that during the course of his interviews Abbey told him of various delusions, visions, hallucinations and sensations which he had experienced in the six months preceding his arrest. Dr. Vallance also testified that Abbey had described certain symptoms of the disease to his mother several months prior to the commission of the offence. In his testimony, Dr. Vallance recounted several incidents of bizarre and unstable conduct by Abbey both before his departure for

d'une maladie mentale, comme c'est le cas en l'espèce, et que les seuls symptômes de cette maladie mentale sont des impulsions irrésistibles, le jury peut conclure à l'aliénation mentale de l'accusé [le juge Hall, à la p. 570].

A cet égard, le jugement rendu au procès ne contient aucune erreur. Le juge du procès n'a pas retenu l'impulsion irrésistible comme moyen de défense indépendant. Il a fait ses observations concernant la «seconde hallucination» dans le cadre de son étude de la défense d'aliénation mentale. Il a formellement rejeté l'existence d'une défense de responsabilité atténuée au Canada.

Je suis d'accord avec la Cour d'appel de la Colombie Britannique que l'interprétation à donner aux motifs du juge du procès est qu'Abbey souffrait d'une maladie mentale qui provoquait chez lui deux hallucinations; la première était que quelque puissance extérieure mystérieuse le protégerait contre toute peine; la seconde était qu'il se croyait irrévocablement engagé dans la voie de l'importation de cocaïne; et, prises ensemble, ces hallucinations le rendaient incapable de juger la nature et la qualité de ses actes. Le juge du procès n'a pas assimilé l'«hallucination» à une défense d'impulsion irrésistible et, tel étant le cas, des arrêts comme *R. c. Borg*, précité, *R. v. Creighton* (1908), 14 C.C.C. 349 et d'autres arrêts semblables cités par le substitut du procureur général ne s'appliquent pas en l'espèce.

IV

La preuve par ouï-dire

Comme troisième moyen d'appel, le ministère public prétend que le juge du procès a commis une erreur quant à l'usage qui pouvait être fait de la preuve par ouï-dire présentée au cours des témoignages des psychiatres.

Le D[r] Vallance a témoigné qu'au cours de ses entrevues, Abbey lui avait parlé des différentes illusions, visions, hallucinations et sensations qu'il avait éprouvées au cours des six mois qui avaient précédé son arrestation. Le D[r] Vallance a également témoigné qu'Abbey avait décrit certains symptômes de sa maladie à sa mère plusieurs mois avant la perpétration de l'infraction. Dans son témoignage, le D[r] Vallance a relaté plusieurs incidents, survenus avant le départ d'Abbey pour le

Peru and during his stay. Abbey had told him, Dr. Vallance testified, that four days prior to his actual departure for Peru he had missed a flight and, in a rage, kicked in a window at Vancouver airport. Dr. Vallance was also told by Abbey of certain experiences in Peru: "he could see lights and follow the lights and would interpret those phenomenon with ideas that there was some power outside of him that was communicating with him. He would do strange things, like run out into the fields. He was licking the wetness from trees". The Crown submits that the trial judge accepted and treated as factual much of this hearsay evidence related by Dr. Vallance in the course of giving his opinion. The point is well taken.

Pérou et pendant son séjour là-bas, qui dénotent un comportement bizarre et instable chez celui-ci. Abbey lui avait dit, a témoigné le Dr Vallance, que quatre jours avant son départ pour le Pérou il avait raté un vol et que, dans un accès de colère, il avait donné un coup de pied dans une fenêtre à l'aéroport de Vancouver. Abbey a également parlé au Dr Vallance de certaines expériences qu'il avait vécues au Pérou: [TRADUCTION] «il pouvait voir des lumières et les suivre et il donnait à ces phénomènes l'interprétation qu'il existait une puissance extérieure quelconque qui communiquait avec lui. Il faisait des choses étranges comme courir dans les champs. Il léchait la rosée sur les arbres». Le ministère public prétend que le juge du procès a accepté et traité comme des faits une bonne partie de ces éléments de preuve par ouï-dire relatés par le Dr Vallance au cours de son témoignage. Cette prétention est bien fondée.

A general principle of evidence is that all relevant evidence is admissible. The law of evidence, however, reposes on a few general principles riddled by innumerable exceptions. Two major exceptions to this general principle are hearsay evidence and opinion evidence. There are also exceptions to the exceptions. "Expert witnesses may testify to their opinion on matters involving their expertise" (*Cross on Evidence*, 5th ed. (1979), at p. 20) and may also, incidentally, base their opinions upon hearsay.

Il y a en matière de preuve un principe général selon lequel toute preuve pertinente est recevable. Le droit de la preuve repose toutefois sur quelques principes généraux auxquels se greffent d'innombrables exceptions. Ce principe général souffre deux exceptions importantes, savoir la preuve par ouï-dire et le témoignage d'opinion. Les exceptions connaissent également des exceptions. [TRADUCTION] «Les témoins experts peuvent donner leur opinion sur des questions qui relèvent de leur domaine de compétence» (*Cross on Evidence*, 5e éd. (1979), à la p. 20), et ils peuvent également, soit dit en passant, fonder leurs opinions sur une preuve par ouï-dire.

A major difficulty encountered by counsel and the courts alike has been identifying hearsay. There exists a "superstitious awe . . . about having any truck with evidence which involves A's telling the court what B said to him" (Cross, "What should be done about the Rule Against Hearsay", [1965] Crim. L.R. 68, at p. 82). Phipson suggests three reasons for this:

La détermination de ce qui constitue une preuve par ouï-dire pose une grande difficulté sur laquelle butent aussi bien les avocats que les cours. Il existe une [TRADUCTION] «crainte superstitieuse ... d'avoir affaire à un témoignage dans lequel A dit à la cour ce que B lui a dit» (Cross, «What should be done about the Rule Against Hearsay», [1965] Crim. L.R. 68, à la p. 82). D'après Phipson, il y a trois raisons à cela:

(1) Failure to appreciate that the hallmark of a hearsay statement is not only the nature and the source of the statement but also the purpose for which it is tendered.

[TRADUCTION] 1) Le défaut de se rendre compte qu'une déclaration qui constitue une preuve par ouï-dire se distingue non seulement par sa nature et par sa source mais aussi par son objet.

(2) The absence of any comprehensive judicial formulation of the rule—no doubt because "it is difficult to make any general statement about the law of hearsay which is entirely accurate."

(3) The multiplicity of formulations found in textbooks upon the subject. [*Phipson on Evidence* 12th ed. (1976), Supplemented to 1980, para. 625 at pp. 263-64.]

2) L'absence d'une formulation judiciaire complète de la règle — sans doute parce qu'«il est difficile de faire une déclaration générale sur le droit de la preuve par ouï-dire qui soit entièrement exacte.»

3) La multiplicité de formulations qu'on trouve dans les ouvrages qui traitent de ce sujet [*Phipson on Evidence* 12e éd. (1976), avec suppléments jusqu'en 1980, par. 625, aux pp. 263 et 264.]

The main concern of the hearsay rule is the veracity of the statements made. The principal justification for the exclusion of hearsay evidence is the abhorrence of the common law to proof which is unsworn and has not been subjected to the trial by fire of cross-examination. Testimony under oath, and cross-examination, have been considered to be the best assurances of the truth of the statements of facts presented. Not all statements by a witness of that which he heard someone else say are, however, necessarily hearsay. A felicitous formulation of the distinction between hearsay and non-hearsay evidence is found in the Privy Council decision in *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965 at p. 970:

La règle de l'irrecevabilité du ouï-dire vise surtout à assurer la véracité des déclarations. L'exclusion de la preuve par ouï-dire se justifie principalement par le fait que la *common law* a en horreur toute preuve qui n'a pas été présentée sous serment et qui n'a pas été soumise à l'épreuve du contre-interrogatoire. On estime que le témoignage rendu sous serment et le contre-interrogatoire constituent les meilleures garanties de la véracité des déclarations de faits présentées. Toutefois, les déclarations que fait un témoin concernant ce qu'il a entendu dire par quelqu'un d'autre ne constituent pas toutes nécessairement une preuve par ouï-dire. Une formulation appropriée de la distinction entre la preuve par ouï-dire et la preuve qui ne tombe pas dans cette catégorie se trouve dans l'arrêt du Conseil privé *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965, à la p. 970:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

[TRADUCTION] La preuve d'une déclaration faite par une personne qui elle-même ne témoignera pas, peut être ou ne pas être une preuve par ouï-dire, selon les circonstances. C'est une preuve par ouï-dire, donc irrecevable, lorsqu'elle vise à établir la véracité du contenu de la déclaration. Ce n'est pas une preuve par ouï-dire et elle est recevable lorsqu'elle vise à établir non pas que la déclaration est exacte mais qu'elle a été faite.

What is sometimes loosely and erroneously referred to as hearsay evidence may in fact be "original evidence" as Cross terms it:

When a witness is asked to narrate another's statement for some purpose *other than that of inducing the court to accept it as true*, his evidence is said to be "original". Original evidence may therefore be defined as evidence of the fact that a statement was made, tendered without reference to the truth of anything alleged in the statement [*Cross on Evidence*, 5th ed. (1979), at p. 8, emphasis added].

Ce qu'on appelle parfois, de façon imprécise et erronée, preuve par ouï-dire, peut être en réalité ce que Cross qualifie de «preuve originale»:

[TRADUCTION] Lorsqu'on demande à un témoin de rapporter la déclaration d'une autre personne à une fin *autre que celle d'inciter la cour à la tenir pour vraie*, on dit que son témoignage constitue une preuve «originale». La preuve originale peut donc se définir comme la preuve qui établit qu'une déclaration a été faite, sans établir pour autant la véracité de ce qui est allégué dans la déclaration [*Cross on Evidence*, 5e éd. (1979), à la p. 8; les italiques sont de moi].

Opinion Evidence

Witnesses testify as to facts. The judge or jury draws inferences from the facts. "In the law of evidence 'opinion' means any inference from observed fact, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them" (*Cross on Evidence*, *supra*, at p. 442). Where it is possible to separate fact from inference the witness may only testify as to fact. It is not always possible, however, to do so and the "law makes allowances for these borderline cases by permitting witnesses to state their opinion with regard to matters not calling for special knowledge whenever it would be virtually impossible for them to separate their inferences from the facts on which those inferences are based" (*ibid.*)

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, *per* Lawton L.J.)

An expert witness, like any other witness, may testify as to the veracity of facts of which he has first-hand experience, but this is not the main purpose of his or her testimony. An expert is there to give an opinion. And the opinion more often than not will be based on second-hand evidence. This is especially true of the opinions of psychiatrists.

As stated by Fauteux J. in *Wilband v. The Queen*, [1967] S.C.R. 14 at p. 21:

Le témoignage d'opinion

Les témoins déposent quant aux faits. Le juge ou le jury tire des conclusions à partir des faits. [TRADUCTION] «Dans le droit de la preuve, «opinion» s'entend de toute conclusion qu'on tire d'un fait observé, et le droit dans ce domaine dérive de la règle générale selon laquelle les témoins doivent uniquement parler de ce qu'ils ont observé directement» (*Cross on Evidence*, précité, à la p. 442). Lorsqu'il est possible de séparer les faits des conclusions tirées de ces faits, le témoin ne peut témoigner que sur les faits. Toutefois, cela n'est pas toujours possible et [TRADUCTION] «le droit fait preuve de souplesse dans ces cas limites en permettant aux témoins d'exprimer leur opinion relativement à des questions qui n'exigent pas de connaissances particulières, chaque fois qu'il leur serait virtuellement impossible de séparer leurs conclusions des faits sur lesquels celles-ci se fondent» (*ibid.*).

Quant aux questions qui exigent des connaissances particulières, un expert dans le domaine peut tirer des conclusions et exprimer son avis. Le rôle d'un expert est précisément de fournir au juge et au jury une conclusion toute faite que ces derniers, en raison de la technicité des faits, sont incapables de formuler. [TRADUCTION] «L'opinion d'un expert est recevable pour donner à la cour des renseignements scientifiques qui, selon toute vraisemblance, dépassent l'expérience et la connaissance d'un juge ou d'un jury. Si, à partir des faits établis par la preuve, un juge ou un jury peut à lui seul tirer ses propres conclusions, alors l'opinion de l'expert n'est pas nécessaire» (*Turner* (1974), 60 Crim. App. R. 80, à la p. 83, le lord juge Lawton).

Un témoin expert, comme tout autre témoin, peut témoigner quant à l'exactitude des faits dont il a une expérience directe, mais ce n'est pas là l'objet principal de son témoignage. L'expert est là pour exprimer une opinion et cette opinion est le plus souvent fondée sur un ouï-dire. Cela est particulièrement vrai en ce qui concerne les opinions de psychiatres.

Comme l'a dit le juge Fauteux dans l'arrêt *Wilband c. La Reine*, [1967] R.C.S. 14, à la p. 21:

The value of psychiatrist's opinion may be affected to the extent to which it may rest on second-hand source material; but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the truth of the information but evidence of the opinion formed on the basis of that information.

In the *Wilband* case counsel for Wilband had attempted to have declared inadmissible as hearsay opinion evidence because it was based in part on prison records, material not proved in open court. Fauteux J. found in fact the prison records were not relied upon to any significant extent by the psychiatrists in the formation of their opinion but the decision does stand for the proposition that the second-hand nature of the basis of the opinion does not "contaminate" the opinion. This is consistent with the acceptance of expert evidence based, as it often is, upon hypothetical questions. For the judge or jury the expert's opinion is a question of fact which may be accepted or rejected as seen fit. The opinion, even if uncontradicted, is not determinative of an issue.

Thus an expert opinion based on second-hand evidence is admissible, if relevant. The problem arose in *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49 (Ont. C.A.), as to second-hand evidence itself which formed the basis of the opinion. Gale C.J.O. reached the conclusion that "Put shortly, if an expert is permitted to give his opinion, he ought to be permitted to give the circumstances upon which that opinion is based" (at p. 65). Testimony as to circumstances upon which the opinion is based is not introduced, and cannot be introduced, in order to establish the veracity of the second-hand evidence. It is thus not hearsay evidence. Jessup J.A. correctly stated the law in *R. v. Rosik*, [1971] 2 O.R. 47:

1. In my view, a psychiatrist expressing an opinion as to a mental or emotional condition of an accused can relate in evidence, as Dr. Gray did, what he has been told by the accused when such information is a basis of his opinion .... The hearsay rule does not operate to exclude such evidence because it is not admitted to

[TRADUCTION] La valeur de l'opinion avancée par un psychiatre peut être amoindrie dans la mesure où elle est fondée sur le ouï-dire, mais cela touche sa valeur probante et non sa recevabilité en preuve; en effet, cette opinion n'est pas une preuve de la véracité des informations, mais une preuve de l'idée faite à partir de ces informations.

Dans l'affaire *Wilband*, l'avocat de Wilband avait essayé d'obtenir qu'un témoignage d'opinion soit déclaré irrecevable pour le motif qu'il constituait une preuve par ouï-dire parce qu'il se fondait en partie sur des dossiers de la prison, lesquels n'avaient pas fait l'objet d'une preuve à l'audience. Le juge Fauteux a conclu qu'en réalité les psychiatres ne s'étaient pas fondés de façon importante sur les dossiers de la prison pour former leur opinion, mais l'arrêt établit qu'une opinion n'est pas «viciée» du simple fait qu'elle se fonde sur un ouï-dire. Cela est compatible avec la réception en preuve d'un témoignage d'expert fondé, comme c'est souvent le cas, sur des questions hypothétiques. En ce qui concerne le juge ou le jury, l'opinion de l'expert est une question de fait qu'ils sont libres d'accepter ou de rejeter. L'opinion, même si elle est incontestée, n'est pas déterminante.

Il s'ensuit que l'opinion d'un expert fondée sur un ouï-dire est recevable, à la condition d'être pertinente. Ce problème s'est présenté dans l'affaire *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49 (C.A. Ont.) relativement au ouï-dire même qui constituait le fondement de l'opinion. Le juge en chef Gale est arrivé à la conclusion suivante: [TRADUCTION] «En bref, si l'on permet à un expert de donner son opinion, on devrait lui permettre de divulguer les circonstances sur lesquelles celle-ci se fonde» (à la p. 65). Un témoignage quant aux circonstances sur lesquelles se fonde l'opinion n'a pas pour objet et ne peut avoir pour objet d'établir la véracité du ouï-dire. Il ne s'agit donc pas de preuve par ouï-dire. Dans l'arrêt *R. v. Rosik*, [1971] 2 O.R. 47, le juge Jessup a énoncé avec exactitude le principe de droit applicable:

[TRADUCTION] 1. A mon avis, un psychiatre qui exprime une opinion sur l'état mental ou émotionnel d'un accusé peut, comme l'a fait le Dr Gray, relater au cours de son témoignage ce que l'accusé lui a dit, lorsque ces renseignements constituent un fondement de son opinion ... La règle de l'irrecevabilité du ouï-dire

prove the fact of what the expert has been told: see *Wigmore on Evidence*, 3rd ed.; vol. VI, s. 1720, p. 70, approved by Gale C.J.O., in the *Dietrich* case. The trial Judge should have so instructed the jury and it would have been proper for him also to point out that there was no sworn evidence that the accused ingested drugs or consumed the quantity of alcohol integral to Dr. Gray's opinion . . . [at p. 84-85, emphasis added].

Jessup J.A.'s view was recently confirmed by this Court in *Phillion v. The Queen*, [1978] 1 S.C.R. 18. After citing the excerpt from *Subramaniam v. Public Prosecutor* which is quoted above with respect to hearsay evidence, Ritchie J. went on to say, at p. 24:

> Statements made to psychiatrists and psychologists are sometimes admitted in criminal cases and when this is so it is because they have qualified as experts in diagnosing the behavioural symptoms of individuals and have formed an opinion which the trial judge deems to be relevant to the case, but the statements on which such opinions are based are not admissible in proof of their truth but rather as indicating the basis upon which the medical opinion was formed in accordance with recognized professional procedures.

The danger, of course, in admitting such testimony is the ever present possibility, here exemplified, that the judge or jury, without more, will accept the evidence as going to the truth of the facts stated in it. The danger is real and lies at the heart of this case. Once such testimony is admitted, a careful charge to the jury by the judge or direction to himself is essential. The problem, however, as pointed out by Fauteux J. in *Wilband* resides not in the admissibility of the testimony but rather the weight to be accorded to the opinion. Although admissible in the context of his opinion, to the extent that it is second-hand his testimony is not proof of the facts stated. Lawton L.J. in *Turner, supra*, spoke of this "elementary principle"which is "frequently overlooked":

n'emporte pas l'exclusion d'une telle preuve parce qu'elle n'est pas reçue en vue d'établir ce qu'on a dit à l'expert: voir *Wigmore on Evidence*, 3e éd., vol. VI, par. 1720, à la p. 70, approuvé par le juge en chef Gale dans l'arrêt *Dietrich*. Le juge du procès aurait dû donner des directives en ce sens au jury et souligner l'absence de témoignage sous serment démontrant que l'accusé avait ingéré de la drogue ou consommé la quantité d'alcool sur laquelle se fondait l'opinion du Dr Gray . . . (aux pp. 84 et 85; c'est moi qui souligne).

Le point de vue du juge Jessup a été confirmé récemment par cette Cour dans l'arrêt *Phillion c. La Reine*, [1978] 1 R.C.S. 18. Après avoir cité l'extrait de l'arrêt *Subramaniam* v. *Public Prosecutor*, cité plus haut relativement à la preuve par ouï-dire, le juge Ritchie ajoute, à la p. 24:

> Les déclarations faites à des psychiatres et à des psychologues sont parfois jugées recevables dans les affaires criminelles et, dans ce cas, c'est parce que ces experts dans le diagnostic du comportement humain se sont fondés sur elles pour émettre une opinion tenue pour pertinente par le juge de première instance; toutefois, les déclarations sur lesquelles ces opinions se fondent sont irrecevables comme preuves de leur propre véracité et constituent seulement le fondement de l'opinion médicale formée suivant les règles professionnelles reconnues.

Certes, le danger que présente l'acceptation en preuve d'un tel témoignage est la possibilité, toujours présente, comme on le voit en l'espèce, que le juge ou le jury conclue sans plus que ce témoignage établit l'exactitude des faits qu'il contient. Il s'agit là d'un danger réel qui touche au coeur de la présente espèce. Dès qu'un témoignage de ce genre est reçu en preuve, il est indispensable que le juge se montre prudent dans son exposé au jury ou dans sa propre appréciation de la preuve. Cependant, comme le souligne le juge Fauteux dans l'arrêt *Wilband*, le problème ne se pose pas au niveau de la recevabilité du témoignage, mais plutôt au niveau de la valeur probante à accorder à l'opinion qu'il contient. Bien que recevable dans le cadre d'une opinion, dans la mesure où il constitue un ouï-dire, ce témoignage ne prouve pas les faits énoncés. Le lord juge Lawton, dans l'arrêt *Turner*, précité, a parlé de ce [TRADUCTION] «principe fondamental» qu'on [TRADUCTION] «néglige souvent»:

Thereupon the judge commented that the report contained "hearsay character evidence" which was inadmissible. He could have said that all the facts upon which the psychiatrist based his opinion were hearsay save for those which he observed for himself during his examination of the appellant such as his appearance of depression and his becoming emotional when discussing the deceased girl and his own family. It is not for this Court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the facts upon which they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked [at p. 82, emphasis added].

In the present case Abbey did not testify. Dr. Vallance testified, in the course of his opinion, as to many events and experiences related to him during several interviews. This testimony, while admissible in the context of the opinion, was not in any way evidence of the factual basis of these events and experiences. The trial judge in his decision fell into the error of accepting as evidence of these facts, testimony which if taken to be evidence of their existence would violate the hearsay rule. There was no admissible evidence properly before the Court with respect to: the delusions experienced by the accused; the accused having described the symptoms of his disease to his mother some six months prior to the commission of the offence; the accused having seen a psychiatrist before leaving for Peru; the accused's unstable conduct at the airport some days prior to leaving for Peru or his bizarre behaviour in Peru.

In my view the trial judge erred in law in treating as factual the hearsay evidence upon which the opinions of the psychiatrist were based.

Counsel for Abbey said that the passages in which the trial judge seemed to take symptoms as findings of fact were merely "unfortunate language". But it goes further than that. As Woods J.A. said in *R. v. Perras* (1972), 8 C.C.C. (2d) 209, at p. 213, "The evidence of a physician stating what a patient told him about his symptoms is not evidence as to the existence of the symptoms. To accept it as such would be to

[TRADUCTION] Puis le juge a dit que le rapport contenait une «preuve de moralité obtenue par ouï-dire» qui était irrecevable. Il aurait pu dire que tous les faits sur lesquels le psychiatre a fondé son opinion constituaient une preuve par ouï-dire, sauf ceux qu'il a lui-même observés au cours de son examen de l'appelant, notamment son air dépressif et son émotivité quand il parlait de la défunte et de sa propre famille. Il n'appartient pas à cette Cour de dire aux psychiatres comment rédiger leurs rapports, mais ceux qui citent des psychiatres comme témoins doivent se rappeler que les faits sur lesquels ces derniers fondent leurs opinions doivent être établis par des preuves recevables. On néglige souvent ce principe fondamental [à la p. 82, c'est moi qui souligne].

En l'espèce, Abbey n'a pas témoigné. Le Dr Vallance, en donnant son opinion, a parlé d'un bon nombre d'événements et d'expériences qui lui avaient été relatés au cours de plusieurs entrevues. Bien que recevable dans le cadre de l'opinion, ce témoignage ne prouve aucunement l'aspect factuel de ces événements et expériences. Dans sa décision, le juge du procès a commis l'erreur de retenir comme preuve de ces faits un témoignage qui, s'il était tenu comme preuve de leur existence, contreviendrait à la règle de l'irrecevabilité du ouï-dire. Aucune preuve régulièrement recevable n'avait été soumise à la cour relativement aux hallucinations de l'accusé, à la description que l'accusé avait faite à sa mère des symptômes de sa maladie quelque six mois avant la perpétration de l'infraction, à sa consultation d'un psychiatre avant de partir pour le Pérou, à sa conduite instable à l'aéroport quelques jours avant son départ pour le Pérou ou à son comportement bizarre au Pérou.

A mon avis, le juge du procès a commis une erreur de droit en tenant pour des faits les éléments de preuve par ouï-dire sur lesquels se fondait l'opinion du psychiatre.

L'avocat d'Abbey a affirmé que les passages dans lesquels le juge du procès a semblé considérer des symptômes comme des constatations de faits ne sont qu'un [TRADUCTION] «choix de mots malencontreux». Mais cela va plus loin. Comme l'a dit le juge Woods dans l'arrêt *R. v. Perras* (1972), 8 C.C.C. (2d) 209, à la p. 213, [TRADUCTION] «Le témoignage d'un médecin qui relate ce qu'un patient lui a dit concernant ses symptômes ne

infringe the rule against hearsay." It was appropriate for the doctors to state the basis for their opinions and in the course of doing so, to refer to what they were told not only by Abbey but by others, but it was error for the judge to accept as having been proved the facts upon which the doctors had relied informing their opinions. While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

V

Conclusion

Thus the trial judge erred in two respects. There was no admissible evidence of important facts regarding Abbey's conduct upon which the medical opinions were based. And the judge misconstrued the recent cases dealing with the interpretation of the insanity defence in s. 16(2). A failure to "appreciate" the penal sanctions attaching to an offence does not render the accused "incapable of appreciating the nature and quality" of his act so as to bring the insanity defence into play.

The appeal should be allowed. The judgments at trial and on appeal should be set aside, and a new trial ordered on both counts.

Appeal allowed.

Solicitor for the appellant: R. Tassé, Ottawa.

Solicitor for the respondent: Josiah Wood, Vancouver.

constitue pas une preuve de l'existence de ces symptômes. En le retenant comme preuve de cette existence, on contreviendrait à la règle de l'irrecevabilité du ouï-dire.» Il convenait que les médecins énoncent le fondement de leurs opinions et, ce faisant, qu'ils mentionnent ce qui leur avait été dit non seulement par Abbey mais aussi par d'autres personnes; cependant, c'est à tort que le juge a tenu pour prouvés les faits sur lesquels les médecins s'étaient fondés pour former leurs opinions. Bien qu'on ne conteste pas le droit des experts médicaux de prendre en considération tous les renseignements possibles pour former leurs opinions, cela ne dégage en aucune façon la partie qui produit cette preuve de l'obligation d'établir, au moyen d'éléments de preuve régulièrement recevables, les faits sur lesquels se fondent ces opinions. Pour que l'opinion d'un expert puisse avoir une valeur probante, il faut d'abord conclure à l'existence des faits sur lesquels se fonde l'opinion.

V

Conclusion

Donc le juge du procès a commis une erreur à deux égards. D'abord, il n'y avait pas de preuve recevable quant à certains faits importants relatifs à la conduite d'Abbey, sur lesquels se fondaient les opinions médicales. Ensuite, le juge a mal interprété les arrêts récents portant sur l'interprétation de la défense d'aliénation mentale prévue au par. 16(2). Le défaut de «se rendre compte» des sanctions pénales qui se rattachent à une infraction ne rend pas l'accusé «incapable de juger la nature et la qualité» de son acte, de manière à pouvoir invoquer la défense d'aliénation mentale.

Le pourvoi doit être accueilli. Le jugement rendu au procès et l'arrêt de la Cour d'appel doivent être infirmés et un nouveau procès ordonné relativement aux deux chefs d'accusation.

Pourvoi accueilli.

Procureur de l'appelante: R. Tassé, Ottawa.

Procureur de l'intimé: Josiah Wood, Vancouver.

Her Majesty The Queen *Appellant*

v.

J.-L.J. *Respondent*

INDEXED AS: R. *v.* J.-L.J.

Neutral citation: 2000 SCC 51.

File No.: 26830.

1999: December 10; 2000: November 9.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Evidence — Expert evidence — Admissibility — Mohan criteria — Accused charged with sexual assaults on two young male children — Expert witness testifying that accused's personality incompatible with any predisposition to commit such offences — Whether trial judge erred in excluding expert evidence.

The accused was charged with a series of sexual assaults on two young male children. He tendered the evidence of a psychiatrist to establish that in all probability a serious sexual deviant had inflicted the abuse, including anal intercourse, and no such deviant personality traits were disclosed by the accused in various tests including penile plethysmography. After a *voir dire*, the trial judge excluded the expert evidence because it purported to show only lack of general disposition and was not saved by the "distinctive group" exception recognized in *Mohan*. The accused was convicted. A majority of the Court of Appeal allowed the accused's appeal and ordered a new trial on the basis that the expert evidence was wrongly excluded.

Held: The appeal should be allowed and the conviction restored.

The trial judge's discharge of his gatekeeper function in the evaluation of the demands of a full and fair trial record, while avoiding distortions of the fact-finding

Sa Majesté la Reine *Appelante*

c.

J.-L.J. *Intimé*

RÉPERTORIÉ: R. *c.* J.-L.J.

Référence neutre: 2000 CSC 51.

N° du greffe: 26830.

1999: 10 décembre; 2000: 9 novembre.

Présents: Les juges L'Heureux-Dubé, McLachlin, Iacobucci, Major, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Preuve — Preuve d'expert — Admissibilité — Critères de l'arrêt Mohan — Accusé inculpé d'avoir agressé sexuellement deux garçonnets — Expert témoignant que la personnalité de l'accusé ne permet pas de conclure qu'il est prédisposé à commettre de telles infractions — Le juge du procès a-t-il commis une erreur en excluant la preuve d'expert?

L'accusé a été inculpé d'avoir commis une série d'agressions sexuelles sur deux garçonnets. Il a fait témoigner un psychiatre dans le but d'établir que, selon toute probabilité, l'auteur des mauvais traitements qui comprenaient des relations sexuelles anales était une personne atteinte d'une déviance sexuelle grave, et que divers tests administrés à l'accusé, dont une pléthysmographie pénienne, ne révélaient aucun trait de personnalité déviant de la sorte. À la suite d'un voir-dire, le juge du procès a exclu la preuve d'expert pour le motif qu'elle paraissait démontrer seulement une absence de prédisposition générale disposition et n'était pas sauvegardée par l'exception du «groupe distinctif» reconnue dans l'arrêt *Mohan*. L'accusé a été déclaré coupable. La Cour d'appel à la majorité a accueilli l'appel de l'accusé et ordonné la tenue d'un nouveau procès pour le motif que la preuve d'expert avait été exclue à tort.

Arrêt: Le pourvoi est accueilli et la déclaration de culpabilité est rétablie.

Le fait que le juge du procès a évité que la recherche des faits soit faussée par la présentation d'un témoignage d'expert inapproprié, en exerçant sa fonction de

exercise through the introduction of inappropriate expert testimony, deserves a high degree of respect. In this case, the trial judge was not persuaded that the *Mohan* requirements had been met.

Novel science is subject to "special scrutiny". In this case the psychiatrist was a pioneer in Canada in trying to use the penile plethysmograph, previously recognized as a therapeutic tool, as a forensic tool. Moreover, if expert evidence were accepted that the offence was probably committed by a member of a "distinctive group" from which the accused is excluded, it would be a short step to the conclusion on the ultimate issue of guilt or innocence. This was another reason for special scrutiny.

The "distinctive group" exception sought to be applied here requires that it be shown that the crime could only, or would only, be committed by a person having distinctive personality traits that the accused does not possess. The personality profile of the perpetrator group must identify truly distinctive psychological elements that were in all probability present and operating in the perpetrator at the time of the offence. The *Mohan* requirement that this profile be "standard" was to ensure that it is not put together on an *ad hoc* basis for the purpose of a particular case. Beyond that, the issue whether the "profile" is sufficient depends on the expert's ability to identify and describe with workable precision what exactly distinguishes the distinctive or deviant perpetrator from other people and on what basis the accused can be excluded. The expert evidence tendered in this case was unsatisfactory on both points. The definition of the "distinctive" group of individuals with a propensity to commit the "distinctive crime" was vague. While the reference in *Mohan* to a "standard profile" should not be taken to require an exhaustive inventory of personality traits, the profile must confine the class to useful proportions. Furthermore, the witness did not satisfy the trial judge that the underlying principles and methodology of the tests administered to the accused were reliable and, importantly, applicable. Even giving a loose interpretation to the need for a "standard profile", and passing over the doubts that only a pedophile would be capable of the offence, the evidence of the error rate in the tests administered to the accused was problematic. The possibility that such evidence would distort the fact-finding process was very real. Consideration of the cost-benefit analysis supports the trial judge's conclusion that the testimony offered as many problems as it did solutions, and it was therefore

gardien dans l'évaluation des exigences de procès juste et équitable, mérite beaucoup de respect. Dans la présente affaire, le juge du procès n'était pas convaincu que les exigences de l'arrêt *Mohan* étaient respectées.

Une nouvelle théorie ou technique scientifique doit être «soigneusement examinée». En l'espèce, le psychiatre a fait œuvre de pionnier au Canada en essayant d'utiliser, en tant qu'outil médicolégal, la pléthysmographie pénienne auparavant reconnue comme étant un outil thérapeutique. De plus, si on acceptait une preuve d'expert que l'infraction a probablement été commise par un membre d'un «groupe distinctif» dont l'accusé est exclu, on serait très près de la conclusion sur la question fondamentale de la culpabilité ou de l'innocence. Cela justifiait d'autant plus un examen minutieux.

L'exception du «groupe distinctif» que l'on cherche à appliquer dans la présente affaire exige qu'il soit démontré que le crime ne serait ou ne pourrait être commis que par une personne ayant des traits de personnalité distinctifs que l'accusé ne possède pas. Le profil de personnalité du groupe auquel appartient l'auteur de l'infraction doit relever des éléments psychologiques véritablement distinctifs qui, selon toute probabilité, étaient présents et en action chez ce dernier au moment de la perpétration de l'infraction. L'exigence de l'arrêt *Mohan* que ce profil soit un profil «type» avait pour objet d'éviter qu'il soit établi de manière ponctuelle en fonction de chaque cas particulier. En outre, la réponse à la question de savoir si le «profil» est suffisant dépend de la capacité de l'expert de déterminer et décrire avec une précision réaliste ce qui, au juste, fait que l'auteur distinctif ou déviant du crime diffère des autres personnes, et du motif pour lequel l'accusé peut être exclu. La preuve d'expert qui a été produite en l'espèce était insuffisante à ces deux égards. La définition du groupe «distinctif» de personnes qui ont une propension à commettre ce «crime distinctif» était vague. Même si la mention d'un «profil type» dans l'arrêt *Mohan* ne devrait pas être interprétée comme exigeant un inventaire exhaustif des traits de personnalité, le profil doit ramener la catégorie à des proportions utiles. En outre, le témoin n'a pas convaincu le juge du procès que les principes et la méthode qui sous-tendent les tests administrés à l'accusé étaient fiables et, qui plus est, applicables. Même en donnant une interprétation large à la nécessité d'un «profil type» et en faisant abstraction des doutes que seul un pédophile serait capable de commettre l'infraction en cause, la preuve du taux d'erreur des tests administrés à l'accusé était problématique. La possibilité qu'une telle preuve fausse le processus de

within his discretion to exclude it. The majority of the Court of Appeal erred in interfering with the exercise of that discretion.

recherche des faits était très réelle. La prise en considération de l'analyse du coût et des bénéfices appuie la conclusion du juge du procès que ce témoignage a apporté autant de problèmes que de solutions, et le juge avait donc le pouvoir discrétionnaire de l'exclure. La Cour d'appel à la majorité a commis une erreur en intervenant dans l'exercice de ce pouvoir discrétionnaire.

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Applied: *R. v. Mohan*, [1994] 2 S.C.R. 9; **referred to:** *R. v. Garfinkle* (1992), 15 C.R. (4th) 254; *R. v. Béland*, [1987] 2 S.C.R. 398; *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, aff'd [1977] 2 S.C.R. 824; *R. v. Lupien*, [1970] S.C.R. 263; *R. v. Robertson* (1975), 21 C.C.C. (2d) 385; *Frye v. United States*, 293 F. 1013 (1923); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Protection de la jeunesse — 539*, [1992] R.J.Q. 1144; *R. c. Blondin*, [1996] Q.J. No. 3605 (QL); *People v. John W.*, 185 Cal.App.3d 801 (1986); *Gentry v. State*, 443 S.E.2d 667 (1994); *United States v. Powers*, 59 F.3d 1460 (1995); *State v. Spencer*, 459 S.E.2d 812 (1995); *R. v. Pascoe* (1997), 5 C.R. (5th) 341; *R. v. B.L.*, [1988] O.J. No. 2522 (QL); *R. v. G. (J.R.)* (1998), 17 C.R. (5th) 399; *R. v. Taillefer* (1995), 100 C.C.C. (3d) 1; *R. v. B. (S.C.)* (1997), 119 C.C.C. (3d) 530; *R. v. K.B.* (1999), 176 N.S.R. (2d) 283; *R. v. Malbœuf*, [1997] O.J. No. 1398 (QL), leave to appeal refused, [1998] 3 S.C.R. vii; *R. v. Perlett*, [1999] O.J. No. 1695 (QL); *R. v. S. (J.T.)* (1996), 47 C.R. (4th) 240; *R. v. Dowd* (1997), 120 C.C.C. (3d) 360; *Davie v. Magistrates of Edinburgh*, [1953] S.C. 34; *R. v. Marquard*, [1993] 4 S.C.R. 223.

Jurisprudence

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APPEAL from a judgment of the Quebec Court of Appeal, [1998] R.J.Q. 2229, 130 C.C.C. (3d) 541, [1998] Q.J. No. 2493 (QL), allowing the accused's appeal from his conviction for sexual offences and ordering a new trial. Appeal allowed.

Carole Lebeuf and *Stella Gabbino*, for the appellant.

Pauline Bouchard and *Sharon Sandiford*, for the respondent.

The judgment of the Court was delivered by

BINNIE J. — In this appeal we are required to consider aspects of the "gatekeeper function" performed by trial judges in the reception of novel scientific evidence. The respondent was charged with a series of sexual assaults over a period of four months on two young males with whom he stood in a parental relationship. At the time of the offences, which involved the allegation of anal penetration, the young males were between three and five years old. The defence contended that such offences were committed by someone possessed of a highly distinct personality disorder, and tendered an expert psychiatrist, Dr. Édouard Beltrami, to testify that the respondent's personality was incompatible with any predisposition to commit such offences. The evidence was excluded by the trial judge, who convicted the respondent. A new trial was ordered by a majority of the Quebec Court of Appeal on the basis that this evidence was wrongly excluded. We are of the opinion that in the circumstances the trial judge was entitled to exclude the expert evidence and that the appeal must be allowed and the conviction restored.

Morin, Luc, et Claude Boisclair. «La preuve d'abus sexuel: allégations, déclarations et l'évaluation d'expert» (1992), 23 *R.D.U.S.* 27.
Myers, John E. B., et al. «Expert Testimony in Child Sexual Abuse Litigation» (1989), 68 *Neb. L. Rev.* 1.
Paciocco, David M., and Lee Stuesser. *The Law of Evidence*. Concord, Ont.: Irwin Law, 1996.

POURVOI contre un arrêt de la Cour d'appel du Québec, [1998] R.J.Q. 2229, 130 C.C.C. (3d) 541, [1998] A.Q. nº 2493 (QL), qui a accueilli l'appel de l'accusé contre sa déclaration de culpabilité d'infractions d'ordre sexuel et ordonné la tenue d'un nouveau procès. Pourvoi accueilli.

Carole Lebeuf et *Stella Gabbino*, pour l'appelante.

Pauline Bouchard et *Sharon Sandiford*, pour l'intimé.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — Dans le présent pourvoi, nous sommes appelés à examiner des aspects de la «fonction de gardien» qu'exerce le juge du procès lorsqu'il reçoit une preuve scientifique d'un genre nouveau. L'intimé a été accusé d'avoir commis, pendant quatre mois, une série d'agressions sexuelles sur deux garçonnets auxquels il tenait lieu de père. Au moment des infractions, qui auraient comporté des actes de pénétration anale, les garçonnets avaient entre trois et cinq ans. La défense a prétendu que la personne qui avait commis ces infractions souffrait d'un trouble de la personnalité très particulier, et a fait comparaître un psychiatre expert, le Dr Édouard Beltrami, qui a témoigné que la personnalité de l'intimé ne permettait pas de conclure qu'il était prédisposé à commettre de telles infractions. Le juge du procès a exclu cette preuve et a déclaré l'intimé coupable. La Cour d'appel du Québec à la majorité a ordonné la tenue d'un nouveau procès pour le motif que cette preuve avait été exclue à tort. Nous sommes d'avis que, dans les circonstances, le juge du procès avait le droit d'exclure la preuve d'expert et que le pourvoi doit être accueilli et la déclaration de culpabilité rétablie.

I. The Facts

2 The respondent's family situation is complex. Between February 1, 1995 and May 19, 1995, he had custody of W. and L., two children between three and five years old. The respondent testified that at the time of the events, he was living with his current wife and her son. Because W. and L. did not get along well with his wife's son, the respondent had rented an apartment for them where they lived with a female friend, who looked after them at nights and during the weekends, and a babysitter who came in on weekdays. The respondent visited the apartment on a daily basis, took about half of his meals there and was often present during the weekends.

3 On May 9, 1995, a child and youth protection centre received information alleging that L. had been sexually abused by the respondent. About a week later, the two children were removed from the respondent's custody and placed in a foster home. The foster mother did not know the respondent nor did she know why the children had been removed from his custody. She and her sister testified against the respondent at the trial.

1. *Statements by the Children*

4 The foster mother testified that:

(i) While giving a bath to the two children, she observed them rubbing their penises together. W. then started to hit L.'s buttock with his penis. On being questioned, the children said it was "Papi" who showed them to do that.

(ii) Another time, W. told her that "Papi" had rubbed his "*coulout*" on his body, had [TRANSLATION] "wet his hair", and that "when papi finished doing that . . . he put his *coulout* in his behind", and that when he had done doing that, there was blood in W's excrement. W. told her

I. Les faits

La situation familiale de l'intimé est complexe. Entre le 1er février 1995 et le 19 mai 1995, il a eu la garde de W. et de L., deux enfants qui avaient entre trois ans et cinq ans. Dans son témoignage, l'intimé a déclaré qu'à l'époque où les épisodes se sont produits, il habitait avec son épouse actuelle et le fils de cette dernière. Comme W. et L. ne s'entendaient pas bien avec le fils de celle-ci, l'intimé avait loué un appartement pour eux où ils habitaient en compagnie de l'une de ses amies qui s'occupait d'eux le soir et la fin de semaine; une dame les gardait durant la semaine. L'intimé se rendait quotidiennement à l'appartement, y prenait environ la moitié de ses repas et y était souvent présent la fin de semaine.

Le 9 mai 1995, un centre de protection de l'enfance et de la jeunesse a été informé que l'intimé aurait agressé sexuellement L. Environ une semaine plus tard, l'intimé s'est vu retirer la garde des deux enfants, qui ont été placés dans une famille d'accueil. La mère de la famille d'accueil ne connaissait aucunement l'intimé et ne savait pas non plus pourquoi il avait perdu la garde des enfants. Sa sœur et elle ont témoigné contre l'intimé au procès.

1. *Les déclarations des enfants*

Dans son témoignage, la mère de la famille d'accueil a affirmé ce qui suit:

(i) Alors qu'elle donnait un bain aux deux enfants, elle a remarqué qu'ils frottaient leur pénis ensemble. W. s'est ensuite mis à frapper le derrière de L. avec son pénis. Quand elle les a questionnés à ce sujet, les enfants ont répondu que c'était «papi» qui leur avait montré cela.

(ii) À une autre occasion, W. lui a révélé que «papi» avait frotté son «coulout» sur son corps, qu'il avait «mouillé ses cheveux», que «quand son papi a fini de faire ça, [. . .] il met son coulout dans son derrière» et que lorsqu'il eut terminé, il y avait du sang dans les selles de W.

that this was painful and caused him to walk with difficulty. According to the foster mother, W. had tears in his eyes when he gave this account. "*Coulout*" is a slang word for penis. The foster mother said she had never heard the word until the child mentioned it.

W. lui a dit que c'était douloureux et qu'il avait ensuite de la difficulté à marcher. Selon la mère de la famille d'accueil, W. avait les larmes aux yeux en racontant cela. «Coulout» est un mot d'argot qui désigne le pénis. La mère de la famille d'accueil a dit qu'elle n'avait jamais entendu ce mot avant que l'enfant l'utilise.

The sister of the foster mother also did not know the respondent. She testified that at one point she was watching television with the children. During an episode in which two persons were kissing, W. blurted out a similar "*coulot*" story with the same details about blood and difficulties in walking. W. said that "Papi" would then clean up the excrement with some paper and that "Papi's" "*coulout*" is quite different than his: [TRANSLATION] "it's bigger and all hairy".

5 La sœur de la mère de la famille d'accueil ne connaissait pas non plus l'intimé. Elle a témoigné qu'à un moment donné elle regardait la télévision avec les enfants. Au cours d'un épisode dans lequel deux personnes s'embrassaient, W. a lâché une histoire semblable de «coulout» avec les mêmes détails en ce qui concerne le sang et la difficulté à marcher. W. a dit que «papi» prenait ensuite un papier pour enlever les excréments et que le «coulout» de «papi» était très différent du sien: «c'est plus gros [et] plein de cheveux».

On October 24, 1995, Sergeant Binette asked W. who had put his "*coulout*" in his buttock. The child answered "Papi J." and quickly identified the respondent as "Papi J." when presented with pictures.

6 Le 24 octobre 1995, le sergent Binette a demandé à W. qui avait mis son «coulout» dans son derrière. L'enfant a répondu «papi J.» et a rapidement identifié l'intimé comme étant «papi J.» quand on lui montré des photos.

2. *The Charges*

2. *Les accusations*

The respondent was charged with sexual offences in relation to both W. and L., including touching for a sexual purpose the body of a person under the age of 14 years, unlawful anal intercourse, and sexual assault.

7 L'intimé a été accusé d'avoir commis des infractions d'ordre sexuel sur W. et L., notamment d'avoir touché le corps d'un enfant de moins de 14 ans à des fins d'ordre sexuel, d'avoir eu des relations sexuelles anales illicites avec une autre personne et de s'être livré à une agression sexuelle.

3. *The Examining Physicians*

3. *Les médecins examinateurs*

Dr. Desmarchais, a pediatrist retained by the Crown, examined W. on July 24, 1995, more than two months after the children were removed from the respondent's custody. She observed a 1.5 cm lesion near the anus and thought that there was no doubt that the boy had been sodomized. On the other hand, Dr. Chabot, also a pediatrist who testified for the Crown, was equivocal. He examined W. on August 31, 1995. He said that while the scar was longer than one might expect from constipa-

8 Le Dr Desmarchais, une pédiatre dont les services ont été retenus par le ministère public a examiné W. le 24 juillet 1995, soit plus de deux mois après que l'intimé eut perdu la garde des enfants. Elle a constaté une lésion de 1,5 cm près de l'anus, qui, à son avis, indiquait indubitablement que le garçon avait été sodomisé. Par contre, le Dr Chabot, un autre pédiatre ayant témoigné pour le ministère public, était nuancé dans ses conclusions. Il a examiné W. le 31 août 1995. Il a affirmé

tion, the injury was consistent with constipation as well as with sodomy.

que, même si la cicatrice était plus longue que celle à laquelle on pourrait s'attendre lorsqu'il y a constipation, la blessure était compatible autant avec la constipation qu'avec la sodomie.

4. *The Excluded Evidence*

4. *La preuve exclue*

9 In the course of his trial, the respondent tendered the evidence of Dr. Édouard Beltrami, a qualified psychiatrist who works extensively in the field of clinical psychology. Dr. Beltrami's evidence was tendered to establish that in all probability a serious sexual deviant had inflicted anal intercourse on two children of that age, and no such deviant personality traits were disclosed in Dr. Beltrami's testing of the respondent. The Crown objected to the admission of this evidence and a *voir dire* was held. Dr. Beltrami testified in the *voir dire* as follows:

Au cours de son procès, l'intimé a fait témoigner le Dr Édouard Beltrami, un psychiatre compétent dont maints travaux portent sur le domaine de la psychologie clinique. Le témoignage du Dr Beltrami visait à établir que, selon toute probabilité, une personne atteinte d'une déviance sexuelle grave avait eu des relations sexuelles anales avec deux enfants de cet âge, et les tests qu'il avait administrés à l'intimé ne révélaient aucun trait de personnalité déviant de la sorte. Le ministère public s'est opposé à l'admission de cette preuve et un voir-dire a été tenu. Au cours du voir-dire, le Dr Beltrami a témoigné ainsi:

> (1) While it is not possible to establish a standard profile of individuals with a disposition to sodomize young children, such individuals [TRANSLATION] "frequently" or "habitually" exhibited certain distinctive characteristics which could be identified. The respondent had been tested for these characteristics and excluded.
>
> (2) The tests, which had been administered by Dr. Beltrami's assistant, but the results evaluated by Dr. Beltrami himself, consisted of two approaches, the first a series of general personality tests, and the second a test which Dr. Beltrami considered could detect individuals with serious sexual disorders.

> (1) Bien qu'il soit impossible d'établir le profil type des individus prédisposés à sodomiser de jeunes enfants, ces individus démontrent «fréquemment» ou «habituellement» certaines caractéristiques distinctives identifiables. L'intimé a été testé en fonction de ces caractéristiques et a été écarté.
>
> (2) Les tests, qui ont été administrés par l'assistant du Dr Beltrami mais dont les résultats ont été évalués par le Dr Beltrami lui-même, comportaient deux volets, soit, dans un premier temps, une série de tests de personnalité généraux et, dans un deuxième temps, un test qui, selon le Dr Beltrami, permettait de détecter les individus atteints de troubles sexuels graves.

10 In the first set of tests, the respondent was asked a series of questions about his family history, his schooling, his work experiences, his emotional and sexual life, his hobbies and life habits. The "Minnesota Multiphasic Personality Inventory Test Version 2" (hereinafter "MMPI2") was also administered. The respondent's reactions, while being questioned, were monitored by electromyography (EMG), which measures anxiety. It acts as a sort of

Dans la première série de tests, l'intimé s'est vu poser une série de questions sur ses antécédents familiaux, ses études, son expérience de travail, sa vie affective et sexuelle, ses passe-temps et ses habitudes de vie. On lui a également administré la deuxième version du test intitulé «Inventaire multiphasique de la personnalité du Minnesota» (ci-après «MMPI2»). Les réactions de l'intimé, lorsqu'il était questionné, étaient captées par électro-

lie detector. The objective of the MMPI2 is to identify different potential personality characteristics, including the tendency to be truthful, to hide symptoms, to be subject to psychosis, to be depressive, to be hyperactive, to be anxious, to be histrionic, etc. These tests are not designed specifically for the detection of sexual disorders.

myographie (EMG), une technique permettant de mesurer l'anxiété. L'EMG est une sorte de détecteur de mensonges. Le MMPI2 vise à déceler diverses caractéristiques potentielles de la personnalité, dont la tendance à dire la vérité, à dissimuler des symptômes et à être psychotique, dépressif, hyperactif, anxieux, histrionique, etc. Ces tests ne sont pas conçus précisément pour déceler des troubles d'ordre sexuel.

The second and more controversial test was directed to the respondent's sexual preferences. It consisted of exposing him to images and sounds of sexual activity, both normal and deviant, and measuring his physiological reaction through a gauge attached to his penis. The "strain gauge" is designed to pick up signs of physical arousal. Dr. Beltrami explained that if the subject has previously derived pleasure from a specific form of sexual activity, the pleasure is imprinted on the brain, and may be restimulated on further exposure to pictures or sounds of similar activity. This is how he explained it to the court:

Le deuxième test, qui est plus controversé, concernait les préférences sexuelles de l'intimé. Il consistait à lui présenter des images et à lui faire entendre des sons d'actes sexuels normaux et déviants, et à mesurer sa réaction psychologique au moyen d'un capteur attaché à son pénis. Le «capteur de contrainte» sert à déceler des signes d'excitation physique. Le D[r] Beltrami a expliqué que si le sujet a déjà éprouvé du plaisir en se livrant à une certaine forme d'activité sexuelle, ce plaisir est enraciné dans son cerveau, et il peut être stimulé de nouveau en présence d'images ou de sons d'actes semblables. Voici comment il a expliqué cela à la cour:

[TRANSLATION]

Q. How do you . . . how is it done?

A. The subject is shown normal and deviant images and is played normal and deviant audio cassettes.

Q. Yes.

A. And those who have derived pleasure in the past from a deviant sexual activity, this . . .

Q. This test?

A. . . . this pleasure is kind of ingrained in his brain in the form of an engram, to use the technical term . . .

Q. Okay, just to . . .

A. And when the subject is shown the same situations, it will cause either a mini-erection of which he is sometimes not aware, but a tumescence, that is, a swelling of his penis that is measured with a device for that purpose that is connected to electronic instruments that take down the resulting measurements.

Q. De quelle façon qu'on . . . que c'est fait ça?

R. C'est qu'on projette des images normales et déviantes, on fait écouter des cassettes audio normales et déviantes au sujet.

Q. Oui.

R. Et les gens qui ont déjà eu du plaisir dans une activité sexuelle déviante, cet . . .

Q. Ce test?

R. . . . ce plaisir est un peu comme enraciné dans son cerveau sous forme d'engramme, pour utiliser le terme technique . . .

Q. O.K., juste pour . . .

R. Et quand on lui représente ces mêmes situations, ça va provoquer ou une mini-érection dont il est parfois pas conscient, mais une tumescence, c'est-à-dire un gonflement de son pénis qui est mesuré avec un appareil adéquat, et relié à des appareils électroniques qui prennent des mesures en conséquence.

12 All of the tests used standardized questions, images and scenarios. The respondent was never confronted with specific images designed to replicate the offences alleged against him.

13 Dr. Beltrami testified on the *voir dire* that the first set of tests showed that the respondent had had an unexceptional childhood, that he had not been sexually abused, that he had a good education which allowed him to hold a responsible job and that he was ingenious and entrepreneurial. He noted that the respondent often maintained two or three intimate heterosexual relationships at the same time without his partners knowing about one another. There were several children from these various relationships. Dr. Beltrami notes [TRANSLATION] "He clearly exhibits judgment problems in his tumultuous emotional life. On the other hand, he does not seem to have the irrational ideas associated with sexual offences." Dr. Beltrami noted a tendency on the part of the respondent to deceive, but apart from some emotional instability with women, Dr. Beltrami concluded that the respondent did not have any particular pathologies.

14 With respect to the plethysmograph test, Dr. Beltrami concluded that the respondent has [TRANSLATION] "a clearly normal profile with a preference for adult women and a slight attraction to adolescents. He exhibits no deviation in respect of boys in general or prepubescent boys".

15 The trial judge ruled Dr. Beltrami's evidence inadmissible. He acquitted the respondent of the charges related to L. but convicted the respondent of having, for a sexual purpose, invited, counseled or incited W. to touch the body of the respondent, (s. 152 of the *Criminal Code*, R.S.C., 1985, c. C-46) and having engaged in an act of anal intercourse (s. 159(1) of the *Criminal Code*). The respondent was sentenced to imprisonment of two years on each charge, to be served concurrently. The majority of the Court of Appeal, Robert J.A. dissenting, found that Dr. Beltrami's evidence ought to have been admitted, allowed the appeal and ordered a new trial.

Tous les tests comportaient des questions, des images et des scénarios normalisés. On n'a jamais montré l'intimé des images particulières visant à reproduire les infractions qui lui étaient reprochées.

Le D^r^ Beltrami a témoigné, au cours du voir-dire, que la première série de tests montrait que l'intimé avait eu une enfance ordinaire, qu'il n'avait pas été victime d'abus sexuel, qu'il avait un bon niveau de scolarité qui lui a permis d'obtenir un emploi comportant des responsabilités, et qu'il était ingénieux et animé de l'esprit d'entreprise. Il a noté que l'intimé entretenait souvent deux ou trois relations hétérosexuelles intimes en même temps sans que ses partenaires ne soient au courant de ce fait. Plusieurs enfants sont issus de ces diverses relations. Le D^r^ Beltrami note: «Il montre clairement des troubles de jugement dans sa vie affective tumultueuse. Par contre, il ne semble pas avoir les idées irrationnelles liées à la délinquance sexuelle.» Le D^r^ Beltrami a remarqué une tendance à la tromperie chez l'intimé, mais il a conclu que, à part une certaine instabilité affective avec les femmes, ce dernier ne souffrait d'aucun trouble particulier.

Pour ce qui est de la pléthysmographie, le D^r^ Beltrami a jugé que l'intimé avait «un profil clairement normal avec une préférence pour les femmes adultes et une légère attirance pour les adolescentes. Il ne présente aucune déviation vis-à-vis des garçons en général ou prépubères».

Le juge du procès a décidé que la preuve du D^r^ Beltrami était inadmissible. Il a acquitté l'intimé quant aux accusations relatives à L., mais l'a déclaré coupable d'avoir, à des fins d'ordre sexuel, invité, engagé ou incité W. à le toucher (art. 152 du *Code criminel*, L.R.C. (1985), ch. C-46), et d'avoir eu des relations sexuelles anales avec une autre personne (par. 159(1) du *Code criminel*). L'intimé a été condamné à purger concurremment des peines de deux ans d'emprisonnement pour chaque chef d'accusation. Après avoir statué que la preuve du D^r^ Beltrami aurait dû être admise, la Cour d'appel à la majorité, le juge Robert étant dissident, a accueilli l'appel et ordonné la tenue d'un nouveau procès.

II. Judgments

1. *Court of Québec*, No. 500-01-015157-958, September 27 and October 18, 1996

Judge Trudel recognized Dr. Beltrami as an expert in psychiatry, sexology and physiology. He characterized his evidence, however, as evidence only of general disposition or propensity to commit this type of offence. As such, the evidence did not come within the "distinctive group" exception recognized in *R. v. Mohan*, [1994] 2 S.C.R. 9, which he interpreted as requiring a scientifically established standard profile of the "distinctive group" of offenders. As Dr. Beltrami had acknowledged that no such standard profile had been developed, the exception was therefore inapplicable and the evidence excluded. Convictions were entered in relation to the offences against W.

2. *Quebec Court of Appeal* (1998), 130 C.C.C. (3d) 541

The respondent appealed his conviction on several grounds. For present purposes, it is sufficient to summarize the opinions of the Court of Appeal in relation to the admission of Dr. Beltrami's evidence, which formed the basis of the dissent.

(a) Beauregard and Fish JJ.A., majority

Fish J.A., with whom Beauregard J.A. agreed, allowed the appeal and ordered a new trial on the basis that the trial judge erred in not admitting Dr. Beltrami's evidence.

In the opinion of the majority, even if Dr. Beltrami was unable to identify a "single set of behavioural characteristics shared by every adult, male pedophile" (p. 545), he was nonetheless able to give evidence concerning the respondent's behavioural profile and to assert, in substance, that it included none of the characteristics that were in

II. Les jugements

1. *Cour du Québec*, nº 500-01-015157-958, 27 septembre et 18 octobre 1996

16 Le juge Trudel a reconnu le Dr Beltrami comme étant un expert en psychiatrie, en sexologie et en physiologie. Il a toutefois considéré que son témoignage était une simple preuve de prédisposition ou de propension générale à commettre ce genre d'infraction. Ainsi, la preuve en question n'était pas visée par l'exception du «groupe distinctif» reconnue dans l'arrêt *R. c. Mohan*, [1994] 2 R.C.S. 9, qu'il a interprétée comme exigeant l'existence d'un profil type établi scientifiquement du «groupe distinctif» de délinquants. Comme le Dr Beltrami avait reconnu qu'aucun profil type de cette nature n'avait été établi, l'exception était donc inapplicable et la preuve a été exclue. Des déclarations de culpabilité ont été inscrites relativement aux infractions dont W. avait été victime.

2. *Cour d'appel du Québec*, [1998] R.J.Q. 2229

17 L'intimé en a appelé de sa déclaration de culpabilité pour plusieurs motifs. Pour les fins qui nous occupent, il suffit de résumer les opinions de la Cour d'appel relatives à l'admission de la preuve du Dr Beltrami, qui constituaient le fondement de la dissidence.

a) Les juges Beauregard et Fish, majoritaires

18 Le juge Fish, avec l'appui du juge Beauregard, a accueilli l'appel et ordonné la tenue d'un nouveau procès pour le motif que le juge du procès avait commis une erreur en excluant la preuve du Dr Beltrami.

19 Selon les juges majoritaires, bien que le Dr Beltrami ait été incapable de relever le [TRADUCTION] «moindre ensemble de caractéristiques de comportement que partagent tous les pédophiles adultes de sexe masculin» (p. 2232), il a pu néanmoins témoigner au sujet du profil de comportement de l'intimé et affirmer, pour l'essentiel, que ce profil ne comportait aucune des caractéristiques qui, selon lui, étaient [TRADUCTION] «compatibles

his view "compatible with the . . . offence with which [he] was charged" (p. 545).

20 Concerning the reliability requirement, Fish J.A. did not believe that absolute reliability was the standard. He noted that the plethysmograph is generally recognized by the scientific community and is used by psychiatric facilities such as the Institut Philippe Pinel de Montréal to monitor the result of treatment for sexual pathologies. He noted that Dr. Beltrami had testified that the respondent's results show a sexual preference for adult women and no desire or preference for children.

21 Fish J.A. did not interpret *Mohan*, *supra*, as requiring "the mechanical exclusion of expert evidence on the sole ground that the scientific community has not developed a single set of personality traits — or single psychological profile — that is common to every offender who commits the crime charged" (p. 546). He observed that in *Mohan* Sopinka J. cited *R. v. Garfinkle* (1992), 15 C.R. (4th) 254 (Que. C.A.), with apparent approval. In *Garfinkle*, the Quebec Court of Appeal had ruled Dr. Beltrami's evidence admissible on the facts presented in that case.

22 Unlike the expert evidence rejected in *Mohan*, the evidence of Dr. Beltrami was to the effect that "the offence charged involves an extreme degree of sexual deviancy. It can properly be characterized as distinctive in virtue of the biological nature of the act and the very young age of the alleged victims" (p. 547). These elements point to an offender having one or more distinctive personality traits. According to Dr. Beltrami, the person who committed the offence would likely respond measurably to the penile plethysmograph test since the instrument is particularly effective in detecting extreme deviance. The respondent did not test positive, and Dr. Beltrami's evidence could therefore be "of material assistance in determining innocence or guilt": *Mohan*, *supra*, at p. 37. The

avec [. . .] l'infraction dont [il] était accusé» (p. 2232).

Quant à l'exigence de fiabilité, le juge Fish ne croyait pas que la fiabilité absolue était la norme applicable. Il a fait remarquer que la pléthysmographie est généralement reconnue par la communauté scientifique et que les établissements psychiatriques tels que l'Institut Philippe Pinel de Montréal s'en servent pour contrôler les résultats du traitement de troubles sexuels. Il a souligné que le Dr Beltrami avait témoigné que les résultats de l'intimé montraient qu'il avait une préférence sexuelle pour les femmes adultes et qu'il n'éprouvait aucun désir et n'avait aucune préférence pour les enfants.

Le juge Fish n'a pas considéré que l'arrêt *Mohan*, précité, exige [TRADUCTION] «l'exclusion automatique d'une preuve d'expert du seul fait que la communauté scientifique n'a pas établi le moindre ensemble de traits de personnalité — ou le moindre profil psychologique — que partagent tous les délinquants qui commettent le crime reproché» (p. 2233). Il a fait observer que, dans l'arrêt *Mohan*, le juge Sopinka avait cité et paru approuver l'arrêt *R. c. Garfinkle* (1992), 15 C.R. (4th) 254 (C.A. Qué.). Dans l'arrêt *Garfinkle*, la Cour d'appel du Québec avait jugé la preuve du Dr Beltrami admissible d'après les faits de l'affaire.

Contrairement à la preuve d'expert rejetée dans l'arrêt *Mohan*, la preuve du Dr Beltrami indiquait que [TRADUCTION] «l'infraction reprochée comporte un niveau extrême de déviance sexuelle. Elle peut être qualifiée, à juste titre, de distinctive en raison de la nature biologique de l'acte et du très jeune âge des prétendues victimes» (p. 2233). Ces éléments portent à croire qu'il s'agit d'un délinquant qui possède un ou plusieurs traits de personnalité distinctifs. D'après le Dr Beltrami, la personne qui a commis l'infraction réagirait probablement de façon appréciable au test de la pléthysmographie pénienne étant donné que l'appareil utilisé est particulièrement efficace pour détecter la déviance extrême. Le test de l'intimé ne s'est pas révélé positif, et la preuve du Dr Beltrami

majority allowed the appeal and ordered a new trial.

(b) Robert J.A., dissenting

Referring to *Mohan*, *supra*, Robert J.A. reviewed the criteria applicable to the admissibility of expert evidence as to disposition to commit a crime. What is required is that the person who has committed the crime *or* the accused has "distinctive characteristics" that allow the trier of fact to make comparisons that will help him or her to determine the issue of guilt. The dissent is based in part on the following passage in *Mohan*, at p. 37:

> The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Put another way: Has the scientific community developed a standard profile for the offender who commits this type of crime? An affirmative finding on this basis will satisfy the criteria of relevance and necessity. [Emphasis added.]

Robert J.A. agreed with the trial judge that Dr. Beltrami's evidence was inadmissible largely because science has not yet identified a standard profile for individuals who commit sodomy on young children. The fact that Dr. Beltrami considered the respondent's personality to be incompatible with characteristics that are [TRANSLATION] "frequently" or "habitually" found among people who commit the crime with which the respondent was accused does not satisfy the *Mohan* test. Dr. Beltrami's evidence amounted to evidence of general disposition and did not come within the limited exception to the prohibition against such evidence. Robert J.A. would thus have dismissed the appeal.

III. Analysis

Expert witnesses have an essential role to play in the criminal courts. However, the dramatic growth in the frequency with which they have been

pourrait donc «aide[r] considérablement à déterminer l'innocence ou la culpabilité»: *Mohan*, précité, à la p. 37. La Cour à la majorité a accueilli l'appel et ordonné la tenue d'un nouveau procès.

b) Le juge Robert, dissident

23 Se référant à l'arrêt *Mohan*, précité, le juge Robert a examiné les critères applicables à l'admissibilité d'une preuve d'expert en ce qui concerne la prédisposition à commettre un crime. Il faut que l'auteur du crime *ou* l'accusé possède des «caractéristiques distinctives» qui permettent au juge des faits de faire des comparaisons qui l'aideront à décider de la culpabilité ou de l'innocence. La dissidence repose en partie sur le passage suivant de l'arrêt *Mohan*, à la p. 37:

> Le juge du procès devrait considérer, d'une part, l'opinion de l'expert et, d'autre part, si ce dernier exprime simplement une opinion personnelle ou si le profil de comportement qu'il décrit est couramment utilisé comme indice fiable de l'appartenance à un groupe distinctif. En d'autres termes, la profession scientifique a-t-elle élaboré un profil type du délinquant qui commet ce genre de crime? Une conclusion affirmative sur ce fondement satisfera aux critères de pertinence et de fiabilité. [Je souligne.]

24 Le juge Robert a convenu avec le juge du procès que la preuve du D^r^ Beltrami était inadmissible en grande partie parce que la science n'avait encore défini aucun profil type des personnes qui se livrent à la sodomie sur de jeunes enfants. Le fait que le D^r^ Beltrami a considéré que la personnalité de l'intimé est incompatible avec les caractéristiques qui se retrouvent «fréquemment» ou «habituellement» chez les personnes qui commettent le crime dont est accusé l'intimé ne satisfait pas au critère de l'arrêt *Mohan*. La preuve du D^r^ Beltrami constituait une preuve de prédisposition générale et n'était pas visée par l'exception limitée de l'interdiction de produire une telle preuve. Le juge Robert aurait donc rejeté l'appel.

III. Analyse

25 Les témoins experts ont un rôle essentiel à jouer devant les tribunaux criminels. Toutefois, la croissance spectaculaire de la fréquence de

called upon in recent years has led to ongoing debate about suitable controls on their participation, precautions to exclude "junk science", and the need to preserve and protect the role of the trier of fact — the judge or the jury. The law in this regard was significantly advanced by *Mohan*, *supra*, where Sopinka J. expressed such a concern at p. 21:

> Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

and at p. 24:

> There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

26 In *R. v. Béland*, [1987] 2 S.C.R. 398, La Forest J. warned at p. 434 about undue weight being given to "evidence cloaked under the mystique of science", and more recently in *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385, the Ontario Court of Appeal rejected the evidence of an expert who was put forward by the defence to discuss the frailties of eyewitness identification. Finlayson J.A. observed that admission of such evidence would suggest that without expert help "our jury system is not adequate to the task of determining the guilt of an accused person beyond a reasonable doubt where the identification evidence is pivotal to the case for the Crown" (p. 395). The present appeal involves a provincial court judge sitting alone, but it raises the same controversy about the need to draw the line properly between the role of the expert and the role of the court.

27 In *Mohan*, the Court excluded expert evidence that was directed to a similar point to the one made here by Dr. Beltrami. In that case, a practising physician was charged with four counts of sexual

l'assignation de témoins experts au cours des dernières années est à l'origine du débat actuel qui porte sur les restrictions qu'il convient d'appliquer à leur participation, les précautions à prendre pour écarter la «science de pacotille», et la nécessité de préserver et de protéger le rôle du juge des faits, que ce soit le juge ou le jury. L'arrêt *Mohan*, précité, a fait grandement progresser le droit à cet égard. Dans cet arrêt, le juge Sopinka a fait part de cette préoccupation, à la p. 21:

> Exprimée en des termes scientifiques que le jury ne comprend pas bien et présentée par un témoin aux qualifications impressionnantes, cette preuve est susceptible d'être considérée par le jury comme étant pratiquement infaillible et comme ayant plus de poids qu'elle ne le mérite.

Et à la p. 24:

> Il y a également la crainte inhérente à l'application de ce critère que les experts ne puissent usurper les fonctions du juge des faits. Une conception trop libérale pourrait réduire le procès à un simple concours d'experts, dont le juge des faits se ferait l'arbitre en décidant quel expert accepter.

Dans l'arrêt *R. c. Béland*, [1987] 2 R.C.S. 398, à la p. 434, le juge La Forest a fait une mise en garde sur le poids indu accordé à la «preuve empreinte de la mystique de la science», et plus récemment, dans l'arrêt *R. c. McIntosh* (1997), 117 C.C.C. (3d) 385, la Cour d'appel de l'Ontario a rejeté une preuve d'expert soumise par la défense pour analyser les faiblesses de l'identification par témoin oculaire. Le juge Finlayson a souligné que l'admission d'une telle preuve indiquerait que, sans l'aide d'un expert, [TRADUCTION] «notre système de jury n'est pas en mesure de déterminer la culpabilité d'un accusé hors de tout doute raisonnable lorsque la preuve d'identification est essentielle à la preuve du ministère public» (p. 395). Le présent pourvoi concerne un juge d'une cour provinciale siégeant seul, mais il suscite la même controverse quant à la nécessité de tracer convenablement la ligne entre le rôle de l'expert et celui de la cour.

Dans l'arrêt *Mohan*, la Cour a exclu une preuve d'expert portant sur un point de vue semblable à celui exprimé par le Dr Beltrami en l'espèce. Dans cette affaire, un médecin faisait l'objet de quatre

assault on four female patients aged 13 to 16. The defence tendered a psychiatrist who was prepared to testify that the perpetrator of the alleged offences was part of a limited and distinctive group of individuals (pedophiles and sexual psychopaths) and that the accused did not possess the characteristics typical of members of the group. This Court accepted the trial judge's conclusion that science had not yet developed sufficiently standardized profiles of pedophiles and sexual psychopaths against which an alleged perpetrator could be matched. The evidence was therefore rejected as unreliable, and unnecessary in the sense that it was not required to clarify "a matter otherwise inaccessible" (p. 38).

chefs d'agression sexuelle sur quatre patientes âgées de 13 à 16 ans. La défense a fait comparaître un psychiatre qui était prêt à témoigner que l'auteur des infractions reprochées faisait partie d'un groupe limité et distinctif de personnes (celui des pédophiles et des psychopathes sexuels) et que l'accusé ne possédait pas les caractéristiques habituelles des membres de ce groupe. Notre Cour a accepté la conclusion du juge du procès que la science n'avait encore établi aucun profil suffisamment normalisé des pédophiles et des psychopathes sexuels auquel l'auteur présumé pouvait être comparé. La preuve a donc été rejetée pour le motif qu'elle n'était ni fiable, ni nécessaire en ce sens qu'elle n'était pas requise pour clarifier «une question qui serait autrement inaccessible» (p. 38).

In the course of *Mohan* and other judgments, the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

28 Dans *Mohan* et d'autres arrêts, la Cour a souligné que le juge du procès devrait prendre au sérieux son rôle de «gardien». La question de l'admissibilité d'une preuve d'expert devrait être examinée minutieusement au moment où elle est soulevée, et cette preuve ne devrait pas être admise trop facilement pour le motif que toutes ses faiblesses peuvent en fin de compte avoir une incidence sur son poids plutôt que sur son admissibilité.

The Court's gatekeeper function must afford the parties the opportunity to put forward the most complete evidentiary record consistent with the rules of evidence. As McLachlin J. noted in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 611:

29 En raison de sa fonction de gardienne, la Cour doit offrir aux parties la possibilité de soumettre la preuve la plus complète, conformément aux règles de la preuve. Comme l'a fait remarquer le juge McLachlin dans l'arrêt *R. c. Seaboyer*, [1991] 2 R.C.S. 577, à la p. 611:

> Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted.

> Les tribunaux canadiens, comme ceux de la plupart des ressorts de common law, ont beaucoup hésité à restreindre le pouvoir de l'accusé de présenter une preuve à l'appui de sa défense, cette hésitation tenant du principe fondamental de notre système judiciaire selon lequel une personne innocente ne doit pas être déclarée coupable.

Nevertheless, the search for truth excludes expert evidence which may "distort the fact-finding process" (*Mohan*, at p. 21). To assist in the gatekeeper exercise, the Court established a list of criteria against which, on this appeal, the admissibility of Dr. Beltrami's evidence must be judged. For ease of exposition, I will address these criteria in a

Néanmoins, la recherche de la vérité exclut la preuve d'expert susceptible de «fausser le processus de recherche des faits» (*Mohan*, à la p. 21). Pour faciliter l'exercice du rôle de gardien, la Cour a établi une liste de critères qui, en l'espèce, doivent servir à évaluer l'admissibilité de la preuve du Dr Beltrami. Pour des raisons de commodité, je

sequence that differs somewhat from that followed in *Mohan*.

1. *Subject Matter of the Inquiry*

30 In *Mohan*, Sopinka J., at p. 23, approved a passage from *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, that "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". See also *R. v. Abbey*, [1982] 2 S.C.R. 24, *per* Dickson J., at p. 42; *R. v. Lavallee*, [1990] 1 S.C.R. 852, *per* Wilson J., at p. 896; and *McIntosh*, *supra*, *per* Finlayson J.A., at p. 392.

31 Dr. Beltrami's evidence satisfies this threshold requirement. In *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, aff'd [1977] 2 S.C.R. 824, Martin J.A. of the Ontario Court of Appeal considered psychiatric evidence of disposition admissible "where the particular disposition or tendency in issue is characteristic of an abnormal group, the characteristics of which fall within the expertise of the psychiatrist" (p. 169 (emphasis added)). See also *R. v. Lupien*, [1970] S.C.R. 263; *McMillan*, *supra*; and *R. v. Robertson* (1975), 21 C.C.C. (2d) 385 (Ont. C.A.). This line of cases was approved in *Mohan* with the notation that the operative concept is "distinctive" rather than "abnormal", at p. 36:

> In my opinion, the term "distinctive" more aptly defines the behavioural characteristics which are a precondition to the admission of this kind of evidence.

32 The exception is based on the notion that "psychical as well as physical characteristics may be relevant to identify the perpetrator of the crime" (*McMillan*, *per* Martin J.A., at p. 173), and "involves the psychiatrist in expressing his conclusion that the accused does not have the capacity to commit the crime with which he is charged" (*Lupien*, *supra*, *per* Ritchie J., at p. 278 (emphasis added)). This is clearly a proper subject matter for

vais les aborder dans un ordre qui diffère quelque peu de celui suivi dans l'arrêt *Mohan*.

1. *Objet de l'analyse*

Dans l'arrêt *Mohan*, à la p. 23, le juge Sopinka a approuvé le passage de l'arrêt *Kelliher (Village of) c. Smith*, [1931] R.C.S. 672, à la p. 684, selon lequel [TRADUCTION] «[l]'objet de l'analyse est tel qu'il est peu probable que des personnes ordinaires puissent former un jugement juste à cet égard sans l'assistance de personnes possédant des connaissances spéciales». Voir également *R. c. Abbey*, [1982] 2 R.C.S. 24, le juge Dickson, à la p. 42; *R. c. Lavallee*, [1990] 1 R.C.S. 852, le juge Wilson, à la p. 896; *McIntosh*, précité, le juge Finlayson, à la p. 392.

La preuve du D[r] Beltrami respecte cette exigence préliminaire. Dans *R. c. McMillan* (1975), 23 C.C.C. (2d) 160, conf. par [1977] 2 R.C.S. 824, le juge Martin de la Cour d'appel de l'Ontario a considéré qu'une preuve psychiatrique de prédisposition est admissible [TRADUCTION] «lorsque la prédisposition ou la propension en question est propre à un groupe anormal, dont les caractéristiques relèvent de l'expertise du psychiatre» (p. 169 (je souligne)). Voir également *R. c. Lupien*, [1970] R.C.S. 263, *McMillan*, précité, et *R. c. Robertson* (1975), 21 C.C.C. (2d) 385 (C.A. Ont.). La Cour, dans l'arrêt *Mohan*, a approuvé ce courant jurisprudentiel en notant, à la p. 36, que le concept-clé est le terme «distinctif» plutôt que le terme «anormal»:

> À mon avis, le terme «distinctif» définit mieux les caractéristiques de comportement qui sont une condition préalable à l'admission de cette forme de preuve.

Cette exception s'appuie sur l'idée que [TRADUCTION] «des caractéristiques tant psychiques que physiques peuvent être pertinentes pour identifier l'auteur du crime» (*McMillan*, le juge Martin, à la p. 173), et «amène le psychiatre à exprimer l'avis que l'inculpé ne possède pas la capacité de commettre le crime dont il est accusé» (*Lupien*, précité, le juge Ritchie, à la p. 278 (je souligne)). Il s'agit clairement d'un sujet qui se prête à une preuve

expert evidence. Whether or not the evidence tendered in this particular case is admissible remains to be established.

2. *Novel Scientific Theory or Technique*

Mohan kept the door open to novel science, rejecting the "general acceptance" test formulated in the United States in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and moving in parallel with its replacement, the "reliable foundation" test more recently laid down by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). While *Daubert* must be read in light of the specific text of the *Federal Rules of Evidence*, which differs from our own procedures, the U.S. Supreme Court did list a number of factors that could be helpful in evaluating the soundness of novel science (at pp. 593-94):

(1) whether the theory or technique can be and has been tested:

Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.

(2) whether the theory or technique has been subjected to peer review and publication:

[S]ubmission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected.

(3) the known or potential rate of error or the existence of standards; and,

(4) whether the theory or technique used has been generally accepted:

A "reliability assessment does not require, although it does permit, explicit identification of a relevant scien-

d'expert. Il reste à déterminer si la preuve soumise dans la présente affaire est admissible.

2. *Nouvelle théorie ou technique scientifique*

33

L'arrêt *Mohan* a laissé la porte ouverte aux nouvelles théories ou techniques scientifiques, rejeté le critère de [TRADUCTION] «l'acceptation générale» formulé aux États-Unis dans *Frye c. United States*, 293 F. 1013 (D.C. Cir. 1923), et s'est engagé dans la même direction que le critère qui l'a remplacé, à savoir celui du [TRADUCTION] «fondement fiable» qui a été établi plus récemment par la Cour suprême des États-Unis dans l'arrêt *Daubert c. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Bien que l'arrêt *Daubert* doive s'interpréter en fonction du texte particulier des *Federal Rules of Evidence*, qui diffère de celui de nos propres règles de procédure, la Cour suprême des États-Unis a énuméré un certain nombre de facteurs susceptibles d'être utiles pour évaluer la solidité d'une nouvelle théorie ou technique scientifique (aux pp. 593 et 594):

(1) la théorie ou la technique peut-elle être vérifiée et l'a-t-elle été?

[TRADUCTION] La méthode scientifique actuelle est fondée sur la formulation d'hypothèses et leur vérification pour voir si elles sont fausses; en réalité, cette méthode est ce qui distingue la science des autres domaines de la connaissance.

(2) la théorie ou la technique a-t-elle fait l'objet d'un contrôle par des pairs et d'une publication?

[TRADUCTION] [L]'assujettissement à l'examen de la communauté scientifique fait partie de l'«application rigoureuse de la démarche scientifique», en partie parce qu'il augmente les chances de déceler des failles importantes dans la méthode en cause.

(3) le taux connu ou potentiel d'erreur ou l'existence de normes, et

(4) la théorie ou la technique utilisée est-elle généralement acceptée?

[TRADUCTION] L'«évaluation de la fiabilité n'exige pas, quoiqu'elle le permette, l'identification explicite d'une

tific community and an express determination of a particular degree of acceptance within that community."

. . .

Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," . . . may properly be viewed with skepticism.

34 Thus, in the United States, as here, "general acceptance" is only one of several factors to be considered. A penile plethysmograph may not yet be generally accepted as a forensic tool, but it may become so. A case-by-case evaluation of novel science is necessary in light of the changing nature of our scientific knowledge: it was once accepted by the highest authorities of the western world that the earth was flat.

35 In *Mohan*, Sopinka J. emphasized that "novel science" is subject to "special scrutiny", at p. 25:

In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert.

The penile plethysmograph, as noted by Fish J.A., is generally recognized by the scientific community and is used by psychiatric facilities such as the Institut Philippe Pinel de Montréal to monitor the result of treatment for sexual pathologies. The plethysmograph enables the medical staff to assess the progress of therapy of known and admitted sexual deviants. This is inapplicable to the respondent. He denies he is part of such a group. He is not undergoing therapy. Dr. Beltrami is a pioneer in Canada in trying to use this therapeutic tool as a forensic tool where the problems are firstly to determine whether the offence could only be committed by a perpetrator who possesses distinctive and identifiable psychological traits, secondly to determine

communauté scientifique pertinente ni la détermination d'un degré particulier d'acceptation au sein de cette communauté.»

. . .

L'acceptation générale peut être un facteur important pour décider qu'un élément de preuve particulier est admissible, et «une technique connue qui n'a obtenu qu'un appui minimal au sein de la communauté,» [. . .] peut à juste titre être envisagée avec scepticisme.

En conséquence, aux États-Unis comme ici, l'«acceptation générale» n'est qu'un des divers facteurs dont il faut tenir compte. La pléthysmographie pénienne n'est peut-être pas encore généralement acceptée en tant qu'outil médicolégal, mais elle peut le devenir. Une évaluation dans chaque cas des nouvelles théories ou techniques scientifiques est nécessaire compte tenu de la nature changeante de notre connaissance scientifique: les plus hautes autorités du monde occidental ont déjà accepté que la terre était plate.

À la page 25 de l'arrêt *Mohan*, le juge Sopinka a souligné qu'une «nouvelle théorie ou technique scientifique» doit être «soigneusement examinée»:

En résumé, il ressort donc de ce qui précède que la preuve d'expert qui avance une nouvelle théorie ou technique scientifique est soigneusement examinée pour déterminer si elle satisfait à la norme de fiabilité et si elle est essentielle en ce sens que le juge des faits sera incapable de tirer une conclusion satisfaisante sans l'aide de l'expert.

La pléthysmographie pénienne, comme l'a noté le juge Fish, est généralement reconnue par la communauté scientifique et les établissements psychiatriques tels que l'Institut Philippe Pinel de Montréal s'en servent pour contrôler les résultats du traitement de troubles sexuels. La pléthysmographie permet au personnel médical d'évaluer les progrès des thérapies suivies par les déviants sexuels connus et avérés. Cela ne s'applique pas à l'intimé. Il nie faire partie d'un tel groupe. Il ne suit aucune thérapie. Au Canada, le D^r^ Beltrami fait œuvre de pionnier en essayant d'utiliser cet outil thérapeutique en tant qu'outil médicolégal lorsqu'on a du mal à déterminer, premièrement, si l'infraction ne peut avoir été commise que par une

whether a "standard profile" of those traits has been developed, and thirdly to match the accused against the profile. Dr. Beltrami's evidence is therefore subject to "special scrutiny". While the techniques he employed are not novel, he is using them for a novel purpose. A level of reliability that is quite useful in therapy because it yields some information about a course of treatment is not necessarily sufficiently reliable to be used in a court of law to identify or exclude the accused as a potential perpetrator of an offence. In fact, penile plethysmography has received a mixed reception in Quebec courts: *Protection de la jeunesse — 539*, [1992] R.J.Q. 1144; *R. c. Blondin*, [1996] Q.J. No. 3605 (QL) (S.C.); L. Morin and C. Boisclair in "La preuve d'abus sexuel: allégations, déclarations et l'évaluation d'expert" (1992), 23 *R.D.U.S.* 27. Efforts to use penile plethysmography in the United States as proof of disposition have largely been rejected: *People v. John W.*, 185 Cal.App.3d 801 (1986); *Gentry v. State*, 443 S.E.2d 667 (Ga. Ct. App. 1994); *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995); *State v. Spencer*, 459 S.E.2d 812 (N.C. App. 1995); J. E. B. Myers et al., "Expert Testimony in Child Sexual Abuse Litigation" (1989), 68 *Neb. L. Rev.* 1, at pp. 134-35; J. G. Barker and R. J. Howell, "The Plethysmograph: A Review of Recent Literature" (1992), 20 *Bull. Am. Acad. of Psychiatry & L.* 13.

Dr. Beltrami also purported to gain assistance from the personality inventory tests (MMPI2) about the propensity of the respondent for sexual deviance, but those tests are too broad and general for that purpose, although the results may well have provided useful background information to the more specific plethysmograph test. Again, it was open to him to establish the reliability of these tests for the purposes of excluding the respondent as perpetrator of the offences, but *Mohan* teaches that the attempt is to be regarded with "special scrutiny".

3. *Approaching the Ultimate Issue*

Dr. Beltrami's evidence, if accepted, was potentially very powerful. Once it is accepted that the

personne qui possède des traits psychologiques distinctifs et identifiables, deuxièmement, si un «profil type» de ces traits a été établi et, troisièmement, si l'accusé correspond à ce profil. La preuve du Dr Beltrami est donc «soigneusement examinée». Bien que les techniques utilisées ne soient pas nouvelles, il s'en sert à des fins nouvelles. Un niveau de fiabilité très utile en thérapie pour obtenir des renseignements quant à une série de traitements n'est pas nécessairement suffisant, devant une cour de justice, pour identifier ou exclure l'accusé en tant qu'auteur potentiel d'une infraction. En fait, la pléthysmographie pénienne a reçu un accueil mitigé au sein des tribunaux québécois: *Protection de la jeunesse — 539*, [1992] R.J.Q. 1144; *R. c. Blondin*, [1996] A.Q. nº 3605 (QL) (C.S.); L. Morin et C. Boisclair dans «La preuve d'abus sexuel: allégations, déclarations et l'évaluation d'expert» (1992), 23 *R.D.U.S.* 27. Aux États-Unis, les tentatives d'utiliser la pléthysmographie pénienne pour établir la prédisposition ont été vaines dans la plupart des cas: *People c. John W.*, 185 Cal.App.3d 801 (1986); *Gentry c. State*, 443 S.E.2d 667 (Ga. Ct. App. 1994); *United States c. Powers*, 59 F.3d 1460 (4th Cir. 1995); *State c. Spencer*, 459 S.E.2d 812 (N.C. App. 1995); J. E. B. Myers et autres, «Expert Testimony in Child Sexual Abuse Litigation» (1989), 68 *Neb. L. Rev.* 1, aux pp. 134 et 135; J. G. Barker et R. J. Howell, «The Plethysmograph: A Review of Recent Literature» (1992), 20 *Bull. Am. Acad. of Psychiatry & L.* 13.

36 Le Dr Beltrami paraît également s'appuyer sur les tests d'inventaire de la personnalité (MMPI2) portant sur la propension de l'intimé à une déviance sexuelle, mais ces tests sont trop larges et généraux pour qu'il puisse le faire, même si les résultats peuvent bien avoir fourni des renseignements généraux utiles pour le test plus précis de la pléthysmographie. Là encore, il lui était loisible d'établir la fiabilité de ces tests afin d'exclure l'intimé en tant qu'auteur des infractions, mais l'arrêt *Mohan* nous enseigne qu'une telle démarche doit être «soigneusement examinée».

3. *Le rapprochement de la question fondamentale*

37 La preuve du Dr Beltrami, si elle était acceptée, pouvait être très puissante. Dès qu'on accepte que

offence was probably committed by a member of a "distinctive group" from which the accused has been excluded, it is a short step to the conclusion on the ultimate issue of guilt or innocence. Dr. Beltrami's underlying hypothesis was that if the respondent did not "score" on the plethysmograph, he must lack the disposition to commit such acts. The inference is that if he lacks the disposition then he did not do it. The closeness of his opinion to the ultimate issue is another reason for special scrutiny, as mentioned by Sopinka J. in *Mohan*, at p. 25:

> The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

See also *R. v. Pascoe* (1997), 5 C.R. (5th) 341 (Ont. C.A.), *per* Rosenberg J.A., at p. 357.

4. *The Absence of Any Exclusionary Rule*

38 In *McMillan*, *supra*, and again in *Mohan*, *supra*, the Court carved out an exception to the general rule that the character of the accused, in the sense of disposition to commit or not to commit the offence, can only be evidenced by general reputation in the community. The "distinctive group" exception has already been mentioned. As explained by Professor A. W. Mewett in "Character as a Fact in Issue in Criminal Cases" (1984-85), 27 *Crim. L.Q.* 29, at pp. 35-36, discussed in *Mohan* at p. 34 *et seq.*, it arises in its relevant aspect where "it is shown that the crime is such that it could only, or in all probability would only, be committed by a person having identifiable peculiarities that the accused does not possess" (emphasis added). In *Garfinkle*, *supra*, pedophiles were considered such a "distinctive" group. It may be an issue, however, whether a particular offence "in all probability would *only*" have been committed by a pedophile, as opposed to a non-pedophile whose untypical behaviour was modified by impulsiveness, stress, alcohol or drugs (*R. v. B.L.*, [1988] O.J. No. 2522 (QL) (Gen. Div.); *R. v. G. (J.R.)* (1998), 17 C.R. (5th) 399 (Ont. Ct. (Prov. Div.)).

l'infraction a probablement été commise par un membre d'un «groupe distinctif» dont l'accusé est exclu, on est très près de la conclusion sur la question fondamentale de la culpabilité ou de l'innocence. Selon l'hypothèse sous-jacente du Dr Beltrami, si l'intimé n'a pas réagi à la pléthysmographie, il ne doit être pas prédisposé à commettre de tels actes. On en déduit que, s'il n'est pas prédisposé à commettre un acte, il ne l'a pas commis. Le fait que son opinion se rapproche de la question fondamentale justifie d'autant plus un examen minutieux, comme l'a mentionné le juge Sopinka dans l'arrêt *Mohan*, à la p. 25:

> Plus la preuve se rapproche de l'opinion sur une question fondamentale, plus l'application de ce principe est stricte.

Voir également *R. c. Pascoe* (1997), 5 C.R. (5th) 341 (C.A. Ont.), le juge Rosenberg, à la p. 357.

4. *L'absence de toute règle d'exclusion*

Dans l'arrêt *McMillan*, précité, et encore une fois dans l'arrêt *Mohan*, précité, la Cour a établi une exception à la règle générale selon laquelle le caractère de l'accusé, dans le sens de la prédisposition à commettre ou à ne pas commettre l'infraction, ne peut être démontré que par sa réputation générale dans la collectivité. L'exception du «groupe distinctif» a déjà été mentionnée. Comme l'a expliqué le professeur A. W. Mewett, dans l'article intitulé «Character as a Fact in Issue in Criminal Cases» (1984-85), 27 *Crim. L.Q.* 29, aux pp. 35 et 36, qui a été analysé dans l'arrêt *Mohan*, aux pp. 34 et suiv., elle s'applique lorsque [TRADUCTION] «il est démontré que le crime est tel qu'il ne pourrait être ou, selon toutes les probabilités, ne serait commis que par une personne ayant des caractéristiques identifiables que l'accusé ne possède pas» (je souligne). Dans l'arrêt *Garfinkle*, précité, on a considéré que les pédophiles constituaient un tel groupe «distinctif». On peut toutefois se demander si une infraction particulière ne serait commise «selon toutes les probabilités [. . .] *que*» par un pédophile, par opposition à un non-pédophile dont le comportement inhabituel a été modifié par l'impulsivité, le stress, l'alcool ou une drogue (*R. c. B.L.*, [1988] O.J. No. 2522 (QL) (Div. gén.); *R. c. G. (J.R.)* (1998), 17 C.R. (5th)

Thus, in *Mohan*, *supra*, Sopinka J. pointed out at p. 38 that:

> Notwithstanding the opinion of Dr. Hill, the trial judge was also not satisfied that the characteristics associated with the fourth complaint identified the perpetrator as a member of a distinctive group. He was not prepared to accept that the characteristics of that complaint were such that only a psychopath could have committed the act. There was nothing to indicate any general acceptance of this theory. [Emphasis added.]

Similarly, in *McMillan*, *supra*, Spence J., at p. 827, approved Martin J.A.'s statement when the case was considered by the Ontario Court of Appeal that the evidentiary exception was limited to cases where "the offence is of a kind that is committed only by members of an abnormal group" (p. 173 (emphasis added)).

Subject to this precondition being established on a balance of probabilities, the personality profile of the perpetrator group must be sufficiently complete to identify *distinctive* psychological elements that were in all probability present and operating in the perpetrator at the time of the offence. Lack of distinctiveness robs the exception of its *raison d'être*. Thus *R. v. Taillefer* (1995), 100 C.C.C. (3d) 1 (Que. C.A.), Proulx J.A., upholding a trial judge's ruling excluding psychiatric testimony designed to establish that the perpetrator was marked by distinctive characteristics that neither accused possessed, stated at p. 34:

> [TRANSLATION] . . . the trial judge, came to the proper conclusion, in a well-reasoned decision, that the crime charged did not involve behavioural characteristics which were sufficiently distinctive to facilitate the identification of the author of the crime. [Emphasis added.]

Similarly, in *R. v. B. (S.C.)* (1997), 119 C.C.C. (3d) 530 (Ont. C.A.), Doherty and Rosenberg JJ.A., applying *Mohan*, *supra*, stated at p. 537 that:

> [T]he defence may, however, lead expert evidence of an accused's disposition where the crime alleged is one that

399 (C. Ont. (Div. prov.)). Ainsi, dans l'arrêt *Mohan*, précité, à la p. 38, le juge Sopinka a souligné que

> [e]n dépit de l'opinion du Dr Hill, le juge du procès n'était pas non plus convaincu que les caractéristiques reliées à la quatrième plainte identifiaient l'auteur comme membre d'un groupe distinctif. Il n'était pas disposé à accepter que les caractéristiques de cette plainte étaient telles que seul un psychopathe pouvait avoir commis l'acte. Rien ne démontre que cette théorie soit généralement acceptée. [Je souligne.]

39 De même, dans l'arrêt *McMillan*, précité, à la p. 827, le juge Spence a approuvé la déclaration qu'a faite le juge Martin au moment où la Cour d'appel de l'Ontario examinait l'affaire, selon laquelle l'exception relative à la preuve se limitait aux cas où [TRADUCTION] «l'infraction est de celles qui sont commises uniquement par les membres d'un groupe anormal» (p. 173 (je souligne)).

40 Dans la mesure où cette condition préalable est établie selon la prépondérance des probabilités, le profil de personnalité du groupe auquel appartient l'auteur de l'infraction doit être suffisamment complet pour pouvoir relever des éléments psychologiques *distinctifs* qui, selon toute probabilité, étaient présents et en action chez ce dernier au moment de la perpétration de l'infraction. L'absence de caractère distinctif dépouille l'exception de sa raison d'être. Ainsi, dans l'arrêt *R. c. Taillefer* (1995), 40 C.R. (4th) 287 (C.A. Qué.), le juge Proulx, confirmant la décision du juge du procès d'exclure un témoignage psychiatrique destiné à établir que l'auteur du crime en cause possédait des caractéristiques distinctives qu'aucun des accusés ne possédait, a affirmé à la p. 325:

> . . . le premier juge a conclu à bon droit, dans une décision bien motivée, que le crime reproché ne comporte pas de caractéristiques de comportement suffisamment distinctives pour faciliter l'identification de l'auteur du crime. [Je souligne.]

De même, dans l'arrêt *R. c. B. (S.C.)* (1997), 119 C.C.C. (3d) 530 (C.A. Ont.), les juges Doherty et Rosenberg, appliquant l'arrêt *Mohan*, précité, ont affirmé ceci, à la p. 537:

> [TRADUCTION] [L]a défense peut, toutefois, produire une preuve d'expert quant à la prédisposition de l'accusé,

was committed by a person who is part of a group possessing distinct and identifiable behavioural characteristics. In those cases, the defence may lead evidence to show that the accused's mental makeup or behavioural characteristics excluded him or her from that group.

41 The question is whether in addition to identifying and describing the distinct and identifiable behavioural characteristics, the expert must be able to point to a more elaborate "standard profile" filling in the rest of the personality portrait. *R. v. K.B.* (1999), 176 N.S.R. (2d) 283 (C.A.), *per* Bateman J.A., at para. 10, is said to be support for that additional requirement. It is true, certainly, that in *Mohan*, Sopinka J. made reference to a standard profile in one of his formulations of the issue, at p. 37:

> Has the scientific community developed a standard profile for the offender who commits this type of crime?

The question is what is meant by a "standard profile". Given that the purpose of the evidence is to define with reasonable precision the psychological characteristics of the class of people to which the perpetrator belongs, and on that basis argue that the accused is either included or excluded, the important thing is to identify what exactly differentiates or distinguishes the perpetrator class from the rest of the population. The "standard profile" relates directly to those distinguishing features. This is clear from Sopinka J.'s preceding sentence:

> The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group.

42 The level of detail required in the "standard profile" may vary with the conclusiveness of individual elements. For example, if commission of an offence most likely requires so "distinctive" a psychological trait as necrophilia, as in *R. v. Malbœuf*, [1997] O.J. No. 1398 (QL) (C.A.), leave to appeal refused, [1998] 3 S.C.R. vii, it may be sufficient for exclusion to show that an accused has no such tendency without requiring the rest of the perpetra-

lorsque le crime reproché a été commis par une personne qui appartient à un groupe qui possède des caractéristiques de comportement distinctives et identifiables. Dans ces cas, la défense peut produire une preuve pour montrer que l'état d'esprit et les caractéristiques de comportement de l'accusé l'excluaient de ce groupe.

La question est de savoir si en plus de relever et de décrire les caractéristiques de comportement distinctives et identifiables, l'expert doit être capable d'indiquer un «profil type» plus détaillé qui complète le reste du portrait de la personnalité. On dit que cette exigence additionnelle trouve appui dans l'arrêt *R. c. K.B.* (1999), 176 N.S.R. (2d) 283 (C.A.), le juge Bateman, au par. 10. Il est certes vrai qu'à la p. 37 de l'arrêt *Mohan* le juge Sopinka a fait référence à un profil type dans l'une de ses formulations de la question litigieuse.

> . . . la profession scientifique a-t-elle élaboré un profil type du délinquant qui commet ce genre de crime?

Il s'agit de déterminer ce qu'on entend par «profil type». Comme la preuve vise à définir avec une précision raisonnable les caractéristiques psychologiques de la catégorie de personnes à laquelle appartient l'auteur du crime reproché et, de là, à démontrer que l'accusé fait ou ne fait pas partie de cette catégorie, il importe de déterminer ce qui, au juste, différencie ou distingue du reste de la population les membres de la catégorie en cause. Le «profil type» concerne directement ces caractéristiques distinctives. Cela ressort clairement de la phrase précédente du juge Sopinka:

> Le juge du procès devrait considérer, d'une part, l'opinion de l'expert et, d'autre part, si ce dernier exprime simplement une opinion personnelle ou si le profil de comportement qu'il décrit est couramment utilisé comme indice fiable de l'appartenance à un groupe distinctif.

Le niveau de précision que requiert le «profil type» peut varier selon le caractère concluant de certains éléments pris individuellement. Par exemple, si la perpétration d'une infraction exige, selon toute vraisemblance, un trait psychologique aussi «distinctif» que la nécrophilie, comme dans l'affaire *R. c. Malbœuf*, [1997] O.J. No. 1398 (QL) (C.A.), autorisation de pourvoi refusée, [1998] 3 R.C.S. vii, il peut être suffisant pour écarter

tor's psychological portrait to be completed. In *Malbœuf* itself, the "necrophilia-lust type of murder" was considered sufficiently distinctive that the Crown was allowed to lead expert evidence that the accused "demonstrated distinctive characteristics that would place him in the category of persons who would commit this type of crime" (para. 5). A high level of distinctiveness, of course, is in addition to the other limitations on the Crown's ability to lead such expert evidence, including the requirements that it be relevant to an issue other than "mere propensity", and that its probative value outweighs its prejudicial effect: *Pascoe*, *supra*, at p. 355.

l'accusé d'établir qu'il n'a pas une telle tendance, sans qu'il soit nécessaire de compléter le reste du portrait psychologique de l'auteur du crime reproché. Dans l'arrêt *Malbœuf* lui-même, le [TRADUCTION] «meurtre motivé par la nécrophilie» a été considéré comme étant suffisamment distinctif pour permettre au ministère public de produire une preuve d'expert que l'accusé «manifestait des caractéristiques distinctives qui le faisaient entrer dans la catégorie des personnes qui commettraient ce genre de crime» (par. 5). Il va sans dire qu'un caractère hautement distinctif s'ajoute aux autres limites applicables à la capacité du ministère public de produire une telle preuve d'expert, notamment les exigences suivantes: qu'elle ait un rapport avec une autre question litigieuse que la [TRADUCTION] «simple propension», et que sa valeur probante l'emporte sur son effet préjudiciable: *Pascoe*, précité, à la p. 355.

More common personality disorders are perhaps less distinctive than necrophilia. They are less likely to serve as "badges" to distinguish the perpetrator class from the rest of the population. Thus in *R. v. Perlett*, [1999] O.J. No. 1695 (QL) (S.C.J.), the trial judge found that the personality profiles of the perpetrators offered by the expert were simply too broad to be of material assistance in determining guilt or innocence: "This collection of ailments appears too general and vague to meet the test in *Mohan*" (*per* Platana J., at para. 36).

43 Les troubles de la personnalité plus courants sont peut-être moins distinctifs que la nécrophilie. Ils sont moins susceptibles de tenir lieu d'élément qui distingue du reste de la population la catégorie à laquelle appartient l'auteur du crime reproché. Ainsi, dans la décision *R. c. Perlett*, [1999] O.J. No. 1695 (QL) (C.S.J.), le juge du procès a conclu que les profils de personnalité des auteurs du crime reproché, soumis par l'expert, étaient tout simplement trop larges pour aider sérieusement à décider de la culpabilité ou de l'innocence: [TRADUCTION] «Le présent ensemble de maux paraît trop vague et général pour satisfaire au critère de l'arrêt *Mohan*» (le juge Platana, au par. 36).

Between these two extremes, the range and distinctiveness of personality traits attributed to perpetrators of different offences will vary greatly. The requirement of the "*standard* profile" is to ensure that the profile of distinctive features is not put together on an *ad hoc* basis for the purpose of a particular case. Beyond that, the issue is whether the "profile" is sufficient for the purpose to be served, whether the expert can identify and describe with workable precision what exactly distinguishes the distinctive or deviant perpetrator from other people. If the demarcation is clear and compelling, the fact the personality portrait cannot

44 Entre ces deux extrêmes, la gamme et le caractère distinctif des traits de personnalité attribués aux auteurs de différentes infractions varient considérablement. L'exigence du «profil *type*» a pour objet d'éviter que le profil des caractéristiques distinctives soit établi de manière ponctuelle en fonction de chaque cas particulier. En outre, il faut déterminer si le «profil» suffit aux fins auxquelles il doit servir et si l'expert peut déterminer et décrire avec une précision réaliste ce qui, au juste, fait que l'auteur distinctif ou déviant du crime diffère des autres personnes. Si la démarcation est claire et convaincante, le fait que le portrait de la

be filled in with elements that do not serve to distinguish the perpetrator is not fatal to acceptance of the evidence. While the trial judge was somewhat cryptic in his reasons on this point, it seems to me his decision is consistent with this analysis.

45 Fish J.A. pointed out in the court below that Sopinka J., in *Mohan*, *supra*, had cited *Garfinkle*, *supra*, where the Quebec Court of Appeal had allowed expert psychiatric evidence that pedophilia is "abnormal" and "that Garfinkle does not have such a disposition". While the "distinctive offence" exception recognized in *Garfinkle* was affirmed in *Mohan*, *Garfinkle* itself was decided without the benefit of the elaboration of the "gatekeeper" function developed in *Mohan*. In *Mohan* itself, at p. 38, the exclusory evidence relating to pedophilia was ruled inadmissible because

> there was no material in the record to support a finding that the profile of a pedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges.

Each case turns on its facts. The conclusion of the *Garfinkle* trial judge, affirmed by the Quebec Court of Appeal, that in the circumstances there presented the evidence of Dr. Beltrami was probative and its benefit outweighed the cost, did not bind the trial judge on the facts of this case, who reached a contrary conclusion on the evidence presented in the *voir dire*.

5. *A Properly Qualified Expert*

46 Dr. Édouard Beltrami was accepted as qualified in the fields of psychiatry, sexology and physiology. It was within his expertise to give opinion evidence about the various tests administered under his supervision and his interpretation of the results.

6. *Relevance of the Proposed Testimony*

47 Evidence is relevant "where it has some tendency as a matter of logic and human experience

personnalité ne puisse être complété au moyen d'éléments qui ne servent pas à distinguer l'auteur des autres personnes n'est pas fatal pour ce qui est d'accepter la preuve. Bien que le juge du procès ait été quelque peu énigmatique dans ses motifs sur ce point, il me semble que sa décision est conforme à la présente analyse.

Le juge Fish de la Cour d'appel a souligné que, dans l'arrêt *Mohan*, précité, le juge Sopinka avait cité l'arrêt *Garfinkle*, précité, dans lequel la Cour d'appel du Québec avait admis une preuve d'expert en psychiatrie que la pédophilie est [TRADUCTION] «anormale» et «que Garfinkle n'a pas une telle prédisposition». Bien que l'exception de l'«infraction distinctive» reconnue dans l'arrêt *Garfinkle* ait été confirmée dans *Mohan*, l'arrêt *Garfinkle* a été rendu en l'absence de la fonction de «gardien» établie dans l'arrêt *Mohan*. Dans l'arrêt *Mohan* lui-même, à la p. 38, la preuve d'exclusion relative à la pédophilie a été jugée inadmissible car

> aucun document dans le dossier ne permettait de conclure que le profil du pédophile ou du psychopathe a été normalisé au point où on pourrait soutenir qu'il correspond au profil présumé du délinquant décrit dans les accusations.

Chaque cas est un cas d'espèce. La conclusion du juge du procès dans *Garfinkle*, confirmée par la Cour d'appel du Québec, que, dans les circonstances de cette affaire, la preuve du D^r^ Beltrami était probante et ses bénéfices l'emportaient sur son coût ne liait le juge du procès en l'espèce, qui a tiré une conclusion contraire fondée sur la preuve présentée lors du voir-dire.

5. *Un expert compétent*

On a reconnu la compétence du D^r^ Édouard Beltrami dans les domaines de la psychiatrie, de la sexologie et de la physiologie. Il était compétent pour offrir un témoignage d'opinion concernant les divers tests administrés sous sa surveillance et son interprétation des résultats.

6. *Pertinence du témoignage proposé*

Une preuve est pertinente [TRADUCTION] «lorsque, selon la logique et l'expérience humaine, elle

to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence" (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (1996), at p. 19). Because the concept of relevance provides a low threshold ("some tendency"), *Mohan* built into the relevance requirement a cost-benefit analysis to determine "whether its value is worth what it costs" (p. 21) in terms of its impact on the trial process. Thus the criteria for reception are relevance, reliability and necessity measured against the counterweights of consumption of time, prejudice and confusion: R. J. Delisle, "The Admissibility of Expert Evidence: A New Caution Based on General Principles" (1994), 29 C.R. (4th) 267. Whether considered as an aspect of relevance or a general exclusionary rule, "[t]he reliability versus effect factor has special significance in assessing the admissibility of expert evidence" (*Mohan*, at p. 21).

It is on this requirement that Dr. Beltrami's evidence is most vulnerable.

(a) Existence of a Distinctive Group

Dr. Beltrami's definition of the "distinctive" group of individuals with a propensity to commit these "distinctive crimes" is vague. As the trial judge and Robert J.A. noted, there is no standard profile. The reliability of the scientific foundations of the theory that certain acts will almost always be done by people having certain distinctive characteristics requires evidence; it cannot simply be assumed: *K.B.*, *supra*, at para. 12; *R. v. S. (J.T.)* (1996), 47 C.R. (4th) 240 (Alta. C.A.), at p. 246; *R. v. Dowd* (1997), 120 C.C.C. (3d) 360 (N.B.C.A.), at p. 366. Dr. Beltrami said that: [TRANSLATION] "there is no point in making me say it a thousand times, there is no standard profile, but nonetheless I compared certain characteristics that are found frequently, not absolutely . . ." (emphasis added). Dr. Beltrami describes these characteristics in the following way:

tend jusqu'à un certain point à rendre la proposition qu'elle appuie plus vraisemblable qu'elle ne le paraîtrait sans elle» (D. M. Paciocco et L. Stuesser, *The Law of Evidence* (1996), à la p. 19). Comme la notion de pertinence constitue un seuil peu élevé («tend jusqu'à un certain point»), l'arrêt *Mohan* a incorporé dans l'exigence de pertinence une analyse du coût et des bénéfices afin de déterminer «si la valeur en vaut le coût» (p. 21) en ce qui concerne son incidence sur le déroulement du procès. Les critères d'admissibilité applicables sont donc la pertinence, la fiabilité et la nécessité par rapport au délai, au préjudice, à la confusion qui peuvent résulter: R. J. Delisle, «The Admissibility of Expert Evidence: A New Caution Based on General Principles» (1994), 29 C.R. (4th) 267. Qu'il soit considéré comme un aspect de la pertinence ou comme une règle d'exclusion générale, «[l]e facteur fiabilité-effet revêt une importance particulière dans l'appréciation de l'admissibilité de la preuve d'expert» (*Mohan*, à la p. 21).

48 C'est relativement à cette exigence que la preuve du Dr Beltrami est particulièrement vulnérable.

(a) L'existence d'un groupe distinctif

49 La définition que le Dr Beltrami a donnée du groupe «distinctif» de personnes qui ont une propension à commettre ces «crimes distinctifs» est vague. Comme l'ont fait remarquer le juge du procès et le juge Robert, il n'y a pas de profil type. La fiabilité des fondements scientifiques de la théorie selon laquelle certains actes sont presque toujours accomplis par des personnes qui possèdent certaines caractéristiques distinctives doit être prouvée; elle ne peut pas être simplement présumée: *K.B.*, précité, au par. 12; *R. c. S. (J.T.)* (1996), 47 C.R. (4th) 240 (C.A. Alb.), à la p. 246; *R. c. Dowd* (1997), 120 C.C.C. (3d) 360 (C.A.N.-B.), à la p. 366. Le Dr Beltrami a affirmé que «ça sert à rien de me le faire dire mille fois, y'en a pas de profil type, mais j'ai quand même comparé certaines caractéristiques qui se trouvent fréquemment, pas d'une manière absolue» (je souligne). Le Dr Beltrami décrit ces caractéristiques de la façon suivante:

[TRANSLATION] Well, as I just mentioned sexual abuse may . . . be committed by people who have organic disorders, people who are psychotic, mentally deficient people, alcoholics, drug addicts, so plainly different people may have committed sexual abuse, but normally, when young children have been abused with a clear and unmistakable [*sic*] such as penetration, there is — there is no one typical pathology, there is no pathology that is always the same and can be categorized, but normally there are a certain number of things that emerge, and the things that most often emerge are what was mentioned earlier, impulsiveness and also having inadequate social controls, which often have been passed on. So yes, it is true that there is no — it isn't a particular psychological type that commits these acts, but when someone has committed that act, there is a disorder somewhere and I considered all the possible disorders. [Emphasis added.]

Bien, comme je l'ai dit tout à l'heure, l'abus sexuel peut [. . .] être commis par des gens qui ont des troubles organiques, des gens qui sont psychotiques, des débiles mentaux, des alcooliques, des toxicomanes, donc c'est évident que des gens différents peuvent avoir commis des abus sexuels, mais habituellement, quand il y a des abus sur des jeunes enfants avec un clair et marqué (*sic*) comme la pénétration, il y a, — il n'y a pas une pathologie type, il n'y a pas une pathologie qui est toujours la même et qui est catégorisable, mais habituellement y'a un certain nombre de choses qui ressortent et celles qui ressortent le plus souvent c'est ce qui a été cité plus tôt, l'impulsivité et aussi d'avoir des normes, qui souvent ont été héritées ailleurs, sociales et inadéquates. Alors, oui, c'est vrai qu'il n'y a pas, — ce n'est pas un type psychologique particulier qui commet ça, mais quand quelqu'un a commis cet acte-là il y a un dérangement quelque part et je les ai passés en revue les dérangements possibles. [Je souligne.]

While the reference in *Mohan* to a "standard profile" should not be taken to require an exhaustive inventory of personality traits, the profile must confine the class to useful proportions. A spectrum of personality "disorders" that stretches from alcoholics to sexual psychopaths is too broad to be useful. If a man with more or less ordinary sexual predilections is capable while under the influence of alcohol or drugs to have committed these offences, the class of potential perpetrators is insufficiently "distinctive" in the *Mohan* sense for the expert evidence to be useful. Dr. Beltrami considered biological factors related to sexual interests to be the most important indicator but did not rule out the possibility that the offence was prompted by behavioural rather than biological factors.

Même si la mention d'un «profil type» dans l'arrêt *Mohan* ne devrait pas être interprétée comme exigeant un inventaire exhaustif des traits de personnalité, le profil doit ramener la catégorie à des proportions utiles. Un spectre des «troubles» de la personnalité qui s'étend des alcooliques aux psychopathes sexuels est trop large pour être utile. Si une personne qui a des préférences sexuelles plus ou moins ordinaires est susceptible d'avoir commis ces infractions alors qu'elle était sous l'influence de l'alcool ou d'une drogue, la catégorie d'auteurs potentiels des infractions n'est pas suffisamment «distinctive», au sens de l'arrêt *Mohan*, pour que la preuve d'expert soit utile. Le Dr Beltrami a estimé que les facteurs biologiques relatifs aux intérêts sexuels constituaient l'indice le plus important, mais il n'a pas écarté la possibilité que l'infraction soit imputable à des facteurs comportementaux plutôt qu'à des facteurs biologiques.

(b) Specificity of Tests

(b) La spécificité des tests

50 The defence was obliged to satisfy the court that the underlying principles and methodology of the tests administered to the respondent were reliable and, importantly, applicable. The MMPI2 and related tests were used to probe for behavioural problems that might trigger conduct that would be out of sexual character, but these tests were not designed to complement the plethysmograph test, and in any event drugs and alcohol-related

La défense devait convaincre la cour que les principes et la méthode qui sous-tendent les tests administrés à l'intimé étaient fiables et, qui plus est, applicables. Le MMPI2 et des tests connexes ont été utilisés pour tenter de déceler chez l'intimé des problèmes de comportement susceptibles de déclencher une conduite qui ne lui ressemble pas sur le plan sexuel, mais ces tests n'étaient pas conçus pour compléter le test de la pléthysmographie,

offences are hardly distinctive in the *Mohan* sense. Dr. Beltrami readily acknowledged that the MMPI2 was not designed for the detection of sexual disorders and it does not contain any specific probe for unusual sexual preferences. Nor were specific scenarios prepared for the plethysmograph test, as hereinafter discussed. There was in fact no evidence from the people who conducted the interviews or administered the plethysmograph test. No test protocols were introduced, and there was no confirmation that whatever standard procedures exist had been followed. An expert such as Dr. Beltrami is certainly entitled to rely on data generated by tests carried out under his supervision, but he more or less disavowed any supervisory function and could not answer specific questions about how the tests on the respondent were conducted.

et, en tout état de cause, les infractions liées à la drogue et à l'alcool ne sont guère distinctives au sens de l'arrêt *Mohan*. Le Dr Beltrami a reconnu volontiers que le MMPI2 n'était pas conçu pour découvrir des troubles d'ordre sexuel et qu'il ne comportait rien de particulier pour détecter des préférences sexuelles inhabituelles. Aucun scénario particulier n'a été préparé pour le test de la pléthysmographie, comme nous le verrons plus loin. En fait, aucune preuve n'a été soumise par les gens qui ont effectué les entrevues ou administré le test de la pléthysmographie. Aucun protocole de test n'a été produit et rien n'a confirmé que toute procédure normale existante a été suivie. Un expert comme le Dr Beltrami a certainement le droit de se fonder sur des données obtenues grâce à des tests effectués sous sa surveillance, mais il a plus ou moins nié avoir exercé une fonction de surveillance et n'a pas pu répondre à des questions précises sur la façon dont les tests ont été administrés à l'intimé.

(c) Error Rate in Plethysmograph Results

(c) Le taux d'erreur des résultats de la pléthysmographie

In his report presented at the *voir dire*, Dr. Beltrami indicated that the "sensitivity" of the plethysmograph would detect a sexual deviant 47.5 per cent of the time. Where a detection was in fact made, the result was considered highly reliable (97.4 per cent). The respondent tested negative, i.e., was excluded, but the success rate of 47.5 per cent means that even in a test population consisting entirely of sexual deviants, the test would deliver a false negative more than half of the time. Dr. Beltrami observed during the *voir dire*, for example, that [TRANSLATION] "So, I acknowledge that in the usual literature, with people who come from all backgrounds, putting all the studies together, that there are about fifty percent (50%) of individuals who do not score." Such a result would render the test so prone to error as not to be useful for purposes of identification or exclusion.

51 Dans le rapport qu'il a soumis lors du voir-dire, le Dr Beltrami a indiqué que la «sensibilité» du pléthysmographe permet de découvrir un déviant sexuel dans 47,5 pour 100 des cas. Quand un déviant sexuel est découvert, le résultat est considéré très fiable (97,4 pour 100). Le test subi par l'intimé s'est révélé négatif, en ce sens que l'intimé a été écarté, mais le taux de réussite de 47,5 pour 100 signifie que, même dans une population expérimentale composée entièrement de déviants sexuels, le test donnerait un faux résultat négatif dans plus de la moitié des cas. Au cours du voir-dire, le Dr Beltrami a fait remarquer ceci, par exemple: «Donc, je reconnais que dans la littérature habituelle, avec des gens venant de tous les milieux, en mettant ensemble toutes les études que, y'a presque cinquante pour cent (50%) d'individus qui parfois ne scorent pas.» Un tel résultat rendrait le test tellement sujet à erreur qu'il ne serait pas utile pour identifier ou pour exclure.

When Dr. Beltrami was cross-examined on the 47.5 per cent success rate, he responded that [TRANSLATION] "nonetheless there are also articles

52 Quand le Dr Beltrami a été contre-interrogé au sujet du taux de réussite de 47,5 pour 100, il a répondu: «y'a aussi quand même y'a des articles

that clearly indicate that the younger the age to which the deviation relates and the more unusual it is, the more specific and precisely sensitive the test will be". He said that some unidentified studies done "in Montreal" suggested that the detection rate in more "unusual preferences" could be up to 87 per cent. Thus the sensitivity of the test would vary between 47.5 per cent and 87 per cent but Dr. Beltrami did not give a more precise figure within this range, except to say that in the case of a perpetrator who derived pleasure from anal penetration of a prepubescent child the detection rate would likely be at the higher end of the scale. He said:

[TRANSLATION] So then, when you are talking, if you want my professional opinion on anal penetration, it is a serious act that, despite what may be said about it, is not really naively so tolerated by children and it is an act that still requires some degree of pressure, whether it be psychological, whether it be physical force or something else, it leaves marks, it leaves marks and the well-known 40% may rise to 80% because this is really something outside of the norm.

53 Dr. Beltrami did not explain how, if the basis of the plethysmograph test was the stimulation of remembrance of past pleasures, the results would vary according to the degree of deviance from some norm, and the issue was not addressed in his written report.

54 Dr. Beltrami agreed that a false negative (i.e., instances where the plethysmograph failed to identify an actual deviant) can, among other things, be caused by the fact that the visual and auditive scenarios presented to the subject lacked certain specific elements of stimulation, for example humiliation of the victim. He said that tailor-made scenarios are sometimes built to fit exactly the alleged acts but that was not done in this case. The standardized scenarios used by Dr. Beltrami were not presented to the Court and no attempt was made to demonstrate that they in fact replicated the type of stimulation the putative offender would have had while committing the alleged act.

qui signalent bien que plus la déviation est vers un âge bas et qu'elle est inusitée, plus le test va être spécifique et sensible plus exactement». Il a précisé, sans plus, que des études effectuées «à Montréal» indiquaient que le taux de détection des «préférences» plus «inhabituelles» pouvait aller jusqu'à 87 pour 100. Ainsi, la sensibilité du test varierait entre 47,5 pour 100 et 87 pour 100, mais le Dr Beltrami n'a pas donné de chiffre plus précis à cet égard, sauf qu'il a affirmé que, lorsqu'une personne a tiré plaisir de la pénétration anale d'un enfant qui n'a pas atteint la puberté, le taux de détection est vraisemblablement plus élevé. Il a dit:

Alors, donc, quand on parle, si vous me demandez mon opinion professionnelle pour une pénétration anale, c'est un acte grave qui, quoiqu'on en dise, est pas si toléré que ça par des enfants naïvement et c'est un acte qui demande quand même une certaine pression, que ce soit psychologique, que ce soit de force physique ou autre et ça laisse des traces, ça laisse des traces et le fameux quarante pour cent (40%) peut remonter à quatre-vingts pour cent (80%) parce que là, on sort vraiment de la norme habituelle.

Le Dr Beltrami n'a pas expliqué comment, en supposant que le test de la pléthysmographie reposait sur la stimulation du souvenir de plaisirs passés, les résultats varieraient selon le degré de déviance par rapport à une norme donnée, et il n'a pas non plus abordé cette question dans son rapport écrit.

Le Dr Beltrami a convenu qu'un faux résultat négatif (c'est-à-dire lorsque la pléthysmographie n'a pas permis de découvrir un déviant réel) peut notamment être attribuable au fait que les scénarios visuels et auditifs présentés au sujet ne comportaient pas certains éléments de stimulation particuliers, tels que l'humiliation de la victime. Il a dit que des scénarios sont parfois conçus spécialement pour correspondre exactement aux faits allégués, mais que cela n'avait pas été fait en l'espèce. Les scénarios normalisés dont s'est servi le Dr Beltrami n'ont pas été soumis à la Cour, et l'on n'a pas tenté de démontrer qu'ils reproduisaient en fait le type de stimulation qu'aurait eu le présumé délinquant en accomplissant l'acte reproché.

In my view, the trial judge had good reason to be sceptical about the value of this testimony. Even giving a loose interpretation to the need for a "standard profile", and passing over the doubts that *only* a pedophile would be capable of the offence, the evidence of the test error rate in the "match" of the respondent with or his "exclusion" from the "distinctive class" was problematic. The possibility that such evidence — "cloaked under the mystique of science" (*Béland*, *supra*, at p. 434) — would distort the fact-finding process, was very real. Moreover, defence evidence of this type can be expected to call forth expert evidence from the Crown in response, with the consequent danger that the trial could be derailed into a controversy on disposition or propensity, with the trial becoming "nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept" (*Mohan*, at p. 24). The trial judge did not regard the testimony as reliable for the purpose of excluding the respondent as a potential perpetrator of the crime, and consideration of the cost-benefit analysis seems to support the conclusion that the testimony offered as many problems as it did solutions.

55 À mon avis, le juge du procès avait de bonnes raisons de douter de la valeur de ce témoignage. Même en donnant une interprétation large à la nécessité d'un «profil type» et en faisant abstraction des doutes que *seul* un pédophile serait capable de commettre l'infraction, la preuve du taux d'erreur du test en ce qui a trait à la «concordance» de l'intimé avec la «catégorie distinctive» ou à son «exclusion» de cette catégorie était problématique. La possibilité qu'une telle preuve — «empreinte de la mystique de la science» (*Béland*, précité, à la p. 434) — fausse le processus de recherche des faits était très réelle. En outre, lorsque la défense soumet une preuve de ce genre, on peut s'attendre à ce que le ministère public réponde au moyen d'une preuve d'expert, d'où le risque que le procès dégénère en controverse sur la prédisposition ou la propension et se transforme en un «simple concours d'experts, dont le juge des faits se ferait l'arbitre en décidant quel expert accepter» (*Mohan*, à la p. 24). Le juge du procès n'a pas considéré que le témoignage en cause était assez fiable pour exclure l'intimé en tant qu'auteur potentiel du crime, et la prise en considération de l'analyse du coût et des bénéfices semble appuyer la conclusion que ce témoignage a apporté autant de problèmes que de solutions.

7. *Necessity in Assisting the Trier of Fact*

7. *La nécessité d'aider le juge des faits*

In *Mohan*, Sopinka J. held that the expert evidence in question had to be more than merely helpful. He required that the expert opinion be *necessary* "in the sense that it provide information, 'which is likely to be outside the experience and knowledge of a judge or jury', . . . the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature" (p. 23). In *Béland*, *supra*, McIntyre J., speaking about the inadmissibility of a polygraph test, cited, at p. 415, *Davie v. Magistrates of Edinburgh*, [1953] S.C. 34, at p. 40, on the role of expert witnesses where Lord Cooper said:

56 Dans l'arrêt *Mohan*, le juge Sopinka a conclu que la preuve d'expert en question devait être plus que simplement utile. Il a exigé que l'opinion d'expert soit *nécessaire*: «au sens qu'elle fournit des renseignements "qui, selon toute vraisemblance, dépassent l'expérience et la connaissance d'un juge ou d'un jury" [. . .] la preuve doit être nécessaire pour permettre au juge des faits d'apprécier les questions en litige étant donné leur nature technique» (p. 23). Dans l'arrêt *Béland*, précité, à la p. 415, le juge McIntyre a, au sujet de l'inadmissibilité de la preuve obtenue au moyen d'un test polygraphique, cité la décision *Davie c. Magistrates of Edinburgh*, [1953] S.C. 34, portant sur le rôle des témoins experts et dans laquelle lord Cooper a dit (à la p. 40):

Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their

[TRADUCTION] Il leur incombe de fournir au juge ou au jury les critères scientifiques nécessaires pour vérifier

conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. [Emphasis added.]

The purpose of expert evidence is thus to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an act of informed judgment, not an act of faith.

57 Dr. Beltrami clearly did not consider it his function to enable the trier of fact to appreciate the basis of the suggested inferences from his data in favour of the respondent. He offered a packaged opinion but was not prepared to share with the trial judge the data which he relied upon. At one point, asked by the Crown about his failure to produce the chart with the penile plethysmograph results, Dr. Beltrami said:

[TRANSLATION] Listen, Your Honour, we have to understand that if we start — normally we do not submit the psychological tests in detail or the curves because at that point if we start calculating everything in centimetres or millimetres, we will be here all morning. Let's just say that this curve, properly analysed, demonstrates the following results, that there are no, according to how those curves are normally evaluated, there are no signs of deviant behaviour in him.

Elsewhere, Dr. Beltrami gave his reason for non-production of the data on which he based his opinion as follows:

[TRANSLATION] Okay. But it is not normally produced because otherwise, it would be too complicated to produce all the details, there would be battles over the little details.

58 The devil, of course, is often in the "little details" and following the cross-examination, Crown counsel had this exchange with the judge

l'exactitude de leurs conclusions, afin de permettre au juge ou au jury de former sa propre opinion par l'application de ces critères aux faits établis par la preuve. [Je souligne.]

La preuve d'expert vise donc à aider le juge des faits en lui fournissant des connaissances particulières qu'une personne ordinaire n'aurait pas. Elle n'a pas pour objet de substituer l'expert au juge des faits. C'est un acte de jugement éclairé, et non un acte de confiance, qui est requis du juge des faits.

Il est clair que le Dr Beltrami a estimé qu'il ne lui appartenait pas de faire en sorte que le juge des faits soit en mesure d'évaluer le fondement des déductions qu'il proposait de faire en faveur de l'intimé à partir de ses données. Il a offert une opinion toute faite, sans toutefois être disposé à communiquer au juge du procès les données sur lesquelles il s'était appuyé. À un moment donné, quand le ministère public l'a interrogé sur son omission de produire la courbe des résultats de la pléthysmographie pénienne, le Dr Beltrami a affirmé:

Écoutez, Votre Seigneurie, il faut comprendre que si on commence, — habituellement ni on remet les tests psychologiques en détail ni les courbes parce qu'à ce moment-là si on commence à calculer tout en centimètres ou en millimètre, on va passer la matinée ici. Disons que cette courbe analysée d'une manière pertinente montre les résultats suivants qu'il n'y a pas, d'après l'habitude d'évaluer ces courbes-là, il n'y a pas de traces du comportement déviant chez lui.

Ailleurs, le Dr Beltrami a expliqué pourquoi il n'avait pas produit les données sur lesquelles il avait fondé son opinion:

O.K. Mais c'est pas produit d'habitude parce que sinon ce serait trop complexe de produire tous les détails, y'aurait des batailles sur des petits détails.

Bien entendu, c'est souvent dans les «petits détails» qu'on trouve à redire et, à la suite du contre-interrogatoire, l'avocate du ministère public

concerning the non-production of the key documents:

[TRANSLATION]

THE CROWN:

I am making my comments to enable my friend to complete, do you understand what I mean?

THE COURT:

Yes, but that . . .

THE CROWN:

In a way . . .

THE COURT:

That's his problem.

THE CROWN:

All right.

The trial judge then said to defence counsel:

[TRANSLATION]

THE COURT:

. . . So, that's your own problem . . .

a eu l'échange suivant avec le juge au sujet de la non-production des documents-clés:

LA COURONNE:

Moi, je fais le commentaire pour peut-être permettre à mon confrère de compléter, vous comprenez ce que je veux dire?

LA COUR:

Ah, oui, mais ça . . .

LA COURONNE:

D'une certaine façon . . .

LA COUR:

C'est son problème.

LA COURONNE:

Ça va.

Le juge du procès a par la suite dit à l'avocat de la défense:

LA COUR:

. . . Alors, c'est votre problème à vous ça . . .

Before any weight at all can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. Even if Dr. Beltrami had offered an explanation of his data, and explained to the trial judge the "expert" basis on which he felt the trial judge could draw appropriate inferences, there remained the question whether Dr. Beltrami's contribution to the judge's ability to form his "own *independent* conclusion" on the issue of the respondent's exclusion was worth the cost in potential distortion of the judge's *independent* consideration of the evidence of opportunity, the out-of-court statements of the children, the respondent's parental relationship with them, and the respondent's ongoing heterosexual relationships with several mature women. It seems to me the trial judge was simply being offered a conclusory opinion that on cross-examination turned out to be short on *demonstrated* scientific support. In terms of the questions posed in *Daubert*, *supra*, Dr. Beltrami did address "the

59

Pour pouvoir accorder une valeur probante à l'opinion d'un expert, il faut conclure à l'existence des faits sur lesquels elle repose. Même si le Dr Beltrami avait offert une explication de ses données et expliqué au juge du procès les raisons d'«expert» pour lesquelles il estimait que le juge du procès pourrait faire les déductions appropriées, il restait à déterminer si la contribution du Dr Beltrami à la capacité du juge de tirer sa «propre conclusion *indépendante*» sur la question de l'exclusion de l'intimé valait le coût de la possibilité que soit faussé l'examen *indépendant*, par le juge, de la preuve d'opportunité, des déclarations extrajudiciaires des enfants, du lien parental de l'intimé avec les enfants et des relations hétérosexuelles que l'intimé avait avec plusieurs femmes d'âge mur. Il me semble qu'on a seulement soumis au juge du procès une opinion théorique qui, au cours du contre-interrogatoire, s'est révélée dépourvue d'appui scientifique *établi*. Pour ce qui est des questions posées dans *Daubert*, précité, le

known or potential rate of error" but was not asked to address the history or acceptance of the techniques for diagnostic as opposed to therapeutic purposes, and the level of acceptance for that purpose amongst his scientific peers.

Dr Beltrami a traité du «taux connu ou potentiel d'erreur», mais on ne lui a demandé d'aborder ni l'historique ou l'acceptation des techniques de diagnostic par opposition aux fins thérapeutiques, ni le niveau d'acceptation à cette fin parmi ses pairs de la profession scientifique.

60 Dr. Beltrami's evidence said in effect that the respondent's denial ought to be believed because he is not the sort of person who would do such a thing. This was close to oath-helping in circumstances not within the expert witness exception: *R. v. Marquard*, [1993] 4 S.C.R. 223, *per* McLachlin J., at p. 248. As the trial judge excluded Dr. Beltrami's evidence because of the lack of a "standard profile", he did not go on to deal in his reasons with the necessity requirement, but it certainly would have been open to him to exclude Dr. Beltrami's opinion on the basis of a "cost-benefit" analysis of the necessity requirement as well.

La preuve du Dr Beltrami indiquait en fait qu'il fallait ajouter foi à la dénégation de l'intimé parce qu'il n'était pas le genre de personne susceptible d'agir ainsi. Cela ressemblait à un témoignage justificatif dans des circonstances non visées par l'exception du témoin expert: *R. c. Marquard*, [1993] 4 R.C.S. 223, le juge McLachlin, à la p. 248. Étant donné que le juge du procès a exclu la preuve du Dr Beltrami en raison de l'absence de «profil type», il n'a pas traité de l'exigence de nécessité dans ses motifs, mais il lui aurait été certainement loisible d'écarter l'opinion du Dr Beltrami en fonction également d'une analyse du coût et des bénéfices de l'exigence de nécessité.

8. *The Discretion of the Trial Judge*

8. *Le pouvoir discrétionnaire du juge du procès*

61 The *Mohan* analysis necessarily reposes a good deal of confidence in the trial judge's ability to discharge the gatekeeper function (*Malbœuf, supra*). The trial judge addressed himself to the proper legal requirements established in *Mohan*. While he perhaps lingered on the need for a "standard profile", his reasons taken as a whole suggest that he was simply not persuaded, on the basis of the evidence which the defence chose to put forward, that the *Mohan* requirements had been met. The trial judge's discharge of his gatekeeper function in the evaluation of the demands of a full and fair trial record, while avoiding distortions of the fact-finding exercise through the introduction of inappropriate expert testimony, deserves a high degree of respect. In this case, there was much in the evidence to support the trial judge's decision to exclude Dr. Beltrami's testimony and in my respectful view the majority of the Quebec Court of Appeal erred in interfering with the exercise of his discretion to do so.

L'analyse de l'arrêt *Mohan* place nécessairement une grande confiance dans la capacité du juge du procès de s'acquitter de son rôle de gardien (arrêt *Malbœuf*, précité). Le juge du procès a abordé les exigences juridiques appropriées qui ont été établies dans l'arrêt *Mohan*. Même s'il peut s'être attardé à la nécessité d'un «profil type», ses motifs indiquent, dans l'ensemble, que la preuve que la défense a choisi de présenter ne l'a simplement pas convaincu que les exigences de l'arrêt *Mohan* avaient été respectées. Le fait que le juge du procès a évité que la recherche des faits soit faussée par la présentation d'un témoignage d'expert inapproprié, en exerçant sa fonction de gardien dans l'évaluation des exigences de procès juste et équitable, mérite beaucoup de respect. En l'espèce, une grande partie de la preuve étayait la décision du juge du procès d'exclure le témoignage du Dr Beltrami, et je suis d'avis que les juges majoritaires de la Cour d'appel du Québec ont commis une erreur en intervenant dans l'exercice de son pouvoir discrétionnaire à cet égard.

IV. Disposition

The appeal is therefore allowed and the conviction entered by the trial judge is restored.

Appeal allowed.

Solicitor for the appellant: The Attorney General's Prosecutor, Montréal.

Solicitors for the respondent: Silver, Morena, Montréal.

IV. Dispositif

62 Le pourvoi est donc accueilli et la déclaration de culpabilité inscrite par le juge du procès est rétablie.

Pourvoi accueilli.

Procureur de l'appelante: Le substitut du Procureur général, Montréal.

Procureurs de l'intimé: Silver, Morena, Montréal.

COURT FILE NO.: P104-05
DATE: 20060111

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	*R. Kenney*
	)	for the Crown
	)	
- and -	)	
	)	
	)	
RANOLD THOMAS	)	*T. Smith*
	)	for the Accused
	)	
	)	**HEARD:** January 10, 2006

T. DUCHARME J.

RULING ON PROPOSED EXPERT EVIDENCE

1] Mr. Thomas is charged with sexual assault causing bodily harm and unlawful confinement. It is alleged that on December 5, 2003 that he dragged the complainant, a 15-year old girl whom he did not know, to his apartment where he forced her to have vaginal intercourse with him. The Crown is calling Ms. Michele McIntosh the sexual assault nurse examiner who examined the complainant on December 8, 2003. The parties are agreed that Ms. McIntosh can testify as to the observations she made during this examination. However, the Crown also seeks to qualify Ms. Michele McIntosh as an expert qualified to give opinion evidence as to whether certain of the injuries she observed on the complainant are more consistent with non-consensual sexual activity than with consensual sexual activity. Yesterday, I indicated that, after careful consideration, I had concluded that Ms. McIntosh was not properly qualified to give the opinion evidence that the Crown seeks to adduce. The following are my reasons for that decision.

(A) The Test for Expert Evidence

[2] Expert evidence is a type of opinion evidence. Opinion evidence is generally inadmissible. To be admissible, expert evidence must meet the following criteria set out by Sopinka J. in *R. v. Mohan* (1994), 11 D.L.R. (4th) 419 at 427 (S.C.C.):

(1) the evidence must be relevant;

(2) the evidence must be necessary to assist the trier of fact;

(3) there must be no exclusionary rule otherwise prohibiting the receipt of the evidence; and

(4) the evidence is given by a properly qualified expert.

[3] There is no question that the path of least resistance in motions such as these oftentimes seems to be to admit the evidence and then compensate for any of its weaknesses by attaching less weight to the opinion. But such an approach is an abdication of the proper function of a trial judge and was explicitly rejected by Binnie J. in *R. v. J.-L.J.*, [2000] 2 S.C.R. 600 (S.C.C) at p. 613:

> the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

Of course, this gatekeeper function directly collides with the general requirement that the parties to an action must be afforded the opportunity to lead the most complete evidentiary record consistent with the rules of evidence. This fundamental tension can only be resolved by the careful and consistent application of the rules of evidence.

[4] Mr. Smith for the defence concedes that the first three criteria in *Mohan* are satisfied in this case. I accept this concession although I note that the proposed evidence, i.e. whether the complainant's injuries are more consistent with non-consensual or consensual sex comes perilously close to an opinion on the ultimate issue before the court. Therefore, in concluding that this evidence is necessary, I have kept in mind that in such cases the requirement of necessity should be strictly enforced: *R. v. Mohan,*

supra, at 430; *R. v. J.-L.J., supra*, at 623; *R. v. Pascoe* (1997), 32 O.R. (3d) 37 (Ont. C.A) at p 55.

[5] Therefore the admissibility of this evidence turns on the question of whether or not Ms. McIntosh is properly qualified to give the opinion evidence that the Crown seeks to lead.

(B) Is Ms. McIntosh A Properly Qualified Expert?

[6] As Sopinka J., stated in *Mohan, supra*, at p. 431:

> the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

As Charron J.A. observed in *R. v. A.K. and N.K., supra*, this criterion is usually not difficult to apply but it is important that it not be overlooked keeping in mind that:

> Opinion evidence can only be of assistance to the extent that the witness has acquired special knowledge over the subject matter that the average trier of fact does not already have. If the witness's "special" or "peculiar" knowledge on a subject matter is minimal, he or she should not be qualified as an expert with respect to that subject.

[7] How the witness acquired that "special" or "peculiar" knowledge is not the central issue at this point. Rather the issue is whether the witness does, in fact, have the "special" or "peculiar" knowledge.[1] Thus one can acquire the necessary knowledge through formal education, private study, work experience or other personal involvement with the subject matter. In some cases, the expertise will require formal study as is the case with the evidence of medical experts. Others areas of expertise can be developed

[1] Where that knowledge involves a novel scientific theory or technique it must also be subjected to special scrutiny to determine whether it meets a basic threshold of reliability: *Mohan, supra*, at p. 415. Where it does not, it will not be admitted as it will be of no assistance to the trier of fact. This consideration does not apply to the purported expertise of Ms. McIntosh as the courts have ruled that this is an appropriate area for the reception of expert evidence: *R v. Quashie*, (2005) 198 C.C.C. (3d) 337 (Ont. C.A.); *R. v. Liu* (2004), 190 C.C.C. (3d) 233 (Ont. C.A.); *R. v. Colas* (2001), 161 C.C.C. (3d) 335 (Ont. C.A.); R. v. Steinbach (1998), 129 C.C.C. (3d) 208 (B.C. C.A.)

in less formal ways. Thus, in *Rice v. Sockett* (1912), 27 O.L.R. 410 (Ont. C.A.), Falconbridge C.J. stated at p. 413:

> The derivation of the term 'expert' implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be well qualified to testify as to the appearance which a gun recently fired would present as a highly-educated and skilled gunsmith.

[8] When assessing the qualifications of a proposed expert, trial judges regularly consider factors such as the proposed witness' professional qualifications, her actual experience, her participation or membership in professional associations, the nature and extent of her publications, her involvement in teaching, her involvement in courses or conferences in the field and her efforts to keep current with the literature in the field and whether or not the witness has previously been qualified to testify as an expert in the area.

(1) Ms. McIntosh's Educational Background

[9] Ms. McIntosh has a B.A. in English Literature, a B.Sc. in Nursing, an M.Sc. in Perinatal Nursing Science and she is currently a candidate for a PhD. in nursing. None of the course work involved in either her M.Sc. or Ph.D. involved courses that related to sexual assault although the former did involve courses in anatomy, physiology and the female reproductive system. She took what she described as a "fairly short" certification program to be a sexual assault examiner. This consisted of two weeks of full time study followed by an apprenticeship period of approximately one month where she had to demonstrate that she could conduct a pelvic examination. She was not required to write an examination to be certified – all she had to do was complete the course.

[10] The certification course was not described in any particular detail by Ms. McIntosh except indirectly when she discussed the meaning of the "pathophysiology of assault":

> We're shown extensive videos and slides of injuries so that when we see them, we can uhm identify them, use appropriate terminology, have some research basis in understanding what would have caused them, uhm, what injuries are correlated with what kinds of -- you know we look at a lot of research looking at consensual sex injuries and non-consensual sex injuries. Uhm, so pathophysiology looks at the medical aspect of -- of genitalia within the context of sexual assault.

Beyond this, there was no evidence before me of the specifics of this course – nor what, if any, part of the course dealt with how one might distinguish between injuries from non-consensual sex from injuries caused by consensual sex.

(2) Ms. McIntosh's Professional Experience

[11] Ms. McIntosh has worked as a sexual assault nurse examiner since 1999 at various hospitals. I accept that Ms. McIntosh has done many pelvic examinations both on women generally and on women who have reported that they have been the victims of a sexual assault. However, unlike Dr. Parker, the expert who testified in *Quashie* and *Liu*, Ms. McIntosh did not give any more precise numbers with respect to the number of examinations she has performed on women who have reported that they have been sexually assaulted nor did she indicate any experience in examining women who have suffered pain following consensual sex. More seriously, Ms. McIntosh gave no evidence that she has assessed the results of these examinations in any systematic way or that she was able to relate the results of her own examinations with the literature in the area. Thus, even assuming that all the reports of sexual assault were truthful, it is unclear how her experience in this regards qualifies her to offer the opinion the Crown seeks to elicit.

[12] In her examination in chief, Ms. McIntosh outlined the duties of a sexual assault nurse examiner as including the following: (1) taking a history of the complainant; (2) examining the complainant and documenting the results of that; (3) collecting forensic

evidence for a sexual assault evidence kit; (4) collaborating with other medical personnel; (5) contacting the police at the complainant's request; and (6) providing the complainant with other referrals. What is striking here is that Ms. McIntosh did not suggest that the duties of a sexual assault nurse examiner include distinguishing injuries caused by non-consensual sex from those caused by consensual sex. Yet all her relevant work experience and training relate solely to the role of a sexual assault nurse practitioner. Thus, none of Ms. McIntosh's experiences in these specified areas qualify her to give the opinion evidence that the Crown seeks to lead – something that lies outside the purview of a sexual assault nurse examiner.

(3) Ms. McIntosh's Research, Teaching or Other Academic Experience

[13] Ms. McIntosh has not done any research or academic writing in the area of distinguishing injuries from non-consensual sex from those caused by consensual sex. In her testimony she made no mention of membership in any relevant associations or organizations. While she has taught at the sexual assault nurse examiner certification course, her teaching seemed to focus on how to perform pelvic examinations.[2] In her examination in chief she testified solely about "pelvic exam training that I did for all the emerging sexual assault nurses." In cross-examination, she added that she had been asked:

> to spend a day providing, uhm, theoretical content for that, so I talked about again anatomy, physiology, that's why I read the research I could find and we showed slides of injuries.

Ms. McIntosh did not testify that she taught how to distinguish between consensual and non-consensual sexual injuries. This is not surprising given that the making of such distinctions is not part of the duties of a sexual assault nurse examiner, *supra*, paragraph 12. Thus, while Ms. McIntosh has taught sexual assault nurse practitioners, this teaching does not qualify her to give the opinion evidence that the Crown seeks to elicit from her.

[2] In her examination in chief she testified solely about "pelvic exam training that I did for all the emerging sexual assault nurses." In examination in chief she added that she had been asked

(4) Ms. McIntosh's Previous Experience As An Expert Witness

[14] Ms. McIntosh has testified 8 to 10 times in both this Court and the Ontario Court of Justice. She was unable to provide any specifics about the cases in which she has testified. It appears that she has never been qualified to give opinion evidence of any type, although she might nonetheless have volunteered opinion evidence - her evidence on this point was somewhat confusing as the following excerpts demonstrate:

> Examination in Chief
>
> THE WITNESS: Uhm, it's -- it's typical for me to talk about injuries and refer to the research that correlates certain kinds of injuries that are consistent with assault or not.
>
> MR. KENNY: Sorry if you could just repeat that for me because I didn't get it all.
>
> THE WITNESS: Uhm it's typical when I'm giving testimony that I'm asked about injuries.
>
> Q. Yes.
>
> A. And in giving the testimony there are certain injuries that research highly correlates with assault, and uhm so I've referred to that research.
>
> Cross-Examination
>
> Q. The last question His Honour asked you is have you ever -- not necessarily verbatim, but have you ever been qualified in a court of law to give expert opinion evidence as to the consistency of general injuries with sexual assault and I don't think with respect to you, you really answered that question?
>
> A. I've never been -- I've never been certified as an expert witness in court, but the testimony that I give, uhm, has usually involved some statement from the research that I know and teach about injuries and their congruency with assault or consensual sex.

In her examination in chief, Ms. McIntosh explained that she has testified "regarding the documentation that was mine in sexual assault auh, evidence kits." Under cross-examination, she conceded that the majority of the questions posed to her related to issues of continuity of exhibits in the sexual assault kit and the like.

[15] From the foregoing, it is obvious that, unlike Dr. Parker the expert in *Quashie* and *Liu*, Ms. McIntosh has never been qualified to give opinion evidence of the type the Crown now seeks to elicit.

(5) Ms. McIntosh's Knowledge of the Literature

[16] In *Liu* the Court of Appeal had evidence before it that there was a "rather limited body of published studies involving injuries resulting from sexual assault."[3] I have no such evidence before me – beyond Ms. McIntosh's generalized assertion that there is a literature. As is obvious from the passages quoted in paragraph 14, *supra*; Ms. McIntosh suggested that there was research with respect to the congruency or correlation between various types of injuries and assault or consensual sexual activity. However she was unable to discuss this literature in any substantive way as is evidenced by the following passages of her cross-examination:

> Q. Okay. Let me ask you this. You referred to some research in the area. Would you agree with me that there is very limited academic research as to genital injuries as a result of unconsensual *(sic)* sex?
>
> A. Uhm, well, I guess I mean I think there is --I've certainly read research that speaks to that issue. Uhm, I'm not sure how to compare it with you know other research.
>
> Q. Okay. What's the last article or academic literature that you've read in regards to this area of expertise?
>
> A. Uhm, are you wanting me to cite authors and journals?
>
> Q. Yes.
>
> A. I can't do that right now.
>
> Q. When is the last time that you read any academic literature in regards to the opinion that my friend wants you to give?
>
> A. Uhm, that would have been in, auh, August of -- of this past year when I was preparing to teach the pelvic exam course for newly graduating sexual assault nurse examiners.
>
> . . .
>
> Q. Do you agree with if I suggested to you that there is no science that can deal with whether injuries are a product of consensual sex or not?

[3] *Liu*, *supra* at p. 242.

A. I'm sorry. What was the first part of your question?

Q. There is no science that can deal with whether the injuries are the product of a consensual sex or not?

A. Uhm, well I don't know if you can ever – I don't know that I could agree with that. Uhm, I mean I think with science generally it's always you know evolving truth and I think that there is uhm enough research and -- and there is emerging research as well that's looking at are there injuries in consensual sex and what do those look like and where are those located? So I think we know a lot of those injuries that women sustain from having a baby for example we know the kind of sexual responses women have and how that affects their genital area after consensual sex. There's a significant amount of research especially in the paediatric literature as well as sexual assault literature that -- that does provide charts that auh, and rationales for why certain kinds of injuries are more prevalent than others and what those are attributable to.

Q. And I think you fairly indicated to us earlier you couldn't point out to any of this research right now?

A. Well, I can -- there's journals called child abuse, there's journals called sexual assault, there's textbooks called sexual assault that have pictures and theoretical explanations. I just saw a text recently at the University of Alberta has just been produced that's going to be used specifically for forensic nurse examiners so I think there's a significant amount of -- of research that addresses these questions.
[Emphasis added]

[17] I am astonished that a proposed expert witness is unable to discuss the literature relevant to her supposed field of expertise with any greater precision. Incredibly, Ms. McIntosh was unable to cite specifically a single relevant study, author or article. While she did make reference to certain journals relevant to sexual assault generally and an unnamed text from the University of Alberta – she was unable to refer to any articles dealing with the particular topic of distinguishing injuries caused by consensual sex from injuries caused by non-consensual sex. Thus, I am not satisfied that Ms. McIntosh was "acquainted with the rather limited body of published studies involving injuries resulting from sexual assault" like Dr. Parker was in *Liu*. While Ms. McIntosh purported to be familiar with the relevant literature, I find that she is incapable of discussing it in any meaningful way. This reflects very badly on her putative expertise. It is particularly

serious where, as is the case here, her knowledge of the relevant research is the only credible basis that she offered for her ability to give the opinion evidence the Crown seeks to lead from her.

(C) Conclusion

[18] As the foregoing analysis makes clear, there is no question that Ms. McIntosh is not remotely as qualified to testify as Dr. Parker the expert who testified in *Quashie* and *Liu*.[4] However, I have contrasted the qualifications of Ms. McIntosh with those of Dr. Parker solely to highlight the deficiencies in Ms. McIntosh's qualifications. I do not mean to suggest that, because there are other persons more qualified to give this evidence, Ms. McIntosh should not be qualified as an expert. I am well aware that the fact that another person may have been more qualified to testify on a particular topic goes only to weight, rather than admissibility: *McLean (Litigation Guardian of) v. Seisel* (2004) 182 O.A.C. 122 (C.A.) at p. 140; *Regina v. Wade*, (1994) 18 O.R (3d) 33 (C.A.) at p. 42, rev'd on other grounds (1995) 23 O.R. (3d) 415 (S.C.C.).

[19] For all these reasons, I have concluded that Ms. McIntosh is not qualified to testify as to whether the injuries suffered by the complainant are more consistent with

[4] At the time of her testimony in *Liu*, Dr. Parker had been licensed by the Royal College of Physicians and Surgeons of Ontario for 17 years. As part of her medical studies, she had studied paediatrics, obstetrics and gynaecology. Dr. Parker was certified in family medicine and emergency medicine. In her family practice approximately 90 percent of Dr. Parker's patients were women, and approximately 40 percent of the work she performed has a gynaecological focus. She had examined the genitalia of thousands of women, having practised in her field for 17 years. She had been the physician liaison to the Sexual Assault Treatment Centre of the Riverdale Hospital. She attended a one day seminar at Women's College Hospital Sexual Assault Centre at the time of setting up the Riverside Hospital Sexual Assault Treatment Centre in 1994.At Ottawa General Hospital, Dr. Parker taught all aspects of emergency medicine with a special emphasis on the sexual assault program. Since 1994, in her capacity as consultant physician to the Sexual Assault Treatment Program, she had conducted a number of seminars on the sexual assault examination process. She had taught continuing medical education sessions for physicians in the Ottawa Valley with respect to the subject of sexual assault treatment procedure. In April, 1999 Dr. Parker attended a conference entitled, "Controversies in Sexual Assault Care", sponsored by the Ontario Network of Sexual Assault Treatment Centres. The trial judge found that Dr. Parker had done more sexual assault examinations than any other physician in Ottawa. Dr. Parker herself had examined approximately 45 women over the past 15 years who have allegedly suffered from non-consensual sex. She had also examined hundreds of women complaining of pain following consensual sex, such as abdominal pain after intercourse, or cramping while pregnant, or from a variety of other complaints. The trial judge also found that Dr. Parker was acquainted with the "rather limited body of published studies involving injuries resulting from sexual assault." Importantly, Dr. Parker was able to testify that the results of these studies mirrored her own experience.

non-consensual as opposed to consensual sex. In making this determination, I am well aware of the observation of Gillese J.A. in *McLean (Litigation Guardian of) v. Seisel*, *supra*, at p. 139 that the facts in *R. v. Marquard*, *supra*, "reveal that the threshold for admissibility is not high." But in *Marquard*, unlike in this case, the problem was not that the proposed experts lacked the "special" knowledge. The challenged witnesses were trained, experienced physicians and, as McLachlin J. noted at p. 78, "There is little doubt that they all possessed some special knowledge relating to the matters on which they testified." Rather, the problem in *Marquard* was that the witnesses were qualified more narrowly than either their actual areas of expertise or the scope of their testimony. Therefore, in my view, *Marquard* does not justify a departure from the clear direction of Binnie J. in *R. v. J.-L.J.*, quoted in paragraph 3, *supra*.

T. Ducharme J.

Released: January 11, 2006

COURT FILE NO.: P104-05
DATE: 20060111

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

- and -

RANOLD THOMAS

RULING

T. Ducharme J.

Released: January 11, 2006

19

Court of Queen's Bench of Alberta

Citation: CM v Alberta, 2022 ABQB 462

Date: 20220704
Docket: 2203 04046
Registry: Edmonton

Between:

C.M., Litigation Guardian for A.B., S.A., Litigation Guardian for F.S., C.H., Litigation Guardian for G.H., A.B., Litigation Guardian for J.K., R.L., Litigation Guardian for L.M. and Alberta Federation of Labour

Applicants

- and -

Her Majesty the Queen in Right of Alberta

Respondent

Reasons for Judgment
of the
Honourable Justice G.S. Dunlop

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1. Overview

[1] On April 12, 2022 the Honourable Tyler Shandro, QC, Minister of Justice and Solicitor General for Alberta, Deputy House Leader and Member of the Executive Council, signed a certificate pursuant to s. 34 of the *Alberta Evidence Act*, RSA 2000, c A-18, certifying that a PowerPoint presentation and minutes of a February 8, 2022 meeting of Cabinet must be kept confidential and not disclosed.

[2] Minister Shandro's certificate was attached and referred to in a Certified Record of Proceedings of Dr. Deena Hinshaw, Alberta's Chief Medical Officer of Health. According to Dr. Hinshaw's Amended Certified Record of Proceedings, filed June 1, 2022, the PowerPoint presentation and the Cabinet minutes are documents in her possession relevant to her decision in CMOH Order 08-2022, which the Applicants allege was deficient in several respects.

[3] The Applicants applied for disclosure of the PowerPoint presentation and the Cabinet minutes. Both the Applicants and the Respondent, Her Majesty the Queen in Right of Alberta (the "Crown") submitted written briefs and I heard the application on June 27, 2022. I concluded, based on the evidence before me then, that public interest immunity did not apply to the two documents. However, following the procedure set out by the Supreme Court of Canada in ***British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*** 2020 SCC 20 at para 103, I directed that the PowerPoint presentation and the Cabinet minutes be provided to me, to ensure that nothing would be disclosed which should remain confidential in the public interest.

[4] I received the PowerPoint presentation and Cabinet minutes on June 29, 2022. For the reasons set out below, I conclude that nothing in them is immune from production based on the public interest. I direct Dr. Hinshaw to file a further amended Certified Record of Proceeding attaching both documents, without redactions. Based on emails from counsel about a possible application for a stay of my order pending appeal, the deadline for Dr. Hinshaw to do so is one week after the release of these reasons.

2. Public Interest Immunity

[5] In my reasons for decision given orally on June 27, 2022 I reviewed the six factors relevant to public interest immunity which are identified by the Supreme Court of Canada in ***Carey v Ontario*** [1986] 2 SCR 637 and listed in ***Provincial Court Judges'*** at para 101. My subsequent review of the PowerPoint presentation and the Cabinet minutes provides me with additional evidence, primarily on the third ***Carey*** factor, the contents of the documents.

[6] The Crown has the burden of proving that public interest immunity applies and it should put in a detailed affidavit to support its claim: ***Provincial Court Judges'*** at para 102. In this case the Crown did not file an affidavit. The only evidence I have relevant to public interest immunity is Minister Shandro's certificate and the documents themselves. Minister Shandro has an obligation to "be as helpful as possible in identifying the interest sought to be protected": ***Carey*** at para 40.

[7] Minister Shandro states in his certificate:

> Furthermore, Cabinet prepared an Official Record of Decision ("ORD") consisting of meeting minutes arising from the February 8, 2022 meeting. The ORD arises from confidential discussions and deliberations which occurred within Cabinet, including Dr. Hinshaw.
>
> …
>
> If Cabinet members' statements were subject to disclosure, this could impede the free flow of discussion and injure the process of democratic governance.
>
> …

> Disclosure of the Power-Point and the ORD would be both (a) not in the public interest, and (b) prejudicial to those not involved in this litigation, as the precedential impact of being compelled to disclose confidential Cabinet discussions, or materials prepared for Cabinet's consideration, could impede the free flow of future Cabinet discussions, or the preparation of materials for Cabinet consideration, thereby negatively impacting the democratic governance of the Province of Alberta.
>
> (underlining added)

[8] The implication of those statements in Minister Shandro's certificate is that the PowerPoint presentation and the Cabinet minutes contain Cabinet members' statements or Cabinet discussions or deliberations. They do not. The minutes set out decisions only, and no statements by or discussions or deliberations among Cabinet members. The PowerPoint presentation contains information about COVID in Alberta and elsewhere in the world, with an emphasis on what other provinces were doing and experiencing and presents options for easing public health measures in Alberta. The PowerPoint presentation contains no statements, discussions or deliberations by individual Cabinet members or Cabinet as a whole.

[9] Although the PowerPoint presentation includes options for easing public health measures, and the Cabinet Minutes set out decisions about that, neither document contains an explicit recommendation about anything, with one exception. Page 38 of the PowerPoint presentation includes a recommendation regarding the Alberta Covid Records verifier apps. According to Minister Shandro's certificate, the PowerPoint presentation was prepared by Dr. Hinshaw, so this may be her recommendation. The document is not clear whose recommendation this is.

[10] As to the materials prepared for Cabinet's consideration, there is no evidence before me to support the conclusion that documents provided by the Chief Medical Officer of Health to Cabinet must be kept secret to ensure she will freely and honestly provide information and recommendations in the future. On the contrary, given her statutory powers and duties under the *Public Health Act*, RSA 2000, c. P-37 and her professional obligations as a physician, I would expect her to be candid and complete, regardless of any potential future public disclosure.

[11] During oral argument on June 27, 2022, I asked counsel for the Crown what public interest would be served by keeping Cabinet decisions secret. Counsel for the Crown submitted that policy decisions of Cabinet may change and for that reason they should be kept secret. He cited no authority in support of that proposition. Counsel for Crown conceded that the argument for public interest immunity is stronger for Cabinet deliberations than for Cabinet decisions. Minister Shandro in the last paragraph of his certificate refers to the prejudicial impact of disclosing Cabinet discussions or materials prepared for Cabinet; he says nothing about any prejudice from disclosing cabinet decisions.

[12] Furthermore, in this case the relationship between Cabinet decisions and Chief Medical Officer of Health decisions is a central issue. The Applicants allege improper delegation by the Chief Medical Officer of Health to the Cabinet whereas the Crown argues that Cabinet makes policy decisions and the Chief Medical Officer of Health implements those policy decisions through her orders. This engages the fifth ***Carey*** factor: the importance of producing the documents in the interests of the administration of justice. Consequently, even if there is a public interest in keeping Cabinet decisions secret in general, in this case the interests of justice tip the balance in favour of disclosure.

[13] The focus of public interest immunity with respect to Cabinet proceedings is Cabinet deliberations: ***Provincial Court Judges'*** at para 95 – 97. The documents before me do not reveal Cabinet deliberations. They contain information and options provided by the Chief Medical Officer of Health to Cabinet, one recommendation, and Cabinet decisions. The Crown has not established a public interest requiring that those things be kept secret.

3. Redactions and Stay Pending Appeal

[14] Natural justice and the open courts principle require that litigation be conducted on notice, on the record, and in public. There are limited exceptions for emergencies and to protect children and other vulnerable people. None of the exceptions applies here. In this case, on no or very short notice to the Applicants, the Crown sought redactions of the PowerPoint presentation and the Cabinet minutes, and a stay of my order should I order disclosure of anything.

[15] During oral argument on June 27, 2022, counsel for the Crown proposed that if I were to order disclosure of the PowerPoint presentation and the Cabinet minutes, they should first be redacted to remove references to anything other than masking in schools. This was not addressed in the Crown's written brief. As far as I know, no notice of this proposal was provided to the Applicants' counsel.

[16] On June 29, 2022, counsel for the Crown delivered a letter to me, which does not appear to have been copied to the Applicants' counsel, and an e-mail to my assistant, which was copied to the Applicants' counsel. The letter and the e-mail were not filed so they would not ordinarily form part of the record accessible to the public. The specific communications to me, including the Applicants' counsel's reply are set out below.

> **Steven Dollansky letter June 29, 2022 received at 2:55 pm**
>
> **Attention: Honourable Justice Grant S. Dunlop**
>
> ***Re: C.M. Litigation Guardian for A.B. et al v. Her Majesty The Queen In Right of Alberta Action No. 2203 – 04046***
>
> Further to your direction of June 27, 2022, we enclose a USB stick that includes:
>
> 1. The Power-Point presentation with information regarding the ongoing COVID-19 Pandemic presented to Cabinet; and
>
> 2. The Official Record of Decision from the February 8, 2022 meeting of cabinet.
>
> In addition, our client has proposed redactions to the documents for your consideration such that only information that relates to the school masking is disclosed. Accordingly, there are two versions of each file.
>
> The USB is password protected. The password will be provided by email directly to your attention.
>
> We wish to apologize to the Court for the delay in getting these documents to your attention. There were a number of approvals that were required from our client that took longer than initially anticipated. Thank you.
>
> Yours truly,

Steven A.A. Dollansky

Steven Dollansky e-mail June 29, 2022 3:43 pm

Justice Dunlop,

Further to our appearance before you on June 27, 2022, the documents protected by public interest immunity have been delivered to your office this afternoon for review.

We have been advised that if you decide that all or part of the protected documents should be disclosed, our clients may apply for a stay of that decision pending an appeal. Accordingly, we wish to confirm that the documents will not be immediately released in whole or in part until sufficient time is provided for our clients to provide instructions on whether an Application and Appeal will be pursued. Given that these instructions will need to come from senior members of Executive Council, we would request that we be given five (5) business days to either file an Application and Appeal or disclose the records. Further, if an Application and Appeal is filed, we would request that the Court order the documents not be released until the stay Application is heard.

Thank you for your attention to this matter,

Steven

Sharon Roberts e-mail June 29, 2022 3:47 pm

Dear Justice Dunlop:

We write further to Mr. Dollansky's email this afternoon, which we received by way of advance copy very shortly before 3 pm today. Our friends have received a similarly short notice copy of this correspondence.

The Crown (to adopt the Court's language) has had considerable notice of the possibility of disclosure of the records over which it claimed cabinet confidence. A five business day delay from notice of decision is excessive in the circumstances. Presumably instructions have already been or ought to have been sought respecting the potential of a stay / appeal if disclosure is directed. The Respondent is asking by way of email for this Court to grant an interim stay pending it even having instructions to file for a stay and bring an appeal. The Applicants object. If a stay is to be sought, a Civil Notice of Appeal and stay application ought to be filed and served as expeditiously as possible and certainly in less than five business days, which could amount to more than a week given the coming holiday weekend, assuming days begin to count on the day after a direction is made. We suggest two business days to file and serve is ample and otherwise are in the Court's hands to ensure a fair process and avoidance of collateral attacks.

Sincerely,

Sharon Roberts

[17] E-mails to a judge's assistant are appropriate for scheduling and other non-contentious matters. They are not an appropriate way to apply for substantive relief, because they are not on the record and they lack the structure of a filed application which ensures counsel for the opposite party has time to obtain instructions and respond. The Crown could have raised the issue of a stay of proceedings in its written brief submitted June 17, 2022 or during the hearing on June 27, 2022. Doing so by email on June 29, 2022 was irregular and unfair to the Applicants.

[18] I am not prepared to permit the Crown to redact everything from the PowerPoint presentation and the Cabinet minutes except references to school masking for five reasons:

a) First, the Applicants had either no or inadequate notice of the Crown's application and the specific redactions they seek.

b) Second, the entire decision, CMOH 08-2022 is under review, and it covers more than masking in schools.

c) Third, Dr. Hinshaw certified that the PowerPoint presentation and the Cabinet Minutes are relevant to her decision, without limiting that to certain portions of those documents.

d) Fourth, counsel for the Crown conceded during oral argument on June 27, 2022 that the documents are relevant.

e) Fifth, the relationship between Cabinet decisions and Chief Medical Officer of Health orders is a central issue in this case, with the Applicants alleging improper delegation by the Chief Medical Officer of Health to the Cabinet, and the Crown arguing that the Cabinet makes policy decisions and Chief Medical Officer of Health implements those policy decisions through her orders. The broader context, beyond just masking in schools, is relevant to that issue.

[19] Given the Applicants' agreement that two business days is sufficient for the Crown to file and serve an application for a stay, I set the deadline for Dr. Hinshaw to file a further amended Certificate of Record attaching the PowerPoint presentation and the Cabinet minutes at one week from the date of this decision, subject to any stay granted by me or the Court of Appeal. I am prepared to hear a stay application at any time on any weekday in the next seven days, except the morning of Friday, July 8, 2022, subject to counsel's agreement on a date and the availability of a WebEx courtroom. Also, if the Crown requires it, I grant leave to the Crown to apply directly to the Court of Appeal for a stay, without first seeking one from me, should the Crown wish to do so.

4. Disposition

[20] The Applicants' application for disclosure of the PowerPoint presentation and the Cabinet minutes is granted. Dr. Hinshaw shall file a further amended Certificate of Record attaching those documents within one week of this decision.

Heard on the 27th day of June, 2022.
Dated at the City of Edmonton, Alberta this 4th day of July, 2022.

G.S. Dunlop
J.C.Q.B.A.

Appearances:

Sharon Roberts and Orlagh O'Kelly
Roberts O'Kelly Law
for the Applicants

Gary Zimmermann, Steven Dollansky, Stuart Chambers
McLennan Ross LLP
for the Respondent

Court of Queen's Bench of Alberta

Citation: R. v. Briscoe, 2012 ABQB 111

Date: 20120221
Docket: 100723519Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown (Respondent)

- and -

Michael Erin Briscoe

Accused (Applicant)

***Voir Dire* Reasons for Judgment**
of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction

[1] On May 31, 2010, the Crown charged Michael Erin Briscoe [the "Applicant"] by direct indictment with the following four offences under the *Criminal Code*, R.S.C. 1985, c. C-46 ["*Criminal Code*"]:

1. first degree murder of Ellie-May Meyer ["Meyer"], pursuant to *Criminal Code* s. 235(1);

2. first degree murder of Nina Louise Courtepatte ["Courtepatte"], pursuant to *Criminal Code* s. 235(1);

3. aggravated sexual assault of Courtepatte, pursuant to *Criminal Code* s. 273(2)(b); and

4. kidnapping of Courtepatte, pursuant to *Criminal Code*, s. 279.

[2] The Applicant's trial on these charges is scheduled to begin in February of 2012.

[3] By way of a pre-trial application, the Applicant seeks an order excluding certain statements he made to members of the Royal Canadian Mounted Police ["RCMP"] when they interviewed him on April 11, 2005, and on April 12, 2005. The Crown will seek to introduce the Applicant's statements into its evidence during the Applicant's trial. At the time he provided these statements to the RCMP officers, the RCMP had arrested the Applicant as part of its investigation into Courtepatte's murder. The statements occurred while the Applicant was detained at the RCMP detachment in Stony Plain, Alberta.

II. Background

[4] Although the background of this matter has little effect on the outcome of this pre-trial motion and the trial over which this Court will be presiding, the Applicant has asked this Court to consider certain matters that arose at a previous trial of the Applicant. As a result, this Court intends to provide a skeletal background of these earlier proceedings in which the Applicant was involved.

[5] The Applicant was prosecuted on four charges, including a count of first degree murder, arising from Courtepatte's death. The Crown had not yet charged the Applicant in relation to Meyer's death. In ***R. v. Briscoe***, 2007 ABQB 196, 413 A.R. 53, Justice Burrows acquitted the Applicant. Subsequently, the Crown successfully appealed that acquittal. In ***R. v. Briscoe***, 2008 ABCA 327, 437 A.R. 301, the Alberta Court of Appeal directed that the Applicant's acquittals be set aside and ordered that the Applicant be retried on all counts. The Supreme Court of Canada affirmed the Alberta Court of Appeal's decision in ***R. v. Briscoe***, 2010 SCC 13, [2010] 1 S.C.R. 411. The application before this Court is part of the Applicant's retrial as ordered by the Supreme Court of Canada.

III. Preliminary Issue - Judicial Comity

[6] Justice Burrows, by way of a pre-trial motion in the initial trial of this matter, considered the same issues that are before this Court, *viz.*, whether to exclude certain statements that the Applicant made to the RCMP on April 11, 2005, and April 12, 2005. In ***R. v. Briscoe***, 2007 ABQB 48, 413 A.R. 29 [the "Burrows *Voir Dire* Decision"], Justice Burrows dismissed the Applicant's arguments concerning the common law "voluntariness" issues surrounding his statements. As well, with one exception, Justice Burrows dismissed the Applicant's arguments concerning the RCMP's alleged breach of his rights under the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the "*Charter*"]. The statement that Justice Burrows excluded from the trial evidence was part of Cst. Patrick Waldorf's interview of the Applicant that Cst. Waldorf conducted on April 12, 2005, from approximately 10:24 to 11:10 hours. Cst. Waldorf is now a staff sergeant, but this Court will take the liberty of referring to him in his capacity at the time of the events in question.

[7] While the Crown appealed Justice Burrows's 2007 trial acquittal, it did not allege that the Burrows *Voir Dire* Decision was incorrect for its exclusion of one of the Applicant's statements. As a consequence there has not been any appellate review or comment on the Burrows *Voir Dire* Decision.

[8] The Applicant argues that this Court should give the Burrows *Voir Dire* Decision significant weight in the present proceedings, based on "judicial comity." He argues that this Court could diverge from the Burrows *Voir Dire* Decision if this Court is satisfied that:

> (a) it has received evidence that is markedly different from the evidence that the parties presented to Justice Burrows, such that he would likely not have made the same decision had he received the same evidence; or
>
> (b) the law has changed in some significant way between the Burrows *Voir Dire* Decision and the present time, such that the Burrows *Voir Dire* Decision and its reasons are no longer correct.

The first aspect should not be an issue unless, during the *voir dire* before this Court, it hears evidence different from that which Justice Burrows received, provided the evidence is relevant and material to the issue before it.

[9] The Crown agrees with the Applicant that this Court should give the Burrows *Voir Dire* Decision significant weight in the present proceedings. It argues, however, that the law supporting the Burrows *Voir Dire* Decision has undergone significant changes.

[10] The Applicant provides this Court with Justice Thomas's decision in ***R. v. Perreault***, 2010 ABQB 714 at paras. 127-37, 497 A.R. 168 in support of his argument that, based on judicial comity, this Court should give the Burrows *Voir Dire* Decision significant weight. In fact, Justice Thomas did not rule on the issue of whether he should grant comity to a judge of the same court. Rather, he specifically chose not to address the issue (at para. 138). He did comment on judicial comity and provided the "often cited rule" from ***Hansard Spruce Mills Ltd. (Re)***, [1954] 4 D.L.R. 590 at 592, 34 C.B.R. 202 (B.C.S.C.) where the court said:

> ... I will only go against a judgment of another judge of this Court if:
>
> (a) Subsequent decisions have affected the validity of the impugned judgment;
>
> (b) It is demonstrated that some binding authority in case law or some relevant statute was not considered;
>
> (c) The judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial judges, where the exigencies of

> the trial require an immediate decision without opportunity to fully consult authority.

As one can see from the "often cited rule," the court did not say that the law had to have changed in some "significant way." It simply said that "[s]ubsequent decisions have affected the validity of the impugned judgment." This is a lower standard.

[11] Justice Thomas said that judicial comity is "essentially a rule of practice developed in a court between judges who are peers" (at para. 135) and that it is a "collegial approach to how the decisions of its judges should be approached by their peers" (at para. 137).

[12] ***R. v. Perreault*** relates to judicial comity in the Alberta Provincial Court. Earlier the same year Justice Thomas in ***Searles v. Alberta (Health and Wellness); Searles v. Alberta (Minister of Health and Wellness)***, 2010 ABQB 157 at paras. 22-24, 485 A.R. 166, affd 2011 ABCA 144, 502 A.R. 198, applied the ***Hansard Spruce Mills*** approach to an Alberta Court of Queen's Bench matter.

[13] In ***R. v. Sipes***, 2009 BCSC 285 the court described judicial comity as follows:

> [10] The approach advocated in *Re Hansard Spruce Mills* is not a rule of law; rather, it is a wise and prudent prescription for the exercise of judicial discretion. It will almost always be in the interests of justice for a judge to follow the decision of another judge of the same court on a question of law. Consistency, certainty, and judicial comity are all sound reasons why this is so. It is for the Court of Appeal to decide whether a judge of this Court has erred, not another judge of the Court.
>
> [11] In my view, both the rule in *Re Hansard Spruce Mills* and the exceptions to it are based on common sense and a consideration of the interests of justice. At all times, the application of the rule should advance the interests of justice, not undermine them. It is for this reason that I am also of the view that the determination as to whether to follow a decision of another judge of the same court should not begin and end with a rote application of *Re Hansard Spruce Mills*; instead, that determination should also be informed by all relevant factors that bear upon whether it is in the best interests of justice in the context of the particular case at hand to do so. ...

[14] This Court agrees with the approach, as stated in ***Sipes***. It must have a principled reason for abiding by, or departing from, a judge of the same court. It must not do so blindly. Thus, whether this Court chooses to exercise judicial comity when it considers the Burrows *Voir Dire* Decision, it still must look at all relevant factors, including changes to the law caused by subsequent decisions or legislation, to determine whether it will deviate from that decision, or arrive at the same conclusion.

[15] As well, it is a well-established principle of law that a court applies the law, in a criminal as well as a civil context, based on the most recent binding court authority. For example, in ***Fullowka v. Pinkerton's of Canada Ltd.***, 2010 SCC 5 at paras. 93-94, [2010] 1 S.C.R. 132, the court applied the causation scheme that was indicated by a binding decision issued subsequent to the original trial. See also ***R. v. Ilesic***, 2000 ABCA 254 at paras. 9-11; ***British Columbia v. Henfrey Samson Belair Ltd.***, [1989] 2 S.C.R. 24; ***Crane v. Brentridge Ford Sales Ltd.***, 2008 ABCA 216 at para. 11; ***R. v. Tkachuk***, 2001 ABCA 66. In that sense, Justice Burrows's conclusion in the Burrows *Voir Dire* Decision was not necessarily incorrect given the state of the law at the time he issued that decision. However, subsequent developments in the law may require this Court to arrive at a different conclusion.

IV. Evidence

[16] A number of RCMP officers provided this Court with testimony concerning the issues before this Court.

A. Constable Brophy

[17] Cst. Kelly Brophy was the officer who arrested the Applicant on April 11, 2005. He arrested the Applicant at the motel room in which the Applicant was living at the time. The arrest took place at 11:37 hours. When Cst. Brophy arrested the Applicant, the Applicant appeared to Cst. Brophy to be surprised, but not agitated. The Applicant was not belligerent and cooperated fully with Cst. Brophy's commands. Cst. Brophy advised the Applicant that he was arresting the Applicant for murder, but he did not say the name of the victim.

[18] Cst. Brophy handcuffed the Applicant and checked the Applicant for any weapons. He then allowed the Applicant to dress. Cst. Brophy then escorted the Applicant to the unmarked police cruiser Cst. Brophy was driving. Once they were in the police cruiser, Cst. Brophy outlined for the Applicant the Applicant's *Charter* rights from a card that Cst. Brophy carried. Cst. Brophy read into the record the text on that card, which included a detained person's right to counsel and the right to remain silent. When Cst. Brophy asked the Applicant whether he understood his rights, the Applicant responded in the affirmative. The Applicant specifically stated that he wanted to contact a lawyer. During this time, Cst. Waldorf joined the Applicant and Cst. Brophy in the police cruiser. Cst. Brophy also testified that after he read what was on the card, he would repeat the detained person's *Charter* rights and caution in plain language. This was his normal practice, especially if he was concerned that the detained person had not understood what was happening. He testified that, in this case, the Applicant understood both the explanation from the card, as well as his plain language explanation.

[19] Cst. Brophy, Cst. Waldorf and the Applicant left the motel at 11:50 hours and headed to the Stony Plain RCMP detachment. Neither Cst. Brophy nor Cst. Waldorf had any discussion with the Applicant while they were in the police cruiser. At 12:10 hours, Cst. Brophy completed

the booking procedure and placed the Applicant in a cell at 12:22 hours to wait for a telephone room to become available, so the Applicant could contact counsel.

[20] A telephone room became available at 12:49 hours. Cst. Brophy took the Applicant to the telephone room and reminded the Applicant that he was under arrest for murder. Cst. Brophy asked the Applicant with whom he wished to speak and the Applicant responded that he wanted to call Mr. Bruce Lennon. Cst. Brophy called operator assistance to obtain Mr. Lennon's telephone number, then dialed it for the Applicant. Cst. Brophy testified that he dialed Mr. Lennon's telephone number, as he wanted to make sure that the Applicant was going to speak with a lawyer. Mr. Lennon's office was closed.

[21] As there was no answer, Cst. Brophy then asked the Applicant whether he wanted to speak with another lawyer. The Applicant chose to speak with Mr. Michele Fontaine, whom the Applicant selected from the Legal Aid list. Again, Cst. Brophy dialed the telephone number and reached Mr. Fontaine's secretary, who gave Cst. Brophy Mr. Fontaine's cellular telephone number. Cst. Brophy dialed that number and reached Mr. Fontaine, who identified himself. Cst. Brophy gave the telephone to the Applicant and then, to give the Applicant privacy, Cst. Brophy left the Applicant alone in the telephone room. Cst. Brophy shut the telephone room door. All this occurred at 12:57 hours.

[22] The telephone room had a steel door, with a glass window and a slider on the window. It was a small room, which had telephone books and the Legal Aid number pasted on the wall. Cst. Brophy moved down the hall to a guard desk and completed his notes as to what had transpired during that morning. He was about 20 feet from telephone room. As was his practice, he asked the Applicant to knock on the telephone room door when the Applicant had completed his call. After about three minutes, the Applicant said he was done. When Cst. Brophy asked the Applicant whether he was satisfied with the advice he had received from Mr. Fontaine, the Applicant responded in the affirmative. He told Cst. Brophy that Mr. Fontaine had told him to say nothing. The Applicant did not say that he wanted to speak with other counsel, nor did the Applicant again say he wanted to speak with Mr. Lennon.

[23] Cst. Brophy then returned the Applicant to the cells and locked the Applicant in a cell at 13:01 hours. Cst. Brophy went back to his desk to prepare for a number of interviews, including the interview he was going to conduct on the Applicant that afternoon. During the period from 13:01 hours to 14:57 hours, Cst. Brophy had no contact with the Applicant. The Applicant remained in his cell.

[24] At 14:57 hours, Cst. Brophy removed the Applicant from his cell for an interview. Cst. Brophy took the Applicant to a secure interview room that was monitored by audio and video. He had no other discussion with the Applicant before taking him to the interview room. Cst. Waldorf monitored the interview. The videotape of Cst. Brophy's interview with the Applicant that this Court observed commenced at 14:57 hours. The interview continued until 18:56 hours.

[25] Cst. Brophy took two breaks, which allowed the Applicant to use the washroom facilities. These breaks also gave Cst. Brophy time to meet with his colleagues to ensure that he was obtaining the information necessary to continue with the investigation. During each break, Cst. Brophy returned the Applicant to his cell. They did not communicate with each other while outside the interview room.

[26] Although Cst. Brophy thought that he had completed the interview for the day, the Applicant asked to see Cst. Brophy again at 19:45 hours. Cst. Brophy did not obtain any further information from the Applicant between 18:56 and 19:45 hours. The Applicant wanted to discuss his safety with Cst. Brophy. After this brief discussion, at 19:52 hours, Cst. Brophy took the Applicant back to the telephone room, as the Applicant asked if he could try to reach Mr. Lennon. Again, they were not able to reach Mr. Lennon, so Cst. Brophy took the Applicant back to his cell. The Applicant used the same telephone number they had used previously to try to contact Mr. Lennon. Cst. Brophy received no information from the Applicant as to whether the Applicant left a message for Mr. Lennon.

[27] At no time did Cst. Brophy and the Applicant discuss whether Mr. Lennon was the Applicant's lawyer. The Applicant did not indicate that was the case. Cst. Brophy was under the impression that Mr. Lennon's name was the only lawyer's name the Applicant knew. The Applicant did not ask to speak with other counsel.

[28] Cst. Brophy arrived at the RCMP detachment on the morning of April 12, 2005, and began preparing for his daily tasks, which did not include speaking with the Applicant. At 8:57 hours, the Applicant asked to speak with Cst. Brophy. Cst. Brophy took the Applicant into the interview room, which was audio and videotaped. The videotape that this Court viewed did not start immediately at the beginning of the interview. Cst. Brophy could not explain why the beginning of the videotape recording was missing. He testified during cross-examination that the missing portion would have been about one-minute long and during that time he would have been talking "about 99% of that time." Cst. Brophy conceded that he might have insulted the Applicant during that unrecorded period but, he testified that he did not threaten the Applicant, make any promises, or provide any inducements to the Applicant in exchange for evidence. Cst. Brophy was adamant in this regard.

[29] Viewing the videotape of this interview, it is clear that Cst. Brophy adopted a more aggressive tack, and he confirmed this in his testimony before this Court. This tack was evident on the videotape, but Cst. Brophy's approach was simply to raise his voice, which he did for virtually the whole interview. He did not yell at the Applicant, pace around the room, or bang on the table. He just spoke with a louder voice and said, for example:

> Cst. Brophy: ... So you wanna talk to me right now. Let's go. Let's have it. Let's have what you never told me last night. The stuff that you left out, get started. Let's have it.

> Cst. Brophy: ... Now smarten up and start tellin' me exactly what happened, and stop beating around the bush.
>
> Cst. Brophy: Look, I'm not here to, to make conversation. I don't have time for this. I got a lot more stuff to be doing than sitting here, listening to you talkin' in circles. Now if you got somethin' to say, spit it out.
>
> Transcript of the Applicant's Statements, April 12, 2005, p. 2, ll. 9-10; p. 2, ll. 18-19, p. 8, ll. 191-93.

Cst. Brophy felt that the information that the Applicant was providing to him lacked detail, and that the Applicant was being evasive. Cst. Brophy testified he felt that the best way to get this information from the Applicant was to adopt this aggressive approach.

[30] This interview ended 24 minutes later at 9:21 hours. Cst. Brophy returned the Applicant to his cell. As the interview ended, the following exchange took place between Cst. Brophy and the Applicant:

> Applicant: . . . I want to make a phone call to my lawyer, I never got a chance to do that.
>
> Cst. Brophy: Yeah, this morning you can call your lawyer again. You called your lawyer yesterday.
>
> Applicant: I didn't have, my lawyer's not that person. . . .
>
> Transcript of the Applicant's Statements, April 12, 2005, p. 13, ll. 369-72, p. 14, l.1

[31] Cst. Brophy spoke briefly with Cst. Waldorf, who was the next RCMP officer to interview the Applicant. They decided that Cst. Waldorf would attempt to build a rapport with the Applicant. Cst. Brophy took the Applicant back to the interview room at 10:24 hours to meet with Cst. Waldorf.

[32] Cst. Brophy again had contact with the Applicant at 11:27 hours, when the Applicant said that he wanted to call a lawyer to deal with his judicial interim release application. The Applicant specifically wanted to call Mr. Lennon. Cst. Brophy assisted the Applicant in dialing Mr. Lennon's telephone number. Mr. Lennon was in court, so Cst. Brophy left a message, asking Mr. Lennon to return the call on Cst. Brophy's cellular telephone. Mr. Lennon called Cst. Brophy at 14:10 hours. Cst. Brophy retrieved the Applicant from his cell, placed him in the telephone room and left the Applicant alone with Mr. Lennon to complete his call.

B. Constable Waldorf

[33] Cst. Waldorf was Cst. Brophy's partner at the time Cst. Brophy arrested the Applicant. By the time Cst. Waldorf had returned to the police cruiser immediately following the Applicant's arrest, Cst. Brophy was in the driver's seat, and the Applicant was in the rear of police cruiser. Cst. Waldorf heard Cst. Brophy reading to the Applicant the "*Charter* and caution." The Applicant responded in the affirmative concerning his understanding the reason for his arrest, his *Charter* rights and the caution. While they were driving to the Stony Plain RCMP detachment, Cst. Waldorf heard the Applicant making various utterances concerning his work and his back ailment. These were not in response to any questions posed by either Cst. Brophy or Cst. Waldorf. In fact, Cst. Waldorf testified that it is his practice to "not engage the suspect" during this period, as nothing is recorded, and he must allow the detainee to first call a lawyer, if the detainee has so requested.

[34] Once they arrived at the Stony Plain RCMP detachment, Cst. Brophy exited the vehicle. While the Applicant and Cst. Waldorf were in the vehicle, the Applicant continued his utterances, but none were in response to any questions or comments that Cst. Waldorf made to the Applicant. Once the Applicant was removed from the police cruiser, Cst. Waldorf conducted a pat-down search of the Applicant. Cst. Waldorf also provided testimony concerning the booking procedure and the implementation phase of the Applicant's right to counsel, which does not differ from that which Cst. Brophy provided.

[35] Cst. Waldorf monitored Cst. Brophy's April 11, 2005 interview of the Applicant. The only portions that Cst. Waldorf did not monitor were those when he took breaks to use the washroom facilities.

[36] Cst. Waldorf interviewed the Applicant on the morning of April 12, 2005, following his interview of another accused, Stephanie Bird. The interview started at 10:24 hours. Immediately before that, Cst Waldorf had heard that the rapport between Cst. Brophy and the Applicant had broken down and that the Applicant wanted to speak with a different officer. He had no discussion with the Applicant before the interview began. Cst. Waldorf's interview with the Applicant began as follows:

> Cst. Waldorf: You remember me from yesterday, right? I'm Pat.
>
> Applicant: I'm scared shitless, man.
>
> Cst. Waldorf: You are?
>
> Applicant: Yes.
>
> Cst. Waldorf: I understand. I understand totally what you're saying. I also understand you were talkin' to another guy, and you don't wanna talk to him anymore.

Applicant: He doesn't, he's not. I don't know what.

Cst. Waldorf: What's the, what's the problem there? What's?

Applicant: He's, he's being so fuckin', and I can't think straight.

Cst. Waldorf: Okay.

Applicant: And he said he was gonna keep me and my friend safe right, if I, if I helped out or whatever, and.

Cst. Waldorf: Okay. Well, I don't know anything about that. But listen now, and I know, I understand you're talkin' about you wanna call a lawyer, okay? My understanding from being around here yesterday, you, you spoke to somebody already, right?

Applicant: Right.

Cst. Waldorf: Okay.

Applicant: Thirty seconds, but that wasn't my lawyer.

Cst. Waldorf: Okay. It was a lawyer, I understand though eh, it was a lawyer, right?

Applicant: Yeah.

Cst. Waldorf: Good enough. Okay. Listen. I just wanna cover off a few things here with you, okay?

Applicant: Okay.

Transcript of the Applicant's Statements, April 12, 2005, p. 14, ll. 388-99, p. 15, ll. 400-411

[37] The friend who the Applicant referenced is a co-accused Stephanie Bird.

[38] The Applicant did not ask for, and was not given an opportunity to contact counsel at any time during Cst. Waldorf's interview of him.

C. Constable McCoshen

[39] Cst. Leonard McCoshen, as he then was (he is now a corporal, but this Court will take the liberty of referring to him in his capacity at the time of the events before this Court), was an

undercover police officer at the time the Applicant was arrested. He was placed in the cell with the Applicant as a "cell plant." He was contacted to attend at the Stony Plain RCMP detachment and, soon after he arrived, he was placed in the Applicant's cell. He testified that there was no time to obtain a judicial authorization to record his conversations with the Applicant.

[40] Cst. McCoshen testified that his training did not allow him to elicit information from a detained person on the topic under investigation. Cst. McCoshen used the term "passive investigation," in which he would listen to the detainee's words and statements. Cst. Robert Teufel confirmed this methodology. Cst. Teufel's confirmation is contained on page 157, lines 35-40, of a transcript of Cst. Teufel's evidence that he presented to Justice Burrows during the Applicant's first trial. The transcript of Cst. Teufel's evidence is attached to an agreed statement of facts that the parties provided to this Court dated December 4, 2011.

[41] After Cst. McCoshen's "release," he would write notes reflecting his conversations with the detainee.

[42] Cst. McCoshen provided this Court with a summary of the conversations he had with the Applicant, most of which is not relevant to this application. He did, however, testify that the Applicant denied that he murdered Courtepatte, and that throughout the ordeal, he was concerned with his safety and that of his girlfriend, Ms. Bird.

[43] For the purposes of this application, the Applicant told Cst. McCoshen at 9:34 hours on April 12, 2005, that he wanted to call his lawyer, as he was concerned that a lawyer would not be present at his first appearance and he would not be able to get bail. It was Cst. McCoshen's belief, at that time, that the Applicant had spoken to a lawyer and had understood his constitutional rights, but the Applicant was concerned which lawyer would be attending his bail hearing.

[44] The Applicant also told Cst. McCoshen that if the Crown offered him a short sentence, he would take it. Later, the Applicant retracted that statement and said that he would wait and fight it out in court.

D. The Applicant

[45] The Applicant did not testify at the *voir dire*. That means this Court has no evidence that he subjectively felt threatened during any of his interviews.

V. Issues

[46] The Applicant raises three issues:

A. whether the Applicant's statements following the "missing" portion of the videotape were voluntary;

B. whether the fact that there was no recording and, thus, no transcript of Cst. McCoshen's conversations with the Applicant, results in unfairness to the Applicant; and

C. whether Cst. Brophy or Cst. Waldorf, or both of them, breached the Applicant's *Charter* s. 10(b) rights by not allowing him to contact his counsel of choice immediately following Cst. Brophy's interview with him on April 12, 2005, and preceding his interview with Cst. Waldorf.

VI. Analysis

A. The "Missing" Portion of the Videotape

[47] On the morning of April 12, 2005, Cst. Brophy had no intention of interviewing the Applicant. The Applicant, however, asked to see Cst. Brophy, so Cst. Brophy agreed to meet with the Applicant. This meeting was audio and video recorded. Cst. Brophy testified that he chose to take a more aggressive approach with the Applicant.

[48] There is no doubt that the Crown must show that the Applicant made his statements voluntarily: ***R. v. Oickle***, 2000 SCC 38 at para. 30, [2000] 2 S.C.R. 3. He must not have made his statements as a result of the RCMP threatening him, or providing him with inappropriate promises or inducements: ***Oickle***, at paras. 48-57.

[49] Furthermore, it is clear that this Court's inquiry as to whether the Applicant provided his statements to Cst. Brophy is contextual and this Court must consider all of the relevant circumstances that touch on the issue of whether the Applicant provided his statements to Cst. Brophy voluntarily: ***Oickle*** at para. 47; ***R. v. Moore-McFarlane*** (2001), 47 C.R. (5th) 203 at para. 64, 56 O.R. (3d) 737 (Ont. C.A.). If the RCMP provides this Court with an unreliable record, such as where it fails to videotape an interview, when such facilities are available, the non-recorded interrogation may be "suspect": ***Moore-McFarlane*** at para. 65; ***R. v. Ahmed*** (2002), 166 O.A.C. 254, 170 C.C.C. (3d) 27 (Ont. C.A.). In such a case, this Court must determine whether Cst. Brophy's testimony is a sufficient substitute for the videotaped recording, such that it will satisfy the Crown's onus: ***Moore-McFarlane*** at para. 65.

[50] This Court finds that the Applicant made none of his statements to Cst. Brophy as a result of any threats, promises or inducements. To this extent, this Court agrees with the Burrows *Voir Dire* Decision. There are a number of things to note concerning the "missing" portion of the videotape:

1. It was the Applicant who asked to see Cst. Brophy. Cst. Brophy had no intention of visiting with the Applicant that day (except, perhaps, to deal with the Applicant's judicial interim release, although that is not clear).

2. When the videotape started, after the "missing" portion, there is nothing which indicates that the Applicant was intimidated (which might indicate that Cst. Brophy threatened him), or enthusiastic about responding to Cst. Brophy's inquiries (which might indicate that Cst. Brophy provided the Applicant with an inducement or other promise). In fact, the Applicant's affect changed little from the day before. He provided little in the way of information that clarified or bolstered the information he provided to Cst. Brophy on April 11, 2005, despite Cst. Brophy's "more aggressive" approach.

[51] This Court has no doubt that the statements the Applicant made to Cst. Brophy on the morning of April 12, 2005, were voluntary. Cst. Brophy was a forthright and credible witness. For example, he readily admitted that he might have insulted the Applicant during the "missing" portion of the videotape. Thus, this Court accepts Cst. Brophy's testimony in its entirety that he did not threaten the Applicant, or make to the Applicant any promises, or provide the Applicant with any inducements. As well, it accepts Cst. Brophy's testimony that the "missing" portion of the videotape involved a very short period, in which he did most of the talking. As a result, this Court agrees with the conclusions that Justice Burrows reached in the Burrows *Voir Dire* Decision.

B. The "Cell Plant" Conversations

[52] When this Court inquired of the Crown on its intended use for Cst. McCoshen's testimony, the Crown responded that it would not directly use that testimony in the trial proper. Rather, Cst. McCoshen's testimony was advanced only for cross-examination purposes. Thus, it is premature for this Court to rule on the admissibility of the "cell plant" conversations.

[53] However, for the purposes of assisting counsel on how this Court might approach the issue of whether it would permit the Crown to use Cst. McCoshen's testimony, this Court sees no unfairness in permitting the Crown to enter this testimony into the trial proper. The extent to which this testimony is of use to this Court will be a question of the weight it places on Cst. McCoshen's testimony:

- Is the testimony reliable?
- Does the testimony have any probative value to this Court's determination of an issue it will face in the trial proper?
- To what extent is Cst. McCoshen's testimony prejudicial to the Applicant, as against its probative value?

[54] Like many of the issues that this Court faces in this pre-trial application, this Court must respond to these questions by taking a contextual approach. As stated in the head note of ***R. v. Harrer***, 1995 CarswellBC 651 (S.C.C.), which accurately summarizes the majority's decision:

> If the admission of crucial evidence, such as the out-of-court self-incriminatory statement, would violate the principles of fundamental justice, the trial would not be fair. The concepts of "fairness" and "principles of fundamental justice" vary with the context in which they are invoked. There is a delicate balance in accommodating the interests of the individual and those of the state in providing a fair and workable system of justice.

[55] In the result, this Court would admit Cst. McCoshen's testimony, but will determine the weight it places on that testimony if it is required so to do.

C. The Applicant's Charter s. 10(b) Rights

1. Introduction

[56] *Charter* s. 10(b) provides:

> 10. Everyone has the right on arrest or detention
>
> ...
>
> (b) to retain and instruct counsel without delay and to be informed of that right; and

2. The Initial Consultation with Counsel

[57] When Cst. Brophy arrested the Applicant, he advised the Applicant of his right to counsel. This Court finds that the Applicant stated that he wanted to contact counsel immediately on being advised of this right. Neither Cst. Brophy nor any of the other members of the RCMP had any discussions with the Applicant from the time of his arrest until the Applicant arrived at the Stony Plain RCMP detachment. During this time, the Applicant made unprompted utterances. Immediately on their arrival, and after the Applicant was processed, Cst. Brophy took the Applicant to the telephone room. Although the Applicant, with Cst. Brophy's assistance, was unable to contact Mr. Lennon, the Applicant spoke to Mr. Fontaine. He did so in private.

[58] In ***R. v. Bartle***, [1994] 3 S.C.R. 173 at 192, 118 D.L.R. (4th) 83 the court said:

> This court has said on numerous previous occasions that s. 10(b) of the *Charter* imposes the following duties on state authorities who arrest or detain a person:
>
> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).
>
> (See also *R. v. Manninen*, [[1987] 1 S.C.R. 1233, 41 D.L.R. (4th) 301] at pp. 1241-42, *R. v. Evans*, [1991] 1 S.C.R. 869 at 890 and *R. v. Brydges* [[1990] 1 S.C.R. 190, 103 N.R. 282] at pp. 203-4.) The first duty is known as an informational duty. The second and third duties are known as implementation duties, and are not triggered unless and until a detainee indicates a desire to exercise their right to counsel.

[59] Justice Berger in ***R. v. Luong***, 2000 ABCA 301, 271 A.R. 368 at para. 12, provides a consolidated restatement of the nature and obligations that result from *Charter* s. 10(b):

> 1. The onus is upon the person asserting a violation of his or her *Charter* right to establish that the right as guaranteed by the *Charter* has been infringed or denied.
>
> 2. Section 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person.
>
> 3. The informational duty is to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel.
>
> 4. The implementational duties are two-fold and arise upon the detainee indicating a desire to exercise his or her right to counsel.
>
> 5. The first implementational duty is "to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)". *R. v. Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.) at 301.
>
> 6. The second implementational duty is "to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger)". *R. v. Bartle*, *supra*, at 301.
>
> 7. A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of

establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.

8. If the trial judge concludes that the first implementation duty was breached, an infringement is made out.

9. If the trial judge is persuaded that the first implementation duty has been satisfied, only then will the trial judge consider whether the detainee, who has invoked the right to counsel, has been reasonably diligent in exercising it; the detainee has the burden of establishing that he was reasonably diligent in the exercise of his rights. *R. v. Smith*, (1989), 50 C.C.C. (3d) 308 (S.C.C.) at 315-16 and 323.

10. If the detainee, who has invoked the right to counsel, is found not to have been reasonably diligent in exercising it, the implementation duties either do not arise in the first place or will be suspended. *R. v. Tremblay* (1987), 37 C.C.C. (3d) 565 (S.C.C.) at 568; *R. v. Ross* (1989), 46 C.C.C. (3d) 129 (S.C.C.) at 135; *R. v. Black* (1989), 50 C.C.C. (3d) 1 (S.C.C.) at 13; *R. v. Smith*, *supra*, at 314; *R. v. Bartle*, *supra*, at 301 and *R. v. Prosper* (1994), 92 C.C.C. (3d) 353 (S.C.C.) at 375-381 and 400-401. In such circumstances, no infringement is made out.

11. Once a detainee asserts his or her right to counsel and is duly diligent in exercising it, (having been afforded a reasonable opportunity to exercise it), if the detainee indicates that he or she has changed his or her mind and no longer wants legal advice, the Crown is required to prove a valid waiver of the right to counsel. In such a case, state authorities have an additional informational obligation to "tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity" (sometimes referred to as a "Prosper warning"). *R. v. Prosper*, *supra*, at 378-79. Absent such a warning, an infringement is made out.

[60] This Court finds that Cst. Brophy complied with the ***Bartle*** exhortation. Cst. Brophy did not breach the Applicant's *Charter* rights in this regard. In fact, Cst. Brophy went further. Following the second part of the first interview with the Applicant, at 19:52 hours on April 11, 2005, the Applicant asked if he could try and reach Mr. Lennon. Cst. Brophy complied immediately with the Applicant's request.

[61] The Applicant conceded during argument that he has no issue with the steps that Cst. Brophy took on April 11, 2005. In other words, he does not allege that the RCMP breached his

Charter s. 10(b) rights or the voluntariness of any of his statements that he provided to Cst. Brophy on that day.

3. Alleged Breach of the Applicant's Charter s. 10(b) Rights

[62] The parties spent the majority of their time arguing the issue of whether Cst. Brophy and, later, Cst. Waldorf, breached the Applicant's *Charter* s. 10(b) rights.

[63] In the Burrows *Voir Dire* Decision, Justice Burrows provided the exchange between Cst. Waldorf and the Applicant, set forth above. He then concluded:

> 44 ... [I]t is clear in the excerpt just set out that Mr. Briscoe wanted an opportunity to speak to a lawyer. For the first time he indicated dissatisfaction with the contact he had had with a lawyer the previous day. Constable Waldorf said his conversation with a lawyer the previous day was "good enough". Though he did not expressly state that Mr. Briscoe would not be allowed to contact a lawyer, he went on to question him and in fact, did not honour Mr. Briscoe's clear request.
>
> 45 In my view this was a violation of Mr. Briscoe's right to counsel.

[64] It is at this point that this Court must consider whether ***Hansard Spruce Mills*** applies such that it "will only go against a judgment of another judge of this Court" on the basis that "subsequent decisions have affected the validity of [the Burrows *Voir Dire* Decision]." After Justice Burrows provided us with the Burrows *Voir Dire* Decision, the Supreme Court of Canada delivered its decisions in ***R. v. Sinclair***, 2010 SCC 35, [2010] 2 S.C.R. 310, ***R. v. McCrimmon***, 2010 SCC 36, [2010] 2 S.C.R. 402, and ***R. v. Willier***, 2010 SCC 37, [2010] 2 S.C.R. 429 [collectively, the "Counsel Trilogy"], which all dealt with the implementation requirements of *Charter* s. 10(b). The Applicant argues that none of the Counsel Trilogy applies to the case before this Court, and he distinguishes each of them, based on their facts. Thus, this Court must present a very brief overview of each of the Counsel Trilogy.

*a. **R. v. Sinclair**, 2010 SCC 35, [2010] 2 S.C.R. 310*

[65] In ***Sinclair***, the police arrested the accused for the second degree murder of another individual. On his arrest, the police advised the accused that they were arresting him for the killing, that he had the right to retain and instruct counsel without delay, that he could call any lawyer he wanted, and that a Legal Aid lawyer would be available free of charge (para. 5). When the police asked the accused whether he wanted to call a lawyer, he responded, "Not right this second." (para. 5). The police then took the accused to the police detachment, with assurances that he would have another opportunity to contact counsel once they got there.

[66] After the police booked the accused, he was again asked whether he wanted to exercise his right to counsel. This time he told the officer that he wanted to speak with a specific lawyer,

whom he had retained to defend him on an unrelated charge (para. 6). The police placed the call and the accused spoke with that lawyer by telephone in a private room for about three minutes. The police officer asked the accused whether he was satisfied with the call, to which the accused replied, “Yeah, he's taking my case.” (para. 6). About three hours later, the police officer called that lawyer to find out if he was coming to the police station to meet with the accused. The lawyer said he would not be attending at the station because he did not yet have a Legal Aid retainer, but he asked to speak with the accused again by telephone (para. 7). That resulted in another three-minute phone call with the accused in a private room. Afterwards, the accused again told police officer that he was satisfied with the call (para. 7).

[67] A different police officer interviewed the accused later that day for about five hours. Before that interview began, that officer confirmed with the accused that he had been advised of, and had exercised, his right to counsel. The officer also warned the accused that he did not have to say anything and informed him that the interview was being recorded and could be used in court (para. 8). As the interview began, the accused said that he had nothing to say until his lawyer was present (para. 8). The officer confirmed that the accused indeed had the right not to speak. The officer also said that, as he understood Canadian law, the accused had the right to consult his lawyer but did not have the right to have the lawyer present during questioning (para. 8). The officer continued to interview the accused by attempting to build trust with the accused while eliciting some preliminary information.

[68] Later, the accused again expressed discomfort with the officer interviewing him in the absence of his lawyer. The officer repeated that the accused had the right to choose whether to talk or not to talk. The officer also expressed the view that the police had already satisfied the accused’s right to counsel by the earlier telephone calls. This explanation seemed to satisfy the accused (para. 9).

[69] The officer continued asking the accused questions and included some incriminating discoveries that had resulted from the investigation. The accused continued to exercise his right to silence and asked that he be allowed to speak with his lawyer (para. 10). Altogether, the accused alternately expressed his desire to speak with his lawyer and his intention to remain silent on matters touching his involvement in the killing four or five times. Each time, the officer emphasized that it was the accused’s choice to make (para. 10).

[70] Eventually, the accused made incriminating statements (para. 11). After that, the officer returned the accused to his cell, where he made further incriminating statements to a “cell plant” (para. 12).

[71] The *ratio decidendi* of ***Sinclair*** is best summarized by an introductory paragraph that explains the judgment’s subject and rationale:

> 2 We conclude that s. 10(b) does not mandate the presence of defence counsel throughout a custodial interrogation. We further conclude that in most cases, an initial warning, coupled with a reasonable opportunity to consult

> counsel when the detainee invokes the right, satisfies s. 10(b). However, the police must give the detainee an additional opportunity to receive advice from counsel where developments in the course of the investigation make this necessary to serve the purpose underlying s. 10(b) of providing the detainee with legal advice relevant to his right to choose whether to cooperate with the police investigation or not. To date, this principle has led to the recognition of the right to a second consultation with a lawyer where changed circumstances result from: new procedures involving the detainee; a change in the jeopardy facing the detainee; or reason to believe that the first information provided was deficient. The categories are not closed.

[72] The Applicant argues that the most important factual difference between ***Sinclair*** and the case before this Court is that the accused in ***Sinclair*** was able to consult with his counsel of choice before the police interviewed him. In the case before this Court, the Applicant was not able to reach Mr. Lennon, his apparent counsel of choice. Furthermore, the Applicant argues, the Supreme Court of Canada did not indicate how courts should respond to situations where the police hold out to a detainee the prospect of future consultations with counsel and then, when the detainee asks for such access, the police do not allow the detainee to contact counsel.

b. ***R. v. McCrimmon****, 2010 SCC 36, [2010] 2 S.C.R. 402*

[73] In ***McCrimmon***, the police arrested the accused in relation to eight assaults committed against five different women. On his arrest, a police officer advised the accused of the reasons for his arrest, his right to retain and instruct counsel, and his right to remain silent. As well, the officer told the accused that he could call any lawyer he wanted, and that he had a right to contact a Legal Aid lawyer through a 24-hour telephone service. The accused stated that he wished to speak to a lawyer (para. 1).

[74] The police then took the accused to the police detachment where he provided the police with the name of a lawyer with whom he wished to speak. A police officer called that lawyer's office, but was unable to reach him and left a message on the answering machine. The officer did not attempt to find the lawyer's home telephone number, nor did the accused ask the officer to do so (para. 7). The accused said to the officer, "I don't know if I'll hear back from him. Like I said, I only used him once. He's the only guy I know. I've never really dealt with a lawyer before." The officer then asked the accused if he would like to call a Legal Aid lawyer, to which he replied, "Well, yes, definitely, but I prefer Mr. Cheevers." The accused then spoke privately with duty counsel for approximately five minutes. At the end of his conversation, the accused confirmed that he was satisfied with the consultation and that he understood the advice that duty counsel provided to him (para. 7).

[75] A different officer then took the accused into an interview room and spoke with him for about three hours and twenty minutes. At the outset, the accused confirmed having spoken with a Legal Aid lawyer, and said the Legal Aid lawyer advised him that he did not have to say anything to the police (para. 8). The officer affirmed the accused's right to silence, cautioned

him that anything he said could be used against him, and commenced with the investigative interview (para. 8).

[76] When the officer turned to the incidents under investigation, the accused stated that he did not want to discuss the topic until he had spoken with his lawyer, but, at the same time, indicated that he did not mind speaking with the officer. The officer told the accused that he had the choice to talk or not to talk, but that he could not have his lawyer in the interview room with him. The officer revealed possible incriminating evidence that the investigation had discovered. The accused repeated his request to speak to his own lawyer (para. 9). The officer declined this request, stating his understanding that the accused had already exercised his right to counsel by speaking to duty counsel and had expressed satisfaction with the advice he had received. The accused asked to be taken back to his cell, indicating that he was not going to answer any more questions (para. 9). The officer continued in his attempts to persuade the accused to discuss the incidents under investigation. The officer interspersed his remarks with references to what the police knew about the incident and referring to witness statements. The accused insisted that he would not speak without his lawyer, stating "my voice will be heard in the end, with my lawyer." (para. 10). The officer affirmed that the accused had a right to exercise his right to silence and that he did not have "to keep repeating it ... to get that." (para. 10). Eventually, the accused made a number of statements implicating himself in the offences (para. 11).

[77] The Supreme Court of Canada's *ratio decidendi* in ***McCrimmon*** is explained in these introductory paragraphs:

> 3 ... [W]e reject Mr. McCrimmon's submission that s. 10(b) requires the presence, upon request, of defence counsel during a custodial interrogation. We also agree with the courts below that no s. 10(b) violation ensued from the failure to provide him with an opportunity to consult with the particular lawyer of his choice prior to the interrogation or from the denial of his requests for further consultation during the course of the interrogation. As explained in *Sinclair*, the police may provide the detainee with any number of opportunities to consult with counsel. However, they are constitutionally required to do so only where developments in the course of the interrogation make this necessary to serve the purpose underlying s. 10(b) of providing the detainee with legal advice relevant to his right to choose whether to cooperate with the police investigation or not. Where no such change occurs, the better approach is to continue to deal with claims of subjective incapacity or intimidation under the confessions rule.
>
> 4 In this case, there was no change in circumstances triggering a right to renewed consultation with counsel. Further, the trial judge properly considered any impact on Mr. McCrimmon arising from the police's refusals to facilitate further contacts with counsel in assessing the voluntariness of the statements. We see no reason to interfere with the trial judge's conclusion that the statements were voluntary or his dismissal of the *Charter* application.

[Emphasis added.]

[78] The Applicant concedes that there are similarities between the facts in ***McCrimmon*** and the facts before this Court. He argues, however, that in ***McCrimmon***, it does not appear that the police ever told the accused that, on his request, he would be allowed further access to legal counsel. In the case before this Court, Cst. Waldorf knew that the Applicant had yet to speak with his apparent counsel of choice. Yet, Cst. Waldorf refused to allow the Applicant any further access to counsel before proceeding with the interview.

c. ***R. v. Willier****, 2010 SCC 37, [2010] 2 S.C.R. 429*

[79] In ***Willier***, the police arrested the accused for the murder of an individual. The police took the accused to a hospital, because the accused told the police that he had taken a number of pills (para. 8). While in the emergency ward, the police informed the accused of the reason for his arrest, and of his right to retain and instruct a lawyer without delay (para. 9). They told the accused that he could call any lawyer he wanted, informed him of the availability of free duty counsel, and provided him with a telephone book and the toll-free number for Legal Aid (para. 9).

[80] After the accused was released from the hospital at approximately midnight, the police took him to the police detachment. When they again informed him of his right to counsel, he asked to speak to a free lawyer. The accused had a three-minute conversation with duty counsel, following which he was returned to his cell for the night (para. 10).

[81] The next morning, a Sunday, another officer confirmed with the accused that he had spoken with a lawyer the night before and offered him another opportunity to contact counsel. The accused indicated that he wanted to speak with a specific lawyer (para. 11). The officer dialed that lawyer's telephone number, passed the telephone to the accused, and left the accused in the room so he could leave a message on the lawyer's answering machine. After the accused hung up the telephone, the officer asked him if he wanted to contact another lawyer. He declined the offer, indicating that his preference was to wait (para. 9). After the officer informed him that the lawyer the accused attempted to call would not likely be available until the next day, and of the immediate availability of Legal Aid, the accused opted to speak with duty counsel a second time. After a brief one-minute conversation with a Legal Aid lawyer, the police returned the accused to his cell (paras. 10-11).

[82] About 50 minutes later, a different officer initiated an investigative interview with the accused. After confirming the accused's prior consultations with Legal Aid, the officer again informed the accused of his right to retain and instruct counsel and offered him another opportunity to contact a lawyer before continuing with the interview (para. 12). The accused indicated that he was satisfied with the advice he had received from Legal Aid. The officer repeated the caution that the accused had the right to remain silent (para. 12). The officer indicated that he would proceed with the interview, but that the accused would be free at any

time during the interview to stop and call a lawyer. Thereafter, the accused did not stop the interview. During the ensuing exchange, the accused made incriminatory statements (para. 12).

[83] The Supreme Court of Canada's *ratio decidendi* in ***Willier*** is as follows:

> 24 ... While the right to choose counsel is certainly one facet of the guarantee under s. 10(b), the *Charter* does not guarantee detainees an absolute right to retain and instruct a particular counsel at the initial investigative stage regardless of the circumstances.
>
> ...
>
> 35 Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on the circumstances as a whole, and may include factors such as the seriousness of the charge and the urgency of the investigation. If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended ...
>
> [Emphasis added, citations excluded].

[84] The Applicant argues that ***Willier*** is distinguishable from the case before this Court, because the police in ***Willier*** honoured the accused's request and granted him further access to a telephone the next morning. At the beginning of the interview, the officer again told the accused of his right to consult with counsel and that if the accused wished to talk with a lawyer again he had only to make that request and the interview would be stopped to accommodate his wishes. The accused did not again ask to be allowed to speak with counsel.

[85] In the case before this Court, the Applicant argues that he did not waive or relinquish his right to consult with his apparent counsel of choice. When he requested a chance to renew his efforts to reach that lawyer, the police refused, despite their promises earlier of letting him have access to counsel as he might from time to time request.

4. Application and Relevance of the Counsel Trilogy

[86] The Crown argues that the Counsel Trilogy and, in particular, some of the *obiter dicta* that the Supreme Court of Canada expresses in those cases apply to the case before this Court. In other words, the Counsel Trilogy provides general principles that set out the scope and nature of a detainee's right to counsel. Those general principles are relevant to the present case.

[87] Factually, the Crown argues that the Applicant did indeed have the right to contact Mr. Lennon and, when he was unable to contact Mr. Lennon the first time, he chose to contact Mr. Fontaine. In other words, the lawyer whom the Applicant successfully contacted, Mr. Fontaine, became the Applicant's chosen counsel. The Applicant never expressed to the RCMP that Mr. Lennon was his specific counsel of choice. The Applicant did not await a return call from Mr. Lennon, nor did he even leave a message for Mr. Lennon to contact the Applicant at the detachment.

[88] As well, the Crown argues that it was the Applicant who chose to speak with Cst. Brophy on April 12, 2005. Cst. Brophy had no intention of interviewing the Applicant that day, and when the Applicant started his meeting with Cst. Waldorf, it was Cst. Waldorf who raised the matter of the Applicant wanting to speak with counsel. The Applicant did not raise the issue with Cst. Waldorf. The next time the Applicant asked to speak with Mr. Lennon was late in the morning on April 12, 2005. At that time, Cst. Brophy testified, the Applicant wanted to speak with Mr. Lennon to discuss issues concerning his judicial interim release.

[89] The critical issue with which this Court must deal, at this point, is the impact of the rulings and commentary that the Supreme Court of Canada provides in the Counsel Trilogy. This Court acknowledges that the fact scenarios in each of the cases in the Counsel Trilogy are not the same as the circumstances of the Applicant's consultation with counsel and interview process. Accordingly, the *rationes decidendi* reflected in those cases do not necessarily apply to the case before this Court, so the commentary could be considered as the Supreme Court of Canada's *obiter dicta* on the larger issue of right to counsel and the appropriate interpretation of *Charter* s. 10(b) and the obligations that provision places on law enforcement personnel.

[90] The Supreme Court of Canada addressed the debate of the binding nature of its *obiter dicta* in ***R. v. Henry***, 2005 SCC 76, [2005] 3 S.C.R. 609:

> 57 The issue in each case, ... is what did the case decide? Beyond the *ratio decidendi* which, ... is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

The Applicant paraphrased this analysis by using an analogy of concentric circles; the farther the *obiter dicta* moves from the centre of the circle (the *ratio decidendi*), the less weight a court should place on that *obiter dicta*.

[91] The Supreme Court of Canada chose to deliver the Counsel Trilogy on the same date, and referred, in each case, to the other cases in the Counsel Trilogy. Why? The answer to this question is reflected in the introductory wording in ***McCrimmon***, where the court said:

> 1 This appeal and its companion cases, *R. v. Sinclair*, 2010 SCC 35 (S.C.C.), and *R. v. Willier*, 2010 SCC 37 (S.C.C.), elaborate upon the nature and limits of the right to counsel provided under s. 10(b) of the *Canadian Charter of Rights and Freedoms.* [Emphasis added].

[92] Thus, the Supreme Court of Canada was dealing with the broader issue of the nature and limits of a detainee's *Charter* s. 10(b) rights. Although each of the cases in the Counsel Trilogy dealt with different aspects of this right, this Court finds that some of the *obiter dicta* is "intended for guidance and ... should be accepted as authoritative." That does not mean that every sentence and example that the Supreme Court of Canada provides in the Counsel Trilogy will carry the same weight. However, for this Court to attempt to parse out each such aspect serves no useful purpose, if the *obiter dictum* falls within the broad scope of the court's elaboration of a detainee's right to counsel.

[93] On April 12, 2005, once Cst. Brophy took the Applicant to the RCMP detachment, the Applicant said he wanted to call Mr. Lennon. Cst. Brophy specifically said:

> He indicated he wanted to call Lennon and Barlow lawyers and I believe mentioned that he had used Mr. Bruce Lennon at some point in the past and wanted to try and get in touch with him.
>
> Transcript of *Voir Dire* Proceedings, December 5, 2011, p. 13, ll. 8-10

[94] This Court finds that Mr. Lennon was the Applicant's counsel of choice. Although the Crown argues that the Applicant never said specifically that Mr. Lennon was his counsel of choice, one would be hard-pressed to say that Mr. Lennon was not. He was the Applicant's first choice, and the person whom the Applicant repeatedly attempted to contact.

[95] However, Cst. Brophy did not hesitate to allow the Applicant to contact Mr. Lennon, and, in fact, helped the Applicant facilitate this contact. Mr. Lennon was not available, and rather than wait for Mr. Lennon to become available, the Applicant immediately took up the offer to contact other counsel. Cst. Brophy did not recommend or select Mr. Fontaine for the Applicant. The Applicant chose Mr. Fontaine on his own. He was satisfied with the advice Mr. Fontaine provided to him. This is not unlike the situation in ***McCrimmon*** where the court said:

> 19 In this case, we agree with the courts below in rejecting Mr. McCrimmon's contention that he was denied the right to counsel of choice in a manner that contravened his rights under s. 10(b). While Mr. McCrimmon expressed a preference for speaking with Mr. Cheevers, the police rightly inquired whether he wanted to contact Legal Aid instead when Mr. Cheevers was not immediately available. Mr. McCrimmon agreed, exercised his right to counsel before the interview began, and expressed satisfaction with the consultation. He also indicated an awareness of his rights at the commencement of the interview. In these circumstances, there was no further obligation on the police to hold off the interrogation until such time as Mr. Cheevers became available. [Emphasis added.]

See also ***Willier*** at para. 35 *supra*, which deals with this issue directly, and ***Willier*** para. 39, which says that if an accused exercises their right to counsel by opting to speak with Legal Aid rather than their counsel of choice, the police need not provide the accused with a "*Prosper* warning."

[96] One of the most important statements that flows from the Counsel Trilogy appears in ***Sinclair*** at para. 64, where the court said, "the right to counsel is essentially a one-time matter with few recognized exceptions." That is the starting point for any analysis of this issue. ***Sinclair*** also provides us with examples of those "few recognized exceptions" and said:

> For the purpose of providing guidance to investigating police officers, it is helpful to indicate situations in which it appears clear that a second consultation with counsel is so required (at para. 49).

[97] The examples that the Supreme Court of Canada provides are:

a. a new and non-routine procedure which involves the detainee (para. 50);

b. a change in jeopardy (para. 51); and

c. a reason to question the detainee's understanding of their *Charter* s. 10(b) right (para. 52).

a. Non-Routine Procedures

[98] The new and non-routine procedures involving the detainee are those that go beyond questioning. In ***Sinclair***, the court referred to questioning as a routine procedure. It then provided examples of "non-routine procedures," such as "participation in a lineup or submitting to a polygraph" (at para. 50).

[99] Subsequent to the Counsel Trilogy, the Alberta Court of Appeal has indicated that a police recording of an interview is not a "non-routine procedure": ***R. v. Wu***, 2010 ABCA 337 at paras. 69-71, 44 Alta. L.R. (5th) 333.

[100] The Applicant argues that two "non-routine procedure events" occurred during the Applicant's interviews with Cst. Brophy:

1. when Cst. Brophy started discussing the nature of DNA and then asked the Applicant whether he would consent to provide a DNA sample [Transcript of the Applicant's Statements, April 11, 2005 Tape 1, pp. 23-25. Transcript of the Applicant's Statements, April 11, 2005 Tape 3, p. 11]; and

2. when the Applicant suggested to Cst. Brophy that Cst. Brophy conduct a polygraph test, and when Cst. Brophy asked the Applicant whether he would consent to a polygraph test, [Transcript of the Applicant's Statements, April 11, 2005 Tape 3, p. 11].

[101] This Court finds an officer's obligation to provide a detainee with a new opportunity to consult counsel arises before a detainee's active *participation* in the non-routine procedure, and not during a *discussion* of the procedure or after a *commitment* to participate. In ***Sinclair*** at para. 50 the Supreme Court of Canada specifically described the trigger for a renewed *Charter* s. 10(b) right as, "participation in" or "submitting to" a procedure. It did not use the phrases "agreeing to" or "consenting to."

[102] Furthermore, the Supreme Court of Canada did not identify a detainee's providing a DNA sample as one of its examples of a non-routine procedure. This Court need not decide whether this is a non-routine procedure, as the Applicant, in any event, did not provide a DNA sample. On the evidence that the parties presented to this Court, Cst. Brophy did not place the Applicant in a position of having to participate in any non-routine procedure, as the RCMP restricted their investigation during this period to questioning the Applicant.

b. A Change in Jeopardy

[103] The Supreme Court of Canada in ***Sinclair*** states that the police are required to allow a detainee a further consultation with counsel when the detainee faces a change in jeopardy:

> 51 The detainee is advised upon detention of the reasons for the detention: s. 10(a). The s. 10(b) advice and opportunity to consult counsel follows this. The advice given will be tailored to the situation as the detainee and his lawyer then understand it. If the investigation takes a new and more serious turn as events unfold, that advice may no longer be adequate to the actual situation, or jeopardy, the detainee faces. In order to fulfill the purpose of s. 10(b), the detainee must be given a further opportunity to consult with counsel and obtain advice on the new situation. [Emphasis added.]

[104] The Applicant argues that, although Cst. Brophy told the Applicant on April 11, 2005, that he was being arrested for murder, the Applicant was not actually *charged* with murder until April 12, 2005. As well, Cst. Brophy and the Applicant had the following exchange on April 11, 2005:

> Applicant: And [sigh], I just think I made a mistake. What is gonna, like, I'm still obviously charged with this major charge.
>
> Cst. Brophy: You are not charged with anything yet. You're arrested for Homicide. Ok, big difference.
>
> Applicant: Oh, ok [unintel.].
>
> Cst. Brophy: If you were charged you'd be in front of a JP. Ok.
>
> Applicant: Ok.
>
> Cst. Brophy: This is still under investigation. You're under arrest for this right now. Ok, you understand the difference?
>
> Applicant: Yeah.
>
> [Transcript of the Applicant's Statements, April 11, 2005 Tape 3, p. 18]

Thus, the Applicant argues that his jeopardy changed when the RCMP charged him with the murder.

[105] What is a change in jeopardy? In ***R. v. V. (S.E.)***, 2009 ABCA 108, 448 A.R. 351 the Alberta Court of Appeal said:

> 27 ... A change in jeopardy requiring a re-caution involves a fundamental and discrete change in the purpose of the investigation, such as a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the prior warning, or an additional offence ... It is not a change in jeopardy under s. 10(b) for a detainee to gradually learn more about the evidence against him during the police interview ... [Citations excluded, emphasis added].

[106] More recently, the Alberta Court of Appeal said in ***R. v. Nelson***, 2010 ABCA 349, 490 A.R. 271:

> 27 ... The arrest for the murders left the appellant with full knowledge of the crimes the police suspected he had committed and that he would be questioned with respect to those crimes. In *R. v. Sinclair*, 2010 SCC 35 (S.C.C.) at para 32, the Supreme Court noted that, in the context of a custodial detention, the purpose

> of s.10(b) of the *Charter* is to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the "situation" he is facing. In this case there is no doubt that the appellant knew the situation he was facing and was able to get advice regarding that situation before he was questioned by police. [Emphasis added.]

These passages clearly indicate that the 'new jeopardy' *Charter* s. 10(b) right exists, such that a detainee can obtain advice concerning a previously undisclosed offense, or an offense that is more serious than the one which the detainee was initially suspected of committing.

[107] The issue concerning the detainee's change in their jeopardy ties closely to their right to be advised of the reason why the police arrested them in the first place. In ***R. v. Latimer***, [1997] 1 S.C.R. 217, 142 D.L.R. (4th) 577 the Supreme Court of Canada said:

> 28 Section 10(a) of the *Charter* provides the right to be informed promptly of the reasons for one's arrest or detention. The purpose of this provision is to ensure that a person "understand generally the jeopardy" in which he or she finds himself or herself ... There are two reasons why the *Charter* lays down this requirement: first, because it would be a gross interference with individual liberty for persons to have to submit to arrest without knowing the reasons for that arrest, and second, because it would be difficult to exercise the right to counsel protected by s. 10(b) in a meaningful way if one were not aware of the extent of one's jeopardy ... [Citations excluded, emphasis added].

[108] In the case before this Court, Cst. Brophy advised the Applicant of the reason for his arrest, which was murder. On April 12, 2005, the RCMP charged the Applicant with murder. There was no fundamental and discrete change in the purpose of the RCMP's investigation, such as a different and unrelated offence or a significantly more serious offence or an additional offence than that contemplated at the time the Applicant contacted Mr. Fontaine. The Applicant had full knowledge of the crime the RCMP suspected he had committed. As well, the Applicant knew that the RCMP would be questioning him with respect to that crime. He knew the "situation" he was facing and was able to get advice from Mr. Fontaine regarding that "situation" before Cst. Brophy and Cst. Waldorf questioned him. He understood the jeopardy he was facing.

[109] The Applicant argues that this Court should apply the "change in jeopardy test" that the Supreme Court of Canada applied in ***R. v. Paternak***, [1996] 3 S.C.R. 607 at para. 1, 203 N.R. 250, where, in a two-paragraph judgment, the court held that the police violated that accused's *Charter* s. 10(b) rights when, "the police officer concluded that the appellant had committed the offence and advised the appellant accordingly."

[110] Although this broad statement might apply to the case before this Court, the Ontario Court of Appeal in ***R. v. Chalmers***, 2009 ONCA 268, 247 O.A.C. 250, clarified the situation with which the Supreme Court of Canada was dealing, when it said:

> 42 ... It is not apparent from the brief endorsement of Sopinka J. in *Paternak*, what facts the Supreme Court relied on in allowing the appeal; however, the appellant's factum in the Supreme Court in that case appears to indicate that Mr. Paternak was initially interviewed as a witness and that he was never told he was a suspect prior to the point of his detention. [Emphasis added.]

That factual matrix makes ***Paternak*** distinguishable from the case before this Court. The RCMP were not interviewing the Applicant as a witness. They were interviewing the Applicant as a suspect, and he knew that was the case.

c. The Applicant's Understanding His Charter s. 10(b) Rights

[111] The Applicant did not argue that he did not understand that he had a right to contact counsel pursuant to *Charter* s. 10(b). Had he argued this, this Court would have found that he was well aware of this right after his arrest and throughout his interviews with the RCMP officers.

5. Application of the General Counsel Trilogy Principles

[112] As mentioned earlier, the Applicant argues that the Counsel Trilogy does not apply to a situation where:

a) the police hold out to a detainee the prospect of future consultations with counsel, and

b) the police then do not allow the detainee to contact counsel when the detainee asks for that access.

[113] This is not an exception identified by the Supreme Court of Canada that would entitle the detainee to a second consultation with counsel. In fact, the court was alive to this issue when it said in ***Sinclair***:

> 49 The police, of course, are at liberty to facilitate any number of further consultations with counsel. In some circumstances, the interrogator may even consider it a useful technique to reassure the detainee that further access to counsel will be available if needed. For example, in the companion case of *R. v. Willier*, 2010 SCC 37 (S.C.C.), a skilled interrogator commenced the interview by making it clear to the detainee that he would be free at any time during the interview to stop and call a lawyer. The question here is when a further consultation is required under s. 10(b) of the *Charter*. [Emphasis added.]

The obvious implication of this passage is that any consultation with counsel after an initial consultation is *optional*, other than in the three circumstances the court identified in ***Sinclair*** at paras. 50-52.

[114] Furthermore, one can imagine situations where the police should not be forced to provide a detainee with an opportunity to contact counsel, even in the face of such a "reassurance." If, for example, the interviewer was at a crucial part of the interview, they could deny the detainee this right, as it could stop the flow of the interview. As well, if the detainee is simply seeking to delay the interview, the police need not provide the detainee a further right to contact counsel, absent the exceptions discussed above. As the court in ***Sinclair*** said:

> 58 ... The purpose of the right to counsel is not to permit suspects, particularly sophisticated and assertive ones, to delay "needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or [, for whatever reasons, made] impossible to obtain" ... [Citation excluded].

[115] This Court finds, in any event, that in the case before it, the "holding out" made no difference. The Applicant was the one who asked to speak with Cst. Brophy and he did not refuse to speak with Cst. Waldorf. Cst. Waldorf then told this Court how he ended up interviewing the Applicant. He said:

> And so during -- between 10:02 and 10:24, I did receive information that Mr. Briscoe was wanting to speak to a different investigator and to tell you where that information came from, I'm sorry, I don't recall.
>
> [Transcript of *Voir Dire* Proceedings, December 6, 2011, p. 24, ll. 29-31].

[116] This is consistent with an exchange that took place between Cst. Waldorf and the Applicant soon after Cst. Waldorf began the interview, which bears repeating:

> Cst. Waldorf: You remember me from yesterday, right? I'm Pat.
>
> Applicant: I'm scared shitless, man.
>
> Cst. Waldorf: I understand. I understand totally what you're saying. I also understand you were talkin' to another guy, and you don't wanna talk to him anymore.
>
> Applicant: He doesn't, he's not. I don't know what.
>
> Cst. Waldorf: What's the, what's the problem there? What's?
>
> Applicant: He's he's being so fuckin', and I can't think straight.
>
> Cst. Waldorf: Okay.

Applicant: And he said he was gonna keep me and my friend safe right, if I, if I helped out or whatever, and.

[Transcript of the Applicant's Statements, April 12, 2005, p. 14].

[117] This Court finds that it was, indeed, the Applicant who wanted to speak, first, with Cst. Brophy, and, later, with Cst. Waldorf. It is not clear why the Applicant wanted to speak with these officers, although the last entry in the foregoing exchange might provide us with a hint. Throughout his interviews with Cst. Brophy and Cst. Waldorf, the Applicant expressed concern for his safety if he revealed any information to the RCMP. He was concerned that he might be viewed as a "rat," which is, apparently, someone who provides information to the police. However, it would be conjecture on this Court's part to find that this was the reason why the Applicant wanted to speak with the RCMP officers on April 12, 2005.

[118] Nonetheless, as matters progressed with Cst. Waldorf, the Applicant did not at any time ask to speak with his chosen counsel or any counsel, for that matter. He freely, with Cst. Waldorf's encouragement, provided information to Cst. Waldorf.

[119] Accordingly, this Court finds that even if, somehow, the Counsel Trilogy did not address the issue before this Court, this Court finds that the holding out did not result in the RCMP breaching the Applicant's *Charter* s. 10(b) rights.

6. Conclusion on the Charter s. 10(b) Issue

[120] Based on the foregoing, this Court finds that the RCMP did not breach the Applicant's *Charter* s. 10(b) rights with respect to anything the Applicant said to Cst. Brophy or Cst. Waldorf. Accordingly, everything he said to those two officers is admissible in his trial. To the extent that this Court has not agreed with the Burrows *Voir Dire* Decision, it does so on the basis that the Counsel Trilogy has changed the law in this regard. This Court's review of the facts as identified by Justice Burrows shows no significant difference from its own observations and conclusions.

[121] As for the "cell plant" statements that the Applicant made to Cst. McCoshen, this Court holds that they are not inadmissible. However, this Court will more thoroughly canvass this issue if the Crown seeks to use them during the Applicant's trial.

D. Charter s. 24(2)

[122] This Court has found that the RCMP did not breach the Applicant's rights under *Charter* s. 10(b). If it is wrong in its analysis, it will briefly examine the issue of whether the admission of the Applicant's statements would bring the administration of justice into disrepute: ***R. v. Grant***, 2009 SCC 32 at para. 45, [2009] 2 S.C.R. 353.

[123] *Charter* s. 24 provides:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[124] This Court, in ***R. v. Simpenzwe***, 2009 ABQB 579, outlined the way in which it approaches a *Charter* s. 24(2) analysis. Rather than paraphrasing its approach, it might be worthwhile to transcribe the portions of its judgment relevant to the analysis it will undertake in this case. Those portions are as follows:

> 48 A *Charter* s. 24(2) analysis starts from the position that there has been a breach of the *Charter*. This is important, as this fact has already brought the administration of justice into disrepute. The *Charter* s. 24(2) analysis is seeking to ensure that courts do not allow a situation where there is further damage to the repute of the administration of justice through the admission of the evidence acquired as a result of that breach, *Grant* at para. 69.
>
> 49 *Grant* at para. 71, provides courts with a roadmap to follow when faced with the issue of whether to exclude evidence as a result of a *Charter* breach, when it said:
>
> > When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.
>
> *(1) The seriousness of the Charter-infringing state conduct*
>
> 50 This first stop along the journey of determining whether the effect of admitting the evidence on society's confidence in the justice system is for this

Court to examine the police or state conduct that led to the *Charter* violation. When we look through society's prism, we will see a spectrum of conduct ranging from deliberate, severe, reckless or wilful to inadvertent or minor. The more deliberate or severe the conduct, the greater the likelihood that society will not tolerate such conduct. As a result, societal needs will direct that courts exclude the evidence that resulted from that conduct.

(2) The impact of the breach on the Charter-protected interests of the accused

51 The second stop along the journey is to examine rights of the accused that the *Charter* protects and determine the impact of the *Charter* violation on the accused's rights. Like the first stop along our journey, courts must examine this through society's prism. The more intrusive the breach on the accused's rights, the more likely that society will see an individual's *Charter* protected rights as meaningless. Society will direct courts to exclude such intrusive evidence.

52 *Grant* at para. 77 provided us with an example, which is on all fours with the situation with which this Court is dealing, when it said:

> For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities ... all stemming from the principle against self-incrimination ... The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. [citations excluded]

(3) Society's interest in the adjudication of the case on its merits

53 *Grant* at para. 79, summarized this stop along the journey of determining whether the effect of admitting the evidence on society's confidence in the justice system as "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion." This analysis requires the court to examine the quality of the evidence against the means by which the evidence was obtained. The latter, in part, is examined during the first two stops along our journey. The former examines the reliability of the evidence. This examination cannot be done in a vacuum. For example, a statement that the police obtain from the accused through threats is unreliable. Society has no interest in having a court adjudicate a case based on such unreliable evidence and, accordingly, society will direct courts to exclude such evidence. On the other hand, society will not tolerate a court excluding evidence that is relevant and reliable.

54 *Grant* at para. 83, also pointed to the importance of the evidence to the prosecution's case. It said:

> The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

(4) Whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute

55 Once it has made all the stops along its journey, the court must then examine what it has found along those stops, balance them and complete its journey by determining the effect of admitting the evidence will have on society's confidence in the justice system. This is not a scientific exercise. In fact, *Grant* at para. 86 said, "No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible."

56 In *Grant* at para. 92, the court said when examining a statement that a person provides to the police, the three stops along that journey will support "the presumptive general, although not automatic, exclusion" of those statements when they are obtained in breach of the *Charter*. However, *Grant* at para. 96 provides certain exceptions, when it said:

> This said, particular circumstances may attenuate the impact of a *Charter* breach on the protected interests of the accused from whom a statement is obtained in breach of the *Charter*. For instance, if an individual is clearly informed of his or her choice to speak to the police, but compliance with s. 10(b) was technically defective at either the informational or implementational stage, the impact on the liberty and autonomy interests of the accused in making an informed choice may be reduced. Likewise, when a statement is made spontaneously following a *Charter* breach, or in the exceptional circumstances where it can confidently be said that the statement in question would have been made notwithstanding the *Charter* breach ..., the impact of the breach on the accused's protected interest in informed choice may be less. [citations excluded]

It then goes on to say at para. 97:

> Just as involuntary confessions are suspect on grounds of reliability, so may, on occasion, be statements taken in contravention of the *Charter*. Detained by the police and without a lawyer, a suspect may make

> statements that are based more on a misconceived idea of how to get out of his or her predicament than on the truth. This danger, where present, undercuts the argument that the illegally obtained statement is necessary for a trial of the merits.

[125] Csts. Brophy and Waldorf were under the impression that they had complied with *Charter* s. 10(b) when they allowed the Applicant to try to contact Mr. Lennon on the morning of April 11, 2005, and thereafter, when the Applicant contacted Mr. Fontaine and advised the officer that he was satisfied with the advice he received. Later in the day on April 11, 2005, Cst. Brophy allowed the Applicant to try to contact Mr. Lennon again. Although the ***Sinclair*** exceptions to the "one-call rule" were not triggered (and, in fact, the Supreme Court of Canada had not yet decided ***Sinclair*** at the relevant time), the RCMP officers had no reason to believe that the Applicant was not aware of his *Charter* s. 10(b) rights, the Applicant's jeopardy had not changed in their minds and they were not undertaking any non-routine procedures.

[126] Even though Cst. Brophy held out to the Applicant that he could contact a lawyer at any time, at worst, the officers' not permitting the Applicant to contact his counsel on April 12, 2005, was not deliberate, severe, reckless or wilful. In fact, neither Cst. Brophy nor Cst. Waldorf (nor this Court, for that matter) knew why the Applicant had summoned them on the morning of April 12, 2005. If the Applicant's reason for summoning them was to ask them if he could contact counsel, the Applicant did not articulate this at the time he started speaking with Cst. Waldorf. When Cst. Waldorf (not the Applicant) raised the matter, he might have inquired why the Applicant wanted to contact counsel. This failure on Cst. Waldorf's part might be, at its worst given the circumstances, negligent. It certainly does not fall into the realm of deliberate, severe, reckless or wilful.

[127] What impact does the *Charter* breach have on the Applicant? We might have gleaned a better sense of this had the Applicant advised Cst. Brophy or Cst. Waldorf of the reason why he had summoned them. From an objective perspective, a detainee's right to counsel is an important *Charter* right. However, a breach of that right does not result in an automatic exclusion of any statements a detainee makes to persons of authority. This is why courts undertake a *Charter* s. 24(2) analysis. The quotation from ***Grant*** that this Court provided in ***Simpenzwe*** at para. 52 above, shows that there is a subjective aspect to the analysis. What is the impact on the detainee who stands before the court? In the case with which this Court is dealing, this Court finds that the impact of the breach (if there is one) on the Applicant's *Charter* s. 10(b) rights is minimal, because:

(a) the Applicant chose to speak with Csts. Brophy and Waldorf;

(b) the Applicant was not coerced into speaking with them;

(c) with respect to his discussion with Cst. Waldorf, the Applicant did not immediately demand that Cst. Waldorf permit him to speak with counsel;

(d) the Applicant voluntarily responded to the questions that Cst. Waldorf and Cst. Brophy posed without interrupting to ask that he be permitted to speak with counsel;

(e) the Applicant was aware of his right to speak with counsel and, in fact, exercised that right at the outset and subsequently asked for, and was provided with, an opportunity to contact Mr. Lennon on the evening of April 12, 2005; and

(f) the Applicant knew he did not have to speak to the police and Mr. Fontaine told him not to. He repeated this instruction to the officers during the interviews and the officers did not challenge that advice.

[128] The Applicant, to use the words from ***Grant***, chose to speak to Cst. Brophy and Waldorf and thereby waived his right to remain silent. This Court finds that neither Cst. Brophy nor Cst. Waldorf extracted any information from the Applicant through promises, threats or inducements. Thus, the impact of the breach (if there is one) on the Applicant's rights under *Charter* s. 10(b) is negligible.

[129] Does society have an interest in having this case adjudicated on its merits? This Court would have no hesitation in finding that the statements, or any one or more of them, are inadmissible if, for example, it found that:

1. the RCMP officers obtained the Applicant's statements in bad faith or through nefarious means,

2. the Applicant was pleading for the police to leave him alone, or

3. the RCMP officers refused to provide Applicant with medical treatment.

Instead, throughout the interviews with Csts. Brophy and Waldorf, the Applicant appeared comfortable and, although he was concerned about his security if he was found to be a "rat," he otherwise had no concern speaking to the officers. *Prima facie* his statements are reliable. However, the weight the trier of fact will place on this evidence has yet to be determined, and cannot be determined, until the trial is underway. A statement is not like, for example, drugs, which are, by their nature, reliable. The reliability of a statement cannot be fully examined until placed within the context of the trial.

[130] Allowing the statements to be entered as evidence in the trial will not bring the administration of justice into disrepute.

[131] There is nothing that this Court has found in its stops along its *Charter* s. 24(2) journey that would call for its finding that the Applicant's statements are inadmissible. The only "bump in the road" might be the fact that the trier of fact cannot assess fully the reliability of the Applicant's statements, until those statements are examined as part of the total matrix of

evidence it receives during the trial. However, the trier of fact must be given that opportunity, as to do otherwise could bring the administration of justice into disrepute. As this Court stated in ***Simpenzwe***, "the weight that the trier of fact will place on this evidence is up to the trier of fact, not the judge hearing the *voir dire*" (at para. 65).

VII. Conclusion

[132] For the foregoing reasons, this Court will not exclude any of the statements that the Applicant made to Csts. Brophy and Waldorf. All with be admissible in the Applicant's trial.

Heard on the 5th , 6th, 7th, and 8th days of December 2011.
Dated at the City of Edmonton, Alberta this 21 day of February, 2012.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Robert Robenhaar, John D. Watson and Douglas Taylor
Mega Prosecutions
Alberta Justice and Attorney General
for the Crown (Respondent)

Charles B. Davison
for the Accused (Applicant)

Lee Carter, Hollis Johnson, William Shoichet, British Columbia Civil Liberties Association and Gloria Taylor *Appellants*

v.

Attorney General of Canada *Respondent*

- and -

Lee Carter, Hollis Johnson, William Shoichet, British Columbia Civil Liberties Association and Gloria Taylor *Appellants*

v.

Attorney General of Canada and Attorney General of British Columbia *Respondents*

and

Attorney General of Ontario, Attorney General of Quebec, Council of Canadians with Disabilities, Canadian Association for Community Living, Christian Legal Fellowship, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario, Association for Reformed Political Action Canada, Physicians' Alliance against Euthanasia, Evangelical Fellowship of Canada, Christian Medical and Dental Society of Canada, Canadian Federation of Catholic Physicians' Societies, Dying With Dignity, Canadian Medical Association, Catholic Health Alliance of Canada, Criminal Lawyers' Association (Ontario), Farewell Foundation for the Right to Die, Association québécoise pour le droit de mourir dans la dignité, Canadian Civil Liberties Association, Catholic Civil Rights League,

Lee Carter, Hollis Johnson, William Shoichet, Association des libertés civiles de la Colombie-Britannique et Gloria Taylor *Appelants*

c.

Procureur général du Canada *Intimé*

- et -

Lee Carter, Hollis Johnson, William Shoichet, Association des libertés civiles de la Colombie-Britannique et Gloria Taylor *Appelants*

c.

Procureur général du Canada et procureure générale de la Colombie-Britannique *Intimés*

et

Procureur général de l'Ontario, procureure générale du Québec, Conseil des Canadiens avec déficiences, Association canadienne pour l'intégration communautaire, Alliance des chrétiens en droit, Réseau juridique canadien VIH/sida, HIV & AIDS Legal Clinic Ontario, Association for Reformed Political Action Canada, Collectif des médecins contre l'euthanasie, Alliance évangélique du Canada, Christian Medical and Dental Society of Canada, Canadian Federation of Catholic Physicians' Societies, Dying With Dignity, Association médicale canadienne, Alliance catholique canadienne de la santé, Criminal Lawyers' Association (Ontario), Farewell Foundation for the Right to Die, Association québécoise pour le droit de mourir dans la dignité, Association canadienne des libertés civiles,

Faith and Freedom Alliance, Protection of Conscience Project, Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society, Canadian Unitarian Council, Euthanasia Prevention Coalition and Euthanasia Prevention Coalition — British Columbia *Interveners*

Ligue catholique des droits de l'homme, Faith and Freedom Alliance, Protection of Conscience Project, Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society, Conseil unitarien du Canada, Coalition pour la prévention de l'euthanasie et Euthanasia Prevention Coalition — British Columbia *Intervenants*

INDEXED AS: CARTER v. CANADA (ATTORNEY GENERAL)

2015 SCC 5

File No.: 35591.

2014: October 15; 2015: February 6.

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

RÉPERTORIÉ : CARTER c. CANADA (PROCUREUR GÉNÉRAL)

2015 CSC 5

N° du greffe : 35591.

2014 : 15 octobre; 2015 : 6 février.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Division of powers — Inter-jurisdictional immunity — Criminal Code provisions prohibiting physician-assisted dying — Whether prohibition interferes with protected core of provincial jurisdiction over health — Constitution Act, 1867, ss. 91(27), 92(7), (13), (16).

Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Fundamental justice — Competent adult with grievous and irremediable medical condition causing enduring suffering consenting to termination of life with physician assistance — Whether Criminal Code provisions prohibiting physician-assisted dying infringe s. 7 of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Criminal Code, R.S.C. 1985, c. C-46, ss. 14, 241(b).

Constitutional law — Charter of Rights — Remedy — Constitutional exemption — Availability — Constitutional challenge of Criminal Code provisions prohibiting physician-assisted dying seeking declaration of invalidity of provisions and free-standing constitutional exemption for claimants — Whether constitutional exemption

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

Droit constitutionnel — Partage des compétences — Doctrine de l'exclusivité des compétences — Dispositions du Code criminel prohibant l'aide d'un médecin pour mourir — La prohibition entrave-t-elle le contenu essentiel protégé de la compétence provinciale en matière de santé? — Loi constitutionnelle de 1867, art. 91(27), 92(7), (13), (16).

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Justice fondamentale — Adulte capable affecté de problèmes de santé graves et irrémédiables qui lui causent des souffrances persistantes consentant à mettre fin à ses jours avec l'aide d'un médecin — Les dispositions du Code criminel qui prohibent l'aide d'un médecin pour mourir violent-elles l'art. 7 de la Charte canadienne des droits et libertés? — Dans l'affirmative, la violation est-elle justifiable au regard de l'article premier de la Charte? — Code criminel, L.R.C. 1985, c. C-46, art. 14, 241b).

Droit constitutionnel — Charte des droits — Réparation — Exemption constitutionnelle — Faisabilité — Contestation constitutionnelle par les demandeurs des dispositions du Code criminel prohibant l'aide d'un médecin pour mourir en vue d'obtenir une déclaration d'invalidité des dispositions et une exemption constitutionnelle

under s. 24(1) of Canadian Charter of Rights and Freedoms should be granted.

Courts — Costs — Special costs — Principles governing exercise of courts' discretionary power to grant special costs on full indemnity basis — Trial judge awarding special costs to successful plaintiffs on basis that award justified by public interest, and ordering Attorney General intervening as of right to pay amount proportional to participation in proceedings — Whether special costs should be awarded to cover entire expense of bringing case before courts — Whether award against Attorney General justified.

Section 241(*b*) of the *Criminal Code* says that everyone who aids or abets a person in committing suicide commits an indictable offence, and s. 14 says that no person may consent to death being inflicted on them. Together, these provisions prohibit the provision of assistance in dying in Canada. After T was diagnosed with a fatal neurodegenerative disease in 2009, she challenged the constitutionality of the *Criminal Code* provisions prohibiting assistance in dying. She was joined in her claim by C and J, who had assisted C's mother in achieving her goal of dying with dignity by taking her to Switzerland to use the services of an assisted suicide clinic; a physician who would be willing to participate in physician-assisted dying if it were no longer prohibited; and the British Columbia Civil Liberties Association. The Attorney General of British Columbia participated in the constitutional litigation as of right.

The trial judge found that the prohibition against physician-assisted dying violates the s. 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition and concluded that this infringement is not justified under s. 1 of the *Charter*. She declared the prohibition unconstitutional, granted a one-year suspension of invalidity and provided T with a constitutional exemption. She awarded special costs in favour of the plaintiffs on the ground that this was justified by the public interest in resolving the legal issues raised by the case, and awarded 10 percent of the costs against the Attorney General of British Columbia in light of the full and active role it assumed in the proceedings.

autonome — Opportunité d'accorder une exemption constitutionnelle aux termes de l'art. 24(1) de la Charte canadienne des droits et libertés.

Tribunaux — Dépens — Dépens spéciaux — Principes régissant l'exercice du pouvoir discrétionnaire des tribunaux d'accorder des dépens spéciaux sur la base de l'indemnisation intégrale — Juge de première instance accordant des dépens spéciaux aux demandeurs qui ont gain de cause parce que l'intérêt public le justifie et condamnant la procureure générale, qui est intervenue de plein droit, à payer une somme proportionnelle à sa participation à l'instance — Faut-il accorder des dépens spéciaux couvrant la totalité des dépenses engagées pour porter l'affaire devant les tribunaux? — La condamnation aux dépens prononcée contre la procureure générale est-elle justifiée?

Aux termes de l'al. 241*b*) du *Code criminel*, quiconque aide ou encourage quelqu'un à se donner la mort commet un acte criminel, et selon l'art. 14, nul ne peut consentir à ce que la mort lui soit infligée. Ensemble, ces dispositions prohibent au Canada la prestation de l'aide à mourir. Après avoir appris en 2009 qu'elle souffrait d'une maladie neurodégénérative fatale, T a contesté la constitutionnalité des dispositions du *Code criminel* qui prohibent l'aide à mourir. Se sont joints à sa demande C et J, qui avaient aidé la mère de C à réaliser son souhait de mourir dans la dignité en l'emmenant en Suisse pour qu'elle puisse recourir aux services d'une clinique d'aide au suicide; se sont aussi joints un médecin disposé à participer à un processus d'aide médicale à la mort si la prohibition était levée, et l'Association des libertés civiles de la Colombie-Britannique. La procureure générale de la Colombie-Britannique a participé de plein droit au litige constitutionnel.

La juge de première instance a conclu que la prohibition de l'aide médicale à mourir viole les droits que l'art. 7 garantit aux adultes capables voués à d'intolérables souffrances causées par des problèmes de santé graves et irrémédiables et a aussi conclu que cette violation n'est pas justifiée au regard de l'article premier de la *Charte*. Elle a déclaré la prohibition inconstitutionnelle, a suspendu pour un an la prise d'effet de la déclaration d'invalidité et a accordé à T une exemption constitutionnelle. Elle a adjugé des dépens spéciaux aux demandeurs parce qu'une telle mesure était justifiée par l'intérêt du public à ce que soient tranchées les questions de droit en litige, et elle a condamné la procureure générale de la Colombie-Britannique à payer 10 pour 100 des dépens du fait qu'elle avait participé pleinement et activement à l'instance.

The majority of the Court of Appeal allowed the appeal on the ground that the trial judge was bound to follow this Court's decision in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, where a majority of the Court upheld the blanket prohibition on assisted suicide. The dissenting judge found no errors in the trial judge's assessment of *stare decisis*, her application of s. 7 or the corresponding analysis under s. 1. However, he concluded that the trial judge was bound by the conclusion in *Rodriguez* that any s. 15 infringement was saved by s. 1.

Held: The appeal should be allowed. Section 241(*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. The declaration of invalidity is suspended for 12 months. Special costs on a full indemnity basis are awarded against Canada throughout. The Attorney General of British Columbia will bear responsibility for 10 percent of the costs at trial on a full indemnity basis and will pay the costs associated with its presence at the appellate levels on a party-and-party basis.

The trial judge was entitled to revisit this Court's decision in *Rodriguez*. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. Here, both conditions were met. The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*.

Les juges majoritaires de la Cour d'appel ont accueilli l'appel pour le motif que la juge de première instance était tenue de suivre la décision de notre Cour dans *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, dans laquelle les juges majoritaires de la Cour ont confirmé l'interdiction générale de l'aide au suicide. Le juge dissident n'a relevé aucune erreur dans l'examen, par la juge de première instance, du principe du *stare decisis*, dans l'application qu'elle a faite de l'art. 7, ni dans l'analyse correspondante fondée sur l'article premier. Il a toutefois conclu qu'elle était liée par la conclusion de l'arrêt *Rodriguez* selon laquelle toute violation de l'art. 15 était sauvegardée par l'article premier.

Arrêt : Le pourvoi est accueilli. L'alinéa 241*b*) et l'art. 14 du *Code criminel* portent atteinte de manière injustifiée à l'art. 7 de la *Charte* et sont inopérants dans la mesure où ils prohibent l'aide d'un médecin pour mourir à une personne adulte capable qui (1) consent clairement à mettre fin à sa vie; et qui (2) est affectée de problèmes de santé graves et irrémédiables (y compris une affection, une maladie ou un handicap) lui causant des souffrances persistantes qui lui sont intolérables au regard de sa condition. La prise d'effet de la déclaration d'invalidité est suspendue pendant 12 mois. Le Canada est condamné à des dépens spéciaux sur la base de l'indemnisation intégrale devant toutes les cours. La procureure générale de la Colombie-Britannique doit assumer la responsabilité de 10 pour 100 des dépens du procès sur la base de l'indemnisation intégrale, et elle est condamnée aux dépens associés à sa participation devant les cours d'appel sur la base partie-partie.

La juge de première instance pouvait réexaminer la décision rendue par notre Cour dans *Rodriguez*. Les juridictions inférieures peuvent réexaminer les précédents de tribunaux supérieurs dans deux situations : (1) lorsqu'une nouvelle question juridique se pose; et (2) lorsqu'une modification de la situation ou de la preuve change radicalement la donne. En l'espèce, ces deux conditions étaient réunies. L'argument présenté à la juge de première instance reposait sur une conception juridique de l'art. 7 différente de celle qui avait cours lors du prononcé de l'arrêt *Rodriguez*. Plus particulièrement, le droit relatif aux principes de la portée excessive et du caractère totalement disproportionné avait évolué de façon importante depuis l'arrêt *Rodriguez*. L'ensemble des faits législatifs et sociaux dans l'affaire qui nous occupe différait également des éléments de preuve soumis à la Cour dans l'affaire *Rodriguez*.

The prohibition on assisted suicide is, in general, a valid exercise of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*, and it does not impair the protected core of the provincial jurisdiction over health. Health is an area of concurrent jurisdiction, which suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and the focus of the legislation. On the basis of the record, the interjurisdictional immunity claim cannot succeed.

Insofar as they prohibit physician-assisted dying for competent adults who seek such assistance as a result of a grievous and irremediable medical condition that causes enduring and intolerable suffering, ss. 241(*b*) and 14 of the *Criminal Code* deprive these adults of their right to life, liberty and security of the person under s. 7 of the *Charter*. The right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Here, the prohibition deprives some individuals of life, as it has the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. The rights to liberty and security of the person, which deal with concerns about autonomy and quality of life, are also engaged. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The prohibition denies people in this situation the right to make decisions concerning their bodily integrity and medical care and thus trenches on their liberty. And by leaving them to endure intolerable suffering, it impinges on their security of the person.

The prohibition on physician-assisted dying infringes the right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice. The object of the prohibition is not, broadly, to preserve life whatever the circumstances, but more specifically to protect vulnerable persons from being induced to commit suicide at a time of weakness. Since a total ban on assisted suicide clearly helps achieve this object, individuals' rights are not deprived arbitrarily. However, the prohibition catches people outside the class of protected persons. It follows that the limitation on their

La prohibition de l'aide au suicide constitue généralement un exercice valide de la compétence en matière de droit criminel conférée au gouvernement fédéral par le par. 91(27) de la *Loi constitutionnelle de 1867* et n'empiète pas sur le contenu essentiel protégé de la compétence provinciale en matière de santé. La santé est un domaine de compétence concurrente, ce qui laisse croire que les deux ordres de gouvernement peuvent validement légiférer sur des aspects de l'aide médicale à mourir, en fonction du caractère et de l'objet du texte législatif. Compte tenu du dossier qui a été soumis à la Cour, la prétention fondée sur l'exclusivité des compétences ne peut être retenue.

Dans la mesure où ils prohibent l'aide d'un médecin pour mourir que peuvent demander des adultes capables affectés de problèmes de santé graves et irrémédiables qui leur causent des souffrances persistantes et intolérables, l'al. 241*b*) et l'art. 14 du *Code criminel* privent ces adultes du droit à la vie, à la liberté et à la sécurité de la personne que leur garantit l'art. 7 de la *Charte*. Le droit à la vie entre en jeu lorsqu'une mesure ou une loi prise par l'État a directement ou indirectement pour effet d'imposer la mort à une personne ou de l'exposer à un risque accru de mort. En l'espèce, la prohibition prive certaines personnes de la vie car elle a pour effet de forcer certaines personnes à s'enlever prématurément la vie, par crainte d'être incapables de le faire lorsque leurs souffrances deviendraient insupportables. Les droits à la liberté et à la sécurité de la personne, qui traitent des préoccupations au sujet de l'autonomie et de la qualité de la vie, sont également en jeu. La réaction d'une personne à des problèmes de santé graves et irrémédiables est primordiale pour sa dignité et son autonomie. La prohibition prive les personnes se trouvant dans cette situation du droit de prendre des décisions relatives à leur intégrité corporelle et aux soins médicaux et elle empiète ainsi sur leur liberté. Et en leur laissant subir des souffrances intolérables, elle empiète sur la sécurité de leur personne.

La prohibition de l'aide médicale à mourir porte atteinte au droit à la vie, à la liberté et à la sécurité de la personne d'une manière non conforme aux principes de justice fondamentale. La prohibition n'a pas pour objet, envisagé largement, de préserver la vie peu importe les circonstances, mais plus précisément d'empêcher que les personnes vulnérables soient incitées à se suicider dans un moment de faiblesse. Puisque la prohibition absolue de l'aide au suicide favorise clairement la réalisation de cet objet, il n'y a pas privation arbitraire de droits individuels. Cependant, la prohibition s'applique à des

rights is in at least some cases not connected to the objective and that the prohibition is thus overbroad. It is unnecessary to decide whether the prohibition also violates the principle against gross disproportionality.

Having concluded that the prohibition on physician-assisted dying violates s. 7, it is unnecessary to consider whether it deprives adults who are physically disabled of their right to equal treatment under s. 15 of the *Charter*.

Sections 241(*b*) and 14 of the *Criminal Code* are not saved by s. 1 of the *Charter*. While the limit is prescribed by law and the law has a pressing and substantial objective, the prohibition is not proportionate to the objective. An absolute prohibition on physician-assisted dying is rationally connected to the goal of protecting the vulnerable from taking their life in times of weakness, because prohibiting an activity that poses certain risks is a rational method of curtailing the risks. However, as the trial judge found, the evidence does not support the contention that a blanket prohibition is necessary in order to substantially meet the government's objective. The trial judge made no palpable and overriding error in concluding, on the basis of evidence from scientists, medical practitioners, and others who are familiar with end-of-life decision-making in Canada and abroad, that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. It was also open to her to conclude that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. The absolute prohibition is therefore not minimally impairing. Given this conclusion, it is not necessary to weigh the impacts of the law on protected rights against the beneficial effect of the law in terms of the greater public good.

The appropriate remedy is not to grant a free-standing constitutional exemption, but rather to issue a declaration of invalidity and to suspend it for 12 months. Nothing in this declaration would compel physicians to provide assistance in dying. The *Charter* rights of patients and

personnes qui n'entrent pas dans la catégorie des personnes protégées. Il s'ensuit que la restriction de leurs droits n'a, dans certains cas du moins, aucun lien avec l'objectif et que la portée de la prohibition est de ce fait excessive. Il n'est pas nécessaire de décider si la prohibition contrevient aussi au principe selon lequel elle ne doit pas avoir un caractère totalement disproportionné.

Comme nous avons conclu que la prohibition de l'aide médicale à mourir viole l'art. 7, point n'est besoin d'examiner si elle prive les adultes affectés d'un handicap physique de leur droit à un traitement égal garanti par l'art. 15 de la *Charte*.

L'alinéa 241*b*) et l'art. 14 du *Code criminel* ne sont pas sauvegardés par application de l'article premier de la *Charte*. Bien que la limite soit prescrite par une règle de droit et que la loi vise un objectif urgent et réel, la prohibition n'est pas proportionnée à son objectif. Il existe un lien rationnel entre une prohibition absolue de l'aide médicale à mourir et l'objectif qui consiste à empêcher que les personnes vulnérables s'enlèvent la vie dans un moment de faiblesse, parce que prohiber une activité qui pose certains risques constitue un moyen rationnel de réduire les risques. Toutefois, la juge de première instance a conclu que la preuve n'étaye pas la prétention qu'une prohibition générale est nécessaire pour réaliser de façon substantielle les objectifs de l'État. La juge n'a pas commis une erreur manifeste et dominante en concluant, sur la foi des témoignages de scientifiques, de praticiens de la santé et d'autres personnes qui connaissent bien la prise de décisions concernant la fin de vie au Canada et à l'étranger, qu'un régime permissif comportant des garanties adéquatement conçues et appliquées pouvait protéger les personnes vulnérables contre les abus et les erreurs. Elle pouvait également conclure que la vulnérabilité peut être évaluée au cas par cas au moyen des procédures suivies par les médecins lorsqu'ils évaluent le consentement éclairé et la capacité décisionnelle dans le contexte de la prise de décisions d'ordre médical de façon plus générale. La prohibition absolue ne constitue donc pas une atteinte minimale. Compte tenu de cette conclusion, il n'est pas nécessaire de mettre en balance l'incidence de la loi sur les droits protégés et l'effet bénéfique de la loi au plan de l'intérêt supérieur du public.

La réparation appropriée consiste non pas à accorder une exemption constitutionnelle autonome, mais plutôt à prononcer une déclaration d'invalidité et de suspendre la prise d'effet de son application pendant 12 mois. Rien dans cette déclaration ne contraindrait les médecins à

physicians will need to be reconciled in any legislative and regulatory response to this judgment.

The appellants are entitled to an award of special costs on a full indemnity basis to cover the entire expense of bringing this case before the courts. A court may depart from the usual rule on costs and award special costs where two criteria are met. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not been previously resolved or that they transcend individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. Finally, only those costs that are shown to be reasonable and prudent will be covered by the award of special costs. Here, the trial judge did not err in awarding special costs in the truly exceptional circumstances of this case. It was also open to her to award 10 percent of the costs against the Attorney General of British Columbia in light of the full and active role it played in the proceedings. The trial judge was in the best position to determine the role taken by that Attorney General and the extent to which it shared carriage of the case.

Cases Cited

Distinguished: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; **applied:** *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; **disapproved:** *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28; **referred to:** *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); *Pretty v. United Kingdom*, No. 2346/02, ECHR 2002-III; *Fleming v. Ireland*, [2013] IESC 19; *R. (on the application of Nicklinson) v. Ministry of Justice*, [2014] UKSC 38, [2014] 3 All E.R. 843; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R.

dispenser une aide médicale à mourir. La réponse législative ou réglementaire au présent jugement devra concilier les droits garantis par la *Charte* aux patients et aux médecins.

Les appelants ont droit à des dépens spéciaux sur la base de l'indemnisation intégrale afin de couvrir la totalité des dépenses engagées pour porter cette affaire devant les tribunaux. Un tribunal peut déroger à la règle habituelle en matière de dépens et octroyer des dépens spéciaux lorsque deux critères sont respectés. Premièrement, l'affaire doit porter sur des questions d'intérêt public véritablement exceptionnelles. Il ne suffit pas que les questions soulevées n'aient pas encore été tranchées ou qu'elles dépassent le cadre des intérêts du plaideur qui a gain de cause : elles doivent aussi avoir une incidence importante et généralisée sur la société. Deuxièmement, en plus de démontrer qu'ils n'ont dans le litige aucun intérêt personnel, propriétal ou pécuniaire qui justifierait l'instance pour des raisons d'ordre économique, les demandeurs doivent démontrer qu'il n'aurait pas été possible de poursuivre l'instance en question avec une aide financière privée. Enfin, seuls les frais dont on établit le caractère raisonnable et prudent seront couverts par l'octroi de dépens spéciaux. En l'espèce, la juge de première instance n'a pas commis une erreur en adjugeant des dépens spéciaux dans les circonstances vraiment exceptionnelles de cette affaire. Elle pouvait également condamner la procureure générale de la Colombie-Britannique à payer 10 pour 100 des dépens puisque cette dernière avait participé pleinement et activement à l'instance. La juge était la mieux placée pour apprécier la participation de la procureure générale et la mesure dans laquelle celle-ci a partagé la responsabilité du dossier.

Jurisprudence

Distinction d'avec l'arrêt : *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; **arrêt appliqué :** *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101; **arrêt critiqué :** *Victoria (City) c. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28; **arrêts mentionnés :** *Washington c. Glucksberg*, 521 U.S. 702 (1997); *Vacco c. Quill*, 521 U.S. 793 (1997); *Pretty c. Royaume-Uni*, nº 2346/02, CEDH 2002-III; *Fleming c. Ireland*, [2013] IESC 19; *R. (on the application of Nicklinson) c. Ministry of Justice*, [2014] UKSC 38, [2014] 3 All E.R. 843; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567; *R. c. Ferguson*, 2008 CSC 6, [2008] 1 R.C.S. 96; *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Nation Tsilhqot'in c.*

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Joseph J. Arvay, Q.C., *Sheila M. Tucker* and *Alison M. Latimer*, for the appellants.

Robert J. Frater and *Donnaree Nygard*, for the respondent the Attorney General of Canada.

Bryant Mackey, for the respondent the Attorney General of British Columbia.

S. Zachary Green, for the intervener the Attorney General of Ontario.

Jean-Yves Bernard and *Sylvain Leboeuf*, for the intervener the Attorney General of Quebec.

David Baker and *Emily Shepard*, for the interveners the Council of Canadians with Disabilities and the Canadian Association for Community Living.

Gerald D. Chipeur, Q.C., for the intervener the Christian Legal Fellowship.

Written submissions only by *Gordon Capern*, *Michael Fenrick*, *Richard Elliott* and *Ryan Peck*, for the interveners the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario.

André Schutten, for the intervener the Association for Reformed Political Action Canada.

Pierre Bienvenu, *Andres C. Garin* and *Vincent Rochette*, for the intervener the Physicians' Alliance against Euthanasia.

435, 51 B.C.L.R. (5th) 213, 302 C.C.C. (3d) 26, 365 D.L.R. (4th) 351, 293 C.R.R. (2d) 109, 345 B.C.A.C. 232, 589 W.A.C. 232, [2014] 1 W.W.R. 211, [2013] B.C.J. No. 2227 (QL), 2013 CarswellBC 3051 (WL Can.), qui a infirmé des décisions de la juge Smith, 2012 BCSC 886, 287 C.C.C. (3d) 1, 261 C.R.R. (2d) 1, [2012] B.C.J. No. 1196 (QL), 2012 CarswellBC 1752 (WL Can.); et 2012 BCSC 1587, 271 C.R.R. (2d) 224, [2012] B.C.J. No. 2259 (QL), 2012 CarswellBC 3388 (WL Can.). Pourvoi accueilli.

Joseph J. Arvay, c.r., *Sheila M. Tucker* et *Alison M. Latimer*, pour les appelants.

Robert J. Frater et *Donnaree Nygard*, pour l'intimé le procureur général du Canada.

Bryant Mackey, pour l'intimée la procureure générale de la Colombie-Britannique.

S. Zachary Green, pour l'intervenant le procureur général de l'Ontario.

Jean-Yves Bernard et *Sylvain Leboeuf*, pour l'intervenante la procureure générale du Québec.

David Baker et *Emily Shepard*, pour les intervenants le Conseil des Canadiens avec déficiences et l'Association canadienne pour l'intégration communautaire.

Gerald D. Chipeur, c.r., pour l'intervenante l'Alliance des chrétiens en droit.

Argumentation écrite seulement par *Gordon Capern*, *Michael Fenrick*, *Richard Elliott* et *Ryan Peck*, pour les intervenants le Réseau juridique canadien VIH/sida et HIV & AIDS Legal Clinic Ontario.

André Schutten, pour l'intervenante Association for Reformed Political Action Canada.

Pierre Bienvenu, *Andres C. Garin* et *Vincent Rochette*, pour l'intervenant le Collectif des médecins contre l'euthanasie.

Geoffrey Trotter, for the intervener the Evangelical Fellowship of Canada.

Albertos Polizogopoulos, for the interveners the Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies.

Written submissions only by *Cynthia Petersen* and *Kelly Doctor*, for the intervener Dying With Dignity.

Harry Underwood and *Jessica Prince*, for the intervener the Canadian Medical Association.

Albertos Polizogopoulos and *Russell G. Gibson*, for the intervener the Catholic Health Alliance of Canada.

Marlys A. Edwardh and *Daniel Sheppard*, for the intervener the Criminal Lawyers' Association (Ontario).

Jason B. Gratl, for the interveners the Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité.

Christopher D. Bredt and *Margot Finley*, for the intervener the Canadian Civil Liberties Association.

Robert W. Staley, *Ranjan K. Agarwal*, *Jack R. Maslen* and *Philip H. Horgan*, for the interveners the Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project.

Angus M. Gunn, *Q.C.*, and *Duncan A. W. Ault*, for the intervener the Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society.

Tim Dickson and *Ryan J. M. Androsoff*, for the intervener the Canadian Unitarian Council.

Hugh R. Scher, for the interveners the Euthanasia Prevention Coalition and the Euthanasia Prevention Coalition — British Columbia.

Geoffrey Trotter, pour l'intervenante l'Alliance évangélique du Canada.

Albertos Polizogopoulos, pour les intervenantes Christian Medical and Dental Society of Canada et Canadian Federation of Catholic Physicians' Societies.

Argumentation écrite seulement par *Cynthia Petersen* et *Kelly Doctor*, pour l'intervenante Dying With Dignity.

Harry Underwood et *Jessica Prince*, pour l'intervenante l'Association médicale canadienne.

Albertos Polizogopoulos et *Russell G. Gibson*, pour l'intervenante l'Alliance catholique canadienne de la santé.

Marlys A. Edwardh et *Daniel Sheppard*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Jason B. Gratl, pour les intervenantes Farewell Foundation for the Right to Die et l'Association québécoise pour le droit de mourir dans la dignité.

Christopher D. Bredt et *Margot Finley*, pour l'intervenante l'Association canadienne des libertés civiles.

Robert W. Staley, *Ranjan K. Agarwal*, *Jack R. Maslen* et *Philip H. Horgan*, pour les intervenants la Ligue catholique des droits de l'homme, Faith and Freedom Alliance et Protection of Conscience Project.

Angus M. Gunn, *c.r.*, et *Duncan A. W. Ault*, pour l'intervenante Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society.

Tim Dickson et *Ryan J. M. Androsoff*, pour l'intervenant le Conseil unitarien du Canada.

Hugh R. Scher, pour les intervenantes la Coalition pour la prévention de l'euthanasie et Euthanasia Prevention Coalition — British Columbia.

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Version française du jugement rendu par

LA COUR —

I. Introduction

[1] Au Canada, le fait d'aider une personne à mettre fin à ses jours constitue un crime. Par conséquent, les personnes gravement et irrémédiablement

seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel.

[2] The question on this appeal is whether the criminal prohibition that puts a person to this choice violates her *Charter* rights to life, liberty and security of the person (s. 7) and to equal treatment by and under the law (s. 15). This is a question that asks us to balance competing values of great importance. On the one hand stands the autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition. On the other stands the sanctity of life and the need to protect the vulnerable.

[3] The trial judge found that the prohibition violates the s. 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition. She concluded that this infringement is not justified under s. 1 of the *Charter*. We agree. The trial judge's findings were based on an exhaustive review of the extensive record before her. The evidence supports her conclusion that the violation of the right to life, liberty and security of the person guaranteed by s. 7 of the *Charter* is severe. It also supports her finding that a properly administered regulatory regime is capable of protecting the vulnerable from abuse or error.

[4] We conclude that the prohibition on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is

malades ne peuvent demander l'aide d'un médecin pour mourir et peuvent être condamnées à une vie de souffrances aiguës et intolérables. Devant une telle perspective, deux solutions s'offrent à elles : soit mettre fin prématurément à leurs jours, souvent par des moyens violents ou dangereux, soit souffrir jusqu'à ce qu'elles meurent de causes naturelles. Le choix est cruel.

[2] Il faut déterminer dans le présent pourvoi si la prohibition criminelle qui impose ce choix à une personne viole les droits que lui garantit la *Charte canadienne des droits et libertés* — le droit à la vie, à la liberté et à la sécurité de la personne (art. 7) et le droit à l'égalité devant la loi (art. 15). Trancher cette question nous oblige à pondérer des valeurs opposées d'une grande importance. D'une part, il y a l'autonomie et la dignité d'un adulte capable qui cherche dans la mort un remède à des problèmes de santé graves et irrémédiables. D'autre part, il y a le caractère sacré de la vie et la nécessité de protéger les personnes vulnérables.

[3] La juge de première instance a conclu que la prohibition viole les droits que l'art. 7 garantit aux adultes capables voués à d'intolérables souffrances causées par des problèmes de santé graves et irrémédiables. Elle a conclu que cette violation n'est pas justifiée au regard de l'article premier de la *Charte*. Nous sommes du même avis. La juge de première instance a fondé ses conclusions sur un examen exhaustif de l'imposant dossier dont elle disposait. La preuve appuie sa conclusion que la violation du droit à la vie, à la liberté et à la sécurité de la personne garanti par l'art. 7 de la *Charte* est grave. Elle étaye aussi sa conclusion qu'un régime de réglementation bien appliqué permet de protéger les personnes vulnérables contre les abus ou les erreurs.

[4] Nous concluons que la prohibition de l'aide d'un médecin pour mourir à une personne (« aide médicale à mourir ») est nulle dans la mesure où elle prive de cette aide un adulte capable dans les cas où (1) la personne touchée consent clairement à mettre fin à ses jours; et (2) la personne est affectée de problèmes de santé graves et irrémédiables

intolerable to the individual in the circumstances of his or her condition. We therefore allow the appeal.

II. Background

[5] In Canada, aiding or abetting a person to commit suicide is a criminal offence: see s. 241(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46. This means that a person cannot seek a physician-assisted death. Twenty-one years ago, this Court upheld this blanket prohibition on assisted suicide by a slim majority: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. Sopinka J., writing for five justices, held that the prohibition did not violate s. 7 of the *Canadian Charter of Rights and Freedoms*, and that if it violated s. 15, this was justified under s. 1, as there was "no halfway measure that could be relied upon with assurance" to protect the vulnerable (p. 614). Four justices disagreed. McLachlin J. (as she then was), with L'Heureux-Dubé J. concurring, concluded that the prohibition violated s. 7 of the *Charter* and was not justified under s. 1. Lamer C.J. held that the prohibition violated s. 15 of the *Charter* and was not saved under s. 1. Cory J. agreed that the prohibition violated both ss. 7 and 15 and could not be justified.

[6] Despite the Court's decision in *Rodriguez*, the debate over physician-assisted dying continued. Between 1991 and 2010, the House of Commons and its committees debated no less than six private member's bills seeking to decriminalize assisted suicide. None was passed. While opponents to legalization emphasized the inadequacy of safeguards and the potential to devalue human life, a vocal minority spoke in favour of reform, highlighting the importance of dignity and autonomy and the limits of palliative care in addressing suffering. The Senate considered the matter as well, issuing a report on assisted suicide and euthanasia in 1995. The

(y compris une affection, une maladie ou un handicap) lui causant des souffrances persistantes qui lui sont intolérables au regard de sa condition. En conséquence, la Cour accueille le pourvoi.

II. Contexte

[5] Au Canada, quiconque aide ou encourage une personne à se donner la mort commet un acte criminel : voir l'al. 241*b*) du *Code criminel*, L.R.C. 1985, c. C-46. Ainsi, une personne ne peut demander une aide médicale à mourir. Il y a 21 ans, la Cour a confirmé par une faible majorité cette interdiction générale de l'aide au suicide : *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519. S'exprimant au nom de cinq juges, le juge Sopinka a estimé que l'interdiction ne contrevenait pas à l'art. 7 de la *Charte*, et que, si elle contrevenait à l'art. 15, elle était justifiée au regard de l'article premier, car il n'existait « pas de demi-mesure qui permettrait de garantir, avec toutes les assurances voulues » la protection des personnes vulnérables (p. 614). Quatre juges se sont dits en désaccord. La juge McLachlin (maintenant Juge en chef), avec l'appui de la juge L'Heureux-Dubé, a exprimé l'avis que l'interdiction violait l'art. 7 de la *Charte* et qu'elle n'était pas justifiée au regard de l'article premier. Le juge en chef Lamer a estimé que l'interdiction violait l'art. 15 de la *Charte* et qu'elle n'était pas sauvegardée par l'article premier. Le juge Cory a estimé que cette interdiction contrevenait à la fois à l'art. 7 et à l'art. 15, et qu'elle ne pouvait être justifiée.

[6] Malgré l'arrêt *Rodriguez* de notre Cour, le débat entourant l'aide médicale à mourir s'est poursuivi. De 1991 à 2010, la Chambre des communes et ses comités ont débattu pas moins de six projets de loi d'initiative parlementaire visant à décriminaliser l'aide au suicide. Aucun n'a été adopté. Bien que les opposants à la légalisation aient souligné le caractère inadéquat des garanties et la possibilité de dévalorisation de la vie humaine, une minorité s'est exprimée énergiquement en faveur d'une réforme, faisant ressortir l'importance de la dignité et de l'autonomie de la personne ainsi que la réduction limitée des souffrances par les soins palliatifs.

majority expressed concerns about the risk of abuse under a permissive regime and the need for respect for life. A minority supported an exemption to the prohibition in some circumstances.

Le Sénat s'est lui aussi penché sur la question, produisant un rapport sur l'aide au suicide et l'euthanasie en 1995. La majorité de ses membres s'est dite préoccupée par le risque qu'un régime permissif ouvre la porte à des abus et par la nécessité de respecter la vie. Une minorité de ses membres s'est prononcée en faveur d'une exemption de l'application de la prohibition dans certaines circonstances.

[7] More recent reports have come down in favour of reform. In 2011, the Royal Society of Canada published a report on end-of-life decision-making and recommended that the *Criminal Code* be modified to permit assistance in dying in some circumstances. The Quebec National Assembly's Select Committee on Dying with Dignity issued a report in 2012, recommending amendments to legislation to recognize medical aid in dying as appropriate end-of-life care (now codified in *An Act respecting end-of-life care*, CQLR, c. S-32.0001 (not yet in force)).

[7] Des rapports plus récents penchent en faveur d'une réforme. En 2011, la Société royale du Canada a publié un rapport sur la prise de décisions en fin de vie et a recommandé que le *Code criminel* soit modifié pour permettre l'aide à mourir dans certaines circonstances. Dans un rapport déposé en 2012, la Commission spéciale de l'Assemblée nationale du Québec sur la question de mourir dans la dignité a elle aussi recommandé que la loi soit modifiée pour reconnaître l'aide médicale à mourir comme un soin de fin de vie approprié (maintenant consacré dans la *Loi concernant les soins de fin de vie*, RLRQ, c. S-32.0001 (non encore en vigueur)).

[8] The legislative landscape on the issue of physician-assisted death has changed in the two decades since *Rodriguez*. In 1993 Sopinka J. noted that no other Western democracy expressly permitted assistance in dying. By 2010, however, eight jurisdictions permitted some form of assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana, and Colombia. The process of legalization began in 1994, when Oregon, as a result of a citizens' initiative, altered its laws to permit medical aid in dying for a person suffering from a terminal disease. Colombia followed in 1997, after a decision of the constitutional court. The Dutch Parliament established a regulatory regime for assisted dying in 2002; Belgium quickly adopted a similar regime, with Luxembourg joining in 2009. Together, these regimes have produced a body of evidence about the practical and legal workings of physician-assisted death and the efficacy of safeguards for the vulnerable.

[8] Le portrait législatif en matière d'aide médicale à mourir a changé au cours des deux décennies qui ont suivi l'arrêt *Rodriguez*. En 1993, le juge Sopinka faisait remarquer qu'aucune autre démocratie occidentale n'autorisait expressément l'aide à mourir. Par contre, en 2010, une certaine forme d'aide à mourir était permise à huit endroits dans le monde : les Pays-Bas, la Belgique, le Luxembourg, la Suisse, l'Oregon, l'État de Washington, le Montana et la Colombie. Le phénomène de la légalisation est apparu en 1994 quand, à l'initiative de citoyens, l'Oregon a modifié ses lois afin de permettre l'aide médicale à mourir à l'égard d'une personne atteinte d'une maladie terminale. La Colombie a fait de même en 1997, à la suite d'une décision rendue par la cour constitutionnelle. Le Parlement néerlandais a établi un régime réglementaire applicable à l'aide à mourir en 2002; la Belgique n'a pas tardé à adopter un régime semblable, et le Luxembourg a emboîté le pas en 2009. Ensemble, ces régimes permettent de disposer d'un ensemble de données concernant les rouages pratiques et juridiques de l'aide médicale à mourir, ainsi que l'efficacité des mesures protégeant les personnes vulnérables.

[9] Nevertheless, physician-assisted dying remains a criminal offence in most Western countries, and a number of courts have upheld the prohibition on such assistance in the face of constitutional and human rights challenges: see, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); *Pretty v. United Kingdom*, No. 2346/02, ECHR 2002-III; and *Fleming v. Ireland*, [2013] IESC 19. In a recent decision, a majority of the Supreme Court of the United Kingdom accepted that the absolute prohibition on assisted dying breached the claimants' rights, but found the evidence on safeguards insufficient; the court concluded that Parliament should be given an opportunity to debate and amend the legislation based on the court's provisional views (see *R. (on the application of Nicklinson v. Ministry of Justice*, [2014] UKSC 38, [2014] 3 All E.R. 843).

[9] L'aide médicale à mourir demeure néanmoins une infraction criminelle dans la plupart des pays occidentaux, et plusieurs tribunaux ont confirmé la prohibition de cette aide à l'issue de contestations constitutionnelles ou relatives aux droits de la personne : voir, p. ex., *Washington c. Glucksberg*, 521 U.S. 702 (1997); *Vacco c. Quill*, 521 U.S. 793 (1997); *Pretty c. Royaume-Uni*, nº 2346/02, CEDH 2002-III; *Fleming c. Ireland*, [2013] IESC 19. Dans un arrêt récent, les juges majoritaires de la Cour suprême du Royaume-Uni ont reconnu que la prohibition absolue de l'aide à mourir portait atteinte aux droits des demandeurs, mais ont jugé insuffisante la preuve concernant les garanties; la cour a conclu qu'il faudrait donner au Parlement l'occasion de débattre de la loi et de la modifier en fonction des avis provisoires de la cour (voir *R. (on the application of Nicklinson) c. Ministry of Justice*, [2014] UKSC 38, [2014] 3 All E.R. 843).

[10] The debate in the public arena reflects the ongoing debate in the legislative sphere. Some medical practitioners see legal change as a natural extension of the principle of patient autonomy, while others fear derogation from the principles of medical ethics. Some people with disabilities oppose the legalization of assisted dying, arguing that it implicitly devalues their lives and renders them vulnerable to unwanted assistance in dying, as medical professionals assume that a disabled patient "leans towards death at a sharper angle than the acutely ill — but otherwise non-disabled — patient" (2012 BCSC 886, 287 C.C.C. (3d) 1, at para. 811). Other people with disabilities take the opposite view, arguing that a regime which permits control over the manner of one's death respects, rather than threatens, their autonomy and dignity, and that the legalization of physician-assisted suicide will protect them by establishing stronger safeguards and oversight for end-of-life medical care.

[10] Dans l'arène publique, le débat reflète celui qui se poursuit au sein de la sphère législative. Certains praticiens de la santé considèrent la modification du droit comme le prolongement naturel du principe de l'autonomie du patient, alors que d'autres craignent que l'on déroge aux principes de déontologie médicale. Certaines personnes handicapées s'opposent à la légalisation de l'aide à mourir et plaident qu'elle dévalorise implicitement leur vie et les rend vulnérables à une aide à mourir non désirée, car les professionnels de la santé présument qu'un patient affecté d'un handicap [TRADUCTION] « penche plus en faveur de la mort que le patient gravement malade qui n'a pas de handicap » (2012 BCSC 886, 287 C.C.C. (3d) 1, par. 811). D'autres personnes handicapées estiment par contre qu'un régime qui accorde aux personnes un droit de regard sur la manière de mourir respecte, plutôt qu'il ne menace, leur autonomie et leur dignité, et que la légalisation de l'aide médicale à mourir les protégera en établissant des garanties plus solides et une meilleure supervision des soins médicaux de fin de vie.

[11] The impetus for this case arose in 2009, when Gloria Taylor was diagnosed with a fatal neurodegenerative disease, amyotrophic lateral sclerosis (or ALS), which causes progressive muscle

[11] Le présent litige a pris naissance en 2009 lorsque Gloria Taylor a appris qu'elle souffrait d'une maladie neurodégénérative fatale — la sclérose latérale amyotrophique (ou SLA) —, une maladie

weakness. ALS patients first lose the ability to use their hands and feet, then the ability to walk, chew, swallow, speak and, eventually, breathe. Like Sue Rodriguez before her, Gloria Taylor did "not want to die slowly, piece by piece" or "wracked with pain," and brought a claim before the British Columbia Supreme Court challenging the constitutionality of the *Criminal Code* provisions that prohibit assistance in dying, specifically ss. 14, 21, 22, 222, and 241. She was joined in her claim by Lee Carter and Hollis Johnson, who had assisted Ms. Carter's mother, Kathleen ("Kay") Carter, in achieving her goal of dying with dignity by taking her to Switzerland to use the services of DIGNITAS, an assisted-suicide clinic; Dr. William Shoichet, a physician from British Columbia who would be willing to participate in physician-assisted dying if it were no longer prohibited; and the British Columbia Civil Liberties Association, which has a long-standing interest in patients' rights and health policy and has conducted advocacy and education with respect to end-of-life choices, including assisted suicide.

causant un affaiblissement progressif des muscles. Les patients atteints de la SLA perdent tout d'abord la capacité d'utiliser leurs mains et leurs pieds, puis celle de marcher, de mastiquer, d'avaler, de parler et, finalement, de respirer. Tout comme Sue Rodriguez avant elle, Gloria Taylor [TRADUCTION] « ne voulait pas mourir lentement, à petit feu » ou « terrassée par la douleur ». Elle a donc intenté devant la Cour suprême de la Colombie-Britannique une action contestant la constitutionnalité des dispositions du *Code criminel* qui prohibent l'aide à mourir, soit les art. 14, 21, 22, 222 et 241. Se sont joints à sa demande Lee Carter et Hollis Johnson, qui avaient aidé la mère de M^me^ Carter, Kathleen (« Kay ») Carter, à réaliser son souhait de mourir dans la dignité en l'emmenant en Suisse pour qu'elle puisse recourir aux services de DIGNITAS, une clinique d'aide au suicide; le D^r^ William Shoichet, un médecin de la Colombie-Britannique qui serait disposé à participer à un processus d'aide médicale à mourir si la prohibition était levée; et l'Association des libertés civiles de la Colombie-Britannique, laquelle s'intéresse depuis longtemps aux droits des patients et à la politique en matière de santé et qui a mené des activités de promotion et d'éducation en matière de choix de fin de vie, y compris l'aide au suicide.

[12] By 2010, Ms. Taylor's condition had deteriorated to the point that she required a wheelchair to go more than a short distance and was suffering pain from muscle deterioration. She required home support for assistance with the daily tasks of living, something that she described as an assault on her privacy, dignity, and self-esteem. She continued to pursue an independent life despite her illness, but found that she was steadily losing the ability to participate fully in that life. Ms. Taylor informed her family and friends of a desire to obtain a physician-assisted death. She did not want to "live in a bedridden state, stripped of dignity and independence", she said; nor did she want an "ugly death". This is how she explained her desire to seek a physician-assisted death:

[12] En 2010, l'état de santé de M^me^ Taylor s'était détérioré à un point tel qu'elle devait se déplacer en fauteuil roulant, sauf pour parcourir de courtes distances, et la détérioration de ses muscles lui causait de la douleur. Elle avait besoin d'un soutien à domicile pour accomplir ses tâches quotidiennes, ce qu'elle a décrit comme un affront à sa vie privée, à sa dignité et à son estime de soi. Malgré sa maladie, elle a continué de mener une existence indépendante, mais elle a constaté qu'elle perdait de plus en plus la capacité de vivre ainsi. M^me^ Taylor a informé sa famille et ses amis de son désir d'obtenir une aide médicale à mourir. Elle a dit ne pas vouloir [TRADUCTION] « vivre clouée au lit, dépouillée de sa dignité et de son indépendance », et qu'elle ne voulait pas non plus d'une [TRADUCTION] « mort affreuse ». C'est en ces termes qu'elle a expliqué son vœu de demander une aide médicale à mourir :

I do not want my life to end violently. I do not want my mode of death to be traumatic for my family members. I

[TRADUCTION] Je ne veux pas que ma vie prenne fin violemment. Je ne veux pas que la façon dont je

want the legal right to die peacefully, at the time of my own choosing, in the embrace of my family and friends.

I know that I am dying, but I am far from depressed. I have some down time – that is part and parcel of the experience of knowing that you are terminal. But there is still a lot of good in my life; there are still things, like special times with my granddaughter and family, that bring me extreme joy. I will not waste any of my remaining time being depressed. I intend to get every bit of happiness I can wring from what is left of my life so long as it remains a life of quality; but I do not want to live a life without quality. There will come a point when I will know that enough is enough. I cannot say precisely when that time will be. It is not a question of "when I can't walk" or "when I can't talk." There is no pre-set trigger moment. I just know that, globally, there will be some point in time when I will be able to say – "this is it, this is the point where life is just not worthwhile." When that time comes, I want to be able to call my family together, tell them of my decision, say a dignified good-bye and obtain final closure – for me and for them.

My present quality of life is impaired by the fact that I am unable to say for certain that I will have the right to ask for physician-assisted dying when that "enough is enough" moment arrives. I live in apprehension that my death will be slow, difficult, unpleasant, painful, undignified and inconsistent with the values and principles I have tried to live by. . . .

. . .

. . . What I fear is a death that negates, as opposed to concludes, my life. I do not want to die slowly, piece by piece. I do not want to waste away unconscious in a hospital bed. I do not want to die wracked with pain.

[13] Ms. Taylor, however, knew she would be unable to request a physician-assisted death when the time came, because of the *Criminal Code* prohibition and the fact that she lacked the financial resources to travel to Switzerland, where assisted suicide is legal and available to non-residents. This

mourrai soit traumatisante pour les membres de ma famille. Je veux qu'on me reconnaisse le droit de mourir paisiblement, au moment que je choisirai, dans les bras de ma famille et de mes amis.

Je sais que je vais bientôt mourir, mais je suis loin d'être déprimée. Je suis parfois découragée – cela fait partie intégrante de l'expérience de savoir que l'on est en phase terminale. Mais la vie m'apporte encore beaucoup de bonnes choses, comme des moments spéciaux en compagnie de ma petite-fille et de ma famille, ce qui me procure une joie immense. Je ne gaspillerai pas le temps qui me reste à être déprimée. J'entends saisir chaque moment de bonheur que je peux encore arracher au temps qu'il me reste à vivre, dans la mesure où il s'agit d'une vie de qualité; mais je ne veux pas d'une vie sans qualité. Il viendra un moment où je saurai que c'en est assez. Je ne peux pas dire exactement quand ce moment arrivera. Ce n'est pas « quand je ne pourrai plus marcher » ou « quand je ne pourrai plus parler ». Il n'y a aucun moment déclencheur préétabli. Je sais simplement que, globalement, il viendra un moment où je pourrai dire : « ça y est, le moment est arrivé où la vie n'en vaut tout simplement plus la peine. » Quand ce moment arrivera, je veux pouvoir réunir les membres de ma famille, les informer de ma décision, leur faire dignement mes adieux et tourner définitivement la page – tant pour eux que pour moi.

Actuellement, ma qualité de vie est diminuée par le fait que je suis incapable d'affirmer avec certitude que j'aurai le droit de demander de l'aide médicale à mourir quand arrivera le moment où « c'en sera assez ». Je vis dans la hantise d'une mort lente, difficile, désagréable, douloureuse, humiliante et incompatible avec les valeurs et principes selon lesquels j'ai essayé de vivre. . .

. . .

. . . Ce que je crains, c'est une mort qui, au lieu d'apporter une conclusion à ma vie, en efface les traces. Je ne veux pas mourir lentement, à petit feu. Je ne veux pas dépérir, inconsciente, dans un lit d'hôpital. Je ne veux pas mourir terrassée par la douleur.

[13] M^me^ Taylor savait cependant qu'il lui serait impossible de demander une aide médicale à mourir au moment venu parce que le *Code criminel* le prohibait et qu'elle n'avait pas les ressources financières voulues pour se rendre en Suisse, où l'aide au suicide est légale et offerte aux non-résidents.

left her with what she described as the "cruel choice" between killing herself while she was still physically capable of doing so, or giving up the ability to exercise any control over the manner and timing of her death.

[14] Other witnesses also described the "horrible" choice faced by a person suffering from a grievous and irremediable illness. The stories in the affidavits vary in their details: some witnesses described the progression of degenerative illnesses like motor neuron diseases or Huntington's disease, while others described the agony of treatment and the fear of a gruesome death from advanced-stage cancer. Yet running through the evidence of all the witnesses is a constant theme — that they suffer from the knowledge that they lack the ability to bring a peaceful end to their lives at a time and in a manner of their own choosing.

[15] Some describe how they had considered seeking out the traditional modes of suicide but found that choice, too, repugnant:

> I was going to blow my head off. I have a gun and I seriously considered doing it. I decided that I could not do that to my family. It would be horrible to put them through something like that. . . . I want a better choice than that.

A number of the witnesses made clear that they — or their loved ones — had considered or in fact committed suicide earlier than they would have chosen to die if physician-assisted death had been available to them. One woman noted that the conventional methods of suicide, such as carbon monoxide asphyxiation, slitting of the wrists or overdosing on street drugs, would require that she end her life "while I am still able bodied and capable of taking my life, well ahead of when I actually need to leave this life".

[16] Still other witnesses described their situation in terms of a choice between a protracted or painful

Elle se trouvait ainsi devant ce qu'elle a décrit comme le [TRADUCTION] « choix cruel » entre mettre fin elle-même à ses jours alors qu'elle était encore physiquement apte à le faire, ou renoncer à la possibilité d'exercer un droit de regard sur le moment et la manière de mourir.

[14] D'autres témoins ont également parlé du choix « horrible » devant lequel se trouve une personne atteinte d'une maladie grave et irrémédiable. Les affidavits présentent des récits dont les détails varient : certains témoins ont décrit la progression de maladies dégénératives comme les maladies des motoneurones ou la maladie de Huntington, d'autres, l'agonie provoquée par traitements et la crainte d'une mort atroce causée par un cancer à un stade avancé. Cependant, un thème revient constamment dans les dépositions de tous les témoins : ils souffrent de se savoir privés de la faculté de mettre fin paisiblement à leurs jours au moment et de la manière de leur choix.

[15] Certains disent avoir envisagé de recourir aux formes traditionnelles de suicide, mais avoir jugé cette solution répugnante elle aussi :

> [TRADUCTION] J'allais me faire sauter la cervelle. Je possède une arme à feu et j'ai sérieusement pensé à passer à l'acte. J'ai décidé que je ne pouvais pas faire cela à ma famille. Il serait horrible de leur faire vivre une chose pareille. [. . .] Je veux une meilleure solution.

Des témoins ont précisé qu'eux-mêmes — ou des êtres chers — avaient envisagé de se suicider et que, dans certains cas, des personnes s'étaient suicidées plus tôt qu'au moment où elles auraient choisi de mourir si elles avaient eu accès à une aide médicale à mourir. Une femme a souligné que le recours aux méthodes de suicide classiques telles l'asphyxie au monoxyde de carbone, l'ouverture des veines ou une surdose de drogues illicites, l'obligerait à mettre fin à ses jours [TRADUCTION] « alors que je suis encore physiquement apte à m'enlever la vie, bien avant que j'aie effectivement besoin de quitter ce monde ».

[16] Par ailleurs, d'autres témoins ont dit se trouver devant la nécessité de choisir entre une agonie

death and exposing their loved ones to prosecution for assisting them in ending their lives. Speaking of himself and his wife, one man said: "We both face this reality, that we have only two terrible and imperfect options, with a sense of horror and loathing."

[17] Ms. Carter and Mr. Johnson described Kay Carter's journey to assisted suicide in Switzerland and their role in facilitating that process. Kay was diagnosed in 2008 with spinal stenosis, a condition that results in the progressive compression of the spinal cord. By mid-2009, her physical condition had deteriorated to the point that she required assistance with virtually all of her daily activities. She had extremely limited mobility and suffered from chronic pain. As her illness progressed, Kay informed her family that she did not wish to live out her life as an "ironing board", lying flat in bed. She asked her daughter, Lee Carter, and her daughter's husband, Hollis Johnson, to support and assist her in arranging an assisted suicide in Switzerland, and to travel there with her for that purpose. Although aware that assisting Kay could expose them both to prosecution in Canada, they agreed to assist her. In early 2010, they attended a clinic in Switzerland operated by DIGNITAS, a Swiss "death with dignity" organization. Kay took the prescribed dose of sodium pentobarbital while surrounded by her family, and passed away within 20 minutes.

[18] Ms. Carter and Mr. Johnson found the process of planning and arranging for Kay's trip to Switzerland difficult, in part because their activities had to be kept secret due to the potential for criminal sanctions. While they have not faced prosecution in Canada following Kay's death, Ms. Carter and Mr. Johnson are of the view that Kay ought to have been able to obtain a physician-assisted suicide at home, surrounded by her family and friends, rather than undergoing the stressful and expensive

prolongée ou douloureuse et exposer leurs proches à des poursuites pour les avoir aidés à mettre fin à leurs jours. Parlant de lui-même et de son épouse, un homme a dit ce qui suit : [TRADUCTION] « Nous sommes tous deux confrontés à cette réalité, de n'avoir que deux solutions terribles et imparfaites, avec un sentiment d'horreur et de dégoût. »

[17] M^me^ Carter et M. Johnson ont décrit le voyage qu'a fait Kay Carter en Suisse pour mettre à exécution son projet de suicide assisté, ainsi que le rôle qu'ils ont joué pour en faciliter la réalisation. En 2008, on a diagnostiqué chez Kay une sténose du canal rachidien lombaire, une maladie qui entraîne la compression progressive de la moelle épinière. Au milieu de l'année 2009, son état de santé s'était détérioré à un point tel qu'elle avait besoin d'aide pour presque toutes ses activités quotidiennes. Sa mobilité était extrêmement réduite et elle souffrait de douleurs chroniques. Vu la progression de sa maladie, Kay a informé sa famille qu'elle ne voulait pas vivre le reste de sa vie alitée, comme une [TRADUCTION] « planche à repasser ». Elle a sollicité l'aide et le soutien de sa fille, Lee Carter, et du mari de celle-ci, Hollis Johnson, pour organiser un suicide assisté en Suisse, et elle leur a demandé de l'accompagner dans ce pays à cette fin. Bien que conscients qu'ils s'exposaient tous les deux à des poursuites au Canada s'ils venaient en aide à Kay, ils ont néanmoins consenti à le faire. Au début de 2010, ils se sont rendus en Suisse dans une clinique exploitée par DIGNITAS, une organisation suisse militant pour le droit de « mourir dans la dignité ». Entourée de sa famille, Kay a pris la dose de pentobarbital sodique prescrite et elle est décédée moins de 20 minutes plus tard.

[18] M^me^ Carter et M. Johnson ont trouvé difficile le processus de planification et d'organisation du voyage de Kay en Suisse, en partie parce que leurs activités devaient rester secrètes compte tenu du risque de sanctions criminelles. Bien qu'ils n'aient pas fait l'objet de poursuites au Canada à la suite du décès de Kay, M^me^ Carter et M. Johnson sont d'avis que celle-ci aurait dû pouvoir obtenir une aide médicale à mourir dans son pays, entourée de sa famille et de ses amis, au lieu de devoir se soumettre au

process of arranging for the procedure overseas. Accordingly, they joined Ms. Taylor in pressing for the legalization of physician-assisted death.

III. Statutory Provisions

[19] The appellants challenge the constitutionality of the following provisions of the *Criminal Code*:

14. No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.

21. (1) Every one is a party to an offence who

. . .

(*b*) does or omits to do anything for the purpose of aiding any person to commit it; or

. . .

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

222. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

processus stressant et onéreux d'obtention d'une telle aide à l'étranger. En conséquence, ils se sont joints à M^me^ Taylor pour revendiquer la légalisation de l'aide médicale à mourir.

III. Dispositions législatives

[19] Les appelants contestent la constitutionnalité des dispositions suivantes du *Code criminel* :

14. Nul n'a le droit de consentir à ce que la mort lui soit infligée, et un tel consentement n'atteint pas la responsabilité pénale d'une personne par qui la mort peut être infligée à celui qui a donné ce consentement.

21. (1) Participent à une infraction :

. . .

b) quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;

. . .

(2) Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale et de s'y entraider et que l'une d'entre elles commet une infraction en réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la perpétration de l'infraction, participe à cette infraction.

22. (1) Lorsqu'une personne conseille à une autre personne de participer à une infraction et que cette dernière y participe subséquemment, la personne qui a conseillé participe à cette infraction, même si l'infraction a été commise d'une manière différente de celle qui avait été conseillée.

(2) Quiconque conseille à une autre personne de participer à une infraction participe à chaque infraction que l'autre commet en conséquence du conseil et qui, d'après ce que savait ou aurait dû savoir celui qui a conseillé, était susceptible d'être commise en conséquence du conseil.

(3) Pour l'application de la présente loi, « conseiller » s'entend d'amener et d'inciter, et « conseil » s'entend de l'encouragement visant à amener ou à inciter.

222. (1) Commet un homicide quiconque, directement ou indirectement, par quelque moyen, cause la mort d'un être humain.

(2) Homicide is culpable or not culpable.

(3) Homicide that is not culpable is not an offence.

(4) Culpable homicide is murder or manslaughter or infanticide.

(5) A person commits culpable homicide when he causes the death of a human being,

(*a*) by means of an unlawful act;

. . .

241. Every one who

(*a*) counsels a person to commit suicide, or

(*b*) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[20] In our view, two of these provisions are at the core of the constitutional challenge: s. 241(*b*), which says that everyone who aids or abets a person in committing suicide commits an indictable offence, and s. 14, which says that no person may consent to death being inflicted on them. It is these two provisions that prohibit the provision of assistance in dying. Sections 21, 22, and 222 are only engaged so long as the provision of assistance in dying is itself an "unlawful act" or offence. Section 241(*a*) does not contribute to the prohibition on assisted suicide.

[21] The *Charter* states:

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

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.

(2) L'homicide est coupable ou non coupable.

(3) L'homicide non coupable ne constitue pas une infraction.

(4) L'homicide coupable est le meurtre, l'homicide involontaire coupable ou l'infanticide.

(5) Une personne commet un homicide coupable lorsqu'elle cause la mort d'un être humain :

a) soit au moyen d'un acte illégal;

. . .

241. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque, selon le cas :

a) conseille à une personne de se donner la mort;

b) aide ou encourage quelqu'un à se donner la mort, que le suicide s'ensuive ou non.

[20] À notre avis, deux de ces dispositions sont au cœur de la présente contestation constitutionnelle : l'al. 241*b*), aux termes duquel quiconque aide ou encourage quelqu'un à se donner la mort est coupable d'un acte criminel, et l'art. 14, qui précise que nul ne peut consentir à ce que la mort lui soit infligée. Ce sont ces deux dispositions qui prohibent le fait d'aider une personne à mourir. Les articles 21, 22 et 222 s'appliquent uniquement si le fait d'aider quelqu'un à se donner la mort constitue en soi un « acte illégal » ou une infraction. L'alinéa 241*a*) ne contribue en rien à la prohibition du suicide assisté.

[21] La *Charte* dispose :

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

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.

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.

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.

IV. Judicial History

A. *British Columbia Supreme Court, 2012 BCSC 886, 287 C.C.C. (3d) 1*

[22] The action was brought by way of summary trial before Smith J. in the British Columbia Supreme Court. While the majority of the evidence was presented in affidavit form, a number of the expert witnesses were cross-examined, both prior to trial and before the trial judge. The record was voluminous: the trial judge canvassed evidence from Canada and from the permissive jurisdictions on medical ethics and current end-of-life practices, the risks associated with assisted suicide, and the feasibility of safeguards.

[23] The trial judge began by reviewing the current state of the law and practice in Canada regarding end-of-life care. She found that current unregulated end-of-life practices in Canada — such as the administration of palliative sedation and the withholding or withdrawal of lifesaving or life-sustaining medical treatment — can have the effect of hastening death and that there is a strong societal consensus that these practices are ethically acceptable (para. 357). After considering the evidence of physicians and ethicists, she found that the "preponderance of the evidence from ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death" (para. 335). Finally, she found that there are qualified Canadian physicians who would find it ethical to assist a patient in dying if that act were not prohibited by law (para. 319).

IV. Historique judiciaire

A. *Cour suprême de la Colombie-Britannique, 2012 BCSC 886, 287 C.C.C. (3d) 1*

[22] L'action intentée par voie de procédure sommaire a été instruite par la juge Smith de la Cour suprême de la Colombie-Britannique. Quoique la majeure partie de la preuve ait été présentée sous forme d'affidavit, un certain nombre de témoins experts ont été contre-interrogés, tant avant le procès que devant la juge de première instance. Le dossier était volumineux : la juge de première instance a examiné attentivement les éléments de preuve provenant du Canada et des endroits où l'aide à mourir est autorisée relativement à l'éthique médicale et aux pratiques utilisées actuellement en fin de vie, aux risques associés à l'aide au suicide ainsi qu'à la possibilité d'appliquer des garanties.

[23] La juge de première instance a d'abord passé en revue l'état actuel du droit et la pratique, au Canada, en ce qui concerne les soins en fin de vie. Elle a estimé que les pratiques utilisées actuellement en fin de vie en l'absence de toute réglementation au Canada — notamment l'administration d'une sédation palliative et l'arrêt ou le retrait d'un traitement vital ou de maintien de la vie — peuvent avoir pour effet de précipiter la mort, et qu'il existe un fort consensus dans la société sur le caractère acceptable de telles pratiques sur le plan éthique (par. 357). Après avoir examiné les éléments de preuve émanant de médecins et d'éthiciens, elle a considéré que, selon la [TRADUCTION] « prépondérance de la preuve émanant d'éthiciens, il n'y a aucune distinction sur le plan éthique entre l'aide médicale à mourir et les autres pratiques utilisées en fin de vie dont l'issue est selon toute vraisemblance la mort » (par. 335). Enfin, elle a estimé que des médecins canadiens qualifiés considéreraient éthique d'aider un patient à mourir si un tel acte n'était pas prohibé par la loi (par. 319).

[24] Based on these findings, the trial judge concluded that, while there is no clear societal consensus on physician-assisted dying, there is a strong consensus that it would only be ethical with respect to voluntary adults who are competent, informed, grievously and irremediably ill, and where the assistance is "clearly consistent with the patient's wishes and best interests, and [provided] in order to relieve suffering" (para. 358).

[25] The trial judge then turned to the evidence from the regimes that permit physician-assisted dying. She reviewed the safeguards in place in each jurisdiction and considered the effectiveness of each regulatory regime. In each system, she found general compliance with regulations, although she noted some room for improvement. The evidence from Oregon and the Netherlands showed that a system can be designed to protect the socially vulnerable. Expert evidence established that the "predicted abuse and disproportionate impact on vulnerable populations has not materialized" in Belgium, the Netherlands, and Oregon (para. 684). She concluded that

> although none of the systems has achieved perfection, empirical researchers and practitioners who have experience in those systems are of the view that they work well in protecting patients from abuse while allowing competent patients to choose the timing of their deaths. [para. 685]

While stressing the need for caution in drawing conclusions for Canada based on foreign experience, the trial judge found that "weak inference[s]" could be drawn about the effectiveness of safeguards and the potential degree of compliance with any permissive regime (para. 683).

[24] S'appuyant sur ces considérations, la juge de première instance a conclu qu'en dépit de l'absence, dans la société, d'un consensus clair sur l'aide médicale à mourir, il existe un fort consensus sur le fait que cette aide ne serait conforme à l'éthique qu'à l'égard d'adultes capables et avisés qui y consentent et qui sont atteints d'une maladie grave et irrémédiable, et lorsque cette aide est [TRADUCTION] « manifestement compatible avec la volonté et l'intérêt du patient et [fournie] dans le but de soulager la souffrance » (par. 358).

[25] La juge de première instance s'est ensuite penchée sur les éléments de preuve provenant des régimes qui permettent l'aide médicale à mourir. Elle a examiné les garanties en place à chaque endroit ainsi que l'efficacité de chaque régime de réglementation. Elle a conclu que dans chacun de ces régimes, la réglementation applicable est généralement respectée, quoiqu'elle ait signalé qu'il y avait encore place à amélioration. Les données provenant de l'Oregon et des Pays-Bas indiquaient qu'il est possible de concevoir un régime pour protéger les personnes socialement vulnérables. Les témoignages d'experts ont établi que les [TRADUCTION] « abus anticipés dans le cas des populations vulnérables ainsi que les répercussions disproportionnées qui devaient les toucher ne se sont pas concrétisés » en Belgique, aux Pays-Bas et en Oregon (par. 684). La juge a conclu comme suit :

> [TRADUCTION] . . . bien qu'aucun des régimes existants ne soit parfait, tant les théoriciens que les praticiens familiers avec ces régimes sont d'avis que ceux-ci protègent adéquatement les patients contre les abus tout en permettant aux malades capables de choisir le moment où ils mourront. [par. 685]

Bien qu'elle ait souligné que la circonspection s'imposait avant de tirer, à l'égard du Canada, des conclusions fondées sur l'expérience acquise à l'étranger, la juge de première instance a estimé que des [TRADUCTION] « inférence[s] sujette[s] à caution » pouvaient être tirées quant à l'efficacité des garanties et au degré possible de respect d'un régime permissif (par. 683).

[26] Based on the evidence from the permissive jurisdictions, the trial judge also rejected the argument that the legalization of physician-assisted dying would impede the development of palliative care in the country, finding that the effects of a permissive regime, while speculative, would "not necessarily be negative" (para. 736). Similarly, she concluded that any changes in the physician-patient relationship following legalization "could prove to be neutral or for the good" (para. 746).

[27] The trial judge then considered the risks of a permissive regime and the feasibility of implementing safeguards to address those risks. After reviewing the evidence tendered by physicians and experts in patient assessment, she concluded that physicians were capable of reliably assessing patient competence, including in the context of life-and-death decisions (para. 798). She found that it was possible to detect coercion, undue influence, and ambivalence as part of this assessment process (paras. 815, 843). She also found that the informed consent standard could be applied in the context of physician-assisted death, so long as care was taken to "ensure a patient is properly informed of her diagnosis and prognosis" and the treatment options described included all reasonable palliative care interventions (para. 831). Ultimately, she concluded that the risks of physician-assisted death "can be identified and very substantially minimized through a carefully-designed system" that imposes strict limits that are scrupulously monitored and enforced (para. 883).

[28] Having reviewed the copious evidence before her, the trial judge concluded that the decision in *Rodriguez* did not prevent her from reviewing the constitutionality of the impugned provisions, because (1) the majority in *Rodriguez* did not address the right to life; (2) the principles of overbreadth and gross disproportionality had not been identified at the time of the decision in *Rodriguez*

[26] Se fondant sur les éléments de preuve provenant des régimes qui permettent l'aide médicale à mourir, la juge de première instance a également rejeté l'argument selon lequel la légalisation de l'aide médicale à mourir nuirait à l'évolution des soins palliatifs au Canada, concluant que, quoique conjecturaux, les effets d'un régime permissif ne [TRADUCTION] « seraient pas nécessairement négatifs » (par. 736). De même, elle a conclu que les changements dans la relation entre le médecin et son patient suivant la légalisation [TRADUCTION] « pourraient s'avérer neutres ou bénéfiques » (par. 746).

[27] La juge de première instance a alors examiné les risques que pose un régime permissif et la faisabilité de la mise en place de garanties pour contrer ces risques. Après un examen des témoignages des médecins et des experts en matière d'évaluation des patients, elle a conclu que les médecins étaient en mesure d'évaluer de manière fiable la capacité d'un patient, notamment à l'égard des décisions touchant la vie et la mort (par. 798). Ce processus d'évaluation permet, selon elle, de déceler l'existence de contraintes, d'influence injustifiée et d'ambivalence (par. 815, 843). Elle a également conclu que la norme régissant le consentement éclairé pouvait s'appliquer dans le contexte de l'aide médicale à mourir, à la condition que l'on ait pris soin de [TRADUCTION] « s'assurer que le patient soit adéquatement informé de son diagnostic et de son pronostic », et d'inclure dans la gamme des traitements décrits toutes les mesures de soins palliatifs raisonnables (par. 831). Enfin, elle a conclu que les risques de l'aide médicale à mourir [TRADUCTION] « peuvent être reconnus et réduits considérablement dans un régime soigneusement conçu » qui impose des limites strictes scrupuleusement surveillées et appliquées (par. 883).

[28] Après avoir passé en revue la preuve abondante qui lui a été soumise, la juge de première instance a conclu que l'arrêt *Rodriguez* ne l'empêchait pas de se prononcer sur la constitutionnalité des dispositions contestées, et ce, parce que (1) dans *Rodriguez*, les juges majoritaires ne s'étaient pas penchés sur le droit à la vie; (2) les principes de la portée excessive et du caractère

and thus were not addressed in that decision; (3) the majority only "assumed" a violation of s. 15; and (4) the decision in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, represented a "substantive change" to the s. 1 analysis (para. 994). The trial judge concluded that these changes in the law, combined with the changes in the social and factual landscape over the past 20 years, permitted her to reconsider the constitutionality on the prohibition on physician-assisted dying.

totalement disproportionné n'avaient pas encore été établis au moment où cet arrêt a été rendu et n'avaient donc pas été examinés dans celui-ci; (3) les juges majoritaires avaient seulement « supposé » l'existence d'une violation de l'art. 15; et (4) l'arrêt *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, a représenté un [TRADUCTION] « changement substantiel » dans l'analyse fondée sur l'article premier (par. 994). Selon la juge de première instance, ces changements dans l'état du droit, conjugués aux changements observés dans le paysage social et factuel au cours des 20 dernières années, lui permettaient de revoir la constitutionnalité de la prohibition de l'aide médicale à mourir.

[29] The trial judge then turned to the *Charter* analysis. She first asked whether the prohibition violated the s. 15 equality guarantee. She found that the provisions imposed a disproportionate burden on persons with physical disabilities, as only they are restricted to self-imposed starvation and dehydration in order to take their own lives (para. 1076). This distinction, she found, is discriminatory, and not justified under s. 1. While the objective of the prohibition — the protection of vulnerable persons from being induced to commit suicide at a time of weakness — is pressing and substantial and the means are rationally connected to that purpose, the prohibition is not minimally impairing. A "stringently limited, carefully monitored system of exceptions" would achieve Parliament's objective:

> Permission for physician-assisted death for grievously ill and irremediably suffering people who are competent, fully informed, non-ambivalent, and free from coercion or duress, with stringent and well-enforced safeguards, could achieve that objective in a real and substantial way. [para. 1243]

[29] La juge de première instance a ensuite procédé à l'analyse fondée sur la *Charte*. Elle s'est d'abord demandé si la prohibition violait la garantie d'égalité de l'art. 15. Elle a conclu que les dispositions imposaient un fardeau disproportionné aux personnes handicapées physiquement, car pour s'enlever la vie, elles seules sont limitées au refus de s'alimenter et de s'hydrater (par. 1076). À son avis, cette distinction est discriminatoire et n'est pas justifiée au regard de l'article premier. Bien que l'objectif de la prohibition — protéger les personnes vulnérables contre toute incitation à se donner la mort dans un moment de faiblesse — soit urgent et réel, et qu'il existe un lien rationnel entre le moyen choisi et cet objectif, la prohibition ne constitue pas une atteinte minimale. Un [TRADUCTION] « régime assorti d'exceptions, rigoureusement circonscrit et surveillé attentivement » permettrait de réaliser l'objectif du législateur :

> [TRADUCTION] Accorder une aide médicale à mourir aux personnes grièvement malades et condamnées à des souffrances irrémédiables — des personnes capables, bien informées, non ambivalentes, qui n'ont subi aucune coercition ou contrainte —, dans le cadre d'un régime comportant des garanties rigoureuses et bien appliquées, pourrait permettre de réaliser réellement et substantiellement cet objectif. [par. 1243]

[30] Turning to s. 7 of the *Charter*, which protects life, liberty and security of the person, the trial judge found that the prohibition impacted all three

[30] Examinant l'art. 7 de la *Charte*, qui protège le droit à la vie, à la liberté et à la sécurité de la personne, la juge de première instance a conclu

interests. The prohibition on seeking physician-assisted dying deprived individuals of liberty, which encompasses "the right to non-interference by the state with fundamentally important and personal medical decision-making" (para. 1302). In addition, it also impinged on Ms. Taylor's security of the person by restricting her control over her bodily integrity. While the trial judge rejected a "qualitative" approach to the right to life, concluding that the right to life is only engaged by a threat of death, she concluded that Ms. Taylor's right to life was engaged insofar as the prohibition might force her to take her life earlier than she otherwise would if she had access to a physician-assisted death.

[31] The trial judge concluded that the deprivation of the claimants' s. 7 rights was not in accordance with the principles of fundamental justice, particularly the principles against overbreadth and gross disproportionality. The prohibition was broader than necessary, as the evidence showed that a system with properly designed and administered safeguards offered a less restrictive means of reaching the government's objective. Moreover, the "very severe" effects of the absolute prohibition in relation to its salutary effects rendered it grossly disproportionate (para. 1378). As with the s. 15 infringement, the trial judge found the s. 7 infringement was not justified under s. 1.

[32] In the result, the trial judge declared the prohibition unconstitutional, granted a one-year suspension of invalidity, and provided Ms. Taylor with a constitutional exemption for use during the one-year period of the suspension. Ms. Taylor passed away prior to the appeal of this matter, without accessing the exemption.

[33] In a separate decision on costs (2012 BCSC 1587, 271 C.R.R. (2d) 224), the trial judge ordered an award of special costs in favour of the plaintiffs. The issues in the case were "complex and

que la prohibition avait une incidence sur ces trois intérêts. La prohibition de demander de l'aide médicale à mourir privait les personnes de leur liberté, qui comporte [TRADUCTION] « le droit d'être protégé des ingérences de l'État relativement aux décisions médicales fondamentalement importantes et personnelles » (par. 1302). La prohibition empiétait également sur la sécurité de la personne de M^me^ Taylor en limitant la maîtrise qu'elle exerçait sur son intégrité corporelle. Même si la juge de première instance a rejeté une approche « qualitative » du droit à la vie et a statué que seule une menace de mort faisait intervenir ce droit, elle a estimé que le droit à la vie de M^me^ Taylor était en jeu dans la mesure où la prohibition la forcerait peut-être à s'enlever la vie plus tôt qu'elle ne le ferait si elle pouvait obtenir une aide médicale à mourir.

[31] La juge de première instance a statué que l'atteinte aux droits garantis aux demandeurs par l'art. 7 n'était pas conforme aux principes de justice fondamentale, en particulier les principes qui interdisent la portée excessive et le caractère totalement disproportionné. La prohibition était plus large que nécessaire, car la preuve établissait qu'un régime offrant des garanties conçues et appliquées adéquatement constituait un moyen moins restrictif de réaliser l'objectif gouvernemental. En outre, les effets [TRADUCTION] « très graves » de la prohibition absolue, par rapport à ses effets bénéfiques, la rendaient totalement disproportionnée (par. 1378). Tout comme dans le cas de la violation de l'art. 15, la juge a conclu que la violation de l'art. 7 n'était pas justifiée aux termes de l'article premier.

[32] En conséquence, la juge de première instance a déclaré la prohibition inconstitutionnelle, a suspendu pour un an la prise d'effet de sa déclaration d'invalidité et a accordé à M^me^ Taylor une exemption constitutionnelle qu'elle pourrait utiliser pendant cette période de suspension. M^me^ Taylor est décédée avant l'audition de l'appel de cette décision, sans recourir à l'exemption.

[33] Dans une décision distincte relative aux dépens (2012 BCSC 1587, 271 C.R.R. (2d) 224), la juge de première instance a adjugé des dépens spéciaux aux demandeurs. Les questions soulevées

momentous" (para. 87) and the plaintiffs could not have prosecuted the case without assistance from pro bono counsel; an award of special costs would therefore promote the public interest in encouraging experienced counsel to take on *Charter* litigation on a pro bono basis. The trial judge ordered the Attorney General of British Columbia to pay 10 percent of the costs, noting that she had taken a full and active role in the proceedings. Canada was ordered to pay the remaining 90 percent of the award.

étaient [TRADUCTION] « complexes et de grande importance » (par. 87) et les demandeurs n'auraient pas pu poursuivre l'affaire sans l'aide d'un avocat bénévole; l'octroi de dépens spéciaux aurait donc pour effet de promouvoir l'intérêt du public à encourager les avocats d'expérience à accepter de se charger bénévolement de litiges fondés sur la *Charte*. La juge a ordonné à la procureure générale de la Colombie-Britannique de payer 10 pour 100 des dépens, soulignant qu'elle avait participé pleinement et activement à l'instance. Le Canada a été condamné à payer le reste, soit 90 pour 100 des dépens.

B. *British Columbia Court of Appeal, 2013 BCCA 435, 51 B.C.L.R. (5th) 213*

B. *Cour d'appel de la Colombie-Britannique, 2013 BCCA 435, 51 B.C.L.R. (5th) 213*

[34] The majority of the Court of Appeal, per Newbury and Saunders JJ.A., allowed Canada's appeal on the ground that the trial judge was bound to follow this Court's decision in *Rodriguez*. The majority concluded that neither the change in legislative and social facts nor the new legal issues relied on by the trial judge permitted a departure from *Rodriguez*.

[34] Les juges majoritaires de la Cour d'appel, les juges Newbury et Saunders, ont accueilli l'appel du Canada pour le motif que la juge de première instance était tenue de suivre la décision de notre Cour dans *Rodriguez*. Ils ont conclu que ni la modification des faits législatifs et sociaux, ni les nouvelles questions de droit dont a fait état la juge de première instance, ne permettaient que l'on s'écarte de l'arrêt *Rodriguez*.

[35] The majority read *Rodriguez* as implicitly rejecting the proposition that the prohibition infringes the right to life under s. 7 of the *Charter*. It concluded that the post-*Rodriguez* principles of fundamental justice — namely overbreadth and gross disproportionality — did not impose a new legal framework under s. 7. While acknowledging that the reasons in *Rodriguez* did not follow the analytical methodology that now applies under s. 7, the majority held that this would not have changed the result.

[35] Selon les juges majoritaires, la Cour dans *Rodriguez* a implicitement rejeté la proposition selon laquelle la prohibition porte atteinte au droit à la vie garanti par l'art. 7 de la *Charte*. Ils ont conclu que les principes de justice fondamentale établis après cet arrêt — la portée excessive et le caractère totalement disproportionné — n'avaient pas pour effet d'imposer un nouveau cadre juridique fondé sur l'art. 7. Tout en reconnaissant que les motifs exposés dans l'arrêt *Rodriguez* ne suivaient pas la méthode d'analyse maintenant applicable dans le cadre d'un examen fondé sur l'art. 7, les juges majoritaires ont estimé que cela n'aurait rien changé au résultat.

[36] The majority also noted that *Rodriguez* disposed of the s. 15 equality argument (which only two judges in that case expressly considered) by holding that any rights violation worked by the prohibition was justified as a reasonable limit under s. 1 of the *Charter*. The decision in *Hutterian*

[36] Les juges majoritaires ont également signalé que, dans l'arrêt *Rodriguez*, la Cour avait tranché l'argument fondé sur le droit à l'égalité garanti par l'art. 15 (que seulement deux juges ont explicitement jugé applicable dans cette affaire) en décidant que toute violation de droits qui découle

Brethren did not represent a change in the law under s. 1. Had it been necessary to consider s. 1 in relation to s. 7, the majority opined, the s. 1 analysis carried out under s. 15 likely would have led to the same conclusion — the "blanket prohibition" under s. 241 of the *Criminal Code* was justified (para. 323). Accordingly, the majority concluded that "the trial judge was bound to find that the plaintiffs' case had been authoritatively decided by *Rodriguez*" (para. 324).

de cette prohibition était justifiée en tant que limite raisonnable au sens de l'article premier de la *Charte*. L'arrêt *Hutterian Brethren* n'a pas modifié le droit applicable en ce qui a trait à l'article premier. Selon les juges majoritaires, s'il avait été nécessaire d'examiner l'article premier au regard de l'art. 7, l'analyse que requiert l'article premier à l'égard d'une violation de l'art. 15 aurait mené à la même conclusion : la « prohibition générale » prévue à l'art. 241 du *Code criminel* était justifiée (par. 323). Les juges majoritaires ont donc estimé que [TRADUCTION] « la juge de première instance était tenue de conclure qu'on avait statué péremptoirement sur la cause des demandeurs dans l'arrêt *Rodriguez* » (par. 324).

[37] Commenting on remedy in the alternative, the majority of the Court of Appeal suggested the reinstatement of the free-standing constitutional exemption eliminated in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, instead of a declaration of invalidity, as a suspended declaration presented the spectre of a legislative vacuum.

[37] Dans leurs commentaires subsidiaires relatifs à la réparation, les juges majoritaires de la Cour d'appel ont suggéré le rétablissement de l'exemption constitutionnelle indépendante qui a été éliminée dans *R. c. Ferguson*, 2008 CSC 6, [2008] 1 R.C.S. 96, au lieu de déclarer la prohibition invalide, puisqu'une déclaration d'invalidité dont l'effet est suspendu faisait apparaître le spectre d'un vide législatif.

[38] The majority denied the appellants their costs, given the outcome, but otherwise would have approved the trial judge's award of special costs. In addition, the majority held that costs should not have been awarded against British Columbia.

[38] Les juges majoritaires ont refusé les dépens aux appelants, étant donné l'issue de l'appel, mais ils auraient par ailleurs approuvé l'ordonnance de la juge de première instance octroyant les dépens spéciaux. Ils ont également statué que la Colombie-Britannique n'aurait pas dû être condamnée aux dépens.

[39] Finch C.J.B.C., dissenting, found no errors in the trial judge's assessment of *stare decisis*, her application of s. 7, or the corresponding analysis under s. 1. However, he concluded that the trial judge was bound by Sopinka J.'s conclusion that any s. 15 infringement was saved by s. 1. While he essentially agreed with her s. 7 analysis, he would have accepted a broader, qualitative scope for the right to life. He agreed with the trial judge that the prohibition was not minimally impairing, and concluded that a "carefully regulated scheme" could meet Parliament's objectives (para. 177); therefore, the breach of s. 7 could not be justified under s. 1.

[39] Le juge en chef Finch, dissident, n'a relevé aucune erreur dans l'examen, par la juge de première instance, du principe du *stare decisis*, dans l'application qu'elle a faite de l'art. 7, ni dans l'analyse correspondante fondée sur l'article premier. Il a toutefois conclu qu'elle était liée par la conclusion du juge Sopinka selon laquelle toute violation de l'art. 15 était sauvegardée par l'article premier. Bien qu'il ait souscrit pour l'essentiel à l'analyse fondée sur l'art. 7 qu'elle avait faite, il aurait aussi accepté qu'une portée plus large, et qualitative, soit conférée au droit à la vie. Il a convenu avec elle que la prohibition ne constituait pas une atteinte minimale,

He would have upheld the trial judge's order on costs.

V. Issues on Appeal

[40] The main issue in this case is whether the prohibition on physician-assisted dying found in s. 241(*b*) of the *Criminal Code* violates the claimants' rights under ss. 7 and 15 of the *Charter*. For the purposes of their claim, the appellants use "physician-assisted death" and "physician-assisted dying" to describe the situation where a physician provides or administers medication that intentionally brings about the patient's death, at the request of the patient. The appellants advance two claims: (1) that the prohibition on physician-assisted dying deprives competent adults, who suffer a grievous and irremediable medical condition that causes the person to endure physical or psychological suffering that is intolerable to that person, of their right to life, liberty and security of the person under s. 7 of the *Charter*; and (2) that the prohibition deprives adults who are physically disabled of their right to equal treatment under s. 15 of the *Charter*.

[41] Before turning to the *Charter* claims, two preliminary issues arise: (1) whether this Court's decision in *Rodriguez* can be revisited; and (2) whether the prohibition is beyond Parliament's power because physician-assisted dying lies at the core of the provincial jurisdiction over health.

VI. Was the Trial Judge Bound by *Rodriguez*?

[42] The adjudicative facts in *Rodriguez* were very similar to the facts before the trial judge. Ms. Rodriguez, like Ms. Taylor, was dying of ALS.

et a conclu qu'un [TRADUCTION] « régime soigneusement réglementé » pourrait satisfaire aux objectifs du législateur (par. 177); la violation de l'art. 7 ne pouvait donc, à son sens, être justifiée au regard de l'article premier. Il aurait confirmé l'ordonnance de première instance relative aux dépens.

V. Questions en litige soulevées dans le présent pourvoi

[40] La principale question à trancher en l'espèce est de savoir si la prohibition de l'aide médicale à mourir que l'on trouve à l'al. 241*b*) du *Code criminel* viole les droits garantis aux demandeurs par les art. 7 et 15 de la *Charte*. Pour les besoins de leur demande, les appelants emploient l'expression « aide médicale à mourir » (*physician-assisted death* et *physician-assisted dying*) pour décrire le fait, pour un médecin, de fournir ou d'administrer un médicament qui provoque intentionnellement le décès du patient à la demande de ce dernier. Les appelants invoquent deux moyens : (1) que la prohibition de l'aide médicale à mourir prive de leur droit à la vie, à la liberté et à la sécurité de la personne garanti par l'art. 7 de la *Charte* les adultes capables affectés de problèmes de santé graves et irrémédiables leur causant des souffrances physiques et psychologiques persistantes qui leur sont intolérables; et (2) que la prohibition prive les adultes affectés d'un handicap physique de leur droit à un traitement égal garanti par l'art. 15 de la *Charte*.

[41] Avant d'examiner les demandes fondées sur la *Charte*, deux questions préliminaires se posent : (1) la décision rendue par la Cour dans l'affaire *Rodriguez* peut-elle être réexaminée? Et (2) la prohibition outrepasse-t-elle la compétence du Parlement du fait que l'aide médicale à mourir se rattache au contenu essentiel de la compétence provinciale sur la santé?

VI. La juge de première instance était-elle liée par l'arrêt *Rodriguez*?

[42] Les faits en litige dans *Rodriguez* étaient très semblables à ceux dont était saisie la juge de première instance. M^me^ Rodriguez, comme M^me^ Taylor,

She, like Ms. Taylor, wanted the right to seek a physician's assistance in dying when her suffering became intolerable. The majority of the Court, per Sopinka J., held that the prohibition deprived Ms. Rodriguez of her security of the person, but found that it did so in a manner that was in accordance with the principles of fundamental justice. The majority also assumed that the provision violated the claimant's s. 15 rights, but held that the limit was justified under s. 1 of the *Charter*.

allait mourir de la SLA. Elle revendiquait, elle aussi, le droit de demander une aide médicale à mourir lorsque sa souffrance deviendrait intolérable. Au nom des juges majoritaires de la Cour, le juge Sopinka a statué que la prohibition portait atteinte au droit de M^me^ Rodriguez à la sécurité de sa personne, mais d'une manière compatible avec les principes de justice fondamentale. Les juges majoritaires ont également supposé que la disposition en cause portait atteinte aux droits garantis à la plaignante par l'art. 15, mais ont conclu que cette atteinte était justifiée au regard de l'article premier de la *Charte*.

[43] Canada and Ontario argue that the trial judge was bound by *Rodriguez* and not entitled to revisit the constitutionality of the legislation prohibiting assisted suicide. Ontario goes so far as to argue that "vertical *stare decisis*" is a *constitutional* principle that requires all lower courts to rigidly follow this Court's *Charter* precedents unless and until this Court sets them aside.

[43] Le Canada et l'Ontario soutiennent que la juge de première instance était liée par l'arrêt *Rodriguez* et n'était pas autorisée à réexaminer la constitutionnalité des dispositions législatives qui interdisent l'aide au suicide. L'Ontario va même jusqu'à prétendre que le [TRADUCTION] « *stare decisis* vertical » est un principe *constitutionnel* qui oblige toutes les juridictions inférieures à suivre rigoureusement les précédents de la Cour relatifs à la *Charte*, et ce, tant et aussi longtemps que la Cour ne les a pas écartés.

[44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[44] La doctrine selon laquelle les tribunaux d'instance inférieure doivent suivre les décisions des juridictions supérieures est un principe fondamental de notre système juridique. Elle confère une certitude tout en permettant l'évolution ordonnée et progressive du droit. Cependant, le principe du *stare decisis* ne constitue pas un carcan qui condamne le droit à l'inertie. Les juridictions inférieures peuvent réexaminer les précédents de tribunaux supérieurs dans deux situations : (1) lorsqu'une nouvelle question juridique se pose; et (2) lorsqu'une modification de la situation ou de la preuve « change radicalement la donne » (*Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 42).

[45] Both conditions were met in this case. The trial judge explained her decision to revisit *Rodriguez* by noting the changes in both the legal framework for s. 7 and the evidence on controlling the risk of abuse associated with assisted suicide.

[45] Ces deux conditions étaient réunies en l'espèce. La juge de première instance a expliqué sa décision de réexaminer l'arrêt *Rodriguez* en signalant les changements, tant dans le cadre juridique applicable à l'art. 7 que dans la preuve relative à la maîtrise du risque d'abus associé à l'aide au suicide.

[46] The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. The majority of this Court in *Rodriguez* acknowledged the argument that the impugned laws were "over-inclusive" when discussing the principles of fundamental justice (see p. 590). However, it did not apply the principle of overbreadth as it is currently understood, but instead asked whether the prohibition was "arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition" (p. 595). By contrast, the law on overbreadth, now explicitly recognized as a principle of fundamental justice, asks whether the law interferes with some conduct that has no connection to the law's objectives (*Bedford*, at para. 101). This different question may lead to a different answer. The majority's consideration of overbreadth under s. 1 suffers from the same defect: see *Rodriguez*, at p. 614. Finally, the majority in *Rodriguez* did not consider whether the prohibition was grossly disproportionate.

[46] L'argument présenté à la juge de première instance reposait sur une conception juridique de l'art. 7 différente de celle qui avait cours lors du prononcé de l'arrêt *Rodriguez*. Plus particulièrement, le droit relatif aux principes de la portée excessive et du caractère totalement disproportionné avait évolué de façon importante depuis l'arrêt *Rodriguez*. Les juges majoritaires de notre Cour dans *Rodriguez* ont pris note de l'argument selon lequel les dispositions contestées avaient une « portée excessive » lorsqu'ils ont analysé les principes de justice fondamentale (voir p. 590). Ils n'ont toutefois pas appliqué le principe de la portée excessive au sens où on l'entend aujourd'hui; ils se sont plutôt demandé si la prohibition était « arbitraire ou injuste parce qu'elle n'a aucun lien avec l'intérêt de l'État à protéger la personne vulnérable et parce qu'elle n'a aucun fondement dans la tradition juridique et les croyances de la société que, soutient-on, elle représente » (p. 595). À l'opposé, le droit applicable à la portée excessive, désormais reconnu explicitement comme principe de justice fondamentale, veut que l'on détermine si la disposition empiète sur un comportement sans lien avec son objectif (*Bedford*, par. 101). Cette question différente peut appeler une réponse différente. L'analyse que les juges majoritaires ont faite de la portée excessive sur la base de l'article premier souffre de la même lacune : voir *Rodriguez*, p. 614. Enfin, les juges majoritaires dans *Rodriguez* ne se sont pas demandé si la prohibition était totalement disproportionnée.

[47] The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*. The majority in *Rodriguez* relied on evidence of (1) the widespread acceptance of a moral or ethical distinction between passive and active euthanasia (pp. 605-7); (2) the lack of any "halfway measure" that could protect the vulnerable (pp. 613-14); and (3) the "substantial consensus" in Western countries that a blanket prohibition is necessary to protect against the slippery slope (pp. 601-6 and 613). The record before the trial judge in this case contained evidence that, if accepted, was capable of undermining each of these conclusions (see

[47] L'ensemble des faits législatifs et sociaux dans l'affaire qui nous occupe différait également des éléments de preuve soumis à la Cour dans l'affaire *Rodriguez*. Les juges majoritaires dans *Rodriguez* se sont fondés sur la preuve (1) de l'acceptation générale d'une distinction morale ou éthique entre l'euthanasie passive et l'euthanasie active (p. 605-607); (2) de l'absence de « demi-mesure » susceptible de protéger les personnes vulnérables (p. 613-614); et (3) du « consensus important », dans les pays occidentaux, sur l'opinion selon laquelle une prohibition générale est nécessaire pour empêcher un dérapage (p. 601-606

Ontario (Attorney General) v. Fraser, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 136, per Rothstein J.).

[48] While we do not agree with the trial judge that the comments in *Hutterian Brethren* on the s. 1 proportionality doctrine suffice to justify reconsideration of the s. 15 equality claim, we conclude it was open to the trial judge to reconsider the s. 15 claim as well, given the fundamental change in the facts.

VII. Does the Prohibition Interfere With the "Core" of the Provincial Jurisdiction Over Health?

[49] The appellants accept that the prohibition on assisted suicide is, in general, a valid exercise of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. However, they say that the doctrine of interjurisdictional immunity means that the prohibition cannot constitutionally apply to physician-assisted dying, because it lies at the core of the provincial jurisdiction over health care under s. 92(7), (13) and (16) of the *Constitution Act, 1867*, and is therefore beyond the legislative competence of the federal Parliament.

[50] The doctrine of interjurisdictional immunity is premised on the idea that the heads of power in ss. 91 and 92 are "exclusive", and therefore each have a "minimum and unassailable" core of content that is immune from the application of legislation enacted by the other level of government (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 33-34). To succeed in their argument on this point, the appellants must show that the prohibition, insofar as it extends to physician-assisted dying, impairs the "protected core" of the provincial jurisdiction over health:

et 613). Le dossier soumis à la juge des faits en l'espèce comportait des éléments de preuve susceptibles de miner chacune de ces conclusions s'ils étaient acceptés (voir *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3, par. 136, le juge Rothstein).

[48] Bien que nous ne soyons pas d'accord avec la juge de première instance pour dire que les observations faites dans *Hutterian Brethren* au sujet du principe de la proportionnalité garanti à l'article premier suffisent pour justifier un réexamen de la prétention fondée sur le droit à l'égalité prévu à l'art. 15, nous estimons que la juge pouvait également réexaminer la prétention fondée sur l'art. 15, compte tenu des faits radicalement différents.

VII. La prohibition porte-t-elle atteinte au « contenu essentiel » de la compétence provinciale sur la santé?

[49] Les appelants reconnaissent que la prohibition de l'aide au suicide constitue généralement un exercice valide de la compétence en matière de droit criminel conférée au gouvernement fédéral par le par. 91(27) de la *Loi constitutionnelle de 1867*. Ils affirment toutefois que, selon la doctrine de l'exclusivité des compétences, la prohibition ne peut constitutionnellement s'appliquer à l'aide médicale à mourir car elle touche à l'essence même de la compétence en matière de santé conférée aux provinces par les par. 92(7), (13) et (16) de la *Loi constitutionnelle de 1867*, et elle outrepasse donc la compétence législative du Parlement fédéral.

[50] La doctrine de l'exclusivité des compétences repose sur la prémisse que les chefs de compétence prévus aux art. 91 et 92 sont « exclusifs » et ont donc chacun un contenu essentiel « minimum [. . .] et irréductible » qui échappe à l'application de la législation édictée par l'autre ordre de gouvernement (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 33-34). Pour que leur argument sur ce point soit retenu, les appelants doivent démontrer que la prohibition, dans la mesure où elle s'applique à l'aide médicale à mourir, entrave le « contenu essentiel protégé » de la

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256, at para. 131.

[51] This Court rejected a similar argument in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134. The issue in that case was "whether the delivery of health care services constitutes a protected core of the provincial power over health care in s. 92(7), (13) and (16) . . . and is therefore immune from federal interference" (para. 66). The Court concluded that it did not (per McLachlin C.J.):

> . . . Parliament has power to legislate with respect to federal matters, notably criminal law, that touch on health. For instance, it has historic jurisdiction to prohibit medical treatments that are dangerous, or that it perceives as "socially undesirable" behaviour: *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. Morgentaler*, [1993] 3 S.C.R. 463. The federal role in the domain of health makes it impossible to precisely define what falls in or out of the proposed provincial "core". Overlapping federal jurisdiction and the sheer size and diversity of provincial health power render daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread. [para. 68]

[52] The appellants and the Attorney General of Quebec (who intervened on this point) say that it is possible to describe a precise core for the power over health, and thereby to distinguish *PHS*. The appellants' proposed core is described as a power to deliver necessary medical treatment for which there is no alternative treatment capable of meeting a patient's needs (A.F., at para. 43). Quebec takes a slightly different approach, defining the core as the power to establish the kind of health care offered to patients and supervise the process of consent required for that care (I.F., at para. 7).

compétence provinciale en matière de santé : *Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 256, par. 131.

[51] Notre Cour a rejeté un argument similaire dans *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134. Il s'agissait dans cette affaire de déterminer « si la prestation de soins de santé fait partie du contenu essentiel protégé du pouvoir conféré aux provinces par les par. 92(7), (13) et (16) [. . .] en matière de santé et si elle est de ce fait à l'abri d'une ingérence fédérale » (par. 66). La Cour a conclu que non (la juge en chef McLachlin) :

> . . . le Parlement a le pouvoir de légiférer dans des matières de compétence fédérale, comme le droit criminel, qui touchent la santé. Ainsi, il a toujours eu le pouvoir d'interdire les traitements médicaux dangereux ou qui, selon lui, constituent une « conduite socialement répréhensible » : *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616; *R. c. Morgentaler*, [1993] 3 R.C.S. 463. Compte tenu du rôle dévolu au fédéral dans le domaine de la santé, il est impossible de définir précisément les éléments que comporterait ou non le « contenu essentiel » provincial proposé. La compétence fédérale concurrente, ainsi que l'ampleur même et la diversité de la compétence provinciale en matière de santé rendent pratiquement insurmontable la tâche de délimiter avec précision un contenu essentiel provincial qui serait protégé de toute incursion fédérale. [par. 68]

[52] Les appelants et la procureure générale du Québec (qui est intervenue sur ce point) affirment qu'il est possible de définir avec précision le contenu essentiel de la compétence en matière de santé et, par conséquent, d'établir une distinction d'avec l'arrêt *PHS*. Le contenu essentiel proposé par les appelants est décrit comme le pouvoir d'administrer le traitement médical nécessaire lorsqu'aucun autre traitement ne peut répondre aux besoins du patient (m.a., par. 43). Le Québec adopte une démarche légèrement différente en définissant le contenu essentiel comme le pouvoir de décider du type de soins de santé à offrir aux patients et de superviser la procédure relative au consentement requis pour ces soins (m.i., par. 7).

[53] We are not persuaded by the submissions that *PHS* is distinguishable, given the vague terms in which the proposed definitions of the "core" of the provincial health power are couched. In our view, the appellants have not established that the prohibition on physician-assisted dying impairs the core of the provincial jurisdiction. Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 32; *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 142. This suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation. We are not satisfied on the record before us that the provincial power over health excludes the power of the federal Parliament to legislate on physician-assisted dying. It follows that the interjurisdictional immunity claim cannot succeed.

[53] Nous ne sommes pas convaincus par les arguments selon lesquels il est possible de faire une distinction d'avec *PHS*, compte tenu des mots vagues employés dans les définitions proposées du « contenu essentiel » de la compétence provinciale en matière de santé. À notre avis, les appelants n'ont pas établi que la prohibition de l'aide médicale à mourir empiète sur le contenu essentiel de la compétence provinciale. La santé est un domaine de compétence concurrente; le Parlement et les provinces peuvent validement légiférer dans ce domaine : *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 32; *Schneider c. La Reine*, [1982] 2 R.C.S. 112, p. 142. Ceci laisse croire que les deux ordres de gouvernement peuvent validement légiférer sur des aspects de l'aide médicale à mourir, en fonction du caractère et de l'objet du texte législatif. Le dossier qui nous a été soumis ne nous convainc pas que la compétence provinciale en matière de santé exclut la compétence du Parlement fédéral de légiférer sur l'aide médicale à mourir. Il s'ensuit que la prétention fondée sur l'exclusivité des compétences ne peut être retenue.

VIII. Section 7

[54] Section 7 of the *Charter* states that "[e]veryone 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."

[55] In order to demonstrate a violation of s. 7, the claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that s. 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice.

[56] For the reasons below, we conclude that the prohibition on physician-assisted dying infringes the right to life, liberty and security of Ms. Taylor and of persons in her position, and that it does so in a manner that is overbroad and thus is not in

VIII. L'article 7

[54] Aux termes de l'art. 7 de la *Charte*, « [c]hacun 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. »

[55] Pour faire la preuve d'une violation de l'art. 7, les demandeurs doivent d'abord démontrer que la loi porte atteinte à leur vie, à leur liberté ou à la sécurité de leur personne, ou les en prive. Une fois qu'ils ont établi que l'art. 7 entre en jeu, ils doivent alors démontrer que la privation en cause n'est pas conforme aux principes de justice fondamentale.

[56] Pour les motifs exposés ci-après, nous concluons que la prohibition de l'aide médicale à mourir porte atteinte au droit à la vie, à la liberté et à la sécurité de M^me^ Taylor et des personnes se trouvant dans sa situation, et qu'elle le fait d'une manière

accordance with the principles of fundamental justice. It therefore violates s. 7.

A. *Does the Law Infringe the Right to Life, Liberty and Security of the Person?*

(1) Life

[57] The trial judge found that the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. On that basis, she found that the right to life was engaged.

[58] We see no basis for interfering with the trial judge's conclusion on this point. The evidence of premature death was not challenged before this Court. It is therefore established that the prohibition deprives some individuals of life.

[59] The appellants and a number of the interveners urge us to adopt a broader, qualitative approach to the right to life. Some argue that the right to life is not restricted to the preservation of life, but protects quality of life and therefore a right to die with dignity. Others argue that the right to life protects personal autonomy and fundamental notions of self-determination and dignity, and therefore includes the right to determine whether to take one's own life.

[60] In dissent at the Court of Appeal, Finch C.J.B.C. accepted the argument that the right to life protects more than physical existence (paras. 84-89). In his view, the life interest is "intimately connected to the way a person values his or her lived experience. The point at which the meaning of life is lost, when life's positive attributes are so diminished as to render life valueless, . . . is an intensely personal decision which 'everyone' has the right to make for him or herself" (para. 86). Similarly, in his dissent in *Rodriguez*, Cory J. accepted that the right to life included a right to die with dignity, on

excessive et de ce fait non conforme aux principes de justice fondamentale. Cette prohibition viole donc l'art. 7.

A. *La loi porte-t-elle atteinte au droit à la vie, à la liberté et à la sécurité de la personne?*

(1) La vie

[57] La juge de première instance a conclu que la prohibition de l'aide médicale à mourir avait pour effet de forcer certaines personnes à s'enlever prématurément la vie, par crainte d'être incapables de le faire lorsque leurs souffrances deviendraient insupportables. Elle a conclu pour cette raison que le droit à la vie entrait en jeu.

[58] Nous ne voyons aucune raison de modifier la conclusion de la juge de première instance sur ce point. La preuve de mort prématurée n'a pas été contestée devant notre Cour. Il est donc établi que la prohibition prive certaines personnes de la vie.

[59] Les appelants et plusieurs intervenants nous pressent d'adopter une conception qualitative et plus large du droit à la vie. Certains prétendent que ce droit ne se limite pas à la préservation de la vie, mais qu'il protège la qualité de la vie et, par conséquent, le droit de mourir dans la dignité. D'autres prétendent que le droit à la vie protège l'autonomie personnelle et les notions fondamentales d'autodétermination et de dignité, et qu'il englobe donc le droit de décider de s'enlever la vie.

[60] Dissident en Cour d'appel, le juge en chef Finch a retenu l'argument selon lequel le droit à la vie ne se limite pas à la protection de l'existence physique (par. 84-89). Selon lui, cet intérêt que l'on porte à la vie est [TRADUCTION] « intimement lié à la manière dont une personne apprécie ce que la vie lui a apporté. Déterminer le stade où la vie perd son sens, où ses avantages sont réduits à un point tel qu'elle ne vaut plus rien, [. . .] constitue une décision éminemment personnelle que "chacun" a le droit de prendre pour soi » (par. 86). De même, dans ses motifs dissidents dans l'arrêt *Rodriguez*,

the ground that "dying is an integral part of living" (p. 630).

[61] The trial judge, on the other hand, rejected the "qualitative" approach to the right to life. She concluded that the right to life is only engaged when there is a threat of death as a result of government action or laws. In her words, the right to life is limited to a "right not to die" (para. 1322 (emphasis in original)).

[62] This Court has most recently invoked the right to life in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, where evidence showed that the lack of timely health care could result in death (paras. 38 and 50, per Deschamps J.; para. 123, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.), and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care (para. 91). In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights. We see no reason to alter that approach in this case.

[63] This said, we do not agree that the existential formulation of the right to life *requires* an absolute prohibition on assistance in dying, or that individuals cannot "waive" their right to life. This would create a "duty to live", rather than a "right to life", and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment. The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life. But s. 7 also encompasses life, liberty and security of the person during the passage to death. It is for this reason that the sanctity of

le juge Cory a reconnu que le droit à la vie comprenait celui de mourir avec dignité, parce que « la mort fait partie intégrante de la vie » (p. 630).

[61] La juge de première instance, par contre, a rejeté la conception « qualitative » du droit à la vie. Elle a estimé que ce droit n'entre en jeu que si une menace de mort résulte d'une mesure ou de lois prises par l'État. Pour reprendre ses propos, le droit à la vie se limite au [TRADUCTION] « droit de ne pas mourir » (par. 1322 (souligné dans l'original)).

[62] Notre Cour a invoqué tout récemment le droit à la vie dans *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791, où la preuve démontrait que l'absence de soins de santé fournis en temps opportun pouvait entraîner la mort (par. 38 et 50, la juge Deschamps; par. 123, la juge en chef McLachlin et le juge Major; par. 191 et 200, les juges Binnie et LeBel), ainsi que dans *PHS*, où les clients d'Insite étaient privés de soins médicaux susceptibles de leur sauver la vie (par. 91). Dans les deux cas, le droit n'était mis en jeu que par le danger de mort. En résumé, selon la jurisprudence, le droit à la vie entre en jeu lorsqu'une mesure ou une loi prise par l'État a directement ou indirectement pour effet d'imposer la mort à une personne ou de l'exposer à un risque accru de mort. Par contre, on a traditionnellement considéré que les préoccupations relatives à l'autonomie et à la qualité de vie étaient des droits à la liberté et à la sécurité. Nous ne voyons aucune raison de modifier cette approche en l'espèce.

[63] Cela dit, nous ne sommes pas d'avis que la formulation existentielle du droit à la vie *exige* une prohibition absolue de l'aide à mourir, ou que les personnes ne peuvent « renoncer » à leur droit à la vie. Il en résulterait une « obligation de vivre » plutôt qu'un « droit à la vie », et la légalité de tout consentement au retrait d'un traitement vital ou d'un traitement de maintien de la vie, ou du refus d'un tel traitement, serait remise en question. Le caractère sacré de la vie est une des valeurs les plus fondamentales de notre société. L'article 7 émane d'un profond respect pour la valeur de la vie humaine, mais il englobe aussi la vie, la liberté et la

life "is no longer seen to require that all human life be preserved at all costs" (*Rodriguez*, at p. 595, per Sopinka J.). And it is for this reason that the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect. It is to this fundamental choice that we now turn.

(2) Liberty and Security of the Person

[64] Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88, per Sopinka J., referring to *R. v. Morgentaler*, [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55-57; *Chaoulli*, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.

[65] The trial judge concluded that the prohibition on assisted dying limited Ms. Taylor's s. 7 right to liberty and security of the person, by interfering with "fundamentally important and personal medical decision-making" (para. 1302), imposing pain and psychological stress and depriving her of control over her bodily integrity (paras. 1293-94). She found that the prohibition left people like Ms. Taylor to suffer physical or psychological pain

sécurité de la personne durant le passage à la mort. C'est pourquoi le caractère sacré de la vie « n'exige pas que toute vie humaine soit préservée à tout prix » (*Rodriguez*, p. 595, le juge Sopinka). Et pour cette raison, le droit en est venu à reconnaître que, dans certaines circonstances, il faut respecter le choix d'une personne quant à la fin de sa vie. C'est de ce choix fondamental que nous allons maintenant traiter.

(2) La liberté et la sécurité de la personne

[64] Le souci de protéger l'autonomie et la dignité de la personne sous-tend ces deux droits. La liberté protège « le droit de faire des choix personnels fondamentaux sans intervention de l'État » : *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, par. 54. La sécurité de la personne englobe « une notion d'autonomie personnelle qui comprend [. . .] la maîtrise de l'intégrité de sa personne sans aucune intervention de l'État » (*Rodriguez*, p. 587-588, le juge Sopinka, citant *R. c. Morgentaler*, [1998] 1 R.C.S. 30) et elle est mise en jeu par l'atteinte de l'État à l'intégrité physique ou psychologique d'une personne, y compris toute mesure prise par l'État qui cause des souffrances physiques ou de graves souffrances psychologiques (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 58; *Blencoe*, par. 55-57; *Chaoulli*, par. 43, la juge Deschamps; par. 119, la juge en chef McLachlin et le juge Major; par. 191 et 200, les juges Binnie et LeBel). Bien que la liberté et la sécurité de la personne constituent des intérêts distincts, elles peuvent être examinées ensemble pour les besoins du présent pourvoi.

[65] La juge de première instance a conclu que la prohibition de l'aide à mourir limitait le droit à la liberté et à la sécurité de la personne reconnu par l'art. 7 à M^me^ Taylor en entravant la [TRADUCTION] « prise de décisions d'ordre médical fondamentalement importantes et personnelles » (par. 1302), en lui causant de la douleur et un stress psychologique et en la privant de la maîtrise de son intégrité corporelle (par. 1293-1294). Elle a estimé

and imposed stress due to the unavailability of physician-assisted dying, impinging on her security of the person. She further noted that seriously and irremediably ill persons were "denied the opportunity to make a choice that may be very important to their sense of dignity and personal integrity" and that is "consistent with their lifelong values and that reflects their life's experience" (para. 1326).

[66] We agree with the trial judge. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.

[67] The law has long protected patient autonomy in medical decision-making. In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.)). As noted in *Fleming v. Reid* (1991), 4 O.R. (3d) 74

que la prohibition laissait des personnes comme M^me^ Taylor subir de la douleur physique et psychologique et leur imposait un stress parce qu'il leur était impossible d'obtenir une aide médicale à mourir, ce qui portait atteinte à la sécurité de leur personne. Elle a également signalé que les personnes atteintes d'une maladie grave et irrémédiable étaient [TRADUCTION] « privées de la possibilité de faire un choix qui peut s'avérer très important pour leur sentiment de dignité et leur intégrité personnelle », un choix « compatible avec les valeurs qu'elles ont eues toute leur vie et qui reflète leur vécu » (par. 1326).

[66] Nous partageons l'avis de la juge de première instance. La réaction d'une personne à des problèmes de santé graves et irrémédiables est primordiale pour sa dignité et son autonomie. La loi permet aux personnes se trouvant dans cette situation de demander une sédation palliative, de refuser une alimentation et une hydratation artificielles ou de réclamer le retrait d'un équipement médical de maintien de la vie, mais leur nie le droit de demander l'aide d'un médecin pour mourir. La loi prive ces personnes de la possibilité de prendre des décisions relatives à leur intégrité corporelle et aux soins médicaux et elle empiète ainsi sur leur liberté. Et en laissant des personnes comme M^me^ Taylor subir des souffrances intolérables, elle empiète sur la sécurité de leur personne.

[67] Le droit protège depuis longtemps l'autonomie du patient dans la prise de décisions d'ordre médical. Dans *A.C. c. Manitoba (Directeur des services à l'enfant et à la famille)*, 2009 CSC 30, [2009] 2 R.C.S. 181, notre Cour, dont l'opinion majoritaire a été rédigée par la juge Abella (la dissidence ne porte pas sur ce point), a reconnu la « solide pertinence qui, dans notre système juridique, caractérise le principe selon lequel les personnes mentalement capables peuvent — et doivent pouvoir — prendre en toute liberté des décisions concernant leur intégrité corporelle » (par. 39). Ce droit de « décider de son propre sort » permet aux adultes de dicter le cours de leur propre traitement médical (par. 40) : c'est ce principe qui sous-tend la notion de « consentement éclairé » et qui est protégé par

(C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.); and *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).

[68] In *Blencoe*, a majority of the Court held that the s. 7 liberty interest is engaged "where state compulsions or prohibitions affect important and fundamental life choices" (para. 49). In *A.C.*, where the claimant sought to refuse a potentially lifesaving blood transfusion on religious grounds, Binnie J. noted that we may "instinctively recoil" from the decision to seek death because of our belief in the sanctity of human life (para. 219). But his response is equally relevant here: it is clear that anyone who seeks physician-assisted dying because they are suffering intolerably as a result of a grievous and irremediable medical condition "does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live" (*ibid.*). The trial judge, too, described this as a decision that, for some people, is "very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experience" (para. 1326). This is a decision that is rooted in their control over their bodily integrity; it represents their deeply personal response to serious pain and suffering. By denying them the opportunity to make that choice, the prohibition impinges on their liberty and security of the person. As noted above, s. 7 recognizes the value of life, but it also honours the role that autonomy and dignity play at the end of that life. We therefore conclude that ss. 241(*b*) and 14 of the *Criminal Code*, insofar as they prohibit physician-assisted dying for competent adults who seek such assistance as a result of a grievous and irremediable medical condition that

la garantie de liberté et de sécurité de la personne figurant à l'art. 7 (par. 100; voir aussi *R. c. Parker* (2000), 49 O.R. (3d) 481 (C.A.)). Comme on l'a souligné dans *Fleming c. Reid* (1991), 4 O.R. (3d) 74 (C.A.), les risques ou conséquences graves, y compris la mort, que peut entraîner la décision du patient ne permettent aucunement de porter atteinte au libre choix en matière médicale. C'est ce même principe qui s'applique dans les affaires relatives au droit de refuser de consentir à un traitement médical, ou d'en exiger le retrait ou l'interruption : voir, p. ex., *Ciarlariello c. Schacter*, [1993] 2 R.C.S. 119; *Malette c. Shulman* (1990), 72 O.R. (2d) 417 (C.A.); *Nancy B. c. Hôtel-Dieu de Québec*, [1992] R.J.Q. 361 (C.S.).

[68] Dans *Blencoe*, les juges majoritaires de la Cour ont conclu que l'intérêt relatif à la liberté garantie par l'art. 7 est en cause « lorsque des contraintes ou des interdictions de l'État influent sur les choix importants et fondamentaux qu'une personne peut faire dans sa vie » (par. 49). Dans *A.C.*, où la demanderesse voulait, pour des motifs religieux, refuser une transfusion sanguine susceptible de lui sauver la vie, le juge Binnie a indiqué que nous pouvons avoir « instinctivement un mouvement de recul » devant la décision de demander la mort en raison de notre conception du caractère sacré de la vie (par. 219). Mais sa réponse est également pertinente en l'espèce : il est clair qu'une personne qui demande une aide médicale à mourir parce que des problèmes de santé graves et irrémédiables lui causent des souffrances intolérables « le fait à cause d'une croyance profondément personnelle et fondamentale sur la façon de vivre sa vie, ou de mourir » (*ibid.*). La juge de première instance a elle aussi affirmé qu'il s'agit, pour certaines personnes, d'une décision qui [TRADUCTION] « revêt une grande importance pour leur sentiment de dignité et d'autonomie, qui est compatible avec les valeurs qu'elles ont eues toute leur vie et qui reflète leur vécu » (par. 1326). Cette décision prend sa source dans la maîtrise qu'elles exercent sur leur intégrité corporelle; la décision représente leur réaction profondément personnelle à une douleur et à des souffrances aiguës. En niant la possibilité pour ces personnes de faire ce choix, la prohibition empiète sur leur liberté et la sécurité de leur personne. Comme nous l'avons

causes enduring and intolerable suffering, infringe the rights to liberty and security of the person.

[69] We note, as the trial judge did, that Lee Carter and Hollis Johnson's interest in liberty may be engaged by the threat of criminal sanction for their role in Kay Carter's death in Switzerland. However, this potential deprivation was not the focus of the arguments raised at trial, and neither Ms. Carter nor Mr. Johnson sought a personal remedy before this Court. Accordingly, we have confined ourselves to the rights of those who seek assistance in dying, rather than of those who might provide such assistance.

(3) Summary on Section 7: Life, Liberty and Security of the Person

[70] For the foregoing reasons, we conclude that the prohibition on physician-assisted dying deprived Ms. Taylor and others suffering from grievous and irremediable medical conditions of the right to life, liberty and security of the person. The remaining question under s. 7 is whether this deprivation was in accordance with the principles of fundamental justice.

B. *The Principles of Fundamental Justice*

[71] Section 7 does not promise that the state will never interfere with a person's life, liberty or security of the person — laws do this all the time — but rather that the state will not do so in a way that violates the principles of fundamental justice.

[72] Section 7 does not catalogue the principles of fundamental justice to which it refers. Over the course of 32 years of *Charter* adjudication, this

vu, l'art. 7 reconnaît la valeur de la vie, mais respecte aussi la place qu'occupent l'autonomie et la dignité à la fin de cette vie. Nous concluons donc que, dans la mesure où ils prohibent l'aide médicale à mourir que demandent des adultes capables affectés de problèmes de santé graves et irrémédiables qui leur causent des souffrances persistantes et intolérables, l'al. 241*b*) et l'art. 14 du *Code criminel* portent atteinte aux droits à la liberté et à la sécurité de la personne.

[69] À l'instar de la juge de première instance, nous faisons observer que le droit à la liberté de Lee Carter et de Hollis Johnson peut être mis en jeu par la menace d'une sanction criminelle en raison du rôle qu'ils ont joué dans la mort de Kay Carter en Suisse. Cette privation potentielle de liberté n'était cependant pas le point de mire des arguments soulevés au procès, et ni M^me^ Carter ni M. Johnson n'ont demandé une réparation personnelle devant notre Cour. Nous nous sommes donc limités à examiner les droits des personnes qui demandent de l'aide pour mourir, plutôt que ceux des personnes qui pourraient dispenser cette aide.

(3) Résumé de l'analyse relative à l'art. 7 : la vie, la liberté et la sécurité de la personne

[70] Pour ces motifs, nous concluons que la prohibition de l'aide médicale à mourir a privé M^me^ Taylor, ainsi que d'autres personnes affectées de problèmes de santé graves et irrémédiables, du droit à la vie, à la liberté et à la sécurité de la personne. Il reste à décider, pour l'application de l'art. 7, si cette privation était conforme aux principes de justice fondamentale.

B. *Les principes de justice fondamentale*

[71] L'article 7 garantit non pas que l'État ne portera jamais atteinte à la vie, à la liberté ou à la sécurité de la personne — les lois le font constamment —, mais que l'État ne le fera pas en violation des principes de justice fondamentale.

[72] L'article 7 ne répertorie pas les principes de justice fondamentale auxquels il renvoie. Au cours des 32 ans de décisions relatives à la *Charte*, notre

Court has worked to define the minimum constitutional requirements that a law that trenches on life, liberty or security of the person must meet (*Bedford*, at para. 94). While the Court has recognized a number of principles of fundamental justice, three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.

Cour s'est employée à définir les exigences constitutionnelles minimales auxquelles doit satisfaire une loi qui empiète sur la vie, la liberté ou la sécurité de la personne (*Bedford*, par. 94). Bien que la Cour ait reconnu un certain nombre de principes de justice fondamentale, trois principes centraux se sont dégagés de la jurisprudence récente relative à l'art. 7 : les lois qui portent atteinte à la vie, à la liberté ou à la sécurité de la personne ne doivent pas être arbitraires, avoir une portée excessive ou entraîner des conséquences totalement disproportionnées à leur objet.

[73] Each of these potential vices involves comparison with the object of the law that is challenged (*Bedford*, at para. 123). The first step is therefore to identify the object of the prohibition on assisted dying.

[73] Chacun de ces vices potentiels suppose une comparaison avec l'objet de la loi contestée (*Bedford*, par. 123). La première étape consiste donc à cerner l'objet visé par la prohibition de l'aide à mourir.

[74] The trial judge, relying on *Rodriguez*, concluded that the object of the prohibition was to protect vulnerable persons from being induced to commit suicide at a time of weakness (para. 1190). All the parties except Canada accept this formulation of the object.

[74] S'appuyant sur l'arrêt *Rodriguez*, la juge de première instance a conclu que la prohibition avait pour objet d'empêcher que les personnes vulnérables soient incitées à se suicider dans un moment de faiblesse (par. 1190). Toutes les parties sauf le Canada acceptent cet énoncé de l'objet.

[75] Canada agrees that the prohibition is intended to protect the vulnerable, but argues that the object of the prohibition should also be defined more broadly as simply "the preservation of life" (R.F., at paras 66, 108, and 109). We cannot accept this submission.

[75] Le Canada convient que la prohibition vise à protéger la personne vulnérable, mais prétend que son objet doit aussi être défini plus largement et qu'il consiste simplement en [TRADUCTION] « la préservation de la vie » (m.i., par. 66, 108 et 109). Nous ne pouvons pas accepter cet argument.

[76] First, it is incorrect to say that the majority in *Rodriguez* adopted "the preservation of life" as the object of the prohibition on assisted dying. Justice Sopinka refers to the preservation of life when discussing the objectives of s. 241(*b*) (pp. 590, 614). However, he later clarifies this comment, stating that "[s]ection 241(*b*) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide" (p. 595). Sopinka J. then goes on to note that this purpose is "grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken" (*ibid.*). His remarks about the "preservation of life" in *Rodriguez* are best understood as a reference to an

[76] Premièrement, il est inexact de dire que les juges majoritaires dans *Rodriguez* ont retenu « la préservation de la vie » comme objet de la prohibition de l'aide à mourir. Le juge Sopinka parle de la préservation de la vie dans son analyse des objectifs de l'al. 241*b*) (p. 590, 614). Il précise toutefois par la suite cette remarque en disant que « [l]'alinéa 241*b*) vise à protéger la personne vulnérable qui, dans un moment de faiblesse, pourrait être incitée à se suicider » (p. 595). Le juge Sopinka poursuit en soulignant que cet objectif, « fondé sur l'intérêt de l'État à la protection de la vie, traduit la politique de l'État suivant laquelle on ne devrait pas dévaloriser la valeur de la vie humaine en permettant d'ôter la vie » (*ibid.*). Il est préférable de considérer ses

animating social value rather than as a description of the specific object of the prohibition.

[77] Second, defining the object of the prohibition on physician-assisted dying as the preservation of life has the potential to short-circuit the analysis. In *RJR-MacDonald*, this Court warned against stating the object of a law "too broadly" in the s. 1 analysis, lest the resulting objective immunize the law from challenge under the *Charter* (para. 144). The same applies to assessing whether the principles of fundamental justice are breached under s. 7. If the object of the prohibition is stated broadly as "the preservation of life", it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate. The outcome is to this extent foreordained.

[78] Finally, the jurisprudence requires the object of the impugned law to be defined precisely for the purposes of s. 7. In *Bedford*, Canada argued that the bawdy-house prohibition in s. 210 of the *Code* should be defined broadly as to "deter prostitution" for the purposes of s. 7 (para. 131). This Court rejected this argument, holding that the object of the prohibition should be confined to measures directly targeted by the law (para. 132). That reasoning applies with equal force in this case. Section 241(*b*) is not directed at preserving life, or even at preventing suicide — attempted suicide is no longer a crime. Yet Canada asks us to posit that the object of the prohibition is to preserve life, whatever the circumstances. This formulation goes beyond the ambit of the provision itself. The direct target of the measure is the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness.

[79] Before turning to the principles of fundamental justice at play, a general comment is in order.

remarques au sujet de la « préservation de la vie » dans *Rodriguez* comme une mention d'une valeur sociale directrice plutôt que comme une description de l'objet précis de la prohibition.

[77] Deuxièmement, définir l'objet visé par la prohibition de l'aide médicale à mourir comme étant la préservation de la vie risque de court-circuiter l'analyse. Dans *RJR-MacDonald*, notre Cour a mis en garde contre une formulation « trop large » de l'objet d'une loi dans l'analyse fondée sur l'article premier, de crainte que l'objectif qui en résulte empêche toute contestation de la loi fondée sur la *Charte* (par. 144). Cette mise en garde vaut également lorsqu'il s'agit de déterminer si les principes de justice fondamentale ont été violés au sens de l'art. 7. Si l'on affirme de manière générale que la prohibition a pour objet « la préservation de la vie », il devient difficile de dire que les moyens utilisés pour atteindre cet objet ont une portée excessive ou sont totalement disproportionnés. Dans cette mesure, le résultat va nécessairement de soi.

[78] Enfin, la jurisprudence exige que l'objet de la loi contestée soit défini avec précision pour l'application de l'art. 7. Le Canada a soutenu dans *Bedford* que la prohibition de tenir une maison de débauche, énoncée à l'art. 210 du *Code*, devrait être définie largement de manière à ce qu'elle vise à « décourager la prostitution » pour l'application de l'art. 7 (par. 131). Notre Cour a rejeté cet argument et a estimé que l'objet de la prohibition devrait se limiter aux mesures directement visées par la loi (par. 132). Ce raisonnement vaut tout autant en l'espèce. L'alinéa 241*b*) ne vise pas à préserver la vie, ni même à prévenir le suicide — la tentative de suicide n'est plus un crime. Le Canada nous demande pourtant d'affirmer que l'objet de la prohibition est de préserver la vie, peu importe les circonstances. Cette formulation va au-delà du champ d'application de la disposition elle-même. Ce que vise directement la mesure, c'est le but restreint d'empêcher que les personnes vulnérables soient incitées à se suicider dans un moment de faiblesse.

[79] Avant d'entreprendre l'examen des principes de justice fondamentale en jeu, une remarque

In determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s. 7, courts are not concerned with competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s. 1 of the *Charter* (*Bedford*, at paras. 123 and 125).

[80] In *Bedford*, the Court noted that requiring s. 7 claimants "to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7" (para. 127; see also *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at paras. 21-22). A claimant under s. 7 must show that the state has deprived them of their life, liberty or security of the person and that the deprivation is not in accordance with the principles of fundamental justice. They should not be tasked with also showing that these principles are "not overridden by a valid state or communal interest in these circumstances": T. J. Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995), 74 *Can. Bar Rev.* 446, at p. 449. As this Court stated in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977:

> It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter* . . . .

[81] In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (the "*Motor Vehicle Reference*"), Lamer J. (as he then was) explained that the principles of fundamental justice are derived from the essential elements of our system of justice, which is itself founded on a belief in the dignity and worth of every human person. To deprive a person of constitutional

générale s'impose. Lorsqu'ils déterminent si la privation du droit à la vie, à la liberté et à la sécurité de la personne est conforme aux principes de justice fondamentale visés à l'art. 7, les tribunaux ne s'intéressent pas à des intérêts sociaux opposés ou aux avantages publics que procure la loi attaquée. Il convient plutôt d'étudier ces prétentions morales opposées et avantages généraux pour la société à l'étape de la justification au regard de l'article premier de la *Charte* (*Bedford*, par. 123 et 125).

[80] Dans *Bedford*, la Cour a fait remarquer qu'obliger la personne qui invoque l'art. 7 « à démontrer l'efficacité de la loi par opposition à ses conséquences néfastes sur l'ensemble de la société revient à lui imposer le même fardeau que celui qui incombe à l'État pour l'application de l'article premier » (par. 127; voir aussi *Charkaoui c. Canada (Citoyenneté et Immigration)*, 2007 CSC 9, [2007] 1 R.C.S. 350, par. 21-22). La personne qui invoque l'art. 7 doit démontrer que l'État a porté atteinte à sa vie, à sa liberté ou à la sécurité de sa personne et que cette atteinte n'est pas conforme aux principes de justice fondamentale. Elle ne devrait pas être appelée à établir aussi que ces principes [TRADUCTION] « ne sont pas supplantés par un intérêt légitime de l'État ou un intérêt collectif en pareilles circonstances » : T. J. Singleton, « The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter » (1995), 74 *R. du B. can.* 446, p. 449. Comme l'a dit notre Cour dans *R. c. Swain*, [1991] 1 R.C.S. 933, p. 977 :

> Il n'est pas acceptable que l'État puisse contrecarrer l'exercice du droit de l'accusé en tentant de faire jouer les intérêts de la société dans l'application des principes de justice fondamentale, et restreindre ainsi les droits reconnus à l'accusé par l'art. 7. Les intérêts de la société doivent entrer en ligne de compte dans l'application de l'article premier de la *Charte* . . .

[81] Dans le *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486 (« *Renvoi relatif à la Motor Vehicle Act* »), le juge Lamer (plus tard Juge en chef) a expliqué que les principes de justice fondamentale découlent des éléments essentiels de notre système de justice, qui est lui-même fondé sur la foi dans la dignité et la valeur de chaque

rights arbitrarily or in a way that is overbroad or grossly disproportionate diminishes that worth and dignity. If a law operates in this way, it asks the right claimant to "serve as a scapegoat" (*Rodriguez*, at p. 621, per McLachlin J.). It imposes a deprivation via a process that is "fundamentally unfair" to the rights claimant (*Charkaoui*, at para. 22).

[82] This is not to say that such a deprivation cannot be *justified* under s. 1 of the *Charter*. In some cases the government, for practical reasons, may only be able to meet an important objective by means of a law that has some fundamental flaw. But this does not concern us when considering whether s. 7 of the *Charter* has been breached.

(1) Arbitrariness

[83] The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person: *Bedford*, at para. 111. An arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law.

[84] The object of the prohibition on physician-assisted dying is to protect the vulnerable from ending their life in times of weakness. A total ban on assisted suicide clearly helps achieve this object. Therefore, individuals' rights are not limited arbitrarily.

(2) Overbreadth

[85] The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object: *Bedford*, at paras. 101

être humain. Priver une personne de droits constitutionnels arbitrairement ou d'une manière excessive ou totalement disproportionnée diminue cette valeur et cette dignité. Si une loi s'applique ainsi, elle demande à la personne qui revendique un droit d'« être le bouc émissaire » (*Rodriguez*, p. 621, la juge McLachlin). Elle impose une privation via une procédure « fondamentalement inéquitable » envers cette personne (*Charkaoui*, par. 22).

[82] Cela ne revient pas à dire qu'une telle privation ne peut être *justifiée* au regard de l'article premier de la *Charte*. Dans certains cas, des raisons d'ordre pratique font en sorte que l'État peut uniquement atteindre un objectif important au moyen d'une loi entachée d'un quelconque vice fondamental. Mais nous n'avons pas à nous en préoccuper au moment de déterminer s'il y a eu violation de l'art. 7 de la *Charte*.

(1) Le caractère arbitraire

[83] Le principe de justice fondamentale interdisant l'arbitraire vise l'absence de lien rationnel entre l'objet de la loi et la limite qu'elle impose à la vie, à la liberté ou à la sécurité de la personne : *Bedford*, par. 111. Une loi arbitraire est une loi qui ne permet pas la réalisation de ses objectifs. Elle porte atteinte à des droits reconnus par la Constitution sans promouvoir le bien public que l'on dit être l'objet de la loi.

[84] L'objet visé par la prohibition de l'aide médicale à mourir est d'empêcher que la personne vulnérable mette fin à ses jours dans un moment de faiblesse. Puisque la prohibition absolue de l'aide au suicide favorise clairement la réalisation de cet objet, la restriction de droits individuels n'est pas arbitraire.

(2) La portée excessive

[85] L'analyse de la portée excessive consiste à déterminer si une loi qui nie des droits d'une manière généralement favorable à la réalisation de son objet va trop loin en niant les droits de certaines personnes d'une façon qui n'a aucun rapport avec son

and 112-13. Like the other principles of fundamental justice under s. 7, overbreadth is not concerned with competing social interests or ancillary benefits to the general population. A law that is drawn broadly to target conduct that bears no relation to its purpose "in order to make enforcement more practical" may therefore be overbroad (see *Bedford*, at para. 113). The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature. The focus is not on broad social impacts, but on the impact of the measure on the individuals whose life, liberty or security of the person is trammelled.

objet : *Bedford*, par. 101 et 112-113. Tout comme les autres principes de justice fondamentale au sens de l'art. 7, la notion de portée excessive ne s'attache pas à des intérêts sociaux divergents ou aux avantages accessoires pour la population en général. Une loi rédigée en termes généraux pour viser un comportement qui n'a aucun lien avec son objet « afin de faciliter son application » peut donc avoir une portée excessive (voir *Bedford*, par. 113). Il ne s'agit pas de savoir si le législateur a choisi le moyen le moins restrictif, mais de savoir si le moyen choisi porte atteinte à la vie, à la liberté ou à la sécurité de la personne d'une manière qui n'a aucun lien avec le mal qu'avait à l'esprit le législateur. On ne met pas l'accent sur des répercussions sociales générales, mais sur l'incidence de la mesure sur les personnes dont la vie, la liberté ou la sécurité est restreinte.

[86] Applying this approach, we conclude that the prohibition on assisted dying is overbroad. The object of the law, as discussed, is to protect vulnerable persons from being induced to commit suicide at a moment of weakness. Canada conceded at trial that the law catches people outside this class: "It is recognised that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives" (trial reasons, at para. 1136). The trial judge accepted that Ms. Taylor was such a person — competent, fully informed, and free from coercion or duress (para. 16). It follows that the limitation on their rights is in at least some cases not connected to the objective of protecting *vulnerable* persons. The blanket prohibition sweeps conduct into its ambit that is unrelated to the law's objective.

[86] Suivant cette approche, nous concluons que la prohibition de l'aide à mourir a une portée excessive. Comme nous l'avons vu, l'objet de la loi est d'empêcher que les personnes vulnérables soient incitées à se suicider dans un moment de faiblesse. Le Canada a admis au procès que la loi s'applique à des personnes qui n'entrent pas dans cette catégorie : [TRADUCTION] « Il est admis que les personnes qui veulent se suicider ne sont pas toutes vulnérables, et qu'il peut se trouver des gens atteints d'une déficience qui ont le désir réfléchi, rationnel et constant de mettre fin à leur propre vie » (motifs de première instance, par. 1136). La juge de première instance a reconnu que M^me^ Taylor correspondait à cette description — une personne capable, bien renseignée et libre de toute coercition ou contrainte (par. 16). Il s'ensuit que la restriction de leurs droits n'a, dans certains cas du moins, aucun lien avec l'objectif de protéger les personnes *vulnérables*. La prohibition générale fait entrer dans son champ d'application une conduite qui n'a aucun rapport avec l'objectif de la loi.

[87] Canada argues that it is difficult to conclusively identify the "vulnerable", and that therefore it cannot be said that the prohibition is overbroad. Indeed, Canada asserts, "every person is *potentially* vulnerable" from a legislative perspective (R.F., at para. 115 (emphasis in original)).

[87] Le Canada plaide qu'il est difficile d'identifier de manière concluante la « personne vulnérable », et qu'on ne peut donc pas dire que la prohibition a une portée excessive. En fait, affirme le Canada, [TRADUCTION] « chaque personne *peut* être vulnérable » du point de vue de la loi (m.i., par. 115 (en italique dans l'original)).

[88] We do not agree. The situation is analogous to that in *Bedford*, where this Court concluded that the prohibition on living on the avails of prostitution in s. 212(1)(*j*) of the *Criminal Code* was overbroad. The law in that case punished everyone who earned a living through a relationship with a prostitute, without distinguishing between those who would assist and protect them and those who would be at least potentially exploitive of them. Canada there as here argued that the line between exploitative and non-exploitative relationships was blurry, and that, as a result, the provision had to be drawn broadly to capture its targets. The Court concluded that that argument is more appropriately addressed under s. 1 (paras. 143-44).

[88] Nous ne sommes pas de cet avis. La situation est analogue à celle de l'affaire *Bedford*, où notre Cour a conclu que la prohibition de vivre des produits de la prostitution faite à l'al. 212(1)*j*) du *Code criminel* était trop large. La disposition en cause dans cette affaire sanctionnait toute personne qui gagnait sa vie aux dépens d'une prostituée, sans faire de distinction entre la personne qui aiderait et protégerait une prostituée et la personne qui, à tout le moins, pourrait l'exploiter. Le Canada a soutenu, dans cette affaire comme en l'espèce, que la ligne de démarcation entre les rapports empreints d'exploitation et ceux exempts d'exploitation était floue, et que la disposition devait donc avoir une large portée afin de réprimer les actes censés l'être. La Cour a conclu qu'il est plus opportun d'examiner cette considération dans l'analyse fondée sur l'article premier (par. 143-144).

(3) Gross Disproportionality

(3) Le caractère totalement disproportionné

[89] This principle is infringed if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure. As with overbreadth, the focus is not on the impact of the measure on society or the public, which are matters for s. 1, but on its impact on the rights of the claimant. The inquiry into gross disproportionality compares the law's purpose, "taken at face value", with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law (*Bedford*, at para. 125). The standard is high: the law's object and its impact may be incommensurate without reaching the standard for *gross* disproportionality (*Bedford*, at para. 120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 47).

[89] Il y a contravention à ce principe si l'effet de la restriction sur la vie, la liberté ou la sécurité de la personne est totalement disproportionné à l'objet de la mesure. Tout comme dans le cas de la portée excessive, l'accent est mis non pas sur l'incidence de la mesure sur la société ou le public, incidence qui relève de l'article premier, mais sur l'effet qu'elle a sur les droits du demandeur. Pour analyser le caractère totalement disproportionné de la loi, il faut comparer son objet « de prime abord » et ses effets préjudiciables sur les droits du demandeur, et déterminer si cette incidence est sans rapport aucun avec l'objet de la loi (*Bedford*, par. 125). La norme est élevée : l'objet de la loi peut ne pas être proportionné à son incidence sans que s'applique la norme du caractère *totalement* disproportionné (*Bedford*, par. 120; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, par. 47).

[90] The trial judge concluded that the prohibition's negative impact on life, liberty and security of the person was "very severe" and therefore grossly disproportionate to its objective (para. 1378). We agree that the impact of the prohibition is severe: it imposes unnecessary suffering on affected individuals, deprives them of the ability to determine what to do with their bodies and how those bodies

[90] Selon la juge de première instance, l'effet préjudiciable de la prohibition sur la vie, la liberté et la sécurité de la personne était [TRADUCTION] « très grave » et, par conséquent, totalement disproportionné à son objectif (par. 1378). Nous convenons que l'effet de la prohibition est important : elle impose aux personnes touchées des souffrances inutiles, les prive de la possibilité de décider

will be treated, and may cause those affected to take their own lives sooner than they would were they able to obtain a physician's assistance in dying. Against this it is argued that the object of the prohibition — to protect vulnerable persons from being induced to commit suicide at a time of weakness — is also of high importance. We find it unnecessary to decide whether the prohibition also violates the principle against gross disproportionality, in light of our conclusion that it is overbroad.

ce qu'il faut faire de leur corps et du traitement à lui réserver, et peut amener les personnes touchées à s'enlever la vie plus tôt qu'elles ne le feraient si elles étaient à même d'obtenir une aide médicale à mourir. Par contre, on plaide que l'objet de la prohibition — empêcher que les personnes vulnérables soient incitées à se suicider dans un moment de faiblesse — est lui aussi très important. À notre avis, puisque nous avons conclu que la portée de la prohibition était excessive, il n'est pas nécessaire de décider si la prohibition contrevient aussi au principe selon lequel elle ne doit pas avoir un caractère totalement disproportionné.

(4) Parity

[91] The appellants ask the Court to recognize a new principle of fundamental justice, the principle of parity, which would require that offenders committing acts of comparable blameworthiness receive sanctions of like severity. They say the prohibition violates this principle because it punishes the provision of physician assistance in dying with the highest possible criminal sanction (for culpable homicide), while exempting other comparable end-of-life practices from any criminal sanction.

[92] Parity in the sense invoked by the appellants has not been recognized as a principle of fundamental justice in this Court's jurisprudence to date. Given our conclusion that the deprivation of Ms. Taylor's s. 7 rights is not in accordance with the principle against overbreadth, it is unnecessary to consider this argument and we decline to do so.

IX. Does the Prohibition on Assisted Suicide Violate Section 15 of the *Charter*?

[93] Having concluded that the prohibition violates s. 7, it is unnecessary to consider this question.

X. Section 1

[94] In order to justify the infringement of the appellants' s. 7 rights under s. 1 of the *Charter*,

(4) La parité

[91] Les appelants demandent à la Cour de reconnaître un nouveau principe de justice fondamentale, le principe de la parité, lequel exigerait que les délinquants ayant commis des actes d'un degré comparable de culpabilité morale se voient infliger des sanctions de même sévérité. Selon eux, la prohibition viole ce principe car elle rend la prestation de l'aide médicale à mourir punissable de la sanction pénale la plus lourde (prévue pour l'homicide coupable), tout en exemptant de toute sanction pénale d'autres pratiques comparables de fin de vie.

[92] La parité, au sens où l'invoquent les appelants, n'a pas été reconnue comme principe de justice fondamentale dans la jurisprudence de notre Cour jusqu'à présent. Vu notre conclusion que la privation des droits reconnus à M^me^ Taylor par l'art. 7 n'est pas conforme au principe interdisant les lois de portée excessive, il n'est pas nécessaire d'examiner cet argument et nous refusons de le faire.

IX. La prohibition de l'aide au suicide viole-t-elle l'art. 15 de la *Charte*?

[93] Comme nous avons conclu que la prohibition viole l'art. 7, point n'est besoin d'examiner cette question.

X. L'article premier

[94] Pour justifier, en vertu de l'article premier de la *Charte*, l'atteinte aux droits que reconnaît

Canada must show that the law has a pressing and substantial object and that the means chosen are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103.

[95] It is difficult to justify a s. 7 violation: see *Motor Vehicle Reference*, at p. 518; *G. (J.)*, at para. 99. The rights protected by s. 7 are fundamental, and "not easily overridden by competing social interests" (*Charkaoui*, at para. 66). And it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed (*Bedford*, at para. 96). However, in some situations the state may be able to show that the public good — a matter not considered under s. 7, which looks only at the impact on the rights claimants — justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*. More particularly, in cases such as this where the competing societal interests are themselves protected under the *Charter*, a restriction on s. 7 rights may in the end be found to be proportionate to its objective.

[96] Here, the limit is prescribed by law, and the appellants concede that the law has a pressing and substantial objective. The question is whether the government has demonstrated that the prohibition is proportionate.

[97] At this stage of the analysis, the courts must accord the legislature a measure of deference. Proportionality does not require perfection: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 78. Section 1 only requires that the limits be "reasonable". This Court has emphasized that there may be a number of possible solutions to a particular social problem, and suggested that a "complex regulatory

l'art. 7 aux appelants, le Canada doit démontrer que l'objet de la loi est urgent et réel et que les moyens choisis sont proportionnels à cet objet. Une loi est proportionnée à son objet si (1) les moyens adoptés sont rationnellement liés à cet objet, (2) elle porte atteinte de façon minimale au droit en question, et (3) il y a proportionnalité entre les effets préjudiciables et les effets bénéfiques de la loi : *R. c. Oakes*, [1986] 1 R.C.S. 103.

[95] Il est difficile de justifier une violation de l'art. 7 : voir *Renvoi relatif à la Motor Vehicle Act*, p. 518; *G. (J.)*, par. 99. Les droits protégés par l'art. 7 sont fondamentaux et « peuvent difficilement être supplantés par des intérêts sociaux divergents » (*Charkaoui*, par. 66). Et il est difficile de justifier une loi qui va à l'encontre des principes de justice fondamentale et qui est de ce fait intrinsèquement lacunaire (*Bedford*, par. 96). Cependant, il peut arriver parfois que l'État soit en mesure de démontrer que le bien public — une question ne relevant pas de l'art. 7, qui tient uniquement compte de l'effet de la loi sur les personnes revendiquant les droits — justifie que l'on prive une personne de sa vie, de sa liberté ou de sa sécurité en vertu de l'article premier de la *Charte*. Plus particulièrement, dans des cas comme celui en l'espèce où les intérêts opposés de la société sont eux-mêmes protégés par la *Charte*, une restriction aux droits garantis par l'art. 7 peut, en fin de compte, être jugée proportionnée à son objectif.

[96] En l'espèce, la limite est prescrite par une règle de droit, et les appelants concèdent que la loi vise un objectif urgent et réel. Il s'agit de savoir si le gouvernement a démontré le caractère proportionné de la prohibition.

[97] À ce stade de l'analyse, les tribunaux doivent faire preuve d'une certaine déférence à l'endroit du législateur. La proportionnalité ne nécessite pas la perfection : *Saskatchewan (Human Rights Commission) c. Whatcott*, 2013 CSC 11, [2013] 1 R.C.S. 467, par. 78. L'article premier exige seulement que les limites soient « raisonnables ». Notre Cour a souligné qu'il peut y avoir plusieurs solutions à un problème social particulier et a indiqué qu'une « mesure

response" to a social ill will garner a high degree of deference (*Hutterian Brethren*, at para. 37).

[98] On the one hand, as the trial judge noted, physician-assisted death involves complex issues of social policy and a number of competing societal values. Parliament faces a difficult task in addressing this issue; it must weigh and balance the perspective of those who might be at risk in a permissive regime against that of those who seek assistance in dying. It follows that a high degree of deference is owed to Parliament's decision to impose an absolute prohibition on assisted death. On the other hand, the trial judge also found — and we agree — that the absolute prohibition could not be described as a "complex regulatory response" (para. 1180). The degree of deference owed to Parliament, while high, is accordingly reduced.

(1) Rational Connection

[99] The government must show that the absolute prohibition on physician-assisted dying is rationally connected to the goal of protecting the vulnerable from being induced to take their own lives in times of weakness. The question is whether the means the law adopts are a rational way for the legislature to pursue its objective. If not, rights are limited for no good reason. To establish a rational connection, the government need only show that there is a causal connection between the infringement and the benefit sought "on the basis of reason or logic": *RJR-MacDonald*, at para. 153.

[100] We agree with Finch C.J.B.C. in the Court of Appeal that, where an activity poses certain risks, prohibition of the activity in question is a rational method of curtailing the risks (para. 175). We therefore conclude that there is a rational connection between the prohibition and its objective.

[101] The appellants argue that the *absolute* nature of the prohibition is not logically connected to the object of the provision. This is another way

réglementaire complexe » visant à remédier à un mal social commande une grande déférence (*Hutterian Brethren*, par. 37).

[98] D'une part, comme l'a fait remarquer la juge de première instance, l'aide médicale à mourir soulève des questions complexes de politique sociale et un certain nombre de valeurs sociales opposées. La tâche du législateur confronté à cette question est difficile : il doit soupeser et pondérer le point de vue des personnes qu'un régime permissif pourrait mettre en danger et le point de vue de celles qui demandent de l'aide pour mourir. Par conséquent, il faut accorder une grande déférence à la décision du législateur d'imposer une prohibition absolue de l'aide à mourir. La juge a toutefois également conclu — et nous sommes d'accord avec elle — que la prohibition absolue ne pouvait pas être qualifiée de [TRADUCTION] « mesure réglementaire complexe » (par. 1180). Bien que le législateur ait droit à une grande déférence, celle-ci s'en trouve donc réduite.

(1) Le lien rationnel

[99] Le gouvernement doit démontrer l'existence d'un lien rationnel entre la prohibition absolue de l'aide médicale à mourir et l'objectif qui consiste à empêcher que les personnes vulnérables soient incitées à s'enlever la vie dans un moment de faiblesse. La question est de savoir si les moyens mis en œuvre par la loi représentent une façon rationnelle pour le législateur d'atteindre son objectif. Si ce n'est pas le cas, les droits sont restreints sans raison valable. Pour prouver l'existence d'un lien rationnel, le gouvernement n'a qu'à démontrer l'existence d'un lien causal, « fondé sur la raison ou la logique », entre la violation et l'avantage recherché : *RJR-MacDonald*, par. 153.

[100] À l'instar du juge en chef Finch de la Cour d'appel, nous estimons que, lorsqu'une activité pose certains risques, la prohiber constitue un moyen rationnel de réduire les risques (par. 175). Nous concluons donc à l'existence d'un lien rationnel entre la prohibition et son objectif.

[101] Les appelants soutiennent que le caractère *absolu* de la prohibition n'a pas de lien logique avec l'objet de la disposition. C'est une autre

of saying that the prohibition goes too far. In our view, this argument is better dealt with in the inquiry into minimal impairment. It is clearly rational to conclude that a law that bars all persons from accessing assistance in suicide will protect the vulnerable from being induced to commit suicide at a time of weakness. The means here are logically connected with the objective.

façon de dire que la prohibition va trop loin. À notre avis, il vaut mieux examiner cet argument dans le cadre de l'analyse de l'atteinte minimale. Il est manifestement logique de conclure qu'une loi interdisant à quiconque d'obtenir de l'aide pour se suicider protégera la personne vulnérable contre toute incitation à se suicider dans un moment de faiblesse. En l'espèce, les moyens ont un lien logique avec l'objectif.

(2) Minimal Impairment

(2) L'atteinte minimale

[102] At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*ibid.*, at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.

[102] La question qui se pose à ce stade de l'analyse est de savoir si la restriction du droit est raisonnablement adaptée à l'objectif. L'analyse de l'atteinte minimale vise à répondre à la question suivante : « . . . existe-t-il des moyens moins préjudiciables de réaliser l'objectif législatif? » (*Hutterian Brethren*, par. 53). C'est au gouvernement qu'il incombe de prouver l'absence de moyens moins attentatoires d'atteindre l'objectif « de façon réelle et substantielle » (*ibid.*, par. 55). Ce stade de l'analyse vise à garantir que la privation de droits reconnus par la *Charte* se limite à ce qui est raisonnablement nécessaire pour atteindre l'objectif de l'État.

[103] The question in this case comes down to whether the absolute prohibition on physician-assisted dying, with its heavy impact on the claimants' s. 7 rights to life, liberty and security of the person, is the least drastic means of achieving the legislative objective. It was the task of the trial judge to determine whether a regime less restrictive of life, liberty and security of the person could address the risks associated with physician-assisted dying, or whether Canada was right to say that the risks could not adequately be addressed through the use of safeguards.

[103] En l'espèce, la question se résume à savoir si la prohibition absolue de l'aide médicale à mourir, avec ses lourdes répercussions sur les droits des demandeurs à la vie, à la liberté et à la sécurité de leur personne protégés par l'art. 7, constitue le moyen le moins radical d'atteindre l'objectif législatif. Il incombait à la juge de première instance de décider si un régime moins attentatoire à la vie, à la liberté et à la sécurité de la personne pouvait contrer les risques associés à l'aide médicale à mourir, ou si le Canada avait raison de dire que le recours à des garanties ne permettait pas de contrer adéquatement ces risques.

[104] This question lies at the heart of this case and was the focus of much of the evidence at trial. In assessing minimal impairment, the trial judge heard evidence from scientists, medical practitioners, and others who were familiar with end-of-life decision-making in Canada and abroad. She also heard extensive evidence from each of the jurisdictions where physician-assisted dying is legal or regulated. In the trial judge's view, an absolute prohibition would

[104] Cette question est au cœur de la présente affaire et elle était le point de mire d'une grande partie de la preuve produite au procès. Pour analyser l'atteinte minimale, la juge de première instance a entendu les témoignages de scientifiques, de praticiens de la santé et d'autres personnes qui connaissaient bien la prise de décisions concernant la fin de vie au Canada et à l'étranger. Elle a aussi pris connaissance d'une preuve abondante émanant

have been necessary if the evidence showed that physicians were unable to reliably assess competence, voluntariness, and non-ambivalence in patients; that physicians fail to understand or apply the informed consent requirement for medical treatment; or if the evidence from permissive jurisdictions showed abuse of patients, carelessness, callousness, or a slippery slope, leading to the casual termination of life (paras. 1365-66).

[105] The trial judge, however, expressly rejected these possibilities. After reviewing the evidence, she concluded that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. While there are risks, to be sure, a carefully designed and managed system is capable of adequately addressing them:

> My review of the evidence in this section, and in the preceding section on the experience in permissive jurisdictions, leads me to conclude that the risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced. [para. 883]

[106] The trial judge found that it was feasible for properly qualified and experienced physicians to reliably assess patient competence and voluntariness, and that coercion, undue influence, and ambivalence could all be reliably assessed as part of that process (paras. 795-98, 815, 837, and 843). In reaching this conclusion, she particularly relied on the evidence on the application of the informed consent standard in other medical decision-making in Canada, including end-of-life decision-making (para. 1368). She concluded that it would be possible for physicians to apply the informed consent standard to patients who seek assistance in dying, adding the caution that physicians should ensure that patients are properly informed of their diagnosis and prognosis and the range of available options

de chacun des endroits où l'aide médicale à mourir est légale ou réglementée. De l'avis de la juge, une prohibition absolue se serait révélée nécessaire si la preuve avait démontré que les médecins ne sont pas en mesure d'évaluer de manière sûre la capacité, la volonté et la non-ambivalence des patients, que les médecins ne comprennent pas la règle du consentement éclairé à un traitement médical ou ne l'appliquent pas, ou si la preuve émanant des endroits où l'aide à mourir est permise faisait état du décès fortuit d'une personne résultant de sévices, d'une insouciance, d'une insensibilité ou d'un dérapage (par. 1365-1366).

[105] La juge de première instance a toutefois écarté expressément ces possibilités. Après avoir étudié la preuve, elle a conclu qu'un régime permissif comportant des garanties adéquatement conçues et appliquées pouvait protéger les personnes vulnérables contre les abus et les erreurs. Certes, il existe des risques, mais un système soigneusement conçu et géré peut les contrer adéquatement :

> [TRADUCTION] L'examen de la preuve auquel j'ai procédé dans la présente section ainsi que dans la section précédente traitant de l'expérience vécue aux endroits où l'aide à mourir est permise m'amène à conclure que les risques inhérents à l'autorisation de l'aide médicale à mourir peuvent être reconnus et réduits considérablement dans un régime soigneusement conçu, qui impose des limites strictes scrupuleusement surveillées et appliquées. [par. 883]

[106] La juge de première instance a conclu qu'il était possible pour un médecin qualifié et expérimenté d'évaluer de manière sûre la capacité du patient et le caractère volontaire de sa décision, et que la coercition, l'abus d'influence et l'ambivalence pouvaient tous être évalués de façon sûre dans le cadre de ce processus (par. 795-798, 815, 837 et 843). Pour arriver à cette conclusion, elle s'est surtout appuyée sur la preuve relative à l'application de la norme du consentement éclairé dans la prise d'autres décisions d'ordre médical au Canada, notamment les décisions de fin de vie (par. 1368). Elle a estimé qu'il serait possible pour les médecins d'appliquer la norme du consentement éclairé à l'égard des patients qui demandent de l'aide pour mourir, et elle a ajouté la mise en garde suivante :

for medical care, including palliative care interventions aimed at reducing pain and avoiding the loss of personal dignity (para. 831).

[107] As to the risk to vulnerable populations (such as the elderly and disabled), the trial judge found that there was no evidence from permissive jurisdictions that people with disabilities are at heightened risk of accessing physician-assisted dying (paras. 852 and 1242). She thus rejected the contention that unconscious bias by physicians would undermine the assessment process (para. 1129). The trial judge found there was no evidence of inordinate impact on socially vulnerable populations in the permissive jurisdictions, and that in some cases palliative care actually improved post-legalization (para. 731). She also found that while the evidence suggested that the law had both negative and positive impacts on physicians, it did support the conclusion that physicians were better able to provide overall end-of-life treatment once assisted death was legalized (para. 1271). Finally, she found no compelling evidence that a permissive regime in Canada would result in a "practical slippery slope" (para. 1241).

(a) *Canada's Challenge to the Facts*

[108] Canada says that the trial judge made a palpable and overriding error in concluding that safeguards would minimize the risk associated with assisted dying. Canada argues that the trial judge's conclusion that the level of risk was acceptable flies in the face of her acknowledgment that some of the evidence on safeguards was weak, and that there was evidence of a lack of compliance with safeguards in permissive jurisdictions. Canada also says the trial judge erred by relying on cultural differences between Canada and other countries in finding that problems experienced elsewhere were not likely to occur in Canada.

les médecins devraient s'assurer que les patients sont informés comme il se doit de leur diagnostic et de leur pronostic ainsi que des soins médicaux qu'ils peuvent recevoir, y compris les soins palliatifs visant à calmer la douleur et à leur éviter la perte de leur dignité (par. 831).

[107] Quant au danger que courent les personnes vulnérables (comme les personnes âgées ou handicapées), la juge de première instance a conclu qu'aucune preuve émanant des endroits où l'aide à mourir est autorisée n'indique que les personnes handicapées risquent davantage d'obtenir une aide médicale à mourir (par. 852 et 1242). Elle a donc rejeté la prétention selon laquelle la partialité inconsciente du médecin compromettrait le processus d'évaluation (par. 1129). Selon la juge, aucune preuve ne démontrait l'existence de répercussions considérables sur les groupes vulnérables de la société aux endroits où l'aide à mourir est autorisée et, dans certains cas, il y avait eu amélioration des soins palliatifs après la légalisation de l'aide médicale à mourir (par. 731). Elle a ajouté que, bien que la preuve indiquait que la loi avait des incidences tant négatives que positives sur les médecins, elle appuyait la conclusion que les médecins étaient plus aptes à administrer un traitement global de fin de vie après la légalisation de l'aide à mourir (par. 1271). Enfin, elle a conclu qu'aucune preuve convaincante n'indiquait que l'instauration d'un régime permissif au Canada aboutirait à un [TRADUCTION] « dérapage » (par. 1241).

a) *Contestation des faits par le Canada*

[108] Le Canada affirme que la juge de première instance a commis une erreur manifeste et dominante en concluant que des garanties minimiseraient le risque lié à l'aide à mourir. Il plaide que la conclusion de la juge, selon laquelle le risque était acceptable, contredit le fait qu'elle ait reconnu la faiblesse de certains éléments de preuve relatifs aux garanties, et que la preuve indiquait que, là où l'aide à mourir est autorisée, l'application des garanties manifestait des lacunes. Toujours selon le Canada, la juge de première instance a eu tort de se fonder sur des différences culturelles entre le Canada et d'autres pays pour conclure que les problèmes rencontrés ailleurs n'étaient pas susceptibles de se manifester ici.

[109] We cannot accede to Canada's submission. In *Bedford*, this Court affirmed that a trial judge's findings on social and legislative facts are entitled to the same degree of deference as any other factual findings (para. 48). In our view, Canada has not established that the trial judge's conclusion on this point is unsupported, arbitrary, insufficiently precise or otherwise in error. At most, Canada's criticisms amount to "pointing out conflicting evidence", which is not sufficient to establish a palpable and overriding error (*Tsilhqot'in Nation*, at para. 60). We see no reason to reject the conclusions drawn by the trial judge. They were reasonable and open to her on the record.

[109] Nous ne pouvons retenir cet argument du Canada. Dans *Bedford*, notre Cour a affirmé que les conclusions d'un juge de première instance relatives à des faits sociaux et législatifs commandent la même déférence que toute autre conclusion de fait (par. 48). À notre avis, le Canada n'a pas établi que la conclusion de la juge de première instance sur ce point ne repose sur rien, qu'elle est arbitraire, insuffisamment précise, ou qu'elle est erronée pour une autre raison. Les critiques du Canada ne servent tout au plus qu'à « souligner le caractère contradictoire de la preuve », ce qui ne suffit pas à établir l'existence d'une erreur manifeste et dominante (*Nation Tsilhqot'in*, par. 60). Nous ne voyons aucune raison de rejeter les conclusions auxquelles est arrivée la juge. Ces conclusions étaient raisonnables compte tenu du dossier.

(b) *The Fresh Evidence*

b) *Le nouvel élément de preuve*

[110] Rothstein J. granted Canada leave to file fresh evidence on developments in Belgium since the time of the trial. This evidence took the form of an affidavit from Professor Etienne Montero, a professor in bioethics and an expert on the practice of euthanasia in Belgium. Canada says that Professor Montero's evidence demonstrates that issues with compliance and with the expansion of the criteria granting access to assisted suicide inevitably arise, even in a system of ostensibly strict limits and safeguards. It argues that this "should give pause to those who feel very strict safeguards will provide adequate protection: paper safeguards are only as strong as the human hands that carry them out" (R.F., at para. 97).

[110] Le juge Rothstein a accordé au Canada l'autorisation de présenter un nouvel élément de preuve sur les changements survenus en Belgique depuis le procès. Il s'agissait d'un affidavit d'Etienne Montero, un professeur en bioéthique et spécialiste de la pratique de l'euthanasie en Belgique. Selon le Canada, il appert de l'affidavit du professeur Montero que des problèmes d'observation et d'élargissement des critères permettant l'accès au suicide assisté surviennent inévitablement, même au sein d'un système assorti de limites et de garanties visiblement strictes. Le Canada soutient que cela [TRADUCTION] « devrait donner matière à réflexion aux tenants de l'opinion que des garanties très strictes offriront une protection suffisante : l'efficacité des garanties est proportionnelle à celle de leur application » (m.i., par. 97).

[111] Professor Montero's affidavit reviews a number of recent, controversial, and high-profile cases of assistance in dying in Belgium which would not fall within the parameters suggested in these reasons, such as euthanasia for minors or persons with psychiatric disorders or minor medical conditions. Professor Montero suggests that these cases demonstrate that a slippery slope is at work in Belgium. In his view, "[o]nce euthanasia is allowed,

[111] Dans son affidavit, le professeur Montero passe en revue plusieurs cas récents, controversés et médiatisés d'aide à mourir en Belgique auxquels ne s'appliqueraient pas les paramètres proposés dans les présents motifs, tels que l'euthanasie pour les mineurs ou pour les personnes affectées de troubles psychiatriques ou de problèmes de santé mineurs. Selon le professeur Montero, ces cas démontrent que la Belgique s'est engagée dans un dérapage.

it becomes very difficult to maintain a strict interpretation of the statutory conditions."

[112] We are not convinced that Professor Montero's evidence undermines the trial judge's findings of fact. First, the trial judge (rightly, in our view) noted that the permissive regime in Belgium is the product of a very different medico-legal culture. Practices of assisted death were "already prevalent and embedded in the medical culture" prior to legalization (para. 660). The regime simply regulates a common pre-existing practice. In the absence of a comparable history in Canada, the trial judge concluded that it was problematic to draw inferences about the level of physician compliance with legislated safeguards based on the Belgian evidence (para. 680). This distinction is relevant both in assessing the degree of physician compliance and in considering evidence with regards to the potential for a slippery slope.

[113] Second, the cases described by Professor Montero were the result of an oversight body exercising discretion in the interpretation of the safeguards and restrictions in the Belgian legislative regime — a discretion the Belgian Parliament has not moved to restrict. These cases offer little insight into how a Canadian regime might operate.

(c) *The Feasibility of Safeguards and the Possibility of a "Slippery Slope"*

[114] At trial Canada went into some detail about the risks associated with the legalization of physician-assisted dying. In its view, there are many possible sources of error and many factors that can render a patient "decisionally vulnerable" and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence

À son avis, [TRADUCTION] « [u]ne fois l'euthanasie permise, il devient très difficile de s'en tenir à une interprétation stricte des conditions prévues par la loi. »

[112] Nous ne sommes pas convaincus que la preuve présentée par le professeur Montero mine les conclusions de fait de la juge de première instance. En premier lieu, cette dernière a signalé (à juste titre selon nous) que le régime permissif de la Belgique résulte d'une culture médico-légale très différente. L'aide à mourir y était [TRADUCTION] « déjà répandue et intégrée à la culture médicale » avant sa légalisation (par. 660). Le régime ne fait que réglementer une pratique courante qui existait déjà. Puisque le Canada n'a pas connu de phénomène analogue, la juge de première instance a estimé problématique de tirer, sur la foi de la preuve provenant de la Belgique, des conclusions relatives à la mesure dans laquelle les médecins respectent les garanties législatives (par. 680). Cette distinction est pertinente tant pour évaluer le degré de respect des garanties par les médecins que pour apprécier la preuve concernant la possibilité de dérapage.

[113] En deuxième lieu, les cas décrits par le professeur Montero découlaient de l'exercice, par un organisme de surveillance, de son pouvoir discrétionnaire pour interpréter les garanties et restrictions prévues par le régime législatif belge. Le Parlement de la Belgique n'a rien fait pour restreindre ce pouvoir. Ces cas nous éclairent peu sur l'application éventuelle d'un régime canadien.

c) *La faisabilité des garanties et la possibilité de « dérapage »*

[114] Au procès, le Canada a traité de façon assez détaillée des risques que pose la légalisation de l'aide médicale à mourir. D'après lui, de multiples sources d'erreur et facteurs peuvent rendre un patient [TRADUCTION] « vulnérable dans la prise de sa décision » et être ainsi à l'origine du risque que des personnes n'ayant pas un désir rationnel et réfléchi de mourir trouvent en fait la mort. Il souligne l'affaiblissement des facultés cognitives, la dépression ou d'autres maladies mentales, la coercition, l'abus d'influence, la manipulation psychologique ou émotionnelle, le préjudice systémique

or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment. Essentially, Canada argues that, given the breadth of this list, there is no reliable way to identify those who are vulnerable and those who are not. As a result, it says, a blanket prohibition is necessary.

[115] The evidence accepted by the trial judge does not support Canada's argument. Based on the evidence regarding assessment processes in comparable end-of-life medical decision-making in Canada, the trial judge concluded that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. Concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making. Logically speaking, there is no reason to think that the injured, ill, and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying. The risks that Canada describes are already part and parcel of our medical system.

[116] As the trial judge noted, the individual assessment of vulnerability (whatever its source) is implicitly condoned for life-and-death decision-making in Canada. In some cases, these decisions are governed by advance directives, or made by a substitute decision-maker. Canada does not argue that the risk in those circumstances requires an absolute prohibition (indeed, there is currently no federal regulation of such practices). In *A.C.*, Abella J. adverted to the potential vulnerability of adolescents who are faced with life-and-death decisions about medical treatment (paras. 72-78). Yet, this Court

(envers les personnes âgées ou les handicapés) et la possibilité d'ambivalence ou de diagnostic erroné comme facteurs susceptibles de passer inaperçus ou de causer des erreurs dans l'évaluation de la capacité. Le Canada soutient essentiellement qu'étant donné l'étendue de cette liste, il n'existe aucun moyen sûr de savoir qui est vulnérable et qui ne l'est pas. Par conséquent, il estime qu'une prohibition générale s'impose.

[115] La preuve retenue par la juge de première instance n'étaye pas l'argument du Canada. Se fondant sur la preuve relative aux procédures d'évaluation dans la prise de décisions médicales analogues concernant la fin de vie au Canada, la juge a conclu que la vulnérabilité peut être évaluée au cas par cas au moyen des procédures suivies par les médecins lorsqu'ils évaluent le consentement éclairé et la capacité décisionnelle dans le contexte de la prise de décisions d'ordre médical de façon plus générale. Les préoccupations au sujet de la capacité décisionnelle et de la vulnérabilité se posent dans tous les cas de décisions médicales concernant la fin de vie. D'un point de vue logique, il n'y a aucune raison de croire que les blessés, les malades et les handicapés qui peuvent refuser un traitement vital ou un traitement de maintien de la vie, demander le retrait de l'un ou l'autre traitement, ou encore réclamer une sédation palliative, sont moins vulnérables ou moins susceptibles de prendre une décision faussée que ceux qui pourraient demander une assistance plus active pour mourir. Les risques dont parle le Canada font déjà partie intégrante de notre régime médical.

[116] Comme l'a fait remarquer la juge de première instance, on cautionne implicitement l'évaluation individuelle de la vulnérabilité (quelle que soit sa source) dans la prise de décisions de vie ou de mort au Canada. Dans certains cas, ces décisions sont régies par des directives préalables ou prises par un mandataire spécial. Le Canada ne prétend pas que le risque présent dans ces cas nécessite une prohibition absolue (ces pratiques ne sont d'ailleurs pas réglementées par le gouvernement fédéral). Dans *A.C.*, la juge Abella a fait allusion à la vulnérabilité potentielle des adolescents qui ont à

implicitly accepted the viability of an individual assessment of decisional capacity in the context of that case. We accept the trial judge's conclusion that it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity.

[117] The trial judge, on the basis of her consideration of various regimes and how they operate, found that it is possible to establish a regime that addresses the risks associated with physician-assisted death. We agree with the trial judge that the risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards.

[118] Canada also argues that the permissive regulatory regime accepted by the trial judge "accepts too much risk", and that its effectiveness is "speculative" (R.F., at para. 154). In effect, Canada argues that a blanket prohibition should be upheld unless the appellants can demonstrate that an alternative approach eliminates all risk. This effectively reverses the onus under s. 1, requiring the claimant whose rights are infringed to prove less invasive ways of achieving the prohibition's object. The burden of establishing minimal impairment is on the government.

[119] The trial judge found that Canada had not discharged this burden. The evidence, she concluded, did not support the contention that a blanket prohibition was necessary in order to substantially meet the government's objectives. We agree. A theoretical or speculative fear cannot justify an absolute prohibition. As Deschamps J. stated in *Chaoulli*, at para. 68, the claimant "d[oes] not have the burden of disproving every fear or every threat", nor can the government meet its burden simply by asserting an adverse impact on the public. Justification under s. 1 is a process of demonstration, not intuition or

prendre des décisions de vie ou de mort quant à un traitement médical (par. 72-78). Notre Cour a pourtant reconnu implicitement la viabilité d'une évaluation individuelle de la capacité décisionnelle dans le contexte de cette affaire. Nous acceptons la conclusion de la juge de première instance selon laquelle il est possible pour les médecins de bien évaluer la capacité décisionnelle avec la diligence requise et en portant attention à la gravité de la décision à prendre.

[117] Se fondant sur l'examen qu'elle a fait des divers régimes et de leur fonctionnement, la juge de première instance a conclu qu'il est possible d'établir un régime qui tient compte des risques associés à l'aide médicale à mourir. Nous sommes d'accord avec elle pour dire qu'un système de garanties soigneusement conçu et surveillé peut limiter les risques associés à l'aide médicale à mourir.

[118] Le Canada plaide également que le régime de réglementation permissif ayant reçu l'aval de la juge de première instance [TRADUCTION] « accepte trop de risques » et qu'il est d'une efficacité « hypothétique » (m.i., par. 154). En fait, le Canada soutient qu'il y a lieu de confirmer la validité d'une prohibition générale à moins que les appelants puissent démontrer qu'une autre mesure éliminerait tous les risques. Cela a pour effet d'inverser le fardeau imposé par l'article premier et d'exiger du demandeur dont les droits ont été violés de prouver l'existence de moyens moins attentatoires d'atteindre l'objet de la prohibition. Le fardeau d'établir une atteinte minimale incombe à l'État.

[119] La juge de première instance a conclu que le Canada ne s'était pas acquitté de ce fardeau. Elle a estimé que la preuve n'étayait pas la prétention qu'une prohibition générale était nécessaire pour réaliser de façon substantielle les objectifs de l'État. Nous sommes du même avis. Une crainte théorique ou hypothétique ne saurait justifier une prohibition absolue. Comme l'a indiqué la juge Deschamps au par. 68 de l'arrêt *Chaoulli*, le demandeur « n'[a] [. . .] pas le fardeau d'écarter toute crainte ou toute menace », et l'État ne peut pas non plus s'acquitter de son fardeau simplement en invoquant un effet

automatic deference to the government's assertion of risk (*RJR-MacDonald*, at para. 128).

préjudiciable sur le public. La justification en vertu de l'article premier est un processus de démonstration, et non d'intuition ou de déférence automatique envers le risque invoqué par l'État (*RJR-MacDonald*, par. 128).

[120] Finally, it is argued that without an absolute prohibition on assisted dying, Canada will descend the slippery slope into euthanasia and condoned murder. Anecdotal examples of controversial cases abroad were cited in support of this argument, only to be countered by anecdotal examples of systems that work well. The resolution of the issue before us falls to be resolved not by competing anecdotes, but by the evidence. The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide. We should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse.

[120] Enfin, on prétend que, si l'aide à mourir n'est pas absolument prohibée, le Canada dérapera vers l'euthanasie et le meurtre cautionné. Des exemples anecdotiques de cas controversés rencontrés à l'étranger ont été cités à l'appui de cet argument, et aussitôt contrés par des exemples anecdotiques de systèmes qui fonctionnent bien. La question dont nous sommes saisis doit être tranchée sur le fondement non pas d'anecdotes contradictoires, mais de la preuve. Après un examen exhaustif de la preuve, la juge de première instance a rejeté l'argument selon lequel l'adoption d'un régime de réglementation nous entraînerait dans un dérapage menant à l'homicide. Nous ne devons pas supposer à la légère qu'un tel régime fonctionnera mal, ni supposer que l'infliction d'autres sanctions pénales à ceux et celles qui enlèvent la vie d'autrui se révélera inefficace contre les abus.

[121] We find no error in the trial judge's analysis of minimal impairment. We therefore conclude that the absolute prohibition is not minimally impairing.

[121] Comme nous ne relevons aucune erreur dans l'analyse qu'a faite la juge de première instance de l'atteinte minimale, nous concluons que la prohibition absolue ne constitue pas une atteinte minimale.

(3) Deleterious Effects and Salutary Benefits

(3) Effets préjudiciables et effets bénéfiques

[122] This stage of the *Oakes* analysis weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good. Given our conclusion that the law is not minimally impairing, it is not necessary to go on to this step.

[122] À ce stade de l'analyse prescrite par l'arrêt *Oakes*, il faut mettre en balance l'incidence de la loi sur les droits protégés et l'effet bénéfique de la loi au plan de l'intérêt supérieur du public. Vu notre conclusion que la loi ne constitue pas une atteinte minimale, il n'est pas nécessaire de passer à cette étape.

[123] We conclude that s. 241(*b*) and s. 14 of the *Criminal Code* are not saved by s. 1 of the *Charter*.

[123] Nous concluons que l'al. 241*b*) et l'art. 14 du *Code criminel* ne sont pas sauvegardés par application de l'article premier de la *Charte*.

XI. Remedy

A. *The Court of Appeal's Proposed Constitutional Exemption*

[124] The majority at the Court of Appeal suggested that this Court consider issuing a free-standing constitutional exemption, rather than a declaration of invalidity, should it choose to reconsider *Rodriguez*. The majority noted that the law does not currently provide an avenue for relief from a "generally sound law" that has an extraordinary effect on a small number of individuals (para. 326). It also expressed concern that it might not be possible for Parliament to create a fully rounded, well-balanced alternative policy within the time frame of any suspension of a declaration of invalidity (para. 334).

[125] In our view, this is not a proper case for a constitutional exemption. We have found that the prohibition infringes the claimants' s. 7 rights. Parliament must be given the opportunity to craft an appropriate remedy. The concerns raised in *Ferguson* about stand-alone constitutional exemptions are equally applicable here: issuing such an exemption would create uncertainty, undermine the rule of law, and usurp Parliament's role. Complex regulatory regimes are better created by Parliament than by the courts.

B. *Declaration of Invalidity*

[126] We have concluded that the laws prohibiting a physician's assistance in terminating life (*Criminal Code*, s. 241(*b*) and s. 14) infringe Ms. Taylor's s. 7 rights to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice, and that the infringement is not justified under s. 1 of the *Charter*. To the extent that the impugned laws deny the s. 7 rights of people like Ms. Taylor they are void by operation of s. 52 of the *Constitution Act, 1982*. It is for Parliament and the provincial legislatures to

XI. La réparation

A. *L'exemption constitutionnelle proposée par la Cour d'appel*

[124] Les juges majoritaires de la Cour d'appel ont suggéré à notre Cour d'envisager la possibilité d'accorder une exemption constitutionnelle autonome plutôt que de prononcer une déclaration d'invalidité si elle décide de réexaminer l'arrêt *Rodriguez*. Les juges majoritaires ont souligné qu'à l'heure actuelle, le droit n'offre pas de voie de recours à l'encontre d'une [TRADUCTION] « loi généralement valide » ayant un effet exceptionnel sur un petit nombre de personnes (par. 326). Ils ont également dit craindre qu'il ne soit pas possible pour le législateur d'instaurer une autre politique globale et équilibrée pendant toute suspension de prise d'effet d'une déclaration d'invalidité (par. 334).

[125] À notre avis, il n'est pas opportun en l'espèce d'accorder une exemption constitutionnelle. Nous avons conclu que la prohibition porte atteinte aux droits garantis aux demandeurs par l'art. 7. Il faut donner au législateur l'occasion de concevoir une réparation convenable. Les préoccupations exprimées dans *Ferguson* au sujet des exemptions constitutionnelles autonomes valent tout autant en l'espèce : pareille exemption serait source d'incertitude, saperait la primauté du droit et constituerait une usurpation de la fonction du législateur, qui est mieux placé que les tribunaux pour créer des régimes de réglementation complexes.

B. *Déclaration d'invalidité*

[126] Nous sommes arrivés à la conclusion que les dispositions prohibant l'aide médicale à mourir (l'al. 241*b*) et l'art. 14 du *Code criminel*) portaient atteinte aux droits à la vie, à la liberté et à la sécurité de la personne que l'art. 7 garantit à M^me^ Taylor, et ce d'une manière non conforme aux principes de justice fondamentale, et que cette atteinte n'était pas justifiée au regard de l'article premier de la *Charte*. Dans la mesure où les dispositions législatives contestées nient les droits que l'art. 7 reconnaît aux personnes comme M^me^ Taylor, elles sont nulles par

respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons.

[127] The appropriate remedy is therefore a declaration that s. 241(*b*) and s. 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. "Irremediable", it should be added, does not require the patient to undertake treatments that are not acceptable to the individual. The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought.

[128] We would suspend the declaration of invalidity for 12 months.

[129] We would not accede to the appellants' request to create a mechanism for exemptions during the period of suspended validity. In view of the fact that Ms. Taylor has now passed away and that none of the remaining litigants seeks a personal exemption, this is not a proper case for creating such an exemption mechanism.

[130] A number of the interveners asked the Court to account for physicians' freedom of conscience and religion when crafting the remedy in this case. The Catholic Civil Rights League, the Faith and Freedom Alliance, the Protection of Conscience Project, and the Catholic Health Alliance of Canada all expressed concern that physicians who object to medical assistance in dying on moral grounds may be obligated, based on a duty to act in their patients' best interests, to participate in physician-assisted dying. They ask us

application de l'art. 52 de la *Loi constitutionnelle de 1982*. Il appartient au Parlement et aux législatures provinciales de répondre, si elles choisissent de le faire, en adoptant une loi compatible avec les paramètres constitutionnels énoncés dans les présents motifs.

[127] La réparation appropriée consiste donc en un jugement déclarant que l'al. 241*b*) et l'art. 14 du *Code criminel* sont nuls dans la mesure où ils prohibent l'aide d'un médecin pour mourir à une personne adulte capable qui (1) consent clairement à mettre fin à sa vie; et qui (2) est affectée de problèmes de santé graves et irrémédiables (y compris une affection, une maladie ou un handicap) lui causant des souffrances persistantes qui lui sont intolérables au regard de sa condition. Il convient d'ajouter que le terme « irrémédiable » ne signifie pas que le patient doive subir des traitements qu'il juge inacceptables. Cette déclaration est censée s'appliquer aux situations de fait que présente l'espèce. Nous ne nous prononçons pas sur d'autres situations où l'aide médicale à mourir peut être demandée.

[128] Nous sommes d'avis de suspendre la prise d'effet de la déclaration d'invalidité pendant 12 mois.

[129] Nous refusons d'accéder à la demande des appelants de créer une procédure d'exemption pendant la période au cours de laquelle la prise d'effet de la déclaration d'invalidité est suspendue. Puisque M^me^ Taylor est maintenant décédée et qu'aucune des autres parties au litige ne demande une exemption personnelle, il ne s'agit pas d'un cas où il convient de créer un tel mécanisme d'exemption.

[130] Plusieurs des intervenants ont prié la Cour de tenir compte de la liberté de conscience et de religion des médecins au moment de concevoir la réparation en l'espèce. La Ligue catholique des droits de l'homme, les organismes Faith and Freedom Alliance, Protection of Conscience Project et l'Alliance catholique canadienne de la santé ont tous dit craindre que les médecins opposés à l'aide médicale à mourir pour des raisons d'ordre moral soient tenus, de par l'obligation qu'ils ont d'agir dans l'intérêt de leur patient, de participer à l'aide médicale

to confirm that physicians and other health-care workers cannot be compelled to provide medical aid in dying. They would have the Court direct the legislature to provide robust protection for those who decline to support or participate in physician-assisted dying for reasons of conscience or religion.

[131] The Canadian Medical Association reports that its membership is divided on the issue of assisted suicide. The Association's current policy states that it supports the right of all physicians, within the bounds of the law, to follow their conscience in deciding whether or not to provide aid in dying. It seeks to see that policy reflected in any legislative scheme that may be put forward. While acknowledging that the Court cannot itself set out a comprehensive regime, the Association asks us to indicate that any legislative scheme must legally protect both those physicians who choose to provide this new intervention to their patients, along with those who do not.

[132] In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures. However, we note — as did Beetz J. in addressing the topic of physician participation in abortion in *Morgentaler* — that a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. Rather, we underline that the *Charter* rights of patients and physicians will need to be reconciled.

XII. Costs

[133] The appellants ask for special costs on a full indemnity basis to cover the entire expense of bringing this case before the courts.

à mourir. Ils nous demandent de confirmer que les médecins et les autres travailleurs de la santé ne peuvent être contraints de fournir cette aide. Ils souhaitent que la Cour enjoigne au législateur d'offrir une protection solide à ceux et celles qui refusent de faciliter l'aide médicale à mourir ou d'y participer pour des raisons de conscience ou de religion.

[131] L'Association médicale canadienne signale que ses membres sont divisés sur la question de l'aide au suicide. Dans sa politique actuelle, elle dit appuyer le droit de tous les médecins, dans les limites des lois existantes, de suivre leur conscience lorsque vient le temps de décider d'offrir une aide médicale à mourir. Elle cherche à faire intégrer cette politique dans tout projet éventuel de régime législatif. Tout en reconnaissant que la Cour ne peut établir elle-même un régime complet, l'Association nous prie d'indiquer que tout régime législatif doit protéger légalement à la fois les médecins qui décident d'administrer ce nouveau traitement à leurs patients et ceux qui s'en abstiennent.

[132] À notre avis, rien dans la déclaration d'invalidité que nous proposons de prononcer ne contraindrait les médecins à dispenser une aide médicale à mourir. La déclaration ne fait qu'invalider la prohibition criminelle. La suite dépend des collèges des médecins, du Parlement et des législatures provinciales. Nous rappelons toutefois — comme l'avait fait le juge Beetz en abordant la participation du médecin à un avortement dans *Morgentaler* — que la décision du médecin de participer à l'aide à mourir relève de la conscience et, dans certains cas, de la croyance religieuse (p. 95-96). Par cette remarque, nous ne souhaitons pas court-circuiter la réponse législative ou réglementaire au présent jugement. Nous soulignons plutôt le besoin de concilier les droits garantis par la *Charte* aux patients et aux médecins.

XII. Dépens

[133] Les appelants réclament des dépens spéciaux sur la base de l'indemnisation intégrale afin de couvrir la totalité des dépenses engagées pour porter cette affaire devant les tribunaux.

[134] The trial judge awarded the appellants special costs exceeding $1,000,000, on the ground that this was justified by the public interest in resolving the legal issues raised by the case. (Costs awarded on the usual party-and-party basis would not have exceeded about $150,000.) In doing so, the trial judge relied on *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28, at para. 188, which set out four factors for determining whether to award special costs to a successful public interest litigant: (1) the case concerns matters of public importance that transcend the immediate interests of the parties, and which have not been previously resolved; (2) the plaintiffs have no personal, proprietary or pecuniary interest in the litigation that would justify the proceeding on economic grounds; (3) the unsuccessful parties have a superior capacity to bear the cost of the proceedings; and (4) the plaintiffs did not conduct the litigation in an abusive, vexatious or frivolous manner. The trial judge found that all four criteria were met in this case.

[135] The Court of Appeal saw no error in the trial judge's reasoning on special costs, given her judgment on the merits. However, as the majority overturned the trial judge's decision on the merits, it varied her costs order accordingly. The majority ordered each party to bear its own costs.

[136] The appellants argue that special costs, while exceptional, are appropriate in a case such as this, where the litigation raises a constitutional issue of high public interest, is beyond the plaintiffs' means, and was not conducted in an abusive or vexatious manner. Without such awards, they argue, plaintiffs will not be able to bring vital issues of importance to all Canadians before the courts, to the detriment of justice and other affected Canadians.

[134] La juge de première instance a adjugé aux appelants des dépens spéciaux de plus de 1 000 000 $ parce qu'une telle mesure était justifiée par l'intérêt du public à ce que soient tranchées les questions de droit en litige. (Les dépens accordés sur la base partie-partie habituelle n'auraient pas dépassé environ 150 000 $.) Pour ce faire, la juge s'est appuyée sur l'arrêt *Victoria (City) c. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28, par. 188, où la cour a énoncé quatre critères à prendre en compte avant d'accorder des dépens spéciaux à une partie représentant l'intérêt public qui a gain de cause : (1) l'affaire soulève des questions d'importance pour le public qui transcendent les intérêts immédiats des parties et qui n'ont pas encore été tranchées; (2) les demandeurs n'ont dans le litige aucun intérêt personnel, propriétal ou pécuniaire qui justifierait l'instance pour des raisons d'ordre économique; (3) les parties déboutées sont plus en mesure de supporter les dépens de l'instance; et (4) les demandeurs n'ont pas engagé le litige de façon abusive, vexatoire ou frivole. La juge de première instance a estimé que les quatre critères étaient respectés en l'espèce.

[135] La Cour d'appel n'a décelé aucune erreur dans le raisonnement de la juge de première instance relatif aux dépens spéciaux, compte tenu du jugement au fond qu'a prononcé cette dernière. Toutefois, comme les juges majoritaires ont infirmé la décision de la juge de première instance sur le fond, ils ont modifié en conséquence son ordonnance relative aux dépens. Ils ont ordonné à chacune des parties de supporter ses propres dépens.

[136] Les appelants soutiennent que, malgré leur caractère exceptionnel, les dépens spéciaux sont de mise dans un cas comme celui qui nous occupe, où l'instance soulève une question constitutionnelle de grand intérêt public, dépasse les moyens des demandeurs et n'a pas été engagée de manière abusive ou vexatoire. Ils plaident que sans ces dépens, les demandeurs ne seront pas en mesure de soumettre aux tribunaux des questions d'importance vitale pour tous les Canadiens et Canadiennes, ce qui nuirait à la justice ainsi qu'aux autres Canadiens et Canadiennes touchés.

[137] Against this, we must weigh the caution that "[c]ourts should not seek on their own to bring an alternative and extensive legal aid system into being": *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at para. 44. With this concern in mind, we are of the view that *Adams* sets the threshold for an award of special costs too low. This Court has previously emphasized that special costs are only available in "exceptional" circumstances: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 48. The test set out in *Adams* would permit an award of special costs in cases that do not fit that description. Almost all constitutional litigation concerns "matters of public importance". Further, the criterion that asks whether the unsuccessful party has a superior capacity to bear the cost of the proceedings will always favour an award against the government. Without more, special costs awards may become routine in public interest litigation.

[137] D'autre part, nous devons prendre en considération la mise en garde selon laquelle « [l]es tribunaux ne devraient pas chercher, de leur propre initiative, à mettre sur pied un autre système complet d'aide juridique » : *Little Sisters Book and Art Emporium c. Canada (Commissaire des Douanes et du Revenu)*, 2007 CSC 2, [2007] 1 R.C.S. 38, par. 44. Compte tenu de cette considération, nous sommes d'avis que le seuil applicable à l'octroi de dépens spéciaux établi dans l'arrêt *Adams* n'est pas assez élevé. Notre Cour a déjà souligné que des dépens spéciaux ne peuvent être accordés que dans des cas « d'exception » : *Finney c. Barreau du Québec*, 2004 CSC 36, [2004] 2 R.C.S. 17, par. 48. Le test énoncé dans *Adams* permettrait l'octroi de dépens spéciaux dans des cas qui ne correspondent pas à cette description. Presque tous les litiges constitutionnels ont trait à des « questions d'importance pour le public ». En outre, le critère relatif à la question de savoir si la partie déboutée est plus en mesure de supporter les dépens de l'instance favorisera toujours la condamnation du gouvernement aux dépens. Sans rien d'autre, l'octroi de dépens spéciaux peut devenir une pratique courante dans les litiges d'intérêt public.

[138] Some reference to this Court's jurisprudence on advance costs may be helpful in refining the criteria for special costs on a full indemnity basis. This Court set the test for an award of advance costs in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371. LeBel J. identified three criteria necessary to justify that departure from the usual rule of costs:

[138] Un regard sur la jurisprudence de notre Cour relative aux provisions pour frais peut s'avérer utile pour préciser les critères applicables à l'octroi de dépens spéciaux sur la base de l'indemnisation intégrale. Notre Cour a énoncé le test applicable à l'octroi d'une provision pour frais dans *Colombie-Britannique (Ministre des Forêts) c. Bande indienne Okanagan*, 2003 CSC 71, [2003] 3 R.C.S. 371. Le juge LeBel y a indiqué trois conditions qui doivent être réunies pour justifier cette dérogation à la règle habituelle en matière de dépens :

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.

1. La partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal — bref, elle serait incapable d'agir en justice sans l'ordonnance.

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient

2. La demande vaut *prima facie* d'être instruite, c'est-à-dire qu'elle paraît au moins suffisamment valable

merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. [para. 40]

[139] The Court elaborated on this test in *Little Sisters*, emphasizing that issues of public importance will not in themselves "automatically entitle a litigant to preferential treatment with respect to costs" (para. 35). The standard is a high one: only "rare and exceptional" cases will warrant such treatment (para. 38).

[140] In our view, with appropriate modifications, this test serves as a useful guide to the exercise of a judge's discretion on a motion for special costs in a case involving public interest litigants. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

[141] Where these criteria are met, a court will have the discretion to depart from the usual rule on costs and award special costs.

[142] Finally, we note that an award of special costs does not give the successful litigant the right

et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers.

3. Les questions soulevées dépassent le cadre des intérêts du plaideur, revêtent une importance pour le public et n'ont pas encore été tranchées. [par. 40]

[139] La Cour a précisé ce test dans *Little Sisters* en soulignant que les questions d'importance pour le public ne signifient pas en soi que « le plaideur a automatiquement droit à un traitement préférentiel en matière de dépens » (par. 35). La norme est élevée : seules des affaires « rares et exceptionnelles » peuvent justifier pareil traitement (par. 38).

[140] Nous estimons que ce test, modifié comme il se doit, constitue un guide utile pour l'exercice du pouvoir discrétionnaire du juge saisi d'une requête pour dépens spéciaux dans une affaire mettant en cause des parties représentant l'intérêt public. Premièrement, l'affaire doit porter sur des questions d'intérêt public véritablement exceptionnelles. Il ne suffit pas que les questions soulevées n'aient pas encore été tranchées ou qu'elles dépassent le cadre des intérêts du plaideur qui a gain de cause : elles doivent aussi avoir une incidence importante et généralisée sur la société. Deuxièmement, en plus de démontrer qu'ils n'ont dans le litige aucun intérêt personnel, propriétal ou pécuniaire qui justifierait l'instance pour des raisons d'ordre économique, les demandeurs doivent démontrer qu'il n'aurait pas été possible de poursuivre l'instance en question avec une aide financière privée. Dans ces rares cas, il est contraire à l'intérêt de la justice de demander aux plaideurs individuels (ou, ce qui est plus probable, aux avocats bénévoles) de supporter la majeure partie du fardeau financier associé à la poursuite de la demande.

[141] Lorsque ces critères sont respectés, le tribunal a le pouvoir discrétionnaire de déroger à la règle habituelle en matière de dépens et d'octroyer des dépens spéciaux.

[142] Enfin, nous faisons remarquer que l'octroi de dépens spéciaux ne donne pas à la partie qui a

to burden the defendant with any and all expenses accrued during the course of the litigation. As costs awards are meant to "encourage the reasonable and efficient conduct of litigation" (*Okanagan Indian Band*, at para. 41), only those costs that are shown to be reasonable and prudent will be covered by the award.

[143] Having regard to these criteria, we are not persuaded the trial judge erred in awarding special costs to the appellants in the truly exceptional circumstances of this case. We would order the same with respect to the proceedings in this Court and in the Court of Appeal.

[144] The final question is whether the trial judge erred in awarding 10 percent of the costs against the Attorney General of British Columbia. The trial judge acknowledged that it is unusual for courts to award costs against an Attorney General who intervenes in constitutional litigation as of right. However, as the jurisprudence reveals, there is no firm rule against it: see, e.g., *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Hegeman v. Carter*, 2008 NWTSC 48, 74 C.P.C. (6th) 112; and *Polglase v. Polglase* (1979), 18 B.C.L.R. 294 (S.C.).

[145] In her reasons on costs, the trial judge explained that counsel for British Columbia led evidence, cross-examined the appellants' witnesses, and made written and oral submissions on most of the issues during the course of the trial. She also noted that British Columbia took an active role in pre-trial proceedings. She held that an Attorney General's responsibility for costs when involved in constitutional litigation as of right varies with the role the Attorney General assumes in the litigation. Where the Attorney General assumes the role of a party, the court may find the Attorney General liable for costs in the same manner as a party (para. 96). She concluded that the Attorney General of British Columbia had taken a full and active role in the proceedings and should therefore be liable for costs

gain de cause le droit de faire supporter au défendeur les moindres dépenses engagées au cours de l'instance. Comme l'octroi de dépens est censé « favoriser le déroulement raisonnable et efficace de la poursuite » (*Bande indienne Okanagan*, par. 41), seuls les frais dont on établit le caractère raisonnable et prudent seront couverts par les dépens spéciaux.

[143] Compte tenu de ces critères, nous ne sommes pas convaincus que la juge de première instance a commis une erreur en adjugeant des dépens spéciaux aux appelants dans les circonstances vraiment exceptionnelles de l'espèce. Nous sommes d'avis de rendre la même ordonnance relativement à l'instance devant notre Cour et devant la Cour d'appel.

[144] La dernière question est de savoir si la juge de première instance a commis une erreur en condamnant la procureure générale de la Colombie-Britannique à payer 10 pour 100 des dépens. Elle a reconnu le caractère inhabituel d'une condamnation aux dépens prononcée contre un procureur général qui intervient de plein droit à un litige constitutionnel. Mais comme le révèle la jurisprudence, aucune règle établie ne l'interdit : voir, p. ex., *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315; *Hegeman c. Carter*, 2008 NWTSC 48, 74 C.P.C. (6th) 112; et *Polglase c. Polglase* (1979), 18 B.C.L.R. 294 (C.S.).

[145] Dans ses motifs relatifs aux dépens, la juge de première instance a expliqué que les avocats de la Colombie-Britannique avaient produit des éléments de preuve, contre-interrogé les témoins des appelants et présenté des arguments écrits et de vive voix sur la plupart des questions au cours du procès. Elle a ajouté que la Colombie-Britannique avait pris une part active aux procédures préliminaires. Toujours selon elle, la responsabilité qu'a un procureur général de payer les dépens lorsqu'il participe de plein droit à un litige constitutionnel varie selon le rôle qu'il joue dans l'instance. S'il joue le rôle de partie, le tribunal peut le tenir responsable des dépens comme s'il était une partie (par. 96). Elle a conclu que la procureure générale de la Colombie-Britannique avait participé pleinement et activement

in proportion to the time British Columbia took during the proceedings.

[146] We stress, as did the trial judge, that it will be unusual for a court to award costs against Attorneys General appearing before the court as of right. However, we see no reason to interfere with the trial judge's decision to do so in this case or with her apportionment of responsibility between the Attorney General of British Columbia and the Attorney General of Canada. The trial judge was best positioned to determine the role taken by British Columbia and the extent to which it shared carriage of the case.

XIII. Conclusion

[147] The appeal is allowed. We would issue the following declaration, which is suspended for 12 months:

Section 241(*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

[148] Special costs on a full indemnity basis are awarded against Canada throughout. The Attorney General of British Columbia will bear responsibility for 10 percent of the costs at trial on a full indemnity basis and will pay the costs associated with its presence at the appellate levels on a party-and-party basis.

Appeal allowed with costs.

Solicitors for the appellants: Farris, Vaughan, Wills & Murphy, Vancouver; Davis, Vancouver.

à l'instance et qu'elle devrait donc être tenue aux dépens en proportion de la période de temps qu'elle a occupée au cours de l'instance.

[146] À l'instar de la juge de première instance, nous soulignons qu'il est inhabituel pour le tribunal de condamner aux dépens le procureur général qui comparaît devant lui de plein droit. Nous ne voyons toutefois aucune raison de modifier la décision de la juge de première instance de le faire en l'espèce, ou la manière dont elle a réparti la responsabilité entre la procureure générale de la Colombie-Britannique et le procureur général du Canada. Elle était la mieux placée pour apprécier la participation de la Colombie-Britannique et la mesure dans laquelle cette dernière a partagé la responsabilité du dossier.

XIII. Conclusion

[147] Le pourvoi est accueilli. Nous sommes d'avis de prononcer le jugement déclaratoire suivant, dont la prise d'effet est suspendue pendant 12 mois :

L'alinéa 241*b*) et l'art. 14 du *Code criminel* portent atteinte de manière injustifiée à l'art. 7 de la *Charte* et sont inopérants dans la mesure où ils prohibent l'aide d'un médecin pour mourir à une personne adulte capable qui (1) consent clairement à mettre fin à sa vie; et qui (2) est affectée de problèmes de santé graves et irrémédiables (y compris une affection, une maladie ou un handicap) lui causant des souffrances persistantes qui lui sont intolérables au regard de sa condition.

[148] Le Canada est condamné à des dépens spéciaux sur la base de l'indemnisation intégrale devant toutes les cours. La procureure générale de la Colombie-Britannique doit assumer la responsabilité de 10 pour 100 des dépens du procès sur la base de l'indemnisation intégrale, et elle est condamnée aux dépens associés à sa participation devant les cours d'appel sur la base partie-partie.

Pourvoi accueilli avec dépens.

Procureurs des appelants : Farris, Vaughan, Wills & Murphy, Vancouver; Davis, Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Ottawa.

Procureur de l'intimé le procureur général du Canada : Procureur général du Canada, Ottawa.

Solicitor for the respondent the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Procureure de l'intimée la procureure générale de la Colombie-Britannique : Procureure générale de la Colombie-Britannique, Victoria.

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

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Procureure de l'intervenante la procureure générale du Québec : Procureure générale du Québec, Québec.

Solicitors for the interveners the Council of Canadians with Disabilities and the Canadian Association for Community Living: Bakerlaw, Toronto.

Procureurs des intervenants le Conseil des Canadiens avec déficiences et l'Association canadienne pour l'intégration communautaire : Bakerlaw, Toronto.

Solicitors for the intervener the Christian Legal Fellowship: Miller Thomson, Calgary.

Procureurs de l'intervenante l'Alliance des chrétiens en droit : Miller Thomson, Calgary.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario: Paliare Roland Rosenberg Rothstein, Toronto; Canadian HIV/AIDS Legal Network, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Procureurs des intervenants le Réseau juridique canadien VIH/sida et HIV & AIDS Legal Clinic Ontario : Paliare Roland Rosenberg Rothstein, Toronto; Réseau juridique canadien VIH/sida, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Solicitor for the intervener the Association for Reformed Political Action Canada: Association for Reformed Political Action Canada, Ottawa.

Procureur de l'intervenante Association for Reformed Political Action Canada : Association for Reformed Political Action Canada, Ottawa.

Solicitors for the intervener the Physicians' Alliance against Euthanasia: Norton Rose Fulbright Canada, Montréal.

Procureurs de l'intervenant le Collectif des médecins contre l'euthanasie : Norton Rose Fulbright Canada, Montréal.

Solicitors for the intervener the Evangelical Fellowship of Canada: Geoffrey Trotter Law Corporation, Vancouver.

Procureurs de l'intervenante l'Alliance évangélique du Canada : Geoffrey Trotter Law Corporation, Vancouver.

Solicitors for the interveners the Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies: Vincent Dagenais Gibson, Ottawa.

Procureurs des intervenantes Christian Medical and Dental Society of Canada et Canadian Federation of Catholic Physicians' Societies : Vincent Dagenais Gibson, Ottawa.

Solicitors for the intervener Dying With Dignity: Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante Dying With Dignity : Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Medical Association: Polley Faith, Toronto.

Solicitors for the intervener the Catholic Health Alliance of Canada: Vincent Dagenais Gibson, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners the Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité: Gratl & Company, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Borden Ladner Gervais, Toronto.

Solicitors for the interveners the Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project: Bennett Jones, Toronto; Philip H. Horgan, Toronto.

Solicitors for the intervener the Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society: Borden Ladner Gervais, Vancouver and Ottawa.

Solicitors for the intervener the Canadian Unitarian Council: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the interveners the Euthanasia Prevention Coalition and the Euthanasia Prevention Coalition — British Columbia: Scher Law Professional Corporation, Toronto.

Procureurs de l'intervenante l'Association médicale canadienne : Polley Faith, Toronto.

Procureurs de l'intervenante l'Alliance catholique canadienne de la santé : Vincent Dagenais Gibson, Ottawa.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Sack Goldblatt Mitchell, Toronto.

Procureurs des intervenantes Farewell Foundation for the Right to Die et l'Association québécoise pour le droit de mourir dans la dignité : Gratl & Company, Vancouver.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Borden Ladner Gervais, Toronto.

Procureurs des intervenants la Ligue catholique des droits de l'homme, Faith and Freedom Alliance et Protection of Conscience Project : Bennett Jones, Toronto; Philip H. Horgan, Toronto.

Procureurs de l'intervenante Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society : Borden Ladner Gervais, Vancouver et Ottawa.

Procureurs de l'intervenant le Conseil unitarien du Canada : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs des intervenantes la Coalition pour la prévention de l'euthanasie et Euthanasia Prevention Coalition — British Columbia : Scher Law Professional Corporation, Toronto.

KING'S BENCH

IN RE OLDFIELD ESTATE (No. 2)

Before WILLIAMS, C.J.K.B.

Trusts—Charitable bequests—Meaning of Charity—Whether trust a perpetuity—Wider meaning of perpetuity as affecting validity of non-charitable trust—Gift to maintain a monument not charitable—Effect of direction to use portion of fund not required to maintain monument for repair of cemetery generally—Cemetery not connected with religious organization—Whether a purpose for benefit of community—Cemetery outside jurisdiction of Court—Trustee named not qualified—Direction to appoint another trustee—Mode of investment set out in will not suitable—Investment section of Trustee Act not excluded—Direction to invest in accordance with Trustee Act.

Wills—Voluntary association, right to receive bequest—Gift conditional on legatee giving undertaking—By whom undertaking may be given to satisfy condition.

Executors and administrators—Right to use estate moneys to disinter body of testator and rebury it in accordance with his desires verbally expressed.

Conflict of laws—Which law governs administration of trusts, Manitoba law or that of England and that of France.

Courts—Stare decisis—Effect of series of decisions of single judges.

The testator Oldfield left two legacies to the following effect: 11. To pay a Church of England organization in London, England, $5000.00 on con-

dition that its secretary for the time being should undertake to the satisfaction of the trustee of the will to give certain care to a grave lot in a cemetery in London. 13. To pay the mayor for the time being of Estaires in France 50,000 francs to be invested and the income used to care for the testator's allottment and a cross thereon in the cemetery at Estaires. Any balance of income not required for that purpose to be used for the upkeep of the cemetery generally. If the said mayor is not a corporation with perpetual succession or if for any reason bequest is not good money is to be paid to any body willing to accept it on the above terms.

The executor applied by originating notice asking the court to decide whether either of the above bequests was valid as being for charitable purposes or otherwise, whether the Church of England organization could give the required undertaking, whether the mayor of Estaires was a corporation with perpetual succession, whether the executor could pay the 50,000 francs to a trust company willing to accept it subject to the terms of the bequest, whether moneys of the estate could be used to disinter the body of the testator and to bury it in the cemetery at Estaires in accordance with a wish verbally expressed by him in his lifetime, and whether the law of Manitoba governed the administration of the said trust.

Held, (1) The questions must be answered by reference to the law of Manitoba: *In re Nanton Estate*, 56 Man. R. 71, [1948] 2 W.W.R. 113; *Freke v. Lord Carberry* (1873) L.R. 16 Eq. 461.

(2) The law of Manitoba relating to charitable trusts such as contained in the will is the same as that of England, and the legal and technical meaning of the term "charity" is precisely the same in Manitoba as in England.

(3) The bequest in clause 13 is a gift of a fund the income of which is to be used (in perpetuity) for the maintenance of a monument and comes within the type known as a "tomb" case.

(4) Gifts for providing or repairing a monument or tomb not forming part of the fabric or ornament of a church cannot be supported as charities, though they may be valid as private trusts if not perpetuities.

(5) A gift primarily for the purpose of repairing the cemetery, and only as ancillary or incidental thereto certain graves or monuments, is a good charitable bequest, but one with the primary object of repairing specific graves or monuments though providing that if any balance of income remains it is to be devoted to the repair of the cemetery generally is not a good charitable bequest: *In re Pardoe, McLaughlin v. A.G.*, [1906] 2 Ch. 184, 75 L.J. Ch. 455; *In re Manser, A.G. v. Lucas*, [1905] 1 Ch. 68, 74 L.J. Ch. 95; *In re Eighmie Coulburne v. Wilks*, [1935] 1 Ch. 524, 104 L.J. Ch. 254.

(6) On the question whether the trust can be supported on the ground that it is a private trust and is not a perpetuity, it is clear that it is illegal to vest property in trustees in perpetuity to be held on perpetual non-charitable trusts, where no person can take any benefit; although a condition for repair of a tomb while not charitable is not illegal: *In re*

Vaughan (1886), 33 Ch. D. 187; *Re Nottage*, [1895] 2 Ch. 649; *In re Good*, [1905] 2 Ch. 60, 74 L.J. Ch. 512; *Kennedy v. Kennedy*, [1914] A.C. 215, 83 L.J.P.C. 63. The case of *In re Chardon*, [1928] 1 Ch. 464, 97 L.J. Ch. 289 is distinguishable on the grounds set out in the article "*Some Reflections on Re Chardon*" in *53 Law Quarterly Review*, pp. 24-60.

(7) The bequest so far as the maintenance of the specific monument and grave is concerned is not a good charitable bequest. It is a perpetuity and so void.

(8) A special rule is set out in *Tudor on Charities*, 5th ed., p. 62, and 4 *Hals.* 17 to the effect that where a fund is given in trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes, the result of the failure of the trust for the repair of the tomb is that the whole income become applicable for the charitable purpose. Under the above rule, although the trust for the monument is invalid, the trust to maintain the cemetery is a good charitable trust and the whole of the income of the fund becomes applicable for such charitable purpose.

(9) A gift to maintain a cemetery provided by a municipal authority and not connected with any church or religious denomination is a gift for the benefit the inhabitants of a community and is also for a religious purpose and is therefore on either ground a charitable bequest, and it makes no difference that the cemetery is not in Manitoba but in France or England: *In re Eighmie*, *supra; In re Vaughan*, *supra; In re Manser*, *supra; In re Robinson*, [1931] 2 Ch. 122, 100 L.J. Ch. 321.

(10) The validity of a gift for maintenance of a cemetery does not depend on its being in relief of taxes, but even if it were so, no different principles would have to be applied depending on whether it was in Manitoba or elsewhere: *In re Robinson*, *supra*.

(11) As the gift was intended to be to the mayor as a corporation with perpetual succession and as the mayor is not such a corporation, he does not qualify to receive it and the gift does not vest in him. But as a charitable gift is not permitted to fail for the lack of a trustee, the court can remedy the defect.

(12) Since the method of investment directed by the testator may not be possible or desirable, the fund should be invested in trustee securities as authorized by the laws of Manitoba. If necessary the court can settle a scheme for the execution of the trust: *In re Fenton Estate*, 30 Man. R. 246, [1920] 2 W.W.R. 367.

(13) The gift in clause 11 to the Church of England organization is a valid bequest subject to a condition; it is not a charitable bequest.

(14) A gift to a voluntary unincorporated association may be and is in this case valid: *In re Swain* (1908), 99 L.T. 604. *Carne v. Long* (1860), 2 De G.F. & J. 75, 27 L.J. Ch. 589, 45 E.R. 413; *Gravenor v. Hallam* (1767), Amb. 643, 27 E.R. 417, and *Re Laing Estate*, [1927] 1 W.W.R. 699 do not apply.

(15) Having in mind the circumstances of this case, the desire of the testator, the fact that he left a large estate and no immediate family, that the wife and only child were buried in the cemetery to which it is

proposed to move the body, the funds of the estate may be used to disinter the body and move it to the new place of burial: *Widdifield on Executor's Accounts*, 4th ed., 116 *et seq.*, and cases cited in the 3rd ed.

(16) Even when it is difficult to decide the real basis of the earlier decisions, it is of the utmost importance, as regards our law, that judges of the first instance should not disregard a series of decisions by other judges of first instance, none of which have been appealed or have been otherwise interfered with: *In re Birkett*, (1878), 9 Ch.D. 576, 47 L.J. Ch. 846.

ARGUED: 15th December, 1948.

DECIDED: 12th February, 1949.

STATEMENT—Application by the executor by way of originating notice of motion to determine *inter alia* whether two bequests were valid as being charitable gifts or otherwise. For answers given to the questions, see reasons for judgment. Costs were given payable out of the estate; those of the trustee to be taxed as between solicitor and client.

ARGUMENT—*C. V. McArthur, K.C.*, for the executors. The law applicable to the administration of the trusts relating to the Church of England Temperance Society and to the mayor of Estaires is the law of Manitoba. The testator, though domiciled in England, had been resident in Manitoba for one year prior to his death. His will was executed here and dealt only with his Manitoba estate. See *Freke v. Lord Carberry* (1873), L.R. 16 Eq. 461; 11 *E. & E. Dig.* 364; 6 *Hals.*, 2nd ed., 214; *Theobald on Wills*, 10th ed., p. 1; *In re Nanton Estate*, 56 Man. R. 79; *In re Kloebe*, 28 Ch.D. 177. The *lex situs* governs the distribution of personal property: *In re Lorrilard*, [1922] 2 Ch. 644. The bequest to the temperance society is valid whether it is charitable or not. If it is charitable there can be no question of its validity. If it is not charitable the only suggested cause of invalidity is that it might infringe the rule against perpetuities. But it does not do so. It vests within a life and 21 years in the society subject to a condition. The law relating to charities goes back to 43 Eliz. ch. 4. Though this statute was repealed by the *Mortmain and Charitable Uses Act* (1888) 51 & 52 Vic., ch. 42, such repeal would not affect the operation of the original Act in Manitoba. The four types of object which fall within the meaning of "charitable" are set out in *Commrs. etc. of Income Tax v. Pemsel*, [1891] A.C. 531. The following cases deal with the application of the statute of Elizabeth and other English statutes to bequests for the maintenance of graves or tombs: *In re Vaughan*, 33 Ch.D. 187; *In re Manser*, [1905] 1 Ch. 68; *Roche v. McDermott*, [1901] 1 Ir. R. 394; *Re Pardoe*,

[1906] 2 Ch. 184; and cases cited in *Tyssen on Charitable Bequests*, p. 93. A charitable trust may last forever. But a bequest for a charitable purpose must nevertheless vest indefeasibly within the period fixed by the rule against perpetuities. *In re Halliday Est.*, 43 Man. R. 81, and *In re Chardon*, [1928] Ch. 464, involve bequests to maintain graves. In the first the bequest was held invalid because the fund did not vest in anyone. In the second it was held that gift did not infringe the rule against perpetuities or the rule against inalienability and was valid. It is difficult to distinguish the two cases on their facts. The gift to the mayor of Estaires could be charitable if the authorities are closely followed. The cemetery is supported by a municipal authority, and donations would be in relief of rates. Would also relieve the necessity of further donations from England. The amount of the gift indicates that it was not the intention merely to maintain the graves of the testator's wife and son, but rather to keep up the cemetery generally. If the bequest is non-charitable the main question will be where it vests. It could be said to vest in a trust company to which it might be handed over by the trustee of the estate subject to the trust company obtaining a satisfactory conveyance from the town of Estaires. As to the meaning of "to vest," see *Re Randall*, 38 Ch. 213. It is possible for property to vest in a trustee, although it does not mean that the trustee would have absolute ownership. See s. 6 of the *Bankruptcy Act*, R.S.C. 1927, ch. 11. On the question of disinterment and reburial, a very liberal allowance may be allowed to permit compliance with the last wishes of the deceased: *In re Allan v. Allan*, 3 Dem. (N.Y.); *Widdifield on Executor's Accounts*, 2nd ed., p. 116; *In re Parry Estate*, 41 Atl. R. 384.

P. G. DuVal, K.C., for Church of England Temperance Society and the mayor of Estaires. In respect of question 1, par. 11 of the will is valid. It is a gift to a charitable fund. It is subject to a condition that it keeps a grave plot in repair. The undertaking is in a form satisfactory to the trustees of the will at the time: *In re Tyler*, [1891] 3 Ch. 252 at 258. In respect of question 2, if the bequest is good the Church of England Temperance Society has power to give the undertaking. Par. 11 says the undertaking must be satisfactory to the trustees of the will and it is satisfactory and the gift is absolute: *Theobald on Wills*, 10th ed., 92, citing *Lloyd v. Lloyd*, 61 E.R. 342. In respect of question 3, the gift to the mayor of Estaires is valid. The evidence establishes that the trust has been accepted by the mayor and the cemetery is for the public's use and benefit and the maintenance is a charge on municipal income and

the tax-payers: *Income Tax Commrs. v. Pemsel*, [1891] A.C. 531 at 583; *In re Manser*, [1905] 1 Ch. 68 at 74 and 75; *In re Pardoe*, [1906] 2 Ch. 184. There is a difference between a cemetery and a church yard. "Cemetery differs from a church yard by its locality and incidents, etc.": *Luke v. Kerr* (1891) 27 C.L.J. 181 (Ont.). If this gift cannot be supported as a charitable gift under the heading of advance of religion, then it can be established as a charitable gift for other purposes beneficial to the community: *House v. Chapman* (1799), 4 Ves. 542; *A. G. v. Corp. of Shrewsbury* (1843), 6 Beav. 220, 12 L.J.Ch. 40, 41 E.R. 602; *Sir Howell Jones Williams Estate v. Inland Rev.*, [1947] 1 All E.R. 513. This last case may be distinguished. It was a case dealing with questions of taxation within the meaning of *The Revenue Act*, but does not deal with the case where a gift vests absolutely. There is nothing in the principles there stated to preclude a gift to a communal cemetery. See *Tudor on Real Proeprty, Wills and Deeds*, 3rd ed., 535; *Tudor on Charities*, 5th ed., 47, where it is stated, "A cemetery is plainly analagous to the objects mentioned in the preamble to the Statute of Elizabeth." See *A. G. v. Blizard*, 21 Beav. 233, and *In re St. Pancreas Burial Ground* (1866), L.R. 3 Eq. 175. A gift is charitable if it is in relief of rates: *A. G. v. Blizard, supra*; *Doe v. Howells*, 2 B. & Ald. 744. In the case of a trust for the relief of rates it is not necessary that the community to be benefited be an English or British community: *New v. Bonaker*, L.R. 4 Eq. 655. Even if the gift is not a charitable one it is good if it vests at once: *Chardon & Johnston v. Davies* (1928), 97 L.J.Ch. 289 and 290. The authorities are reviewed in 44 *Law Quarterly Rev.* 419 and 53 *Law Quarterly Rev.* 24 and 35-52. A gift to a cemetery which was maintained by the borough and not identified with the church was held valid: *In re Eighmie*, [1935] 1 Ch. 524, 104 L.J.Ch. 254 at 255. A trust for the benefit of a parish would be good: *Houston v. Burns*, [1918] A.C. 337. In respect of question 4, the mayor of Estaires is not a corporation under the law of France with perpetual succession, but it is submitted the mayor and council are. In respect of question 5, the trustees are empowered to pay over to a trust company or institution. This would be an absolute gift on a condition which vests at once and would not offend the rule against perpetuities: *In re Tyler, supra*; *Theobald on Wills*, 10th ed., 92, citing *Lloyd v. Lloyd, supra*.

W. P. Fillmore, K.C., for the other charities. Referred to *Statute of 43 Eliz.* ch. 4, (1601); *Origin and Growth of Poor Law System*, 12 *Hals. Statutes*, 902; *The Poor Relief Act 1601*, 43 Eliz.

ch. 2, 14 *Hals. Statutes*, 477; *Meanwell v. Meanwell*, 49 Man. R. 26; *In re Fenton Estate*, 30 Man. R. 246; The *Ontario Mortmain Act*, R.S.O. 1914, ch. 103, s. 2(2); *In re Orr*, 57 S.C.R. 298, 40 O.L.R. 567, 595. Ontario cases are not applicable because of the provisions of the Ontario statutes: *Re Harding* 4 O.W.R. 316, 318. English courts always looked to the preamble of the Statute of Eliz. as containing the enumeration of all things charitable and Manitoba courts should follow them. See *Williams Trustees v. Inland Revenue Commrs.*, [1947] A.C. 449, [1947] 1 All E. R. 513; *In re Strakosch*, [1948] 1 Ch. 37. A church is referred to in the Statute of Eliz. as a proper object of charity. A churchyard is part of a church. He referred to *In re Vaughan*, 33 Ch. D. 187 at 191; *Webster v. Southey*, 36 Ch.D. 915; *In re Eighmie Coulburne v. Wilks*, [1935] 1 Ch. 524; *In re Dalziel*, [1943] 1 Ch. 277. A gift to keep a monument in repair is bad. A "balance" gift is bad. The gift cannot be brought under the heading of relief of poor from rates as referred to in the Statutes of Eliz. He referred to the following poor rate cases: *Doe d. Preece v. Howells*, 109 E.R. 1320, 2 B. & Ad. 745; *A.G. v. Blizard* (1855), 21 Beav. 233, 25 L.J. Ch. 171; *A.G. v. Berwick-on-Tweed* (1829), Tamlyn 239, 48 E.R. 95. It is difficult to argue against the validity of the gift to the society: See *In re Chardon*, [1928] 1 Ch. 464 and *In re Dalziel, supra. In re Halliday Est.*, 43 Man. R. 81, cannot be supported. A reasonable expense only should be allowed for the removal of the body: *Re Murray*, [1936] 1 D.L.R. 463; *Re Hutzall*, [1942] 2 W.W.R. 492.

WILLIAMS, C.J.K.B.—Recently the court was asked to answer a large number of questions arising in the administration of this estate. Among the questions were two which involved a consideration of certain bequests in a will drawn by the testator himself (a layman) and relating only to his Canadian estate, some of which were clearly charitable but others of which might not be. At that time, while dealing with the other questions asked (55 Man. R. 435, [1947] 2 W.W.R. 529), for reasons then given I did not answer the two questions.

Since then all the legatees, other than those which are or may be "charitable," have been paid, and there remains in the hands of the executor $116,136.81, which is available, after paying costs, executor's remuneration, etc., to pay the charitable bequests. If these are all "charitable," the amount required to pay them in full would be $190,000.00, so there would in any event be an abatement. It is alleged, however, that two of the bequests, of amounts totalling $55,000.00, are invalid in that they are not charitable and create

perpetuities. If this contention is correct the other charitable bequests will abate much less than they otherwise would.

The relevant provisions of the will are set out in the following questions which the court is now asked to answer:

(1) Is the bequest in the last will and testament of the said Leonidas Alcibiades Oldfield reading as follows:

"11. To pay to the London council for the time being of the Church of England Temperance Society (England) five thousand dollars ($5,000.00) on the condition that the said council or the secretary for the time being for the said society undertake or undertakes, to the satisfaction of the trustee or trustees for the time being of my will but not so as to incur any personal liability on members of the said council or said secretary, to keep the grass on grave No. 172650 C/B in the Brompton Cemetery, London, England, from time to time cut, and the memorial thereon clean and erect."

valid in whole or in part as a bequest for charitable purposes or otherwise?

(2) If the said bequest is valid in whole or in part, has the London council for the time being of the Church of England Temperance Society (England), or the secretary thereof, power to give the undertaking contained in paragraph 11 of the last will and testament of Leonidas Alcibiades Oldfield?

(3) Is the bequest contained in the last will and testament of the said Leonidas Alcibiades Oldfield reading as follows:

"13. To pay to the mayor for the time being of the town of Estaires, North France, the sum of fifty thousand dollars ($50,000.00) to be invested by him in French 5 per cent rents, and in such name or names as he may think fit, the interest from which is to be used for the purpose of keeping the marble cross on the testator's allotment clean and erect and the grass on the said allotment cut and kept in good order and any balance from time to time of such interest which may not be required for the purpose aforesaid is to be applied in or toward the upkeep of said cemetery generally. If the said mayor is not properly constituted under the laws of France a corporation with perpetual succession and for such or any other reason the said bequest is not a good charitable bequest I direct my trustees to pay the said sum to any responsible corporation, body or institution which is willing to accept the said bequest subject to the terms hereof as to the application of the income therefrom."

valid in whole or in part as a bequest for charitable purposes or otherwise?

(4) Is the mayor of the town of Estaires in France properly constituted under the laws of France a corporation with perpetual succession?

(5) If the answer to question No. 3 is No, is the trustee empowered to pay over the said bequest to a responsible trust company, upon

receiving an undertaking from the said trust company that it is willing to accept the said bequest subject to the terms of the last will and testament of Leonidas Alcibiades Oldfield as to the application of the income therefrom?

(6) Has the executor appointed under the last will and testament of Alfred Clarence Weldon, deceased, who was in his lifetime the surviving executor appointed under the last will and testament of Leonidas Alcibiades Oldfield, the right to expend moneys of the estate to disinter the body of Leonidas Alcibiades Oldfield from a grave in the city of Winnipeg, in the province of Manitoba, and convey the body to France and inter it in the cemetery at or near the town of Estaire in a plot close to where his wife and son are interred?

(7) Does the law of the province of Manitoba govern the administration of the trusts relating to the London Council for the time being of the Church of England Temperance Society (England) and the mayor of Estaire in north France contained in the last will and testament of Leonidas Alcibiades Oldfield?

The testator's son, an English barrister, was killed in action, with the R.F.C., during the war of 1914-1918, and was buried in what is called the English cemetery in the town of Estaires, in France. The English cemetery, which is maintained by the British authorities, is separated from the communal or municipal cemetery of the town only by a path. When the testator's wife died she was buried in a plot in the communal cemetery opposite the grave of her son. Over her grave there is a marble cross. The communal cemetery contains, in addition to the graves of the citizens of the town, graves of English, French, and German soldiers killed in the war of 1939-1945. Of these the English graves are maintained by the British authorities, and the French and German graves by, and at the expense of, the commune (municipality of Estaires).

The Canadian will is silent on the matter but the testator, in his lifetime, had, and expressed, a desire to be buried by his wife in the communal cemetery which was as near to their son as they could be buried. When he died, 7 June 1929, he was buried in St. John's Cemetery, Winnipeg, where his body still lies.

The testator also owned a grave plot in Brompton cemetery in London, England, in which no bodies are buried, but upon which a family memorial has been erected.

The testator was domiciled in England (see 55 Man. R. at p. 437) but the will in question related only to his Canadian estate, which was all in Manitoba and has been administered here. Under these circumstances counsel all agree that the questions must be answered by reference to the law of Manitoba: see *Falconbridge, Conflict of*

Laws, p. 560; *In re Nanton Estate* (1948) 56 Man.R. 71 at 79, [1948] 2 W.W.R. 113, and the cases there referred to; and *Freke v. Lord Carberry* (1873), L.R. 16 Eq. 461. This answers question No. 7.

I propose to deal with question No. 3 first as it presents the greatest difficulty. Is the bequest contained in clause 13 of the will a good charitable bequest, in whole or part, under the law of Manitoba?

The law of Manitoba relating to charitable bequests such as this seems to be the same as that of England:

> To decide whether a purpose is charitable or not in law, it is the practice of the courts to refer to the preamble to the Statute of Elizabeth (43 Eliz., c. 4) which contains a comprehensive and varied list of charities. (4 *Hals.*, p. 107.)

The *Statute of Elizabeth*, 1601, ch. 4, which was repealed by *The Mortmain and Charitable Uses Act* (1888), 51 & 52 Vict. c. 42, was passed to cure certain abuses in the administration of charitable trusts. It is common ground that the *Statute of Elizabeth* was never in force in Manitoba. But it is, I think, clear that the preamble of the Act may be looked at in this court in considering whether a bequest is charitable or not.

In *Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (580); 61 L.J.Ch. 265 (289), Lord Macnaghten said:

> That according to the law of England a technical meaning is attached to the word "charity," and to the word "charitable" in such expressions as "charitable uses," "charitable trusts," or "charitable purposes," cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void. Whatever may have been the foundation of the jurisdiction of the court over this class of trusts, and whatever may have been the origin of the title by which these trusts are still known, no one I think who takes the trouble to investigate the question can doubt that the title was recognized and the jurisdiction established before the Act of 43 Eliz. and quite independently of that Act. The object of that statute was merely to provide new machinery for the reformation of abuses in regard to charities. But by a singular construction it was held to authorize certain gifts to charity which otherwise would have been void. And it contained in the preamble a list of charities so varied and comprehensive that it became the practice of the court to refer to it as a sort of

> index or chart. At the same time it has never been forgotten that the "objects there enumerated," as Lord Chancellor Cranworth observes (in *The University of London v. Yarrow* (1857)) 1 De Gex & J. 72, 79; 26 L.J.Ch. 430) "are not to be taken as the only objects of charity, but are given as instances. . . ."
>
> . . . . . .
>
> In Ireland, though neither the *Statute of Elizabeth* nor the so-called *Statute of Mortmain* extended to that country, the legal and technical meaning of the term "charity" is precisely the same as it is in England.

I am of opinion, then, that the legal and technical meaning of the term "charity" is precisely the same in Manitoba as it is in England.

The preamble to the Act 43 Eliz. which was considered in detail during the argument on this motion, refers to the following charitable objects:

> . . . some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free-schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, seabanks and highways, some for education and preferment of orphans, some for or towards relief, stock, or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help to young tradesmen, handicraftsmen, and persons decayed, and other for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes;

In the *Pemsel* case Lord Macnaghten classified charities in their legal sense into four principal divisions: (1) trusts for the relief of poverty, (2) trusts for the advancement of education, (3) trusts for the advancement of religion, (4) trusts for other purposes beneficial to the community not falling under any of the preceding heads.

This classification, as explained by later decisions, is still authoritative. In *Trustees of Sir Howell Jones Williams Trusts v. Inland Revenue Commissioners*, [1947] A.C. 449, at 454; [1947] 1 All E.R. 513, at 518, [1948] L.J.R. 644, Lord Simonds said:

> My Lords, there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers unless it is within the spirit and intendment of the preamble to 43 Eliz., c. 4, which is expressly preserved by s. 13(2) of the *Mortmain and Charitable Uses Act, 1888*. The second is that the classification of charity in its legal sense into four principal divisions by Lord Macnaghten in *Pemsel's* case (*supra*) must always be read subject to the qualification appearing in the judgment of Lindley, L.J., in *Re Macduff*, [1896] 2 Ch. 466, 65 L.J.Ch. 700:

"Now Sir Samuel Romilly did not mean, and I am certain that Lord Macnaghten did not mean to say, that every object of public general utility must necessarily be a chairty. Some may be and some may not be."

This observation has been expanded by Viscount Cave, L.C., in this House, in *A.-G. v. National Provincial Bank*, [1924] A.C. 269 at 265, 93 L.J.Ch. 231, in these words:

"Lord Macnaghten did not mean that all trusts beneficial to the community are charitable, but that there were certain beneficial trusts which fall within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or is for the public welfare; you must also show it to be a charitable trust."

Stated in that way the general principles seem clear enough, but a study of the numerous decisions shows how difficult it is in many instances to apply them. Some of the later authorities show a marked tendency to broaden the interpretation of the term "charitable" and it is not possible satisfactorily to reconcile all of the judgments.

In the case of *Williams Trusts*, *supra*, Lord Simonds said ([1947] 1 All E.R. at 519):

My Lords, the cases in which the question of charity has come before the courts are legion, and no one who is versed in them will pretend that all the decisions, even of the highest authority, are easy to reconcile. . . .

With this statement I heartily concur.

The bequest in clause 13 is a gift of a fund the income of which is to be used (in perpetuity) for the maintenance of a monument (a marble cross) now erected over a grave in which the testator's wife is buried and in which the testator desired to be buried, and the care of the grave plot. Any balance of the income is to be applied towards the upkeep of the communal cemetery. This is what is usually referred to as a "tomb" case.

The English cases collected in 4 *Hals.*, pp. 121 and 129, show that a bequest to provide or repair a monument in a church, even though it to be to an individual or his family, is a good charitable bequest. But they also show that gifts for providing or repairing a monument or tomb not forming part of the fabric or ornament of a church, whether as a memorial or burying place of the donor alone, or of himself and his family, cannot be supported as charities though they may be valid as private trusts, if not perpetuities.

In considering the cases it must be remembered that

> only those purposes are charitable in the eye of the law which are of a public nature, whose object, that is to say, is to benefit the community or some part of it, not merely particular private individuals, or a fluctuating class of private individuals, pointed out by the donor: 4 *Hals.*, p. 110.
>
> The line of distinction between purposes of a public and of a private nature is fine and practically incapable of definition: 4 *Hals.*, p. 110.

This statement is illustrated by the decision in *In Re Pardoe, McLaughlin v. A.-G.*, [1906] 2 Ch. 184; 75 L.J. Ch. 455, where a gift for providing head-stones to the graves of pensioners of certain named almhouses who should be buried in the churchyard of a named church was held a good charitable bequest.

While the "index or chart" in the preamble to the Act, 43 Eliz., uses the words "for repair . . . of churches," it makes no reference to "parsonages" or "churchyards." But as early as 1785 it was held that the repair of a parsonage was a charitable object: *A.-G. v. Bishop of Chester* (1785), 1 Bro. C.C. 444, 28 E.R. 1229, and see per North, J., in *In re Vaughan, Vaughan v. Thomas* (1886), 33 Ch. D. 187, at 191.

In this latter case it was held that a gift for keeping a churchyard in repair was a good charitable bequest. It was later argued that the decision in *In re Vaughan* could only be supported on the ground that such a gift, up to £500, was permitted for the first time by *The Church Building Act* of 1803, 43 Geo. III, c. 108, s. 1, and that, because the Act applied only to churchyards of the Established Church, a gift for the repair or maintenance of any other churchyard would not be a good charitable bequest.

But in *In Re Manser, A.-G. v. Lucas*, [1905] 1 Ch. 68, 74 L.J. Ch. 95, Warrington, J., as he then was, held that North, J., had based his judgment not only on the Act of 1803, but on the broader ground that the repair of a churchyard was a charitable object, and that a bequest for keeping in order burial grounds, the use of which was restricted to members of the Society of Friends, was a good charitable bequest.

In the *Manser* case the bequest reads:

> . . . for the sole purpose of keeping in good order the existing burial grounds under the care of the meeting, and in particular the grave of my late wife.

Warrington, J., said of the concluding words:

I regard those words as nothing more than a special obligation ancillary to the repair of the burial ground, and not as a separate trust at all.

Then, in *In re Eighmie Coulburne v. Wilks*, [1935] 1 Ch. 524, 104 L.J. Ch. 254, Eve, J., had to consider a bequest of £10,000 to the rector and churchwardens or other the governing body of Chiswick Church for the purpose of keeping the burial ground and monument therein to the testatrix's late husband and herself in good and sufficient repair and for the maintenance of the said church and the decorations thereof and of the said churchyard. After argument, in which the *Manser* and *Vaughan* cases were cited, Eve, J., said:

The burial grounds in the immediate vicinity of Chiswick Church are two in number, the one the churchyard, which was closed for burials about thirty years ago, and the other the cemetery, consecrated and opened many years ago as a public burial ground wherein the bodies of the husband of the testatrix and the testatrix herself were buried in 1923 and 1925 respectively. The testatrix in terms includes both in her will, identifying the one as the burial ground wherein is the monument to her husband and the other by its proper name, the churchyard. Is this a good charitable gift? I think it is. The money is given for the purpose of keeping the burial ground and the church and churchyard in good and sufficient repair, and this incidentally involves the maintenance of the monuments and other decorations of the church, the burial ground and the churchyard. I think the fund falls to be divided equally between the vicar and churchwardens as the controllers of the church and the churchyard, and the Brentford and Chiswick Borough council, in which are vested the management and ownership of the cemetery.

From these authorities it appears that if the bequest here in question had been for the purpose of repairing the cemetery and, as ancillary or incidental thereto, the grave and monument of the testator and his wife, it would have been a good charitable bequest. But as the bequest was to repair the grave and monument and only expend any balance of the income from time to time remaining on the upkeep of the cemetery, the bequest in so far as it relates to the repair of the grave and monument is not a good charitable bequest.

Postponing for the moment the question whether the bequest of any balance of income for the upkeep of the cemetery in question makes the bequest a valid charitable bequest, and if so, to what extent, I now have to ask whether the bequest can be supported on the other ground already indicated, namely, that it is a private trust and is not a perpetuity (see 4 *Hals.*, p. 129, *supra*).

We usually think of the word "perpetuity," as it is used in the law relating to interests arising *in futuro* and not *in praesenti*, that is

in the law dealing with (1) the rule against perpetuities, (2) the rule against double possibilities, and (3) the statutory restrictions on accumulation. When, however, we have to consider

> interests held on perpetual non-charitable trust, where no person or persons can take any benefit, for example, trusts to keep in repair a tomb not part of the fabric of a church

(25 *Hals.*, p. 82) we find the word "perpetuity" used in a wider sense.

A long line of cases finally established the rule that it is illegal to vest property in trustees in perpetuity to be held on perpetual non-charitable trusts where no person can take any benefit; although a condition for repair of a tomb while not charitable is not illegal.

Out of the many cases reference might be made to *Lloyd v. Lloyd* (1852), 2 Sim. (N.S.) 255, 21 L.J. Ch. 596, 61 E.R. 338; *Thompson v. Shakespear* (1860), DeG. F. & J. 399, 45 E.R. 413; *Carne v. Long* (1860), 2 DeG. F. & J. 75, 27 L.J. Ch. 589, 45 E.R. 550; *Rickard v. Robson* (1862), 31 Beav. 244, 31 L.J. Ch. 897, 54 E.R. 1132; *Fowler v. Fowler* (1864), 33 Beav. 616, 33 L.J. Ch. 674, 55 E.R. 507; *Re Tyler*, [1891] 3 Ch. 252; *Re Williams* (1877), 5 Ch. D. 735, 47 L.J. Ch. 92; *In re Vaughan* (1886), *supra*; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381; *Re Nottage*, [1895] 2 Ch. 649; *In re Good*, [1905] 2 Ch. 60, 74 L.J. Ch. 512; *Kennedy v. Kennedy* [1914] A.C. 215, 83 L.J. P.C. 63; and *Re Porter*, [1925] Ch. 746, 95 L.J. Ch. 46; and see 25 *Hals.* pp. 80, 83; 4 *Hals.*, pp. 127, 130.

I must now consider an argument by Mr. DuVal that the decision of Romer, J., in *Re Chardon, Johnston v. Davies*, [1928] 1 Ch. 464, 97 L.J. Ch. 289, compels a reconsideration of the tomb cases, and should be followed.

The headnote reads:

> By his will a testator gave a sum of £200 to his trustees upon trust to invest it and to pay the income thereof to a cemetery company "during such period as they shall continue to maintain and keep" two specified graves "in the said cemetery in good order and condition with flowers and plants thereon as the same have hitherto been kept by me," and he declared that, if the graves should not be kept in such order and condition, his trustees should pay and apply the income in manner therein mentioned.
>
> *Held*, that the gift did not infringe the rule against perpetuities or the rule against inalienability and was a valid gift.
>
> *In re Gage*, [1898] 1 Ch. 498, 67 L.J.Ch. 200, referred to.

Since it was decided, the *Chardon* case has not, so far as I can

find, been considered in the English courts. It was distinguished by a late chief justice of this court (Macdonald, C.J.K.B.) in *In re Halliday Estate*, 43 Man.R. 81, [1935] 1 W.W.R. 360. In that case the testator directed that the sum of $500.00 be paid to some trust company and the proceeds thereof be used to keep his grave and that of his mother in good condition. Macdonald, C.J.K.B., pointed out that in the *Chardon* case the fund vested, and said (p. 83):

> The bequest of the $500.00 for the purpose expressed in his will does not vest in anyone. The direction that it be paid into some trust company to be used for the purpose mentioned, in my opinion, infringes the rule against perpetuities and the rule against inalienability.

He held the bequest was void. I respectfully concur in the result at which the learned chief justice arrived, but my reasons for doing so would be somewhat different.

Neither in the *Chardon* case nor in the *Halliday* case was the wider rule relating to perpetuities enunciated in the tomb cases considered.

I am of opinion that that rule is now part of our law until it is held otherwise by the highest court, or is altered by the legislature. I also think that the *Chardon* case is distinguishable on the grounds referred to by Mr. Hart in his learned article, "*Some Reflections on Re Chardon*" (1937) 53, *Law Quarterly Review*, pp. 24-60. At p. 52 he said:

> One further point remains to be considered before the correctness of *Re Chardon* in the light of the tomb cases can be assessed. Keeping a tomb in repair is not itself illegal (*Lloyd v. Lloyd*, *supra*; *Re Tyler*, *supra*); indeed "it is a very laudable thing to do," (per Lindley, L.J., in *Re Tyler*, p. 258). Consequently a condition determining a gift on failure to maintain a grave is in itself valid (*Lloyd v. Lloyd*, *supra*, *Re Tyler*, *supra*). It is the duration of the gift which the rule attacks not the purpose which it is directly or indirectly designed to fulfil. But if the breach of such a condition determining one gift is made the event on which a later gift is to vest, the modern rule against perpetuities will itself come into play and avoid the later gift if its vesting may occur outside the perpetuity period. Thus in order to determine which "perpetuity rule"—that concerned with duration or that concerned with vesting— is to be applied to the facts of *Re Chardon*, it is first necessary to consider the proper construction of the gift to the cemetery company for so long as they should maintain the graves. If in reality it is a gift to the company on trust to maintain the graves indefinitely, then it would appear to have been void *in toto* as a "perpetuity." But the gift over seems to militate against this construction, and indeed it appears clear that the testator's intention was carefully

to refrain from creating a trust for this purpose and so to avoid the line of decisions discussed above. The case must therefore be considered on the assumption that no express trust to maintain the graves was imposed on the cemetery company, but that the desired result was sought to be achieved in a more indirect manner. On this assumption the correctness of the decision would appear to depend on the application of the modern rule against perpetuities—the rule against remoteness of vesting—to the testator's will.

The authorities, then, as I understand them, compel me to hold that the bequest so far as the maintenance of the cross and grave is concerned is not a good charitable bequest, and it is a perpetuity and so void.

But there is a special rule of law which must now be considered. It is expressed in *Tudor on Charities*, 5th ed., p. 62, as follows:

A number of cases, in which there have been gifts upon trust to keep up tombs not forming part of the fabric of a church, with the gift of a particular residue to charity, may be regarded as establishing this special rule of law: "Where a fund had been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes, it has been held that the result of the failure of the trust for the repair of the tomb is that the whole of the income becomes applicable for the charitable purpose.

The learned authors of the article on "*Charities*" in 4 *Hals.*, at p. 177, express the rule thus:

In cases connected with the repair of private tombs, where a fund is bequeathed to trustees upon trust out of the income to keep a tomb not forming part of a church in repair, and as to the residue, surplus, balance, or remainder, upon trusts for charitable objects, the gift is construed as a bequest of the whole fund charged with a gift that fails, and not as a gift of the residue after a void gift, and accordingly the whole fund, including the amount necessary to satisfy the invalid object, is applicable to the valid charitable object.

The authors add a footnote:

It is not easy to say on what principle this class of cases is to be distinguished from the class, of which *Mitford v. Reynolds* (1842), 1 Ph. 185, 41 E.R. 602, forms one, in which the charity took only the surplus after the amount necessary for the invalid object had been ascertained, and not the entire fund.

As Sir George Jessel, M.R., said in *In re Birkett* (1878), 9 Ch. D. 576, 47 L.J.Ch. 846, these cases are a singular illustration of the way in which our law gets altered. The authorities cited in illustration of the statement in *Halsbury* are all decisions of single judges and in order of date we have: *Fowler v. Fowler* (1864), *supra*,

(Romilly, M.R.); *Hoare v. Osborne* (1866), L.R. 1 Eq. 585, 55 L.J. Ch. 345 (Kindersley, V.C.); *Re Rigley's Trusts* (1866), 36 L.J. Ch. 147 (Kindersley, V.C.); *Fisk v. A.-G.* (1867), L.R. 4 Eq. 521 (Wood, V.C.); *Hunter v. Bullock* (1872), L.R. 14 Eq. 45, 41 L.J. Ch. 637 (Bacon, V.C.); *Dawson v. Small* (1874), L.R. 18 Eq. 114, 43 L.J. Ch. 406 (Bacon, V.C.); *Re Williams* (1877), *supra* (Malins, V.C.); *Re Birkett* (1878), *supra* (Jessel, M.R.); *Re Vaughan, Vaughan v. Thomas* (1886), *supra* (North, J.); and *Re Rogerson, Bird v. Lee*, [1901] 1 Ch. 715, 70 L.J. Ch. 444 (Joyce, J.).

In *Fowler v. Fowler*, the gift of the surplus, after a trust to repair a tomb, was held void for uncertainty on the ground that the amount required for repairing a tomb could not be ascertained. In *Hoare v. Osborne* it was held that the portion of the fund attributable to one of three gifts which was void (perpetual repair of a grave or vault not in a church) fell into the residue. In *Re Rigley's Trusts* the court directed an inquiry to ascertain in what proportions a gift valid as to part and invalid as to the other part (repair of a tomb) should be divided. In *In re Vaughan* (a tomb case) the same principle was applied. In all the other cases above referred to, it was held that the whole income of the fund went to the charity.

I must confess I am unable to decide to my own satisfaction the real basis of the decisions of the majority of the judges. In *In Re Rogerson, supra*, Joyce, J., said, (p. 718):

> 'I think that the law on this question is correctly stated on p. 45 of *Tudor's Charitable Trusts*, in the passage which says that in all cases where "a fund has been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes . . . it has been held that the result of the failure of the trust for the repair of the tomb is that the whole of the income becomes applicable for the charitable purpose. . . . Now, of course, in all these cases the real question is whether on the true construction of the gift the trust for the application of the income for the repair of the tomb is to be a charge on the whole income, and the residue is to be given to the charitable purpose. By "residue" I mean so much of the income as is not required for the repair of the tomb. In this particular gift the word "residue" is not used; the words are, "do and shall out of the proceeds or annual income of such investment in the first place maintain yearly and keep in good repair and condition annually in all respects the two tombs . . . and in the next place to divide and distribute the remainder of such annual income or dividend unto and equally among the poor, etc." That to my mind is equivalent to making the provision for the tomb a charge on the bequest. I think that there is no practical difference between the gift in this case and the gift in *Fisk v. Attorney-General, supra*, and I think that this case is governed by the decision in that case, and *In re Birkett, supra*, and *In*

re Vaughan, supra. If there be any contradiction between the cases, I think that there is a preponderance of authority in favour of the view adopted in *Fisk v. Attorney-General* and the other cases I have mentioned, and I think that the statement to which I have referred in *Tudor's Charitable Trusts* is right. Of course, if there were provisions for various objects, and it were possible as a matter of construction to arrive at the conclusion that the testator never intended that there should be any surplus at all, that would be a different matter. Where, however, there is a trust for a tomb, as here, then, as Bacon, V.C., pointed out in *Dawson v. Small, supra*,—a similar case—"the obligation to keep up the tombstones is merely honorary, but the obligation to give all that is not applied for the purposes first mentioned in favour of these poor people is by no means honorary; it is a trust that must be executed." Testators who make bequests of this nature, if they know the law, really mean the legacy to go to the objects of the charitable bequest with a moral obligation to keep up the tomb. I therefore hold that the whole income of this bequest goes to the vicar and churchwardens of St. George's Doncaster. The fund must be invested in the name of the official trustees of charitable funds, who will from time to time remit the income to the vicar and churchwardens for the purposes of the charitable bequest.

The foregoing judgment is a good example of the difficulties posed by the various decisions; there is, as I read the cases, a real contradiction between *A.-G. v. Fisk* and *In re Birkett* on the one hand, and *In re Vaughan* on the other.

I cannot do better than adopt the language and attitude of that very learned judge, Sir George Jessel, in *In re Birkett, supra.*

In that case the bequest read:

To the incumbent for the time being of Unsworth the sum of £500, the income to be applied when necessary in keeping in good repair the grave and the railing and tombstone of my late father, and the remainder of such income to be applied by such incumbent for the time being in providing wine and bread for the sick poor of Unsworth.

It was held that the first purpose of the gift being invalid, the whole of the income was applicable to the charity; and that the sum should be paid to the official charity trustee to invest and pay the income to the incumbent of Unsworth for the time being to be applied by him for the sick poor of the parish as in the will directed. Jessel, M.R., said (p. 578 and 580):

Now I have no hesitation in saying that, if there were no authorities, I should feel very little difficulty in deciding quite in a different way from that in which I am about to decide.

He then proceeded to indicate his own views and concluded:

That being my opinion as to the case if it were untrammelled by any authorities, what do I find as regards authority? It is of the utmost importance, as regards our law, that judges of the first instance should not disregard a series of decisions by other judges of first instance, none of which have been appealed or have been otherwise interfered with. In the case of *Fisk v. Attorney-General*, in 1867, where there was a gift to an incumbent of a sum of stock upon trust out of the dividends to apply such part thereof as should be required to keep in repair a family grave, and to apply the surplus for charity, Vice-Chancellor Wood decided that, although the gift for the grave failed, yet the gift of the corpus was not affected, and the whole of the income was applicable to the charity. It may be difficult on principle to discover how he arrived at that conclusion, but he did arrive at it. The gift here in question is, to my mind, wholly undistinguishable from the gift there. I cannot find any possibility of fairly distinguishing it. That decision of the Vice-Chancellor was followed twice by Vice-Chancellor Bacon—once in the case of *Hunter v. Bullock*, in which he considered it settled law, and again the case of *Dawson v. Small*. It was also followed by Vice-Chancellor Malins in the case of *In re Williams*, so recently as the 2nd of June, 1877. Consequently we have four decisions, the oldest ten years old, all in point, by three judges of co-ordinate jurisdiction. With these authorities before me, and sitting here as a judge of first instance, I shall simply follow them, and decide the case in the same way. The result will therefore be that the whole of the income will be applicable to the charitable purpose. The respondents have very properly suggested that the fund should be paid over to the official charity trustee, and the income only given to the incumbent of Unsworth for the time being, to be applied by him for the charitable purpose named in the will and that is the order I shall make.

It is nearly 71 years since the foregoing was written, and the principles applied have only been departed from once (*In re Vaughan*), and have been applied as recently as 1901 in *In re Rogerson*, "the last of the tomb cases," and recognized in *In re Dalziel*, [1943] Ch. 277, 112 L.J. Ch. 353. Since that time the law seems to be taken as settled and to be as stated in the extract from *Tudor on Charitable Trusts* quoted above.

In the course of argument before me the decision of Cohen, J. (now L.J.), in *In re Dalziel, supra*, was pressed upon me as one that should be followed. The headnote reads:

A testatrix gave £20,000 to the governors of a hospital to add to an existing discretionary fund of £2,000, on which the cost of the upkeep of a family mausoleum was a first charge, on condition that they should use the income as far as was necessary to maintain and, when necessary, rebuild the mausoleum, and directed that "if they shall fail to carry out this request I give the said sum of £20,000 to such other of the charities named in this my will as my trustees may select and as shall be willing to accept the legacy subject to the above conditions":

Held, that, the upkeep of the mausoleum not being a charitable object, the gift failed, and that the gift over also failed.

In re Tyler, [1891] 3 Ch. 252, and *Chamberlayne v. Brockett* (1872), L.R. 8 Ch. 206, followed.

Cohen, J., (p. 281) referred to an analysis of the tomb cases by counsel disputing the validity of the gift and said that counsel

> pointed out that they appear all to have been based either on the trifling amount involved as in *Fisk v. Attorney-General*, *supra*, or on the view that the testator intended to impose a moral obligation as in *In re Rogerson*, *supra*. He pointed out that that class of case was distinguishable from the present case in that (*a*) the upkeep of a tomb costing over £20,000 with a possible liability to rebuild it, necessarily involved more than a trifling amount, and (*b*) some of the wills considered in the tomb cases contained no gift over in the event of failure to maintain the tomb.

Cohen, J., added:

> The last distinction seems to me vital. I think that the real foundation of the tomb cases is that the court felt itself able to construe the provision in the various wills as to the upkeep of the tombs as imposing only a moral obligation. Now, a gift over to take effect in the event of failure to maintain the mausoleum in good repair is only consistent with the view that the obligation to maintain the mausoleum was not to be a mere moral obligation.

While I am not prepared to subscribe to a distinction based on the "trifling amount" theory—I doubt if the judgments support a distinction so stated—I do not think that in this case as a "matter of construction" I can "arrive at the conclusion that the testator never intended that there should be any surplus at all," using the language of Joyce, J., in *In re Rogerson* quoted above.

The whole income at five per cent of $50,000.00—no trifling amount—would surely never be required in each year merely for keeping the marble cross clean and erect, and the grass on the allotment cut and in good order. There is no direction to rebuild the cross, but even if there were there would be a surplus, and there is no power to resort to capital.

In the *Dalziel* case, Cohen, J., also said (p. 285):

> The obligation as to rebuilding the tomb is not limited to rebuilding out of income, but would require the hospital, if necessary, to have recourse to capital. The void trust, might, therefore, involve not only the whole income, but even the corpus. In my judgment, therefore, the gift fails *in toto*.

In *In re Birkett*, Jessel, M.R., asked: "On which side of the line

does this particular case fall?" I think the case I am now considering falls on the opposite side of the line to *In re Dalziel*, which is not applicable to the facts of this case.

Subject to the two matters next to be dealt with, I am of opinion that the bequest contained in clause 13 of the will for the upkeep of the cross and allotment is invalid, but the trust to maintain the cemetery is a good charitable trust and the whole of the income of the fund becomes applicable for such charitable purpose.

The upkeep of the cemetery will involve the upkeep of the cross and grave plot, and I have no doubt the "honorary" or "moral" obligation, it is nothing more, will be borne in mind.

Two further matters must now be dealt with: (1) Is a gift to maintain a cemetery owned or provided by municipal authorities and not connected with any church or religious denomination a valid charitable gift? (2) If it is, does this principle apply if the cemetery is not in Manitoba, but in France?

The only case which throws any light on the first of these matters is *In re Eighmie*, *supra*. In that case, Eve, J., divided the gift equally between the vicar and church-wardens as controllers of the church and churchyard and the Brentford and Chiswick Borough council in which were vested the management and ownership of the cemetery. It will be observed that the cemetery had been consecrated as a public burial ground. Eve, J., does not discuss the authorities in his very brief judgment, but on the argument he was referred to the earlier cases of *In re Vaughan*, *supra*, and *In re Manser*, *supra*.

In the *Vaughan* case, North, J., said (p. 191):

> Then, in the next place, there is this to be borne in mind, that charity is "a general public use." That is the largest definition of the word, and it seems to me that the repair of a parish churchyard is clearly for the benefit of the inhabitants of the parish. In the first place, it was the duty of parishioners to keep their churchyard in repair. That appears from a passage in *Coke's* Second Institute; which runs thus: "The parishioners ought to repair the inclosure of the churchyard, because the bodies of the more common sort are buried there, and for the preservation of the burials of those that were or should have been, whiles they lived the temples of the Holy Ghost." After referring to the derivation of the word "cemetery," it goes on: "And also if the churchyard be not decently inclosed, the church, which is *domus Dei*, cannot decently be kept, and therefore this the parishioners ought to do *per consuetudinem notoriam et approbatum*, and the conusans thereof is allowed by this Act." Then, again, a case was cited which shows

> that if a person whose duty it is to repair the churchyard does not repair it he is subject to indictment.

In the Manzer case, Warrington, J., approved and applied this statement. It is obvious from his judgment that he considered the provision of a burial ground to be for the advancement of religion, and he said (p. 74): "I think one naturally connects the burial of the dead with religion"; and at p. 75:

> I need not go into any general considerations as to the necessity or as to the pious object of providing burial grounds. I decide this question on the ground I have expressed, and I do not think, therefore, it is necessary to consider whether this is a general public trust or not. It comes within the now very wide definition of "charity," and in particular that branch of it which is concerned with the advancement of religion. I think, therefore, the gift is good.

Eve, J., had no difficulty in 1935 in extending the principle to a municipally provided cemetery, and I doubt if his decision would have been different if the cemetery had not been consecrated. In Manitoba municipalities are empowered to, and do, establish and maintain cemeteries not connected with any church. I should not hesitate to hold that a gift to a Manitoba municipal authority to be used for the maintenance and upkeep of such a cemetery was a good charitable bequest, whether it was for the advancement of religion or for a purpose beneficial to the community: Lord Macnaghten's divisions 3 and 4 in the *Pemsel* case, *supra*.

The provisions of *The Cemetery Act* of Ontario (now R.S.O. 1937, c. 351, s. 15) referred to in *In re Halliday Estate*, *supra*, specifically permit gifts to the person "owning, controlling or managing a cemetery." These words are wide enough to include any cemetery, even one privately owned and operated. We have no such statute in Manitoba, but the view I take of the authorities is in accord with the principle of this legislation.

There was considerable discussion whether a gift to maintain a cemetery could be justified or could only be justified as being in relief of rates. The preamble to the Act of Elizabeth uses the words "for the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes." Reference was made to *A.-G. v. Blizard* (1855), 21 Beav. 233, 25 L.J. Ch. 171; *Doe v. Howells* (1831), 2 B. & Ad. 745, 109 E.R. 1320; and *A.-G. v. Berwick-on-Tweed* (1829), Tamlyn 239, 48 E.R. 95.

The significance of this question is twofold. The gift of the "balance" of the income for the upkeep of the cemetery was sought

to be maintained on this ground as well, and in answer it was argued that, even if such a gift would be a good charitable gift in Manitoba as in relief of rates, a gift which would be for the relief of rates in a foreign community would not be a good charitable gift by Manitoba law.

Notwithstanding the decisions in *A.-G. v. Blizard*, *supra*, which turned on the meaning of a special Act and which is not of much or any assistance in this case, and in the other cases just referred to, the decisions to which I have earlier referred do not, so far as I can see, decide that charitable gifts for the maintenance of a cemetery can, or can only, be justified as being in relief of rates. Nor does the portion of the judgment of North, J., already quoted lead to that conclusion.

Even if the gift had to depend for its validity on being in relief of rates, and in my opinion it does not, I would not think that different principles would be applied depending on whether the cemetery was in Manitoba, or France, or England. All of which brings me to the second of the two matters I am now dealing with: Does the fact that the cemetery is in a foreign country make any difference? In my opinion it does not.

In *In re Robinson, Besant v. The German Reich*, [1931] 2 Ch. 122, 100 L.J. Ch. 321, Maugham, J. (later L.C.), said (p. 126):

> It is abundantly clear that, whatever the construction which might have been placed upon the *Statute of Elizabeth* when that statute was passed in the forty-third year of that queen's reign, for at least 200 years the courts have been in the habit of treating the phrase "charitable purposes" as not confined to charitable purposes within this realm. There are numerous authorities to that effect; and apart from cases of charities to be performed in the jurisdictions of Scotland and Ireland, there are several cases where the charity has been wholly foreign.

He referred to *New v. Bonaker* (1867), L.R. 4 Eq. 655, 36 L.J. Ch. 846, and *In re Vagliano*, [1905] W.N. 179, 75 L.J. Ch. 119. Other cases were cited in the argument before him and reference may also be made to *Parkhurst v. Roy* (1880), 27 Gr. 361, 7 A.R. 614; *Lewis v. Doerle* (1898), 28 O.R. 412, 25 A.R. 206, and *Anderson v. Kilborn* (1875), 22 Gr. 385.

As I have come to the conclusion that clause 13 is a good charitable bequest for the maintenance of the communal cemetery of Estaires, I must now decide if it vested in the mayor for the time being of that town. Clause 13 presents many difficulties in construction. The part I am now considering reads:

> . . . to pay to the mayor for the time being of the town of Estaires $50,000.00 to be invested by him in French 5 per cent rents and in such name or names as he may think fit. . . . If the mayor is not properly constituted under the laws of France a corporation with perpetual succession and for such or any other reason the said bequest is not a good charitable bequest, I direct my trustees to pay the said sum to any responsible corporation, body or institution which is willing to accept the said bequest subject to the terms hereof as to the application of the income therefrom.

The testator seems to have been of opinion that it was essential to a good charitable bequest that the trustee should be a corporation with perpetual succession, and that, if the mayor for the time being were not such, his gift would not be a good charitable bequest.. This is emphasized by his second choice of a corporation, body or institution which he evidently assumed would have perpetual succession. It also emphasizes his intention to create a perpetuity.

It may be that the thinking of the testator, when he drew this clause in this way, was influenced by the practice so common in England of giving gifts to charitable corporations with the imposition of some moral or honorary obligation to maintain or repair a tomb or monument.

The evidence before me establishes that the mayor of Estaires is not constituted under the laws of France a corporation with perpetual succession.

There is no reason why an individual may not be a trustee for charitable purposes. If the charitable trust is a perpetuity, it might be inconvenient to appoint an individual but the law will always provide a trustee. The testator may also have had this inconvenience in mind when he desired a trustee with perpetual succession.

Is the payment directed by clause 13 to be made to the mayor, who is mayor at the time when the money is to be paid over, to be held by him and such successors as he may from time to time appoint, or was it the testator's intention that the money should pass from mayor to mayor as a corporation with perpetual succession? Notwithstanding the power to the mayor for the time being to invest the corpus in such name or names as he may think fit, I feel certain that the gift was intended to be to the mayor for the time being as a corporation with perpetual succession and that was the real meaning of the peculiar wording the testator used. In my opinion the mayor does not qualify and the gift could not, nor did it, vest in him.

But a charitable gift will not be permitted to fail because the

donor does not appoint a trustee, or because the trustee is not able to act or qualify. The court can always act to remedy the defect.

The testator has attempted to provide for this. The wording of the clause is in this respect very vague and difficult to construe. He clearly wanted a corporation, body or institution to act as trustee, but he said that if the bequest is not a good charitable bequest because the mayor was not a corporation with perpetual succession, or for any other reason, the trustee was to pay the sum to any responsible corporation, body or institution which is willing to accept the said bequest subject to the terms hereof as to the application of the income.

If the bequest were invalid no further consideration would be required. As it is valid, in my opinion the trustee should select some responsible corporation which is willing to accept the bequest "subject to the terms" of clause 13 as I have found them to be as to the application of the income.

Those terms I have held are to apply the income towards the upkeep of the communal "cemetery generally." The upkeep of the cemetery will naturally involve the upkeep of the testator's grave allotment and monument and I have already said I have no doubt that the recipient of the fund will fully recognize the moral or honorary obligation in that respect. I suggest that the trustee select some Canadian or English trust company, preferably, though not necessarily, one authorized to do business in France, under the provisions of clause 13 to whom the legacy can be paid. The trustee should take from the trust company an undertaking to accept the bequest on the conditions I have held applicable, namely, to apply the income of the whole fund in or towards the upkeep of the municipal or communal cemetery of Estaires, generally. The trustee should be entitled to be paid its proper charges out of the said income and those charges should be agreed and included in the undertaking.

The testator has directed how the fund should be invested. Such investment may not be possible or desirable, now, or in the future. In my opinion the fund should be invested in trustee securities as authorized by the laws of Manitoba. Under the circumstances of this case, this court can, if it is necessary or desirable, settle the necessary scheme for the execution of the trust: *In re Fenton Estate*, 30 Man. R. 246, [1920] 2 W.W.R. 367.

While there are references in some of the English cases to the so-called *Statutes of Mortmain*, and while we have no such statute

in Manitoba, *Re Fenton, supra*, those statutes do not affect the principles I have been discussing.

Questions 3, 4 and 5 are, therefore, answered according to the foregoing.

I now turn to questions 1 and 2. This is a much simpler problem. Clause 11 of the will gives to "the London Council for the time being of the Church of England Temperance Society (England)" a legacy of $5,000.00 on a condition. That condition is clearly stated; it is not illegal or uncertain, and the gift is a good and valid one if the condition is performed: *Re Tyler*, [1891] 3 Ch. 252, and if the beneficiary is capable of taking the gift.

The condition can be performed by giving an undertaking satisfactory to the trustee who would be justified in taking the undertaking in the words set out in the will, even though it cannot be enforced: *Roche v. McDermott*, [1901] 1 Ch. 394.

The real question is whether the beneficiary purported to be named is entitled to be a beneficiary. The evidence before me is that there is in existence in London a body which, so far as I can see, is a voluntary unincorporated association, known as the Council of the Church of England Temperance Society. There is also an incorporated body "The Church of England Temperance Society (Incorporated)" incorporated under the English *Companies Acts* 1862 to 1900, on 1 February 1907. By the articles of association of the incorporated body the persons eligible for membership are (1) members of the council of the Church of England Temperance Society who declare they desire to be members of the incorporated body and who may only be members of such body while they remain members of the council, and (2) all such other persons as shall be nominated by the executive of the incorporated body and consent to become members.

The gift is to the council and not to the incorporated body. May such voluntary unincorporated body be a beneficiary?

There is here no question of a trust charitable or otherwise, or a perpetuity. It is merely a legacy of $5,000.00, and no restriction on how the money may be used. A voluntary unincorporated association is not an entity known to the law and there are cases which appear to show that such an association cannot be a donee. I refer, for example, to *Carne v. Long* (1860), 2 De G.F. & J. 75, 27 L.J. Ch. 589, 45 E.R. 413; *Gravenor v. Hallam* (1767), Amb. 643,

27 E.R. 417; *Re Amos*, [1891] 3 Ch. 159, and *Re Laing Estate*, 38 B.C.R. 449, [1927] 1 W.W.R. 699.

I do not think these decisions apply here and in my opinion the principle applicable is stated by Joyce, J., in *Re Swain* (1908), 99 L.T. 604, when he said (p. 606) that the cases showed that:

> . . . a gift to a voluntary association of a legacy which is to go into its coffers and may be spent with its other funds as income is valid . . . It is not necessary . . . to the validity of such a gift that it must be in accordance with the rules of the society, or be possible under the rules to distribute the money as or by way of bonus to the individual members.

The whole question is discussed in Mr. Hart's article on *Re Chardon*, already referred to, which I have found most helpful.

I answer question 1 as follows: The bequest in clause 11 of the will is a valid bequest subject to a condition; it is not a charitable bequest.

Question No. 2 does not, in my opinion, depend on the constitution of the London Council; all of the members of the council may, as individuals, give the undertaking and the secretary may do so in his individual capacity. In no case does anyone incur any personal liability and *Roche v. McDermott*, *supra*, decides that the undertaking is, in any event, unenforceable at law. It is merely a "moral" or "honorary" obligation.

This leaves only question No. 6 to be answered. As I mentioned the testator died 7 June 1929, and was buried in Winnipeg. I am not informed why this was done, but I assume it was because the estate was not in funds to pay the cost of removing the body to France and interring it at Estaires. The cost of dis-interring the body, removing it to France and re-interring it there, will be about $1,000.00, and this money must be paid out of the amount available to pay the charitable bequests and the bequest to the London Council.

Questions such as this usually arise on passing accounts in the Surrogate Court, but there is power in this court to deal with the matter (see *The Trustee Act*, R.S.M. 1940, c. 221, s. 73, and I can see no reason why I should not answer this question.

There is no British or Canadian authority directly in point. Generally an executor will be allowed in his account reasonable funeral expenses having regard to the station in life of the testator and the estate he left: *Williams on Executors* (1930), 12th ed.,

pp. 116 *sq.*; *Widdifield on Executors Accounts* (1944), 4th ed., pp 116 *sq.* The testator has received decent burial and the expenses have been allowed in the executor's accounts.

> Compliance with the last wishes of the deceased as to the style and character of the funeral, if not extravagant or unreasonable, and if no injustice is done to creditors, violates no principle of law: *Widdifield, op. cit., p. 120.*

The question of the allowance of the expense of removing a body from one place of interment to another has been discussed in a number of American cases most of which are set out in the third (1933) edition of Judge Widdifield's work on executors' accounts but are omitted from the fourth edition. And there is an annotation in 40 A.L.R. Annotated at p. 1459.

In Pettigrew v. Pettigrew, 207 Pa. St. 313, 64 L.R.A. 179, 23 C.J. 1171, it was held that the duties of an executor terminate with the first interment, and if any question arises as to the necessity or advisability of a re-interment involving a removement to another locality, that is a matter for the next of kin.

It has been held that where the burial place had become undesirable, an administrator should be allowed credit for the reasonable expense of dis-interring the body of the deceased and re-burying in another place: *Allen v. Allen*, 3 Dem. (N.Y.) (so cited in Widdifield), but not where the place of burial was suitable and had been selected by the deceased: *Watkins v. Romine*, 106 Ind. 378, 7. N.E. 193.

A reasonable amount for services and expenses incurred in transporting the body of the deceased from a foreign country, where he died, is properly payable out of the estate: *Re Parry's Estate*, 41 Atl. R. 384, 24 C.J. 92. And see *Sullivan v. Harner*, 41 N.J.Eq. 299.

The full texts of these cases are, unfortunately, not available to us; they are not, with the exception of the annotation in 40 A.L.R. Annotated, in the Great Library. They were available to Judge Widdifield and I have no doubt were accurately stated.

Having in mind the circumstances of this case, the natural desire of the testator, the fact that he left a large estate and who were the objects of his bounty, I am of opinion that the general principle to be extracted from the authorities enables me to answer this question in the affirmative with the qualification that the amount expended must be reasonable. The trustee will probably be able to sell the plot in St. John's Cemetery which will be vacated and so reduce

somewhat the cost to be incurred. I am sure that the charities will have no criticism to make of such an expenditure.

At the time of his death the testator, domiciled in England, was temporarily resident in Manitoba. His wife and only child were dead; he was the last of his immediate family. No one can doubt that if the trustee had taken the body to France for burial beside his wife and son, the reasonable expenses of doing so would have been allowed without question on any passing of accounts.

This leaves only the question of costs. It was the duty of the various charities and parties to take the stand they did and to submit all these matters to the court. The state of the authorities and the new points raised make this a matter of great difficulty. The matters raised were exceptionally well argued by all counsel; and all parties should have their costs out of the estate, the costs of the trustee to be taxed as between solicitor and client.

Attorney General of Canada *Appellant/ Respondent on cross-appeal*

v.

Terri Jean Bedford, Amy Lebovitch and Valerie Scott *Respondents/Appellants on cross-appeal*

- and -

Attorney General of Ontario *Appellant/ Respondent on cross-appeal*

v.

Terri Jean Bedford, Amy Lebovitch and Valerie Scott *Respondents/Appellants on cross-appeal*

and

Attorney General of Quebec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secretariat of the Joint United Nations Programme on HIV/AIDS, British Columbia Civil Liberties Association, Evangelical Fellowship of Canada, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère

Procureur général du Canada *Appelant/ Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

- et -

Procureur général de l'Ontario *Appelant/ Intimé au pourvoi incident*

c.

Terri Jean Bedford, Amy Lebovitch et Valerie Scott *Intimées/Appelantes au pourvoi incident*

et

Procureur général du Québec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secrétariat du Programme commun des Nations Unies sur le VIH/sida, Association des libertés civiles de la Colombie-Britannique, Alliance évangélique du Canada, Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Association canadienne des centres contre les agressions à caractère sexuel, Association des femmes autochtones du Canada, Association canadienne des Sociétés Elizabeth Fry, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle,

sexuel, Vancouver Rape Relief Society, Christian Legal Fellowship, Catholic Civil Rights League, REAL Women of Canada, David Asper Centre for Constitutional Rights, Simone de Beauvoir Institute, AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution and Aboriginal Legal Services of Toronto Inc. *Interveners*

Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel, Vancouver Rape Relief Society, Alliance des chrétiens en droit, Ligue catholique des droits de l'homme, REAL Women of Canada, David Asper Centre for Constitutional Rights, Institut Simone de Beauvoir, AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution et Aboriginal Legal Services of Toronto Inc. *Intervenants*

Indexed as: Canada (Attorney General) *v.* Bedford

2013 SCC 72

File No.: 34788.

2013: June 13; 2013: December 20.*

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to security of person — Freedom of expression — Criminal law — Prostitution — Common bawdy-house — Living on avails of prostitution — Communicating in public for purposes of prostitution — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Prostitutes alleging impugned provisions violate s. 7 security of the person rights by preventing implementation of safety measures that could protect them from violent clients — Prostitutes also alleging prohibition on communicating in public for purposes of prostitution infringes freedom of expression guarantee — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1), 210, 212(1)(j), 213(1)(c).

* A judgment was issued on January 17, 2014, amending para. 164 of both versions of the reasons. The amendments are included in these reasons.

Répertorié : Canada (Procureur général) *c.* Bedford

2013 CSC 72

N° du greffe : 34788.

2013 : 13 juin; 2013 : 20 décembre*.

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 L'ONTARIO

Droit constitutionnel — Charte des droits — Droit à la sécurité de la personne — Liberté d'expression — Droit criminel — Prostitution — Maisons de débauche — Proxénétisme — Communiquer en public à des fins de prostitution — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — Allégation selon laquelle ces dispositions portent atteinte au droit à la sécurité de la personne garanti à l'art. 7 en empêchant les prostituées de prendre des mesures susceptibles de les protéger contre la violence de certains clients — Allégation supplémentaire suivant laquelle l'interdiction de communiquer en public à des fins de prostitution porte atteinte à la liberté d'expression garantie aux prostituées — Charte canadienne des droits et libertés, art. 1, 2b), 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 197(1), 210, 212(1)j), 213(1)c).

* Un jugement a été rendu le 17 janvier 2014, modifiant le par. 164 des deux versions des motifs. Les modifications ont été incorporées dans les présents motifs.

Courts — Decisions — Stare decisis — Standard of review — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Under what circumstances application judge could revisit conclusions of Supreme Court of Canada in Prostitution Reference which upheld bawdy-house and communicating prohibitions — Degree of deference owed to application judge's findings on social and legislative facts.

B, L and S, current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, which criminalize various activities related to prostitution, infringe their rights under s. 7 of the *Charter*: s. 210 makes it an offence to keep or be in a bawdy-house; s. 212(1)(*j*) prohibits living on the avails of prostitution; and, s. 213(1)(*c*) prohibits communicating in public for the purposes of prostitution. They argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, by preventing them from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violence. B, L and S also alleged that s. 213(1)(*c*) infringes the freedom of expression guarantee under s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

The Ontario Superior Court of Justice granted the application, declaring, without suspension, that each of the impugned *Criminal Code* provisions violated the *Charter* and could not be saved by s. 1. The Ontario Court of Appeal agreed s. 210 was unconstitutional and struck the word "prostitution" from the definition of "common bawdy-house" as it applies to s. 210, however it suspended the declaration of invalidity for 12 months. The court declared that s. 212(1)(*j*) was an unjustifiable violation of s. 7, ordering the reading in of words to clarify that the prohibition on living on the avails of prostitution applies only to those who do so "in circumstances of exploitation". It further held the communicating prohibition under s. 213(1)(*c*) did not violate either s. 2(*b*) or s. 7. The Attorneys General appeal from the declaration that ss. 210 and 212(1)(*j*) of the *Code* are unconstitutional. B, L and S cross-appeal on the constitutionality of s. 213(1)(*c*) and in respect of the s. 210 remedy.

Tribunaux — Décisions — Stare decisis — Norme de contrôle — Contestation par des prostituées des dispositions du Code criminel qui interdisent les maisons de débauche, le proxénétisme et la communication en public à des fins de prostitution — À quelles conditions un juge de première instance peut-il réexaminer les conclusions de la Cour suprême du Canada dans le Renvoi sur la prostitution selon lesquelles les interdictions visant les maisons de débauche et la communication sont valides? — Degré de déférence que commandent les conclusions du juge de première instance sur des faits sociaux ou législatifs.

B, L et S — trois prostituées ou ex-prostituées — ont sollicité un jugement déclarant que trois dispositions du *Code criminel*, L.R.C. 1985, ch. C-46, qui criminalisent diverses activités liées à la prostitution, portent atteinte au droit que leur garantit l'art. 7 de la *Charte* : l'art. 210 crée l'acte criminel de tenir une maison de débauche ou de s'y trouver; l'al. 212(1)*j*) interdit de vivre des produits de la prostitution d'autrui; l'al. 213(1)*c*) interdit la communication en public à des fins de prostitution. Elles font valoir que ces restrictions apportées à la prostitution compromettent la sécurité et la vie des prostituées en ce qu'elles les empêchent de prendre certaines mesures de protection contre les actes de violence, telles l'embauche d'un garde ou l'évaluation préalable du client. Elles ajoutent que l'al. 213(1)*c*) porte atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte* et qu'aucune des dispositions n'est sauvegardée par l'article premier.

La Cour supérieure de justice de l'Ontario a fait droit à la demande et déclaré, sans effet suspensif, que chacune des dispositions contestées du *Code criminel* porte atteinte à un droit ou à une liberté garantis par la *Charte* et ne peut être sauvegardée par application de l'article premier. La Cour d'appel de l'Ontario a convenu de l'inconstitutionnalité de l'art. 210 et radié le mot « prostitution » de la définition de « maison de débauche » applicable à cette disposition, mais elle a suspendu l'effet de la déclaration d'invalidité pendant 12 mois. Elle a statué que l'al. 212(1)*j*) constitue une atteinte injustifiable au droit garanti à l'art. 7 et ordonné d'interpréter la disposition de manière que l'interdiction vise seulement les personnes qui vivent de la prostitution d'autrui « dans des situations d'exploitation », comme si ces mots y étaient employés. Elle a par ailleurs estimé que l'interdiction de communiquer prévue à l'al. 213(1)*c*) n'est attentatoire ni à la liberté garantie par l'al. 2*b*), ni au droit que consacre l'art. 7. Les procureurs généraux se pourvoient contre la déclaration d'inconstitutionnalité de l'art. 210 et de l'al. 212(1)*j*) du *Code*. B, L et S se pourvoient de manière incidente relativement à la constitutionnalité de l'al. 213(1)*c*) et à la mesure prise pour remédier à l'inconstitutionnalité de l'art. 210.

Held: The appeals should be dismissed and the cross-appeal allowed. Section 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) of the *Criminal Code* are declared to be inconsistent with the *Charter*. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only. The declaration of invalidity should be suspended for one year.

The three impugned provisions, primarily concerned with preventing public nuisance as well as the exploitation of prostitutes, do not pass *Charter* muster: they infringe the s. 7 rights of prostitutes by depriving them of security of the person in a manner that is not in accordance with the principles of fundamental justice. It is not necessary to determine whether this Court should depart from or revisit its conclusion in the *Prostitution Reference* that s. 213(1)(*c*) does not violate s. 2(*b*) since it is possible to resolve this case entirely on s. 7 grounds.

The common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. However, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. The threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. In this case, the application judge was entitled to rule on the new legal issues of whether the laws in question violated the security of the person interests under s. 7, as the majority decision of this Court in the *Prostitution Reference* was based on the s. 7 physical liberty interest alone. Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case — arbitrariness, overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years. The application judge was not, however, entitled to decide the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference* and was binding on her.

The application judge's findings on social and legislative facts are entitled to deference. The standard of review for findings of fact — whether adjudicative,

Arrêt : Les pourvois sont rejetés, et le pourvoi incident est accueilli. L'article 210, en ce qui concerne la prostitution, et les al. 212(1)*j*) et 213(1)*c*) du *Code criminel* sont déclarés incompatibles avec la *Charte*. Le mot « prostitution » est supprimé de la définition de « maison de débauche » figurant au par. 197(1) du *Code criminel* pour les besoins de l'art. 210 uniquement. L'effet de la déclaration d'invalidité est suspendu pendant un an.

Les trois dispositions contestées, qui visent principalement à empêcher les nuisances publiques et l'exploitation des prostituées, ne résistent pas au contrôle constitutionnel. Elles portent atteinte au droit à la sécurité de la personne que l'art. 7 garantit aux prostituées, et ce, d'une manière non conforme aux principes de justice fondamentale. Point n'est besoin de déterminer si notre Cour devrait rompre avec la conclusion qu'elle a tirée dans le *Renvoi sur la prostitution*, à savoir que l'al. 213(1)*c*) ne porte pas atteinte à la liberté garantie à l'al. 2*b*), ou la réexaminer, puisqu'il est possible de trancher en l'espèce sur le fondement du seul art. 7.

La règle du *stare decisis* issue de la common law est subordonnée à la Constitution et ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle. Une juridiction inférieure ne peut toutefois pas faire abstraction d'un précédent qui fait autorité, et la barre est haute lorsqu'il s'agit d'en justifier le réexamen. Les conditions sont réunies lorsqu'une nouvelle question de droit se pose ou qu'il y a modification importante de la situation ou de la preuve. En l'espèce, la juge de première instance pouvait trancher la question nouvelle de savoir si les dispositions en cause portent atteinte ou non au droit à la sécurité de la personne garanti à l'art. 7 car, dans le *Renvoi sur la prostitution*, les juges majoritaires de la Cour statuent uniquement en fonction du droit à la liberté physique de la personne garanti par l'art. 7. Qui plus est, dans le *Renvoi sur la prostitution*, les principes de justice fondamentale sont examinés sous l'angle de l'imprécision de la criminalisation indirecte et de l'acceptabilité de celle-ci. En l'espèce, ce sont le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné qui sont allégués, des notions qui ont en grande partie vu le jour au cours des 20 dernières années. La juge de première instance n'était cependant pas admise à trancher la question de savoir si la disposition sur la communication constitue une limitation justifiée de la liberté d'expression. Notre Cour s'était prononcée sur ce point dans le *Renvoi sur la prostitution*, et la juge était liée par cette décision.

Les conclusions tirées en première instance sur des faits sociaux ou législatifs commandent la déférence. La norme de contrôle applicable aux conclusions de fait —

social, or legislative — remains palpable and overriding error.

The impugned laws negatively impact security of the person rights of prostitutes and thus engage s. 7. The proper standard of causation is a flexible "sufficient causal connection" standard, as correctly adopted by the application judge. The prohibitions all heighten the risks the applicants face in prostitution — itself a legal activity. They do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks. That causal connection is not negated by the actions of third-party johns and pimps, or prostitutes' so-called choice to engage in prostitution. While some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Moreover, it makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

The applicants have also established that the deprivation of their security of the person is not in accordance with the principles of fundamental justice: principles that attempt to capture basic values underpinning our constitutional order. This case concerns the basic values against arbitrariness (where there is *no connection* between the effect and the object of the law), overbreadth (where the law goes too far and interferes with *some* conduct that bears no connection to its objective), and gross disproportionality (where the effect of the law is grossly disproportionate to the state's objective). These are three distinct principles, but overbreadth is related to arbitrariness, in that the question for both is whether there is no connection between the law's effect and its objective. All three principles compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness; they do not look to how well the law achieves its object, or to how much of the population the law benefits or is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently

qu'elles portent sur les faits en litige, des faits sociaux ou des faits législatifs — demeure celle de l'erreur manifeste et dominante.

Les dispositions contestées ont un effet préjudiciable sur la sécurité des prostituées et mettent donc en jeu le droit garanti à l'art. 7. La norme qui convient est celle du « lien de causalité suffisant », appliquée avec souplesse, celle retenue à juste titre par la juge de première instance. Les interdictions augmentent tous les risques auxquels s'exposent les demanderesses lorsqu'elles se livrent à la prostitution, une activité qui est en soi légale. Elles ne font pas qu'encadrer la pratique de la prostitution. Elles franchissent un pas supplémentaire déterminant par l'imposition de conditions *dangereuses* à la pratique de la prostitution : elles empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection. Le lien de causalité n'est pas rendu inexistant par les actes de tiers (clients et proxénètes) ou le prétendu choix des intéressées de se prostituer. Bien que certaines prostituées puissent correspondre au profil de celle qui choisit librement de se livrer à l'activité économique risquée qu'est la prostitution (ou qui a un jour fait ce choix), de nombreuses prostituées n'ont pas vraiment d'autre solution que la prostitution. De plus, le fait que le comportement des proxénètes et des clients soit la source immédiate des préjudices subis par les prostituées ne change rien. La violence d'un client ne diminue en rien la responsabilité de l'État qui rend une prostituée plus vulnérable à cette violence.

Les demanderesses ont également établi que l'atteinte à leur droit à la sécurité n'est pas conforme aux principes de justice fondamentale, lesquels sont censés intégrer les valeurs fondamentales qui sous-tendent notre ordre constitutionnel. Dans la présente affaire, les valeurs fondamentales qui nous intéressent s'opposent à l'arbitraire (*absence de lien* entre l'effet de la loi et son objet), à la portée excessive (la disposition va trop loin et empiète sur *quelque* comportement sans lien avec son objectif) et à la disproportion totale (l'effet de la disposition est totalement disproportionné à l'objectif de l'État). Il s'agit de trois notions distinctes, mais la portée excessive est liée au caractère arbitraire en ce que l'absence de lien entre l'effet de la disposition et son objectif est commune aux deux. Les trois notions supposent de comparer l'atteinte aux droits qui découle de la loi avec l'objectif de la loi, et non avec son efficacité; elles ne s'intéressent pas à la réalisation de l'objectif législatif ou au pourcentage de la population qui bénéficie de l'application de la loi ou qui en pâtit. L'analyse se veut qualitative, et non quantitative. La question que commande l'art. 7 est celle de savoir si une disposition législative intrinsèquement

bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

Applying these principles to the impugned provisions, the negative impact of the bawdy-house prohibition (s. 210) on the applicants' security of the person is grossly disproportionate to its objective of preventing public nuisance. The harms to prostitutes identified by the courts below, such as being prevented from working in safer fixed indoor locations and from resorting to safe houses, are grossly disproportionate to the deterrence of community disruption. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. Second, the purpose of the living on the avails of prostitution prohibition in s. 212(1)(*j*) is to target pimps and the parasitic, exploitative conduct in which they engage. The law, however, punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security of prostitutes, for example, legitimate drivers, managers, or bodyguards. It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes *some* conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is consequently overbroad. Third, the purpose of the communicating prohibition in s. 213(1)(*c*) is not to eliminate street prostitution for its own sake, but to take prostitution off the streets and out of public view in order to prevent the nuisances that street prostitution can cause. The provision's negative impact on the safety and lives of street prostitutes, who are prevented by the communicating prohibition from screening potential clients for intoxication and propensity to violence, is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

While the Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1, some of their arguments under s. 7 are properly addressed at this stage of the analysis. In particular, they attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work

mauvaise prive *qui que ce soit* du droit à la vie, à la liberté ou à la sécurité de sa personne; un effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7.

Si l'on applique ces notions aux dispositions contestées, l'effet préjudiciable de l'interdiction des maisons de débauche (art. 210) sur le droit à la sécurité des demanderesses est totalement disproportionné à l'objectif de prévenir les nuisances publiques. Les préjudices subis par les prostituées selon les juridictions inférieures (p. ex. le fait de ne pouvoir travailler dans un lieu fixe, sûr et situé à l'intérieur, ni avoir recours à un refuge sûr) sont totalement disproportionnés à l'objectif de réprimer le désordre public. Le législateur a le pouvoir de réprimer les nuisances, mais pas au prix de la santé, de la sécurité et de la vie des prostituées. L'interdiction faite à l'al. 212(1)*j*) de vivre des produits de la prostitution d'autrui vise à réprimer le proxénétisme, ainsi que le parasitisme et l'exploitation qui y sont associés. Or, la disposition vise toute personne qui vit des produits de la prostitution d'autrui sans établir de distinction entre celui qui exploite une prostituée et celui qui peut accroître la sécurité d'une prostituée (tel le chauffeur, le gérant ou le garde du corps véritable). La disposition vise également toute personne qui fait affaire avec une prostituée, y compris un comptable ou un réceptionniste. *Certains* actes sans aucun rapport avec l'objectif de prévenir l'exploitation des prostituées tombent ainsi sous le coup de la loi. La disposition sur le proxénétisme a donc une portée excessive. L'alinéa 213(1)*c*), qui interdit la communication, vise non pas à éliminer la prostitution dans la rue comme telle, mais bien à sortir la prostitution de la rue et à la soustraire au regard du public afin d'empêcher les nuisances susceptibles d'en découler. Son effet préjudiciable sur le droit à la sécurité et à la vie des prostituées de la rue, du fait que ces dernières sont empêchées de communiquer avec leurs clients éventuels afin de déterminer s'ils sont intoxiqués ou enclins à la violence, est totalement disproportionné au risque de nuisance causée par la prostitution de la rue.

Même si les procureurs généraux ne prétendent pas sérieusement que, si elles sont jugées contraires à l'art. 7, les dispositions en cause peuvent être justifiées en vertu de l'article premier, certaines des thèses qu'ils défendent en fonction de l'art. 7 sont reprises à juste titre à cette étape de l'analyse. En particulier, ils tentent de justifier la disposition sur le proxénétisme par la nécessité d'un libellé général afin que tombent sous le coup de son application toutes les relations empreintes d'exploitation. Or, la disposition vise non seulement

with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships. The impugned laws are not saved by s. 1.

Concluding that each of the challenged provisions violates the *Charter* does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. Considering all the interests at stake, the declaration of invalidity should be suspended for one year.

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Referred to: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *R. v. Pierce* (1982), 37 O.R. (2d) 721; *R. v. Worthington* (1972), 10 C.C.C. (2d) 311; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Grilo* (1991), 2 O.R. (3d) 514; *R. v. Barrow* (2001), 54 O.R. (3d) 417; *R. v. Head* (1987), 59 C.R. (3d) 80; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R.

le chauffeur ou le garde du corps, qui peut en réalité être un proxénète, mais aussi la personne qui entretient avec la prostituée des rapports manifestement dénués d'exploitation (p. ex. un réceptionniste ou un comptable). La disposition n'équivaut donc pas à une atteinte minimale. Pour les besoins du dernier volet de l'analyse fondée sur l'article premier, son effet bénéfique — protéger les prostituées contre l'exploitation — ne l'emporte pas non plus sur son effet qui empêche les prostituées de prendre des mesures pour accroître leur sécurité et, peut-être, leur sauver la vie. Les dispositions contestées ne sont pas sauvegardées par application de l'article premier.

La conclusion que les dispositions contestées portent atteinte à des droits garantis par la *Charte* ne dépouille pas le législateur du pouvoir de décider des lieux et des modalités de la prostitution, à condition qu'il exerce ce pouvoir sans porter atteinte aux droits constitutionnels des prostituées. L'encadrement de la prostitution est un sujet complexe et délicat. Il appartiendra au législateur, s'il le juge opportun, de concevoir une nouvelle approche qui intègre les différents éléments du régime actuel. Au vu de l'ensemble des intérêts en jeu, il convient de suspendre l'effet de la déclaration d'invalidité pendant un an.

Jurisprudence

Arrêts mentionnés : *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458; *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401; *R. c. Pierce* (1982), 37 O.R. (2d) 721; *R. c. Worthington* (1972), 10 C.C.C. (2d) 311; *R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Grilo* (1991), 2 O.R. (3d) 514; *R. c. Barrow* (2001), 54 O.R. (3d) 417; *R. c. Head* (1987), 59 C.R. (3d) 80; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; *Nouveau-Brunswick (Ministre de la Santé et des Services*

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POURVOIS et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Rosenberg, Feldman, MacPherson et Cronk), 2012 ONCA 186, 109 O.R. (3d) 1, 290 O.A.C. 236, 346 D.L.R. (4th) 385, 282 C.C.C. (3d) 1, 256 C.R.R. (2d) 143, 91 C.R. (6th) 257, [2012] O.J. No. 1296 (QL), 2012 CarswellOnt 3557, qui a confirmé en partie une décision de la juge Himel,

(3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Appeals dismissed and cross-appeal allowed.

Michael H. Morris, *Nancy Dennison* and *Gail Sinclair*, for the appellant/respondent on cross-appeal the Attorney General of Canada.

Jamie C. Klukach, *Christine Bartlett-Hughes* and *Megan Stephens*, for the appellant/respondent on cross-appeal the Attorney General of Ontario.

Alan N. Young, *Marlys A. Edwardh* and *Daniel Sheppard*, for the respondents/appellants on cross-appeal.

Sylvain Leboeuf and *Julie Dassylva*, for the intervener the Attorney General of Quebec.

Katrina E. Pacey, *Joseph J. Arvay*, *Q.C.*, *Elin R. S. Sigurdson*, *Lisa C. Glowacki* and *M. Kathleen Kinch*, for the interveners the Pivot Legal Society, the Downtown Eastside Sex Workers United Against Violence Society and the PACE Society.

Written submissions only by *Michael A. Feder* and *Tammy Shoranick*, for the intervener the Secretariat of the Joint United Nations Programme on HIV/AIDS.

Brent B. Olthuis, *Megan Vis-Dunbar* and *Michael Sobkin*, for the intervener the British Columbia Civil Liberties Association.

Georgialee A. Lang and *Donald Hutchinson*, for the intervener the Evangelical Fellowship of Canada.

Jonathan A. Shime, *Megan Schwartzentruber* and *Renée Lang*, for the interveners the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS and the HIV & AIDS Legal Clinic Ontario.

Janine Benedet and *Fay Faraday*, for the interveners the Canadian Association of Sexual Assault Centres, the Native Women's Association of

2010 ONSC 4264, 102 O.R. (3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Pourvois rejetés et pourvoi incident accueilli.

Michael H. Morris, *Nancy Dennison* et *Gail Sinclair*, pour l'appelant/intimé au pourvoi incident le procureur général du Canada.

Jamie C. Klukach, *Christine Bartlett-Hughes* et *Megan Stephens*, pour l'appelant/intimé au pourvoi incident le procureur général de l'Ontario.

Alan N. Young, *Marlys A. Edwardh* et *Daniel Sheppard*, pour les intimées/appelantes au pourvoi incident.

Sylvain Leboeuf et *Julie Dassylva*, pour l'intervenant le procureur général du Québec.

Katrina E. Pacey, *Joseph J. Arvay*, *c.r.*, *Elin R. S. Sigurdson*, *Lisa C. Glowacki* et *M. Kathleen Kinch*, pour les intervenantes Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society et PACE Society.

Argumentation écrite seulement par *Michael A. Feder* et *Tammy Shoranick*, pour l'intervenant le Secrétariat du Programme commun des Nations Unies sur le VIH/sida.

Brent B. Olthuis, *Megan Vis-Dunbar* et *Michael Sobkin*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Georgialee A. Lang et *Donald Hutchinson*, pour l'intervenante l'Alliance évangélique du Canada.

Jonathan A. Shime, *Megan Schwartzentruber* et *Renée Lang*, pour les intervenants le Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS et HIV & AIDS Legal Clinic Ontario.

Janine Benedet et *Fay Faraday*, pour les intervenants l'Association canadienne des centres contre les agressions à caractère sexuel, l'Association

Canada, the Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* and *Amanda C. McLachlan*, for the interveners the Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada.

Joseph J. Arvay, *Q.C.*, and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Walid Hijazi, for the intervener the Simone de Beauvoir Institute.

Gwendoline Allison, for the intervener the AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution.

Christa Big Canoe and *Emily R. Hill*, for the intervener Aboriginal Legal Services of Toronto Inc.

des femmes autochtones du Canada, l'Association canadienne des Sociétés Elizabeth Fry, l'Action ontarienne contre la violence faite aux femmes, la Concertation des luttes contre l'exploitation sexuelle, le Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel et Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* et *Amanda C. McLachlan*, pour les intervenantes l'Alliance des chrétiens en droit, la Ligue catholique des droits de l'homme et REAL Women of Canada.

Joseph J. Arvay, *c.r.*, et *Cheryl Milne*, pour l'intervenant David Asper Centre for Constitutional Rights.

Walid Hijazi, pour l'intervenant l'Institut Simone de Beauvoir.

Gwendoline Allison, pour l'intervenante AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution.

Christa Big Canoe et *Emily R. Hill*, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

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[1] THE CHIEF JUSTICE — It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution. It is argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, and are therefore unconstitutional.

[2] These appeals and the cross-appeal are not about whether prostitution should be legal or not. They are about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster. I conclude that they do not. I would therefore make a suspended declaration of invalidity, returning the question of how to deal with prostitution to Parliament.

I. The Case

[3] Three applicants, all current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, are unconstitutional.

[4] The three impugned provisions criminalize various activities related to prostitution. They are primarily concerned with preventing public nuisance, as well as the exploitation of prostitutes. Section 210 makes it an offence to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant, or occupier of a place who knowingly permits it to be used as a bawdy-house. Section 212(1)(*j*) makes it an offence to live on the avails of another's prostitution. Section 213(1)(*c*) makes it an offence to either stop or attempt to stop, or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute.

Version française du jugement de la Cour rendu par

[1] LA JUGE EN CHEF — Au Canada, offrir ses services sexuels contre de l'argent n'est pas un crime. Par contre, tenir une maison de débauche, vivre des produits de la prostitution d'autrui ou communiquer avec quelqu'un en public en vue d'un acte de prostitution constituent des actes criminels. On fait valoir que ces restrictions apportées à la prostitution compromettent la sécurité et la vie des prostituées et qu'elles sont de ce fait inconstitutionnelles.

[2] Les pourvois et le pourvoi incident ne visent pas à déterminer si la prostitution doit être légale ou non, mais bien si les dispositions adoptées par le législateur fédéral pour encadrer sa pratique résistent au contrôle constitutionnel. Je conclus qu'elles n'y résistent pas. Je suis donc d'avis de les invalider avec effet suspensif et de renvoyer la question au législateur afin qu'il redéfinisse les modalités de cet encadrement.

I. Le dossier

[3] Les demanderesses — trois prostituées ou ex-prostituées — ont sollicité un jugement qui déclare inconstitutionnelles trois dispositions du *Code criminel*, L.R.C. 1985, ch. C-46.

[4] Les trois dispositions contestées criminalisent diverses activités liées à la prostitution. Elles visent principalement à empêcher les nuisances publiques et l'exploitation des prostituées. Suivant l'art. 210, est coupable d'une infraction quiconque, selon le cas, habite une maison de débauche, est trouvé, sans excuse légitime, dans une maison de débauche ou, en qualité de propriétaire, locateur, occupant ou locataire d'un local, en permet sciemment l'utilisation comme maison de débauche. L'alinéa 212(1)*j*) dispose qu'est coupable d'un acte criminel quiconque vit des produits de la prostitution d'autrui. L'alinéa 213(1)*c*) crée l'infraction d'arrêter ou de tenter d'arrêter une personne ou de communiquer ou de tenter de communiquer avec elle dans un endroit public dans le but de se livrer à la prostitution ou de retenir les services sexuels d'une personne qui s'y livre.

[5] However, prostitution itself is not illegal. It is not against the law to exchange sex for money. Under the existing regime, Parliament has confined lawful prostitution to two categories: street prostitution and "out-calls" — where the prostitute goes out and meets the client at a designated location, such as the client's home. This reflects a policy choice on Parliament's part. Parliament is not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes.

[6] The applicants allege that all three provisions infringe s. 7 of the *Canadian Charter of Rights and Freedoms* by preventing prostitutes from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violent clients. The applicants also allege that s. 213(1)(*c*) infringes s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

[7] The backgrounds of the three applicants as revealed in their evidence were reviewed in the application judge's decision (2010 ONSC 4264, 102 O.R. (3d) 321).

[8] Terri Jean Bedford was born in Collingwood, Ontario, in 1959, and as of 2010 had 14 years of experience working as a prostitute in various Canadian cities. She worked as a street prostitute, a massage parlour attendant, an escort, an owner and manager of an escort agency, and a dominatrix. Ms. Bedford had a difficult childhood and adolescence during which she was subjected to various types of abuse. She also encountered brutal violence throughout her career — largely, she stated, while working on the street. In her experience, indoor prostitution is safer than prostitution on the street, although she conceded that safety of an indoor location can vary. Ms. Bedford has been convicted of both keeping and being an inmate of a common bawdy-house, for which she has paid a number of fines and served 15 months in jail.

[5] Or, la prostitution n'est pas elle-même illégale. Échanger des services sexuels contre de l'argent n'est pas contraire à la loi. Le régime actuel ne permet que deux types de prostitution : celle qui se pratique dans la rue et celle qui est « itinérante », où la prostituée se déplace pour aller à la rencontre de son client dans un endroit convenu, chez lui par exemple. Cette limitation témoigne d'un choix de politique générale du législateur. Il est loisible à ce dernier de limiter les modalités et les lieux d'exercice de la prostitution à condition qu'il le fasse sans porter atteinte aux droits constitutionnels des prostituées.

[6] Les demanderesses soutiennent que les dispositions portent toutes trois atteinte au droit garanti à l'art. 7 de la *Charte canadienne de droits et libertés* en ce qu'elles empêchent les prostituées de prendre certaines mesures pour se prémunir contre les actes de violence, telles l'embauche d'un garde ou l'évaluation préalable du client. Elles ajoutent que l'al. 213(1)*c*) porte atteinte à une liberté garantie à l'al. 2*b*) de la *Charte* et qu'aucune des dispositions n'est sauvegardée par l'article premier.

[7] Dans sa décision, la juge de première instance relate l'histoire personnelle de chacune des trois demanderesses à partir de leurs témoignages (2010 ONSC 4264, 102 O.R. (3d) 321).

[8] Terri Jean Bedford est née en 1959 à Collingwood, en Ontario. En 2010, elle se prostituait depuis 14 ans et avait travaillé dans différentes villes canadiennes. Elle a été tour à tour prostituée dans la rue, employée de salon de massage, escorte, propriétaire et directrice d'une agence d'escortes, puis dominatrice. Elle a connu une enfance et une adolescence difficiles pendant lesquelles elle a subi divers types de violence. Elle a également été victime d'actes de violence pendant ses années de prostitution, surtout, a-t-elle expliqué, lorsqu'elle travaillait dans la rue. Elle en conclut que la prostitution pratiquée à l'intérieur est moins risquée que la prostitution dans la rue, même si elle reconnaît que la sécurité à l'intérieur peut varier d'un lieu à l'autre. M^me^ Bedford a été déclarée coupable d'avoir tenu et habité une maison de débauche, deux infractions qui lui ont valu des amendes et une peine d'emprisonnement de 15 mois.

[9] When she ran an escort service in the 1980s, Ms. Bedford instituted various safety measures, including: ensuring someone else was on location during in-calls, except during appointments with well-known clients; ensuring that women were taken to and from out-call appointments by a boyfriend, husband, or professional driver; if an appointment was at a hotel, calling the hotel to verify the client's name and hotel room number; if an appointment was at a client's home, calling the client's phone to ensure it was the correct number; turning down appointments from clients who sounded intoxicated; and verifying that credit card numbers matched the names of clients. She claimed she was not aware of any incidents of violence by the clientele towards her employees during that time. At some point in the 1990s, Ms. Bedford ran the Bondage Bungalow, where she offered dominatrix services. She also instituted various safety measures at this establishment, and claimed she only experienced one incident of "real violence" (application decision, at para. 30).

[9] Lorsqu'elle dirigeait un service d'escortes dans les années 1980, M^me^ Bedford prenait diverses mesures de sécurité, dont les suivantes. Assurer la présence sur place d'une autre personne lors de la visite d'un nouveau client; faire en sorte que la prostituée soit amenée au lieu de rendez-vous, puis en soit ramenée par son petit ami, son mari ou un chauffeur; appeler l'hôtel où le rendez-vous est donné pour vérifier le nom du client et le numéro de sa chambre; composer le numéro de téléphone du client pour s'assurer que c'était le bon lorsque la rencontre avait lieu chez le client; refuser tout rendez-vous à un client qui semblait intoxiqué; s'assurer que le numéro de carte de crédit correspondait au nom du client. Pour autant qu'elle sache, aucune de ses employées n'a été victime d'actes de violence de la part de clients pendant cette période. À un certain moment au cours des années 1990, M^me^ Bedford a ouvert le « Bondage Bungalow » où elle a offert des services de dominatrice. Elle y a également pris des mesures de sécurité et n'a connu qu'un seul incident de [TRADUCTION] « violence véritable » (décision de première instance, par. 30).

[10] Ms. Bedford is not currently working in prostitution but asserted that she would like to return to working as a dominatrix in a secure, indoor location; however, she is concerned that in doing so, she would be exposed to criminal liability. Furthermore, she does not want the people assisting her to be subject to criminal liability due to the living on the avails of prostitution provision.

[10] Pour l'heure, M^me^ Bedford ne se livre pas à la prostitution. Elle aimerait reprendre ses activités de dominatrice dans un lieu sûr, à l'intérieur, mais elle craint d'engager alors sa responsabilité criminelle. Elle ajoute ne pas vouloir non plus que ses collaborateurs s'exposent à des accusations de proxénétisme.

[11] Amy Lebovitch was born in Montréal in 1979. She comes from a stable background and attended both CEGEP and university. She currently works as a prostitute and has done so since approximately 1997 in various cities in Canada. She worked first as a street prostitute, then as an escort, and later in a fetish house. Ms. Lebovitch considers herself lucky that she was never subjected to violence during her years working on the streets. She moved off the streets to work at the escort agency after seeing other women's injuries and hearing stories of the violence suffered by other street prostitutes. Ms. Lebovitch maintains that she felt safer in an indoor location; she attributed remaining safety issues mainly to poor management. Ms. Lebovitch experienced one notable instance of violence, which

[11] Née en 1979 à Montréal, Amy Lebovitch a grandi dans une famille stable et a fréquenté le cégep et l'université. Elle se livre actuellement à la prostitution. Elle a commencé vers 1997 et a travaillé dans plusieurs villes du Canada. Elle s'est d'abord prostituée dans la rue, puis comme escorte et, enfin, dans une maison fétichiste. Elle s'estime chanceuse de n'avoir jamais été victime de violence au cours des années où elle a travaillé dans la rue. Elle a quitté ce milieu pour devenir escorte après avoir vu les blessures infligées à d'autres prostituées de la rue et avoir entendu le récit des actes de violence commis à leur endroit. M^me^ Lebovitch soutient qu'elle se sent davantage en sécurité lorsqu'elle se livre à la prostitution à l'intérieur. Selon elle, les incidents qui s'y produisent malgré tout sont

she did not report to the police out of fear of police scrutiny and the possibility of criminal charges.

[12] Presently, Ms. Lebovitch primarily works independently out of her home, where she takes various safety precautions, including: making sure client telephone calls are from unblocked numbers; not taking calls from clients who sound drunk, high, or in another manner undesirable; asking for expectations upfront; taking clients' full names and verifying them using directory assistance; getting referrals from regular clients; and calling a third party — her "safe call" — when the client arrives and before he leaves. Ms. Lebovitch fears being charged and convicted under the bawdy-house provisions and the consequent possibility of forfeiture of her home. She says that the fear of criminal charges has caused her to work on the street on occasion. She is also concerned that her partner will be charged with living on the avails of prostitution. She has never been charged with a criminal offence of any kind. Ms. Lebovitch volunteers as the spokesperson for Sex Professionals of Canada ("SPOC"), and she also records information from women calling to report "bad dates" — incidents that ended in violence or theft. Ms. Lebovitch stated that she enjoys her job and does not plan to leave it in the foreseeable future.

[13] Valerie Scott was born in Moncton, New Brunswick, in 1958. She is currently the executive director of SPOC, and she no longer works as a prostitute. In the past, she worked indoors, from her home or in hotel rooms; she also worked as a prostitute on the street, in massage parlours, and she ran a small escort business. She has never been charged with a criminal offence of any kind. When Ms. Scott worked from home, she would screen new clients by meeting them in public locations. She never experienced significant harm working from home. Around 1984, as awareness about HIV/AIDS increased, Ms. Scott was compelled to work as a street prostitute, since indoor clients felt entitled not to wear condoms. On the street, she was subjected to threats of violence, as well as verbal and physical abuse. Ms. Scott described some precautions street

essentiellement attribuables à une mauvaise gestion. Elle n'a connu qu'un seul cas de violence digne de mention, qu'elle n'a toutefois pas dénoncé de crainte d'attirer l'attention de la police sur ses activités et d'être accusée au criminel.

[12] À l'heure actuelle, M^me^ Lebovitch se prostitue essentiellement chez elle, de manière autonome. Elle prend diverses précautions, dont s'assurer que le numéro de téléphone du client n'est pas masqué, refuser un client qui semble ivre, intoxiqué ou par ailleurs rebutant, s'enquérir au départ des attentes du client, lui demander son nom au complet et vérifier son identité à l'assistance annuaire, obtenir des références d'un client fiable et appeler un tiers — son « ange gardien » — à l'arrivée du client et peu avant qu'il ne parte. M^me^ Lebovitch craint d'être accusée et déclarée coupable de tenir une maison de débauche et que sa demeure soit confisquée en conséquence. Elle affirme que la peur d'être accusée au criminel l'a parfois amenée à travailler dans la rue. Elle craint également que son conjoint ne soit accusé de proxénétisme. Elle n'a jamais fait l'objet d'accusations au pénal. Elle est porte-parole bénévole de l'organisme Sex Professionals of Canada (« SPOC ») et consigne par ailleurs les incidents que lui signalent des prostituées victimes de violence ou de vol de la part de clients. M^me^ Lebovitch dit aimer son travail et n'entend pas en changer dans un avenir prévisible.

[13] Née en 1958 à Moncton, au Nouveau-Brunswick, Valerie Scott est actuellement directrice administrative de SPOC. Elle ne travaille plus comme prostituée, mais elle l'a fait, à l'intérieur, chez elle ou dans des chambres d'hôtel, dans la rue et dans des salons de massage. Elle a aussi dirigé une petite agence d'escortes. Elle n'a jamais été accusée de la moindre infraction criminelle. Lorsqu'elle travaillait chez elle, elle soumettait tout nouveau client à une évaluation préalable lors d'une rencontre dans un lieu public. Elle n'a alors jamais eu d'ennuis graves. Vers 1984, les craintes accrues suscitées par le VIH/SIDA l'ont amenée à travailler dans la rue car les clients qu'elle recevait chez elle se croyaient dispensés du port du condom. Dans la rue, elle a été l'objet de menaces de violence ainsi que d'agressions verbales et physiques. Elle fait

prostitutes took prior to the enactment of the communicating law, including working in pairs or threes and having another prostitute visibly write down the client's licence plate number, so he would know he was traceable if something was to go wrong.

[14] Ms. Scott worked as an activist and, among other things, advocated against Bill C-49 (which included the current communicating provision). Ms. Scott stated that following the enactment of the communicating law, the Canadian Organization for the Rights of Prostitutes ("CORP") began receiving calls from women working in prostitution about the increased enforcement of the laws and the prevalence of bad dates. In response, Ms. Scott was involved in setting up a drop-in and phone centre for prostitutes in Toronto; within the first year, Ms. Scott spoke to approximately 250 prostitutes whose main concerns were client violence and legal matters arising from arrest. In 2000, Ms. Scott formed SPOC to revitalize and continue the work previously done by CORP. As the executive director of this organization, she testified before a Parliamentary Subcommittee on Solicitation Laws in 2005. Over the years, Ms. Scott estimates that she has spoken with approximately 1,500 women working in prostitution. If this challenge is successful, Ms. Scott would like to operate an indoor prostitution business. While she recognizes that clients may be dangerous in both outdoor and indoor locations, she would institute safety precautions such as checking identification of clients, making sure other people are close by during appointments to intervene if needed, and hiring a bodyguard.

[15] The three applicants applied pursuant to rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order that the provisions restricting prostitution are unconstitutional. The evidentiary record consists of over 25,000 pages of evidence in 88 volumes. The affidavit evidence was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard and many

état de certaines précautions que les prostituées de la rue prenaient avant l'adoption des dispositions interdisant la communication, dont le travail à deux ou à trois ou la prise ostensible du numéro de plaque du client par une autre prostituée afin que ce dernier sache qu'on pouvait le retracer si les choses tournaient mal.

[14] M^me^ Scott a été militante. Elle a notamment fait campagne contre le projet de loi C-49 (dont est issue la disposition actuelle interdisant la communication). Elle dit qu'après l'interdiction de la communication, la Canadian Organization for the Rights of Prostitutes (« CORP ») a commencé à recevoir des appels de prostituées qui constataient une répression policière accrue et un plus grand nombre d'incidents avec des clients. C'est pourquoi elle a participé à la mise sur pied à Toronto d'un centre d'aide aux prostituées dont les services étaient offerts sur place et au téléphone. Dès la première année, M^me^ Scott s'est entretenue avec environ 250 prostituées dont les principaux sujets de préoccupation étaient la violence des clients et les conséquences juridiques d'une arrestation. En 2000, elle a créé SPOC afin de donner une nouvelle impulsion au travail entrepris par la CORP. C'est à titre de directrice administrative de cet organisme qu'elle a témoigné en 2005 devant le Sous-comité parlementaire de l'examen des lois sur le racolage. Au fil des ans, elle se serait entretenue avec environ 1 500 femmes qui se livrent à la prostitution. Si les appelantes ont gain de cause, M^me^ Scott aimerait se mettre à son compte et offrir des services de prostitution à l'intérieur. Elle reconnaît qu'un client peut se révéler dangereux tant à l'intérieur qu'à l'extérieur, mais elle prendrait des précautions, comme la vérification de l'identité du client, la présence d'une autre personne à proximité qui puisse intervenir au besoin lors d'un rendez-vous et l'embauche d'un garde du corps.

[15] Les trois demanderesses ont demandé, sur le fondement de l'al. 14.05(3)g.1) des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, que les dispositions qui limitent la prostitution soient déclarées inconstitutionnelles. Le dossier de preuve compte plus de 25 000 pages et 88 volumes. La preuve par affidavit s'accompagne d'une foule d'études, de rapports, d'articles de journaux, d'extraits de textes

other documents. Some of the affiants were cross-examined.

II. Legislation

[16] The relevant legislation is as follows:

Canadian Charter of Rights and Freedoms

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

2. Everyone has the following fundamental freedoms:

. . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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.

Criminal Code

197. (1) In this Part,

. . .

"common bawdy-house" means a place that is

(*a*) kept or occupied, or

(*b*) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

de loi et des Débats de la Chambre des communes, et de nombreux autres documents. Certains déposants ont été contre-interrogés.

II. Dispositions législatives

[16] Les dispositions législatives applicables sont les suivantes :

Charte canadienne des droits et libertés

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

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;

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.

Code criminel

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

. . .

« maison de débauche » Local qui, selon le cas :

a) est tenu ou occupé;

b) est fréquenté par une ou plusieurs personnes,

à des fins de prostitution ou pour la pratique d'actes d'indécence.

210. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque tient une maison de débauche.

(2) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, selon le cas :

(*a*) is an inmate of a common bawdy-house,

(*b*) is found, without lawful excuse, in a common bawdy-house, or

(*c*) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

212. (1) Every one who

. . .

(*j*) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

213. (1) Every person who in a public place or in any place open to public view

. . .

a) habite une maison de débauche;

b) est trouvé, sans excuse légitime, dans une maison de débauche;

c) en qualité de propriétaire, locateur, occupant, locataire, agent ou ayant autrement la charge ou le contrôle d'un local, permet sciemment que ce local ou une partie du local soit loué ou employé aux fins de maison de débauche.

(3) Lorsqu'une personne est déclarée coupable d'une infraction visée au paragraphe (1), le tribunal fait signifier un avis de la déclaration de culpabilité au propriétaire ou locateur du lieu à l'égard duquel la personne est déclarée coupable, ou à son agent, et l'avis doit contenir une déclaration portant qu'il est signifié selon le présent article.

(4) Lorsqu'une personne à laquelle un avis est signifié en vertu du paragraphe (3) n'exerce pas immédiatement tout droit qu'elle peut avoir de résilier la location ou de mettre fin au droit d'occupation que possède la personne ainsi déclarée coupable, et que, par la suite, un individu est déclaré coupable d'une infraction visée au paragraphe (1) à l'égard du même local, la personne à qui l'avis a été signifié est censée avoir commis une infraction visée au paragraphe (1), à moins qu'elle ne prouve qu'elle a pris toutes les mesures raisonnables pour empêcher le renouvellement de l'infraction.

212. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, selon le cas :

. . .

j) vit entièrement ou en partie des produits de la prostitution d'une autre personne.

213. (1) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, dans un endroit soit public soit situé à la vue du public et dans le but de se livrer à la prostitution ou de retenir les services sexuels d'une personne qui s'y livre :

. . .

(*c*) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

c) soit arrête ou tente d'arrêter une personne ou, de quelque manière que ce soit, communique ou tente de communiquer avec elle.

III. Prior Decisions

A. *Ontario Superior Court of Justice (Himel J.)*

[17] The application judge, Himel J., concluded that the applicants had private interest standing to challenge the provisions. She held that the decision of this Court upholding the bawdy-house and communicating law in the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 ("*Prostitution Reference*"), did not prevent her from reviewing their constitutionality because: (1) s. 7 jurisprudence has evolved considerably since 1990; in particular, the doctrines of arbitrariness, overbreadth and gross disproportionality had not yet been fully articulated and therefore were not argued or considered in the *Prostitution Reference*; (2) the evidentiary record before her was much richer, based on research not available in 1990; (3) the social, political and economic assumptions underlying the *Prostitution Reference* may no longer be valid; and (4) the type of expression at issue differed from that considered in the *Prostitution Reference*.

[18] In considering the legislative scheme as it exists and the evidence before her, Himel J. found that each of the impugned laws deprived the applicants and others like them of their liberty (by reason of potential imprisonment) and their security of the person (because they increased the risk of injury). The increased risk of violence created by the laws constituted a "sufficient" cause, engaging the security of the person protected by s. 7. She stated:

With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes

III. Décisions des juridictions inférieures

A. *Cour supérieure de justice de l'Ontario (la juge Himel)*

[17] En première instance, la juge Himel conclut que les demanderesses ont qualité pour agir dans l'intérêt privé et contester les dispositions. Elle estime que le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123 (« *Renvoi sur la prostitution* »), dans lequel notre Cour confirme la validité des dispositions sur les maisons de débauche et la communication à des fins de prostitution, ne l'empêche pas d'examiner leur constitutionnalité, car (1) la jurisprudence relative à l'art. 7 a beaucoup évolué depuis 1990 et, plus particulièrement, les notions de caractère arbitraire, de portée excessive et de disproportion totale n'étaient pas encore bien arrêtées, de sorte qu'elles n'avaient pas été invoquées ou examinées dans cette affaire, (2) le dossier de preuve est beaucoup plus étoffé et repose sur les résultats de recherches qui n'étaient pas disponibles en 1990, (3) les données sociales, politiques et économiques qui sous-tendent le *Renvoi sur la prostitution* ne sont peut-être plus valables et (4) l'expression considérée en l'espèce diffère de celle examinée dans le *Renvoi sur la prostitution*.

[18] Après examen du régime législatif existant et de la preuve offerte, la juge Himel conclut que les dispositions contestées portent toutes trois atteinte au droit à la liberté (en raison du risque d'emprisonnement) et à la sécurité (en raison du risque accru de préjudice) des demanderesses et d'autres personnes dans la même situation. Le risque accru de violence créé par les dispositions « suffit » pour mettre en jeu le droit à la sécurité de la personne garanti à l'art. 7. Elle déclare :

[TRADUCTION] À l'égard de l'art. 210, les preuves indiquent que travailler à l'intérieur est la façon la plus

who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(*j*), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(*c*) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.

In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence. [paras. 361-62]

[19] Himel J. concluded that the deprivation of security thus established was not in accordance with the principles of fundamental justice, notably the requirements that laws not infringe security of the person in a way that is arbitrary, overbroad or grossly disproportionate.

[20] Himel J. found the bawdy-house provision (s. 210) overbroad because it extended to virtually any place and allowed for convictions that were unrelated to the objective of preventing community nuisance. And the harms it inflicted were grossly disproportionate to the few nuisance complaints received. The effect of preventing prostitutes from working in-call at a regular indoor location was to force them to choose between their liberty interest (obeying the law) and their personal security.

[21] Himel J. found the prohibition against living on the avails of prostitution (s. 212(1)(*j*)) arbitrary, overbroad and grossly disproportionate. While targeting exploitation by pimps, the provision

sécuritaire de vendre des services à caractère sexuel. Pourtant, les prostituées qui tentent d'accroître leur niveau de sécurité en travaillant à l'intérieur sont passibles d'une sanction pénale. Relativement à l'al. 212(1)*j*), la prostitution, y compris le travail légal « itinérant », pourrait être plus sécuritaire si la prostituée avait le droit d'embaucher un adjoint ou un garde du corps. Pourtant, de telles relations de travail sont illégales en raison de la disposition interdisant de vivre des produits de la prostitution. En dernier lieu, l'al. 213(1)*c*) interdit aux prostituées de la rue, qui sont de loin les plus vulnérables et font l'objet d'un nombre alarmant d'actes de violence, de présélectionner les clients à l'étape initiale, et cruciale, de la transaction possible, les exposant ainsi à un risque accru de violence.

En conclusion, ces trois dispositions empêchent les prostituées de prendre des précautions, certaines extrêmement rudimentaires, qui pourraient réduire le risque de violence à leur endroit. Les prostituées sont obligées de choisir entre la liberté et la sécurité de leur personne. Ainsi, bien que ce soit le client qui, en fin de compte, fasse subir la violence à la prostituée, je suis d'avis que la loi contribue suffisamment à empêcher qu'une prostituée prenne des mesures qui pourraient réduire le risque d'une telle violence. [par. 361-362]

[19] La juge Himel conclut que la privation du droit à la sécurité qui en résulte n'est pas conforme aux principes de justice fondamentale, dont celui qui empêche le législateur de porter atteinte au droit à la sécurité de la personne par l'adoption d'une disposition arbitraire ou totalement disproportionnée ou dont la portée est trop grande.

[20] À son avis, la disposition sur les maisons de débauche (l'art. 210) a une portée trop grande en ce qu'elle vise pratiquement tout lieu et réprime des actes qui n'ont rien à voir avec l'objectif d'empêcher les nuisances publiques. De plus, le préjudice infligé est totalement disproportionné compte tenu du nombre peu élevé de plaintes pour nuisance. Empêcher les prostituées de se livrer à la prostitution dans un lieu établi, situé à l'intérieur, les contraint à renoncer à leur liberté (par l'observation de la loi) ou à leur sécurité personnelle.

[21] La juge Himel estime que l'interdiction du proxénétisme (l'al. 212(1)*j*)) est arbitraire et totalement disproportionnée, et que sa portée est trop grande. Même si elle est censée réprimer

encompasses virtually anyone who provides services to prostitutes. Prostitutes are forced to work alone, increasing the risk of harm, or work with people prepared to break the law. It increases reliance on pimps, and is therefore arbitrary. It catches non-exploitative relationships, and is therefore overbroad. And it creates the risk of severe violence from pimps and exploiters, making it grossly disproportionate.

[22] Finally, Himel J. found the prohibition on communicating for the purposes of prostitution (s. 213(1)(*c*)) violates the principle against gross disproportionality. By preventing prostitutes from screening clients — an essential tool for enhancing their safety — it endangers them out of all proportion to the small social benefit it provides. It also infringes the freedom of expression guarantee under s. 2(*b*) of the *Charter*.

[23] Himel J. found that the infringement of the s. 7 and s. 2(*b*) rights imposed by the laws could not be justified under s. 1 of the *Charter*.

[24] In the result, Himel J. declared the communicating and living on the avails offences unconstitutional, without suspension, and rectified the bawdy-house prohibition by striking the word "prostitution" from the definition of "common bawdy-house" in s. 197(1) as it applies to s. 210.

B. *Ontario Court of Appeal (Doherty, Rosenberg, Feldman, MacPherson and Cronk JJ.A.)*

[25] The majority of the Court of Appeal, *per* Doherty, Rosenberg and Feldman J.J.A. (with whom the minority *per* MacPherson J.A. concurred on these issues), agreed with the application judge that the bawdy-house and living on the avails provisions were unconstitutional on the basis that they

l'exploitation par le proxénète, la disposition vise pratiquement toute personne qui offre des services à une prostituée. Celle-ci est obligée soit de travailler seule, ce qui augmente le risque auquel elle s'expose, soit de travailler avec des gens qui sont disposés à contrevenir à la loi. L'interdiction accroît la dépendance des prostituées envers les souteneurs, ce qui la rend arbitraire. Elle s'applique à des rapports exempts d'exploitation, de sorte que sa portée est trop grande. Enfin, elle crée un risque de violence grave de la part des proxénètes et des exploiteurs, d'où son caractère totalement disproportionné.

[22] Enfin, la juge Himel statue que l'interdiction de communiquer en vue de se livrer à la prostitution (l'al. 213(1)*c*)) va à l'encontre du principe de la proportionnalité. Parce qu'elle empêche les prostituées de jauger leurs clients — une mesure essentielle à l'accroissement de leur sécurité —, l'interdiction les expose à un danger disproportionné au faible avantage social obtenu. Elle porte par ailleurs atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte*.

[23] La juge Himel opine que l'atteinte au droit et à la liberté garantis à l'art. 7 et à l'al. 2*b*) qui découle des dispositions en cause ne peut se justifier en vertu de l'article premier de la *Charte.*

[24] Elle déclare donc inconstitutionnelles, sans effet suspensif, les dispositions créant les infractions de communication aux fins de prostitution et de proxénétisme, et elle modifie l'interdiction de tenir une maison de débauche par la suppression du mot « prostitution » dans la définition de « maison de débauche » figurant au par. 197(1) pour les besoins de l'art. 210.

B. *Cour d'appel de l'Ontario (les juges Doherty, Rosenberg, Feldman, MacPherson et Cronk)*

[25] Les juges majoritaires de la Cour d'appel (les juges Doherty, Rosenberg et Feldman, avec l'accord des juges minoritaires sur ces points exprimé par le juge MacPherson) conviennent avec la juge de première instance que les dispositions sur les maisons de débauche et le proxénétisme sont

engaged the security of the person in a way that was not in accordance with the principles of fundamental justice (2012 ONCA 186, 109 O.R. (3d) 1). In particular, the majority found as follows.

[26] The prohibition on bawdy-houses was overbroad and had an impact on security that was grossly disproportionate to any benefit conferred. The court agreed that the word "prostitution" should be struck from the definition of "common bawdy-house". However, it suspended the declaration of invalidity for 12 months.

[27] The prohibition on living on the avails was not arbitrary, as the application judge found, but was overbroad and grossly disproportionate in its effects. However, instead of striking the provision out, the court narrowed the provision by reading in "in circumstances of exploitation" (para. 267).

[28] The majority of the Court of Appeal found the prohibition on communicating in public for the purpose of prostitution was constitutional. While it engaged security of the person, it did so in accordance with the principles of fundamental justice. The provision aims to combat nuisance-related problems caused by street solicitation. It is not arbitrary; it has been effective in protecting residential neighbourhoods from the targeted harms. Nor is it overbroad or grossly disproportionate. In finding the provision grossly disproportionate, the application judge erred by understating the objective in a way that did not reflect the evidence, and by overemphasizing the impact of the provision on prostitutes' security of the person. The evidence did not establish that inability to communicate with customers contributed to the harm experienced by prostitutes to a degree that made the impact grossly disproportionate to the benefits. The majority also found that it was bound by the *Prostitution Reference*: thus, this provision violated s. 2(*b*) of the *Charter*, but was justified under s. 1 of the *Charter*.

inconstitutionnelles parce qu'elles portent atteinte à la sécurité de la personne d'une manière non conforme aux principes de justice fondamentale (2012 ONCA 186, 109 O.R. (3d) 1). Ils concluent notamment ce qui suit.

[26] Selon eux, l'interdiction des maisons de débauche a une portée trop grande et un effet sur le droit à la sécurité qui est totalement disproportionné à l'avantage obtenu. Ils conviennent de supprimer le mot « prostitution » dans la définition de « maison de débauche », mais suspendent l'effet de l'invalidation pendant 12 mois.

[27] Ils opinent que l'interdiction du proxénétisme n'est pas arbitraire, contrairement à ce qu'affirme la juge de première instance, mais que sa portée est trop grande et qu'elle est totalement disproportionnée par ses effets. Toutefois, au lieu d'invalider la disposition, ils en restreignent la portée en l'interprétant largement comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés (par. 267).

[28] Les juges majoritaires de la Cour d'appel concluent que l'interdiction de communiquer en public à des fins de prostitution est constitutionnelle. Même si elle porte atteinte à la sécurité de la personne, elle est conforme aux principes de justice fondamentale. La disposition vise à empêcher les nuisances causées par le racolage, et elle n'est pas arbitraire. Elle a permis d'assurer la quiétude des quartiers résidentiels. Sa portée n'est pas trop grande et elle n'est pas totalement disproportionnée. Pour arriver à la conclusion que la disposition est totalement disproportionnée, la juge de première instance a eu tort de sous-estimer l'objectif sans égard à la preuve et d'accorder trop d'importance aux répercussions sur le droit à la sécurité des prostituées. La preuve ne démontrait pas que l'impossibilité de communiquer avec des clients contribuait aux ennuis des prostituées au point d'avoir un effet totalement disproportionné à l'avantage obtenu. Les juges majoritaires s'estiment également liés par le *Renvoi sur la prostitution* et ils concluent que la disposition porte atteinte à la liberté garantie à l'al. 2*b*) de la *Charte*, mais que cette atteinte est justifiée au regard de l'article premier de la *Charte*.

[29] The minority, *per* MacPherson J.A. (dissenting only on this one issue), would have struck down the communicating prohibition under ss. 7 and 1 of the *Charter* as grossly disproportionate to the legislative objective of combatting social nuisance. The minority found that: (1) its effects were equally or more serious than the other provision; (2) the application judge correctly stated the objective of the provision; (3) the record supported the conclusion that screening is an essential tool for safety; (4) beyond screening, the provision adversely impacts safety by forcing prostitutes to work in isolated and dangerous areas; (5) the provision impacts the most vulnerable class of prostitutes, street workers, raising s. 15 equality concerns; (6) the recent decision of this Court in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, supports the conclusion that the provision violates s. 7; and (7) the compounding effect of legislation that drives prostitutes onto the streets and then denies them the ability to evaluate prospective clients supports unconstitutionality. This conclusion made it unnecessary for the minority to consider s. 2(*b*) of the *Charter*.

[29] Sous la plume du juge MacPherson, les juges minoritaires (dissidents sur ce seul point) auraient invalidé l'interdiction de communiquer à des fins de prostitution sur le fondement de l'art. 7 et de l'article premier de la *Charte* au motif qu'elle est totalement disproportionnée à l'objectif législatif de réprimer la nuisance sociale. Selon eux, (1) ses répercussions sont aussi graves, sinon plus, que celles des autres dispositions, (2) la juge de première instance a correctement énoncé l'objectif de la disposition, (3) le dossier permettait de conclure que l'évaluation du client est essentielle à la sécurité des prostituées, (4) la disposition empêche non seulement cette évaluation, mais nuit à la sécurité des prostituées en les obligeant à travailler dans des endroits isolés et dangereux, (5) la disposition a des répercussions sur les prostituées les plus vulnérables, celles de la rue, ce qui compromet le droit à l'égalité garanti à l'art. 15, (6) notre récent arrêt *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134 appuie la conclusion d'atteinte au droit garanti à l'art. 7 et (7) l'effet combiné de mesures législatives ayant pour effet d'obliger les prostituées à exercer leurs activités dans la rue tout en les empêchant de jauger leurs clients éventuels va également dans le sens de l'inconstitutionnalité. Cette conclusion des juges minoritaires les dispense d'examiner l'al. 2*b*) de la *Charte*.

[30] In the course of arriving at its conclusions, the majority of the Court of Appeal made a number of ancillary observations of importance.

[30] Pour en arriver à leurs conclusions, les juges majoritaires formulent accessoirement un certain nombre d'observations importantes.

[31] In considering the doctrine of *stare decisis* and whether the application judge was bound by the *Prostitution Reference*, the court adopted a narrow view of when a trial judge can reconsider previous decisions of the Supreme Court of Canada on the basis of changes in the social, economic or political landscapes: the trial judge cannot change the law, but is limited to making findings of fact and credibility to create the necessary evidentiary record which the Supreme Court of Canada can then consider. Reasons that justify a court departing from its own prior decisions cannot justify a lower court revisiting binding authority. This applies to

[31] En ce qui concerne la règle du *stare decisis* et la question de savoir si la juge était liée par le *Renvoi sur la prostitution*, la Cour d'appel interprète strictement les conditions auxquelles un juge de première instance peut réexaminer une décision antérieure de notre Cour au regard de mutations sociales, économiques ou politiques. Le juge ne peut modifier le droit établi. Il doit s'en tenir à des conclusions sur les faits et la crédibilité afin de constituer le dossier de preuve à partir duquel notre Cour pourra ensuite se prononcer. Les motifs pour lesquels un tribunal peut s'écarter de ses propres décisions antérieures ne sauraient permettre à une

determining what constitutes a reasonable limit on a right under s. 1 of the *Charter* (paras. 75-76).

[32] On the standard of causation required to engage s. 7, the Court of Appeal held that the traditional causation analysis is inappropriate where it is legislation, and not the actions of a government official, that is said to have interfered with a s. 7 interest. Rather, the judge should conduct a practical, pragmatic analysis to determine what the legislation prohibits or requires, its impact on the persons affected, and whether this amounts to an interference with protected rights (paras. 107-9).

[33] On the issue of deference to findings of fact of the application judge, the Court of Appeal held that findings on social and legislative facts are not entitled to appellate deference, while findings on the credibility of affiants and the objectivity of expert witnesses attract deference (paras. 128-31).

[34] Regarding the purpose of the laws, the court rejected the Attorney General of Ontario's submission that there was an overarching legislative objective to eradicate, or at least discourage, prostitution. Rather, the purpose of each of the laws must be independently ascertained with reference to its unique historical context (paras. 165-70).

[35] On the principles of fundamental justice, the Court of Appeal held that arbitrariness, overbreadth, and gross disproportionality each use a different filter to examine the connection between the law and the legislative objective. Arbitrariness is the absence of any link between the objective of the law and its negative impact on security of the person. Overbreadth addresses the situation where the law imposes limits on security of the person that go beyond what is required to achieve its objective. Gross disproportionality describes the case where the effects of the impugned law are so extreme that they cannot be justified by its object (paras. 143-49).

juridiction inférieure de remettre en question un arrêt qui la lie. Ce principe vaut lorsqu'il s'agit de déterminer ce qui constitue une limite raisonnable à l'exercice d'un droit au sens de l'article premier de la *Charte* (par. 75-76).

[32] S'agissant de la causalité requise pour emporter l'application de l'art. 7, la Cour d'appel explique que l'analyse traditionnelle ne convient pas lorsque ce sont les dispositions d'une loi, et non les actes d'un fonctionnaire, qui auraient porté atteinte à un droit garanti par l'art. 7. Il faut plutôt recourir à une analyse factuelle et pragmatique pour déterminer ce que les dispositions interdisent ou prescrivent, quelles sont leurs répercussions sur les intéressés et s'il en résulte une atteinte à un droit garanti (par. 107-109).

[33] En ce qui concerne la déférence qui s'impose à l'égard des conclusions de fait tirées en première instance, la Cour d'appel opine que les conclusions sur des faits sociaux ou législatifs ne commandent pas la déférence de la juridiction d'appel, tandis que celles sur la crédibilité des déposants et l'objectivité des témoins experts la commandent (par. 128-131).

[34] S'agissant de l'objet des dispositions, la Cour d'appel rejette la prétention du procureur général de l'Ontario suivant laquelle leur objectif primordial est de supprimer la prostitution ou, du moins, de la décourager. À son avis, il faut plutôt cerner l'objet de chacune des dispositions séparément, dans son propre contexte historique (par. 165-170).

[35] Quant aux principes de justice fondamentale, la Cour d'appel statue que le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné appellent des examens sous des angles différents du lien entre la disposition contestée et l'objectif législatif. Le caractère arbitraire s'entend de l'absence de rapport entre l'objectif de la loi et ses effets préjudiciables sur la sécurité de la personne. Une disposition a une portée trop grande lorsqu'elle limite le droit à la sécurité de la personne plus qu'il n'est nécessaire pour atteindre son objectif. Une disposition est par ailleurs totalement disproportionnée lorsque ses répercussions sont si extrêmes qu'elles ne peuvent être justifiées par son objet (par. 143-149).

IV. Discussion

[36] The appellant Attorneys General appeal from the Court of Appeal's declaration that ss. 210 and 212(1)(*j*) of the *Code* are unconstitutional. The respondents cross-appeal on the issue of the constitutionality of s. 213(1)(*c*), and in respect of the Court of Appeal's remedy to resolve the unconstitutionality of s. 210.

[37] Before turning to the *Charter* arguments before us, I will first discuss two preliminary issues: (1) whether the 1990 decision in the *Prostitution Reference*, upholding the bawdy-house and communication prohibitions, is binding on trial judges and this Court; and (2) the degree of deference to be accorded to the application judge's findings on social and legislative facts.

A. *Preliminary Issues*

(1) Revisiting the *Prostitution Reference*

[38] Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies.

[39] The issue of when, if ever, such precedents may be departed from takes two forms. The first "vertical" question is when, if ever, a lower court may depart from a precedent established by a higher court. The second "horizontal" question is when a court such as the Supreme Court of Canada may depart from its own precedents.

[40] In this case, the precedent in question is the Supreme Court of Canada's 1990 advisory opinion in the *Prostitution Reference*, which upheld the constitutionality of the prohibitions on

IV. Analyse

[36] Les procureurs généraux appelants se pourvoient contre le jugement de la Cour d'appel qui déclare inconstitutionnels l'art. 210 et l'al. 212(1)*j*) du *Code*. Les intimées se pourvoient de manière incidente relativement à la constitutionnalité de l'al. 213(1)*c*) et à la mesure prise par la Cour d'appel pour remédier à l'inconstitutionnalité de l'art. 210.

[37] Avant de passer aux moyens fondés sur la *Charte*, j'examine d'abord deux questions préliminaires. Premièrement, les juges de première instance et notre Cour sont-ils liés par le *Renvoi sur la prostitution* de 1990, qui confirme la validité des dispositions interdisant les maisons de débauche et la communication à des fins de prostitution? Deuxièmement, quel degré de déférence commandent les conclusions tirées en première instance sur des faits sociaux ou législatifs?

A. *Questions préliminaires*

(1) Réexamen du *Renvoi sur la prostitution*

[38] La notion de certitude du droit exige que les tribunaux suivent et appliquent les précédents qui font autorité. C'est d'ailleurs l'assise fondamentale de la common law.

[39] La question de savoir à quelles conditions il est possible de s'écarter d'un précédent, le cas échéant, se présente de deux manières. Elle se pose premièrement du point de vue « hiérarchique ». À quelles conditions une juridiction inférieure peut-elle, le cas échéant, s'écarter du précédent établi par une juridiction supérieure? Elle se pose deuxièmement du point de vue « collégial ». À quelles conditions une juridiction comme notre Cour peut-elle, le cas échéant, s'écarter de ses propres précédents?

[40] Dans la présente affaire, le précédent correspond à l'avis consultatif de la Cour dans le *Renvoi sur la prostitution* de 1990, qui confirme la constitutionnalité des interdictions faites par deux des

bawdy-houses and communicating — two of the three provisions challenged in this case. The questions in that case were whether the laws infringed s. 7 or s. 2(*b*) of the *Charter*, and, if so, whether the limit was justified under s. 1. The Court concluded that neither of the impugned laws were inconsistent with s. 7, and that although the communicating law infringed s. 2(*b*), it was a justifiable limit under s. 1 of the *Charter*. While reference opinions may not be legally binding, in practice they have been followed (G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960), 6 *McGill L.J.* 168, at p. 175).

[41] The application judge in this case held that she could revisit those conclusions because: the legal issues under s. 7 were different, in light of the evolution of the law in that area; the evidentiary record was richer and provided research not available in 1990; the social, political and economic assumptions underlying the *Prostitution Reference* no longer applied; and the type of expression at issue in that case (commercial expression) differed from the expression at issue in this case (expression promoting safety). The Court of Appeal disagreed with respect to the s. 2(*b*) issue, holding that a trial judge asked to depart from a precedent on the basis of new evidence, or new social, political or economic assumptions, may make findings of fact for consideration by the higher courts, but cannot apply them to arrive at a different conclusion from the previous precedent (para. 76).

[42] In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence

trois dispositions contestées en l'espèce de tenir une maison de débauche et communiquer à des fins de prostitution. Dans ce renvoi, la Cour devait décider si les dispositions portaient atteinte au droit ou à la liberté garantis à l'art. 7 ou à l'al. 2*b*) de la *Charte* et, dans l'affirmative, si cette limite était justifiée par application de l'article premier. Elle conclut que ni l'une ni l'autre des dispositions ne sont incompatibles avec l'art. 7 et que, même si l'interdiction de communiquer à des fins de prostitution porte atteinte à une liberté garantie à l'al. 2*b*), il s'agit d'une limite justifiable suivant l'article premier de la *Charte*. Bien que les avis consultatifs puissent ne pas être juridiquement contraignants, dans les faits, il sont suivis (G. Rubin, « The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law » (1960), 6 *R.D. McGill* 168, p. 175).

[41] La juge de première instance dit pouvoir réexaminer les conclusions tirées dans le *Renvoi sur la prostitution* parce que les questions de droit soulevées relativement à l'art. 7 sont différentes étant donné l'évolution du droit dans le domaine, que le dossier de preuve est plus étoffé et fait état de résultats de recherches qui n'étaient pas disponibles en 1990, que les données sociales, politiques et économiques sous-jacentes ne sont plus valables et que l'expression alors en cause (commerciale) diffère de celle considérée dans la présente affaire (celle qui contribue à la sécurité). La Cour d'appel exprime son désaccord au sujet de l'al. 2*b*) et explique que le tribunal de première instance invité à rompre avec un précédent en raison de nouveaux éléments de preuve ou de nouvelles données sociales, politiques ou économiques peut tirer des conclusions de fait susceptibles d'être examinées ensuite par une juridiction supérieure, mais ne peut les appliquer pour arriver à une solution différente de celle retenue dans le précédent (par. 76).

[42] À mon avis, le juge du procès peut se pencher puis se prononcer sur une prétention d'ordre constitutionnel qui n'a pas été invoquée dans l'affaire antérieure; il s'agit alors d'une nouvelle question de droit. De même, le sujet peut être réexaminé lorsque de nouvelles questions de droit sont soulevées par suite d'une évolution importante du droit ou qu'une

that fundamentally shifts the parameters of the debate.

[43] The intervener, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis (I.F., at para. 25).

[44] I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[45] It follows that the application judge in this case was entitled to rule on whether the laws in question violated the security of the person interests under s. 7 of the *Charter*. In the *Prostitution Reference*, the majority decision was based on the s. 7 physical liberty interest alone. Only Lamer J., writing for himself, touched on security of the person — and then, only in the context of economic interests. Contrary to the submission of the Attorney General of Canada, whether the s. 7 interest at issue is economic liberty or security of the person is *not* "a distinction without a difference" (A.F., at para. 94). The rights protected by s. 7 are "independent interests, each of which must be given independent significance by the Court" (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 52). Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case — arbitrariness,

modification de la situation ou de la preuve change radicalement la donne.

[43] L'intervenant David Asper Centre for Constitutional Rights fait valoir que la règle du *stare decisis* propre à la common law est subordonnée à la Constitution et ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle. À son avis, une juridiction inférieure ne doit pas s'en tenir au rôle de [TRADUCTION] « simple exécutant » qui constitue un dossier et tire des conclusions sans se livrer à l'analyse du droit (m.i., par. 25).

[44] Je partage cet avis. Mais comme le signale aussi l'intervenant, la juridiction inférieure ne peut faire abstraction d'un précédent qui fait autorité, et la barre est haute lorsqu'il s'agit de justifier le réexamen d'un précédent. Rappelons que, selon moi, le réexamen est justifié lorsqu'une nouvelle question de droit se pose ou qu'il y a modification importante de la situation ou de la preuve. Cette approche met en balance les impératifs que sont le caractère définitif et la stabilité avec la reconnaissance du fait qu'une juridiction inférieure doit pouvoir exercer pleinement sa fonction lorsqu'elle est aux prises avec une situation où il convient de revoir un précédent.

[45] Il s'ensuit que, en l'espèce, la juge pouvait trancher la question de savoir si les dispositions en cause respectaient ou non le droit à la sécurité de la personne garanti à l'art. 7 de la *Charte*. Dans le *Renvoi sur la prostitution*, les juges majoritaires statuent uniquement en fonction du droit à la liberté physique de la personne garanti à l'art. 7. Seul le juge Lamer, qui s'exprime en son nom personnel, aborde la question de la sécurité de la personne, et ce, dans le seul contexte des droits économiques. Contrairement à ce que prétend le procureur général du Canada, le fait que le droit en cause garanti par l'art. 7 soit celui à la liberté économique ou à la sécurité de la personne *n'*est *pas* [TRADUCTION] « une distinction sans importance » (m.a., par. 94). Les droits garantis à l'art. 7 sont des « intérêts indépendants auxquels la Cour doit respectivement donner un sens indépendant » (*R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 52). Qui plus est, dans le *Renvoi sur la prostitution*, la Cour a examiné les

overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years.

[46] These considerations do not apply to the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference*. Re-characterizing the type of expression alleged to be infringed did not convert this argument into a new legal issue, nor did the more current evidentiary record or the shift in attitudes and perspectives amount to a change in the circumstances or evidence that fundamentally shifted the parameters of the debate.

[47] This brings me to the question of whether this Court should depart from its previous decision on the s. 2(*b*) aspect of this case. At heart, this is a balancing exercise, in which the Court must weigh correctness against certainty (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 27). In this case, however, it is not necessary to determine whether this Court can depart from its s. 2(*b*) conclusion in the *Prostitution Reference*, since it is possible to resolve the case entirely on s. 7 grounds.

(2) Deference to the Application Judge's Findings on Social and Legislative Facts

[48] The Court of Appeal held that the application judge's findings on social and legislative facts — that is, facts about society at large, established by complex social science evidence — were not entitled to deference. With respect, I cannot agree. As this Court stated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, appellate courts should not interfere with a trial judge's findings of fact, absent a palpable and overriding error.

principes de justice fondamentale sous l'angle de l'imprécision de la criminalisation indirecte et de son acceptabilité. En l'espèce, ce sont le caractère arbitraire, la portée trop grande et le caractère totalement disproportionné qui sont allégués, des notions qui ont en grande partie vu le jour au cours des 20 dernières années.

[46] Ces considérations sont étrangères à la question — tranchée dans le *Renvoi sur la prostitution* — de savoir si la disposition qui interdit la communication constitue une limitation justifiée de la liberté d'expression. Qualifier différemment l'expression à laquelle il aurait été porté atteinte en l'espèce ne fait pas naître une nouvelle question de droit, et ni une preuve actualisée, ni l'évolution des mentalités et des points de vue n'équivalent à une modification de la situation ou de la preuve qui change radicalement la donne.

[47] Passons à la question de savoir si, en l'espèce, notre Cour doit rompre ou non avec une décision antérieure concernant l'application de l'al. 2*b*). Il nous faut essentiellement mettre en balance deux éléments : la justesse et la certitude (*Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489, par. 27). Dans le présent dossier, toutefois, il n'est pas nécessaire de déterminer si notre Cour peut rompre avec la conclusion qu'elle a tirée sur l'application de l'al. 2*b*) dans le *Renvoi sur la prostitution* puisqu'il est possible de trancher sur le fondement du seul art. 7.

(2) Déférence envers les conclusions tirées en première instance sur des faits sociaux ou législatifs

[48] La Cour d'appel se dit d'avis que les conclusions de la juge sur des faits sociaux ou législatifs — qui intéressent la société en général et qui sont établis au moyen d'une preuve complexe relevant des sciences sociales — ne commandent pas la déférence. Je ne puis malheureusement souscrire à son opinion. Comme le dit notre Cour dans *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, une cour d'appel doit se garder de modifier les conclusions de fait tirées en première instance, sauf erreur manifeste et dominante.

[49] When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case.

[50] There are two important practical reasons not to depart from the usual standard of review simply because social or legislative facts are at issue.

[51] First, to do so would require the appeal court to duplicate the sometimes time-consuming and tedious work of the first instance judge in reviewing all the material and reconciling differences between the experts, studies and research results. A new set of judges would need to take the hours if not weeks required to intimately appreciate and analyze the evidence. And counsel for the parties would be required to take the appellate judges through all the evidence once again so they could draw their own conclusions. All this would increase the costs and delay in the litigation process. In a review for error — which is what an appeal is — it makes more sense to have counsel point out alleged errors in the trial judge's conclusions on the evidence and confine the court of appeal to determining whether those errors vitiate the trial judge's conclusions.

[52] Second, social and legislative facts may be intertwined with adjudicative facts — that is, the facts of the case at hand — and with issues of credibility of experts. To posit a different standard of review for adjudicative facts and the credibility of

[49] Le juge saisi d'éléments de preuve portant sur des faits sociaux ou législatifs a l'obligation de les examiner et de les soupeser en vue de tirer les conclusions de fait nécessaires pour trancher le litige. Il lui incombe de constituer le dossier sur lequel reposeront les appels subséquents. Sauf erreur d'appréciation susceptible de contrôle, la juridiction d'appel doit se garder de modifier les conclusions de première instance sur des faits sociaux ou législatifs. Ce partage des tâches est fondamental dans notre système de justice. Le juge du procès se prononce sur les faits, puis les juridictions d'appel contrôlent sa décision pour déterminer si elle est fondée en droit ou si elle est entachée d'une erreur de fait manifeste et dominante. La règle vaut pour les faits sociaux ou législatifs tout autant que pour les conclusions sur les faits qui sont à l'origine du litige.

[50] Deux raisons importantes d'ordre pratique militent contre la mise au rancart de la norme de contrôle habituelle seulement parce que des faits sociaux ou législatifs sont en cause.

[51] En premier lieu, la juridiction d'appel devrait alors reprendre le travail parfois long et fastidieux qui consiste à examiner tous les éléments et à concilier les divergences entre les experts, les études et les résultats de recherches. Une nouvelle formation de juges devrait passer des heures, voire des semaines, à prendre connaissance de la preuve et à l'analyser. Et les avocats des parties devraient examiner la preuve avec ces juges une fois de plus afin que ces derniers puissent tirer leurs propres conclusions. Il en résulterait une augmentation du coût et de la durée de la procédure judiciaire. Lorsqu'il s'agit de rechercher une erreur éventuelle — ce qui est le propre d'un appel —, il est plus sensé de demander aux avocats de signaler toute erreur qui entacherait les conclusions tirées de la preuve en première instance, de sorte que la juridiction d'appel n'ait qu'à décider si l'erreur vicie les conclusions.

[52] En second lieu, les faits sociaux ou législatifs peuvent s'entremêler avec les faits en litige — les faits de l'espèce — et avec les questions liées à la crédibilité des experts. Appliquer une norme de contrôle aux faits en litige ainsi qu'à la crédibilité

affiants and expert witnesses on the one hand, and social and legislative facts on the other (as proposed by the Court of Appeal), is to ask the impossible of courts of appeal. Untangling the different sources of those conclusions and applying different standards of review to them would immensely complicate the appellate task.

[53] As the Attorney General of Canada points out, this Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, suggested that legislative fact findings are owed less deference. However, the use of social science evidence in *Charter* litigation has evolved significantly since *RJR-MacDonald* was decided. In the intervening years, this Court has expressed a preference for social science evidence to be presented through an expert witness (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras 26-28; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 68). The assessment of expert evidence relies heavily on the trial judge (*R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at paras. 62-96). This is particularly so in the wake of the Ontario report by Justice Goudge, which emphasized the role of the trial judge in preventing miscarriages of justice flowing from flawed expert evidence (*Inquiry into Pediatric Forensic Pathology in Ontario: Report*, vol. 3, *Policy and Recommendations* (2008)). The distinction between adjudicative and legislative facts can no longer justify gradations of deference.

[54] This case illustrates the problem. The application judge arrived at her conclusions on the impact of the impugned laws on s. 7 security interests on the basis of the personal evidence of the applicants, the evidence of affiants and experts, and documentary evidence in the form of studies, reports of expert panels and Parliamentary records. The Court of Appeal conceded that it must accord deference to her findings of adjudicative facts and the credibility of affiants and experts, but said it owes no deference to findings on social and legislative facts. The task

des déposants et des témoins experts et en appliquer une autre aux faits sociaux ou législatifs (comme le propose la Cour d'appel) revient à demander l'impossible aux juridictions d'appel. Démêler les différentes sources de ces conclusions et les soumettre à des normes de contrôle différentes compliqueraient immensément la tâche de la juridiction d'appel.

[53] Le procureur général du Canada souligne que, dans l'arrêt *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, notre Cour affirme que les conclusions relatives aux faits législatifs commandent un degré de déférence moins élevé. Or, le recours à des éléments de preuve relevant des sciences sociales dans les affaires portant sur l'application de la *Charte* a beaucoup évolué depuis cet arrêt. Dans les années qui ont suivi, notre Cour a dit préférer que de tels éléments de preuve soient présentés par des témoins experts (*R. c. Malmo-Levine*, 2003 CSC 74, [2003] 3 R.C.S. 571, par. 26-28; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458, par. 68). L'appréciation du témoignage d'un expert relève au premier chef du juge du procès (*R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, par. 62-96), surtout depuis le rapport établi en Ontario par le juge Goudge qui met en évidence le rôle du juge du procès dans la prévention des erreurs judiciaires imputables aux témoignages d'experts déficients (*Commission d'enquête sur la médecine légale pédiatrique en Ontario : Rapport*, vol. 3, *Politique et recommandations* (2008)). La distinction entre les faits en litige et les faits législatifs ne peut plus justifier des degrés différents de déférence.

[54] La présente affaire constitue un bon exemple. La juge de première instance tire ses propres conclusions concernant l'effet des dispositions contestées sur le droit à la sécurité de la personne garanti à l'art. 7 à partir du témoignage des demanderesses, des déposants et des experts, ainsi que de la preuve documentaire constituée d'études, de rapports de comités d'experts et de documents parlementaires. La Cour d'appel concède qu'elle doit déférer aux conclusions de la juge sur les faits en litige ainsi que sur la crédibilité des déposants

of applying different standards of review when the evidence is intertwined would be daunting.

[55] It is suggested that no deference is required on social and legislative facts because appellate courts are in as good a position to evaluate such evidence as trial judges. If this were so, adjudicative facts presented only in affidavit form would similarly be owed less deference. Yet this Court has been clear that, absent express statutory instruction, there is no middling standard of review for findings of fact (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401). Furthermore, this view does not meet the concerns of duplication of effort and the intertwining of such evidence with other kinds of evidence. Nor does it address the point that the appellate task is not to review evidence globally, but rather to review the conclusions the first instance judge has drawn from the evidence.

[56] For these reasons, I am of the view that a no-deference standard of appellate review for social and legislative facts should be rejected. The standard of review for findings of fact — whether adjudicative, social, or legislative — remains palpable and overriding error.

B. *Section 7 Analysis*

[57] In the discussion that follows, I first consider whether the applicants have established that the impugned laws impose limits on security of the person, thus engaging s. 7. I then examine the argument of the appellant Attorneys General that the laws do not cause the alleged harms. I go on to consider whether any limits on security of the person are in accordance with the principles of fundamental justice.

et des experts, mais elle refuse de faire preuve de déférence à l'endroit de ses conclusions sur des faits sociaux ou législatifs. Appliquer des normes de contrôle différentes à des éléments de preuve entremêlés représenterait une tâche colossale.

[55] On laisse entendre qu'il n'y a pas lieu de déférer aux conclusions sur des faits sociaux ou législatifs, car une juridiction d'appel est aussi bien placée qu'un juge de première instance pour les apprécier. Si tel était le cas, un fait en litige établi uniquement au moyen d'un affidavit aurait donc droit à un degré de déférence moindre. Or, notre Cour précise qu'à défaut d'un libellé exprès en ce sens, aucune norme de contrôle intermédiaire ne s'applique aux conclusions de fait (*H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401). De plus, ce n'est pas de nature à apaiser la crainte d'un dédoublement de l'examen et d'un entremêlement de tels éléments de preuve avec d'autres. C'est méconnaître également la fonction d'une juridiction d'appel, qui ne consiste pas à examiner la preuve globalement, mais à s'en tenir aux conclusions que le juge de première instance a tirées à partir de la preuve.

[56] Pour ces motifs, je suis d'avis qu'il ne convient pas d'appliquer aux faits sociaux ou législatifs une norme de contrôle non déférente. La norme de contrôle applicable aux conclusions de fait — qu'elles portent sur les faits en litige, des faits sociaux ou des faits législatifs — demeure celle de l'erreur manifeste et dominante.

B. *Analyse fondée sur l'art. 7*

[57] Dans l'analyse qui suit, j'examine d'abord si les demanderesses ont démontré que les dispositions en cause restreignent le droit à la sécurité de la personne et mettent ainsi en jeu l'art. 7. Je me penche ensuite sur la thèse des procureurs généraux appelants selon laquelle les dispositions n'ont pas l'effet attentatoire allégué. Je poursuis en me demandant si la limite apportée le cas échéant au droit à la sécurité de la personne est conforme aux principes de justice fondamentale.

(1) Is Security of the Person Engaged?

[58] Section 7 provides that the state cannot deny a person's right to life, liberty or security of the person, except in accordance with the principles of fundamental justice. At this stage, the question is whether the impugned laws negatively impact or limit the applicants' security of the person, thus bringing them within the ambit of, or engaging, s. 7 of the *Charter*.[1]

[59] Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution — itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.

[60] For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.

1 The focus is on security of the person, not liberty, for three reasons. First, the *Prostitution Reference* decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point. The security of the person argument is a novel issue and an important reason why the application judge was able to revisit the *Prostitution Reference*. Second, it is not clear that any of the applicants' personal liberty interests are engaged by the living on the avails provision; rather, they have pleaded that they fear that it could apply to their employees or their loved ones. Lastly, it seems to me that the real gravamen of the complaint is not that *breaking* the law engages the applicants' liberty, but rather that *compliance* with the laws infringes the applicants' security of the person.

(1) Le droit à la sécurité de la personne est-il en jeu?

[58] L'article 7 dispose que l'État ne peut porter atteinte au droit de quiconque à la vie, à la liberté et à la sécurité de sa personne qu'en conformité avec les principes de justice fondamentale. Il faut dès lors se demander si les dispositions contestées ont un effet préjudiciable sur le droit à la sécurité des demanderesses ou limitent ce droit, de sorte qu'elles tombent sous le coup de l'art. 7 de la *Charte* ou mettent celui-ci en jeu[1].

[59] En l'espèce, les demanderesses soutiennent que l'interdiction des maisons de débauche, du proxénétisme et de la communication en public à des fins de prostitution augmente les risques auxquels elles s'exposent lorsqu'elles se livrent à la prostitution, une activité qui est en soi légale. La juge de première instance conclut que la preuve va dans ce sens, et la Cour d'appel lui donne raison.

[60] Pour les motifs qui suivent, je suis du même avis. Le législateur ne se contente pas d'encadrer la pratique de la prostitution. Il franchit un pas supplémentaire déterminant qui l'amène à imposer des conditions *dangereuses* à la pratique de la prostitution : les interdictions empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection contre les risques ainsi courus.

1 L'accent est mis sur la sécurité de la personne, non sur la liberté, pour trois raisons. Premièrement, le *Renvoi sur la prostitution* établit que les dispositions relatives à la communication et aux maisons de débauche mettent en jeu le droit à la liberté et il fait autorité sur ce point. Le moyen fondé sur le droit à la sécurité de la personne est nouveau et justifie amplement le réexamen du renvoi par la juge de première instance. Deuxièmement, on ne saurait dire avec certitude que le droit à la liberté des demanderesses est mis en jeu par la disposition relative au proxénétisme; les demanderesses disent en fait craindre l'application de la disposition à leurs employés ou à leurs proches. Enfin, il me semble que les demanderesses prétendent essentiellement dans les faits non pas que l'*inobservation* de la loi porte atteinte à leur droit à la liberté, mais plutôt que son *respect* porte atteinte à leur droit à la sécurité.

(a) *Sections 197 and 210: Keeping a Common Bawdy-House*

[61] It is not an offence to sell sex for money. The bawdy-house provisions, however, make it an offence to do so in any "place" that is "kept or occupied" or "resorted to" for the purpose of prostitution (ss. 197 and 210(1) of the *Code*). The reach of these provisions is broad. "Place" includes any defined space, even if unenclosed and used only temporarily (s. 197(1) of the *Code*; *R. v. Pierce* (1982), 37 O.R. (2d) 721 (C.A.)). And by definition, it applies even if resorted to by only one person (s. 197(1); *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont. C.A.)).

[62] The practical effect of s. 210 is to confine lawful prostitution to two categories: street prostitution and out-calls (application decision, at para. 385). In-calls, where the john comes to the prostitute's residence, are prohibited. Out-calls, where the prostitute goes out and meets the client at a designated location, such as the client's home, are allowed. Working on the street is also permitted, though the practice of street prostitution is significantly limited by the prohibition on communicating in public (s. 213(1)(*c*)).

[63] The application judge found, on a balance of probabilities, that the safest form of prostitution is working independently from a fixed location (para. 300). She concluded that indoor work is far less dangerous than street prostitution — a finding that the evidence amply supports. She also concluded that out-call work is not as safe as in-call work, particularly under the current regime where prostitutes are precluded by virtue of the living on the avails provision from hiring a driver or security guard. Since the bawdy-house provision makes the safety-enhancing method of in-call prostitution illegal, the application judge concluded that the bawdy-house prohibition materially increased the risk prostitutes face under the present regime. I agree.

a) *Articles 197 et 210 : Tenue d'une maison de débauche*

[61] Offrir ses services sexuels contre de l'argent ne constitue pas une infraction. Toutefois, la disposition relative aux maisons de débauche dispose qu'est coupable d'un acte criminel quiconque tient une maison de débauche dans un « local » qui est « tenu ou occupé » ou « employé » à des fins de prostitution (art. 197 et par. 210(1) du *Code*). Sa portée est grande. On entend par « local » ou « endroit » tout lieu défini, même s'il n'est pas enclos et n'est employé que temporairement (par. 197(1) du *Code*; *R. c. Pierce* (1982), 37 O.R. (2d) 721 (C.A.)). De plus, il y a « local » ou « endroit » au sens de cette définition même lorsque le lieu est utilisé par une seule personne (par. 197(1); *R. c. Worthington* (1972), 10 C.C.C. (2d) 311 (C.A. Ont.)).

[62] Dans les faits, l'art. 210 limite à deux les modalités d'exercice d'une activité légale : la prostitution dans la rue et la prostitution « itinérante » (décision de première instance, par. 385). La prostitution pratiquée chez soi, où la prostituée reçoit ses clients chez elle, est interdite. La prostitution itinérante, où la prostituée rejoint le client dans un lieu convenu, telle la résidence de ce dernier, est permise. Il en est de même de la prostitution dans la rue, bien que celle-ci soit considérablement limitée par l'interdiction de communiquer en public (al. 213(1)*c*)).

[63] La juge de première instance conclut, selon la prépondérance des probabilités, que la forme de prostitution la plus sûre est celle qui se pratique de façon autonome dans un même lieu (par. 300). Elle ajoute que travailler à l'intérieur est beaucoup moins dangereux que travailler dans la rue, une conclusion amplement étayée par la preuve. Toujours selon elle, il est moins sûr d'offrir ses services chez autrui de manière itinérante, surtout sous le régime actuel, l'interdiction du proxénétisme empêchant l'embauche d'un chauffeur ou d'un garde de sécurité. Étant donné que la disposition sur les maisons de débauche rend illégale la pratique plus sûre qu'est la prostitution chez soi, la juge opine que l'interdiction augmente sensiblement le risque auquel s'exposent actuellement les prostituées. Je suis de cet avis.

[64] First, the prohibition prevents prostitutes from working in a fixed indoor location, which would be safer than working on the streets or meeting clients at different locations, especially given the current prohibition on hiring drivers or security guards. This, in turn, prevents prostitutes from having a regular clientele and from setting up indoor safeguards like receptionists, assistants, bodyguards and audio room monitoring, which would reduce risks (application decision, at para. 421). Second, it interferes with provision of health checks and preventive health measures. Finally — a point developed in argument before us — the bawdy-house prohibition prevents resort to safe houses, to which prostitutes working on the street can take clients. In Vancouver, for example, "Grandma's House" was established to support street workers in the Downtown Eastside, at about the same time as fears were growing that a serial killer was prowling the streets — fears which materialized in the notorious Robert Pickton. Street prostitutes — who the application judge found are largely the most vulnerable class of prostitutes, and who face an alarming amount of violence (para. 361) — were able to bring clients to Grandma's House. However, charges were laid under s. 210, and although the charges were eventually stayed — four years after they were laid — Grandma's House was shut down (supplementary affidavit of Dr. John Lowman, May 6, 2009, J.A.R., vol. 20, at p. 5744). For some prostitutes, particularly those who are destitute, safe houses such as Grandma's House may be critical. For these people, the ability to work in brothels or hire security, even if those activities were lawful, may be illusory.

[64] Premièrement, l'interdiction empêche les prostituées de travailler dans un lieu fixe, situé à l'intérieur, ce qui est plus sûr que de travailler dans la rue ou d'aller à la rencontre des différents clients, d'autant plus que l'interdiction actuelle empêche l'embauche d'un chauffeur ou d'un garde de sécurité. L'interdiction les empêche également de se constituer une clientèle et de prendre des précautions chez elles en embauchant par exemple un réceptionniste, un assistant ou un garde du corps et en installant des dispositifs de surveillance audio, de manière à réduire le risque couru (décision de première instance, par. 421). Deuxièmement, elle empêche les prostituées de faire certaines vérifications sur l'état de santé des clients et de prendre des mesures sanitaires préventives. Enfin, lors de la plaidoirie devant notre Cour, on a fait valoir que l'interdiction de tenir une maison de débauche empêche l'existence d'endroits sûrs où les prostituées peuvent emmener les clients recrutés dans la rue. À Vancouver, par exemple, la « Grandma's House » a été créée pour venir en aide aux prostituées du Downtown Eastside à peu près à la même époque où les craintes allaient croissant quant à la possibilité qu'un tueur en série sévisse dans le quartier (des craintes que les actes imputés au tristement célèbre Robert Pickton ont justifiées). Les prostituées de la rue — qui, selon la juge de première instance, sont de loin les plus vulnérables et font l'objet d'un nombre alarmant d'actes de violence (par. 361) — pouvaient se rendre à la Grandma's House en compagnie de leurs clients. Toutefois, le refuge a fait l'objet d'accusations fondées sur l'art. 210, et même s'il y a eu arrêt des procédures quatre ans après, la Grandma's House a finalement fermé ses portes (affidavit complémentaire du D^r^ John Lowman en date du 6 mai 2009, d.c.d., vol. 20, p. 5744). L'existence d'un établissement sûr comme Grandma's House peut être indispensable à certaines prostituées, en particulier celles qui sont démunies. Pour elles, la possibilité de travailler dans un bordel ou d'embaucher un garde de sécurité peut se révéler illusoire même s'il s'agit d'activités légales.

[65] I conclude, therefore, that the bawdy-house provision negatively impacts the security of

[65] Je conclus donc que la disposition sur les maisons de débauche a un effet préjudiciable sur

the person of prostitutes and engages s. 7 of the *Charter*.

(b) *Section 212(1)(j): Living on the Avails of Prostitution*

[66] Section 212(1)(*j*) criminalizes living on the avails of prostitution of another person, wholly or in part. While targeting parasitic relationships (*R. v. Downey*, [1992] 2 S.C.R. 10), it has a broad reach. As interpreted by the courts, it makes it a crime for anyone to supply a service to a prostitute, because she is a prostitute (*R. v. Grilo* (1991), 2 O.R. (3d) 514 (C.A.); *R. v. Barrow* (2001), 54 O.R. (3d) 417 (C.A.)). In effect, it prevents a prostitute from hiring bodyguards, drivers and receptionists. The application judge found that by denying prostitutes access to these security-enhancing safeguards, the law prevented them from taking steps to reduce the risks they face and negatively impacted their security of the person (para. 361). As such, she found that the law engages s. 7 of the *Charter*.

[67] The evidence amply supports the judge's conclusion. Hiring drivers, receptionists, and bodyguards, could increase prostitutes' safety (application decision, at para. 421), but the law prevents them from doing so. Accordingly, I conclude that s. 212(1)(*j*) negatively impacts security of the person and engages s. 7.

(c) *Section 213(1)(c): Communicating in a Public Place*

[68] Section 213(1)(*c*) prohibits communicating or attempting to communicate for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute, in a public place or a place open to public view. The provision extends to conduct short of verbal communication by prohibiting stopping or attempting to stop any person for those purposes (*R. v. Head* (1987), 59 C.R. (3d) 80 (B.C.C.A.)).

le droit à la sécurité des prostituées et met en jeu l'art. 7 de la *Charte*.

b) *Alinéa 212(1)j) : Proxénétisme*

[66] L'alinéa 212(1)*j*) criminalise le proxénétisme, c'est-à-dire le fait de vivre entièrement ou en partie des produits de la prostitution d'une autre personne. Bien qu'il vise le parasitisme (*R. c. Downey*, [1992] 2 R.C.S. 10), sa portée est grande. Suivant son interprétation par les tribunaux, commet un acte criminel quiconque fournit un service à une prostituée parce qu'elle est une prostituée (*R. c. Grilo* (1991), 2 O.R. (3d) 514 (C.A.); *R. c. Barrow* (2001), 54 O.R. (3d) 417 (C.A.)). Dans les faits, il empêche la prostituée d'engager un garde du corps, un chauffeur ou un réceptionniste. La juge de première instance conclut qu'en niant aux prostituées le droit de prendre de telles mesures susceptibles d'accroître leur sécurité, la disposition fait obstacle à la réduction des risques auxquels elles s'exposent et a un effet préjudiciable sur la sécurité de leur personne (par. 361). Elle statue donc que la disposition met en jeu l'art. 7 de la *Charte*.

[67] La preuve appuie amplement sa conclusion. L'embauche d'un chauffeur, d'un réceptionniste ou d'un garde du corps pourrait accroître la sécurité des prostituées (décision de première instance, par. 421), mais la loi y fait obstacle. Je conclus donc que l'al. 212(1)*j*) a un effet préjudiciable sur la sécurité de la personne et met en jeu l'art. 7 de la *Charte*.

c) *Alinéa 213(1)c) : Communication en public*

[68] L'alinéa 213(1)*c*) interdit de communiquer ou de tenter de communiquer avec une personne en vue de se livrer à la prostitution ou d'obtenir les services sexuels d'une prostituée dans un endroit public ou situé à la vue du public. La disposition vise non seulement la communication verbale, mais aussi le fait d'arrêter ou de tenter d'arrêter une personne à ces fins (*R. c. Head* (1987), 59 C.R. (3d) 80 (C.A.C.-B.)).

[69] The application judge found that face-to-face communication is an "essential tool" in enhancing street prostitutes' safety (para. 432). Such communication, which the law prohibits, allows prostitutes to screen prospective clients for intoxication or propensity to violence, which can reduce the risks they face (paras. 301 and 421). This conclusion, based on the evidence before her, sufficed to engage security of the person under s. 7.

[70] The application judge also found that the communicating law has had the effect of displacing prostitutes from familiar areas, where they may be supported by friends and regular customers, to more isolated areas, thereby making them more vulnerable (paras. 331 and 502).

[71] On the evidence accepted by the application judge, the law prohibits communication that would allow street prostitutes to increase their safety. By prohibiting communicating in public for the purpose of prostitution, the law prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses. In these ways, it significantly increases the risks they face.

[72] I conclude that the evidence supports the application judge's conclusion that s. 213(1)(*c*) impacts security of the person and engages s. 7.

(2) A Closer Look at Causation

[73] For the reasons discussed above, the application judge concluded — and I agree — that the impugned laws negatively impact and thus engage security of the person rights of prostitutes. However, the appellant Attorneys General contend that s. 7 is not engaged because there is an insufficient causal connection between the laws and the risks faced by prostitutes. First, they argue that the courts below erroneously measured causation by an attenuated standard. Second, they argue that it is the choice of the applicants to engage in prostitution, rather than

[69] La juge de première instance conclut que la communication entre les intéressés est [TRADUCTION] « essentielle » à l'accroissement de la sécurité des prostituées de la rue (par. 432). Cette communication, que la loi interdit, permet aux prostituées de jauger leurs clients éventuels afin d'écarter ceux qui sont intoxiqués et qui pourraient être enclins à la violence, ce qui serait de nature à réduire les risques auxquels elles s'exposent (par. 301 et 421). Cette conclusion fondée sur la preuve offerte suffit à mettre en jeu le droit à la sécurité de la personne garanti à l'art. 7.

[70] La juge estime en outre que l'interdiction de la communication a eu pour effet de faire migrer les prostituées vers des lieux isolés et peu familiers où elles ne peuvent compter sur l'appui de leurs amis et de leurs clients habituels, ce qui les a rendues plus vulnérables (par. 331 et 502).

[71] Suivant les éléments admis en preuve au procès, la loi interdit une communication qui permettrait aux prostituées de la rue d'accroître leur sécurité. En interdisant la communication en public à des fins de prostitution, la loi empêche les prostituées d'évaluer leurs clients éventuels, ainsi que de convenir de l'utilisation du condom ou d'un lieu sûr. Elle accroît ainsi sensiblement le risque couru.

[72] Je conclus que la preuve appuie la conclusion de la juge de première instance selon laquelle l'al. 213(1)*c*) a une incidence sur la sécurité de la personne et met en jeu l'art. 7.

(2) Examen approfondi du lien de causalité

[73] Pour les motifs examinés précédemment, la juge de première instance conclut — et je conviens avec elle — que les dispositions contestées ont un effet préjudiciable sur le droit à la sécurité des prostituées et mettent donc en jeu ce droit. Les procureurs généraux appelants soutiennent toutefois que l'art. 7 ne s'applique pas faute d'un lien de causalité suffisant entre les dispositions et les risques auxquels s'exposent les prostituées. D'abord, ils avancent que les juridictions inférieures ont eu tort de soumettre le lien de causalité à une norme

the law, that is the causal source of the harms they face. These arguments cannot succeed.

(a) *The Nature of the Required Causal Connection*

[74] Three possible standards for causation are raised for our consideration: (1) "sufficient causal connection", adopted by the application judge (paras. 287-88); (2) a general "impact" approach, adopted by the Court of Appeal (paras. 108-9); and (3) "active and foreseeable" and "direct" causal connection, urged by the appellant Attorneys General (A.G. of Canada factum, at paras. 64-68; A.G. of Ontario factum, at paras. 12-17).

[75] I conclude that the "sufficient causal connection" standard should prevail. This is a flexible standard, which allows the circumstances of each particular case to be taken into account. Adopted in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, and applied in a number of subsequent cases (see, e.g., *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3), it posits the need for "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" for s. 7 to be engaged (*Blencoe*, at para. 60 (emphasis added)).

[76] A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. Understood in this way, a sufficient causal connection standard is consistent with the substance of the standard that the Court of Appeal applied in this case. While I

atténuée. Ils prétendent ensuite que le préjudice couru par les demanderesses tient à leur choix de se livrer à la prostitution et non à la loi. On ne saurait faire droit à ces prétentions.

a) *Nature du lien de causalité requis*

[74] Nous sommes appelés à considérer trois normes de causalité possibles : (1) celle fondée sur un « lien de causalité suffisant » retenue par la juge de première instance (par. 287-288), (2) celle, générale, fondée sur l'« effet » adoptée par la Cour d'appel (par. 108-109) et (3) celle fondée sur un lien de causalité « actif, prévisible et direct » préconisée par les procureurs généraux appelants (mémoire du p.g. du Canada, par. 65; mémoire du p.g. de l'Ontario, par. 14-15).

[75] Je suis d'avis que la norme du « lien de causalité suffisant » est celle qui convient. Sa souplesse permet l'adaptation aux circonstances propres à chaque espèce. Adoptée dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, et appliquée dans plusieurs affaires subséquentes (voir, p. ex., *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3), elle postule l'existence d'« un lien de causalité suffisant entre [l'effet] imputable à l'État et le préjudice subi par [le demandeur] » pour que l'art. 7 entre en jeu (*Blencoe*, par. 60 (je souligne)).

[76] La norme du lien de causalité suffisant n'exige pas que la mesure législative ou autre reprochée à l'État soit l'unique ou la principale cause du préjudice subi par le demandeur, et il y est satisfait par déduction raisonnable, suivant la prépondérance des probabilités (*Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 21). L'exigence d'un lien de causalité suffisant tient compte du contexte et s'attache à l'existence d'un lien réel, et non hypothétique. Considérée sous cet angle, la norme du lien de causalité suffisant correspond essentiellement à celle qu'applique la Cour d'appel en l'espèce. Bien que je ne convienne

do not agree with the Court of Appeal that causation is not the appropriate lens for examining whether legislation — as opposed to the conduct of state actors — engages s. 7 security interests, its "practical and pragmatic" inquiry (para. 108) tracks the process followed in cases such as *Blencoe* and *Khadr*.

[77] The Attorney General of Canada argues for a higher standard. The prejudice to the claimant's security interest, he argues, must be active, foreseeable, and a "necessary link" (factum, at paras. 62 and 65). He relies on this Court's statement in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (cited by way of contrast in *Blencoe*, at para. 69), that "[i]n the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights." He also relies on the Court's statement in *Suresh*, at para. 54, that "[a]t least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice". These statements establish that a causal connection is made out when the state action is a foreseeable and necessary cause of the prejudice. They do not, however, establish that this is the only way a causal connection engaging s. 7 of the *Charter* can be demonstrated.

[78] Finally, from a practical perspective, a sufficient causal connection represents a fair and workable threshold for engaging s. 7 of the *Charter*. This is the port of entry for s. 7 claims. The claimant bears the burden of establishing this connection. Even if established, it does not end the inquiry, since the claimant must go on to show that the deprivation of her security of the person is not in accordance with the principles of fundamental justice. Although mere speculation will not suffice to establish causation, to set the bar too high risks barring meritorious claims. What is required is a sufficient connection, having regard to the context of the case.

pas avec elle que l'exigence d'un lien de causalité ne permet pas de déterminer si la loi — par opposition aux actes de représentants de l'État — met en jeu le droit à la sécurité de la personne garanti à l'art. 7, la démarche [TRADUCTION] « pratique et pragmatique » (par. 108) qui la sous-tend s'inspire de celle suivie, par exemple, dans *Blencoe* et *Khadr*.

[77] Le procureur général du Canada préconise une norme plus stricte. Il fait valoir que l'atteinte au droit à la sécurité des demanderesses doit être active et prévisible et qu'un [TRADUCTION] « lien nécessaire » est requis (mémoire, par. 62 et 65). Il cite à l'appui les motifs de notre Cour dans *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519 (cités à des fins de comparaison dans l'arrêt *Blencoe*, par. 69), suivant lesquels : « N'eût été le rôle de l'État, il n'y aurait eu aucune atteinte aux droits garantis à M^me^ Rodriguez par l'art. 7. » Il invoque par ailleurs l'arrêt *Suresh*, par. 54 : « À tout le moins, dans les cas où la participation du Canada est un préalable nécessaire à l'atteinte et où cette atteinte est une conséquence parfaitement prévisible de la participation canadienne, le gouvernement ne saurait être libéré de son obligation de respecter les principes de justice fondamentale . . . » Ces énoncés établissent qu'il y a lien de causalité lorsque l'acte de l'État est prévisible et qu'il est la cause nécessaire du préjudice, mais pas qu'il s'agit du seul moyen de démontrer l'existence d'un lien de causalité qui met en jeu l'art. 7 de la *Charte*.

[78] Enfin, sur le plan pratique, l'existence d'un lien de causalité suffisant constitue un critère juste et fonctionnel pour déterminer si l'art. 7 de la *Charte* est en jeu. Elle ouvre la voie à l'application du droit garanti à l'art. 7, et il incombe au demandeur de la démontrer. Une fois ce lien établi, l'analyse ne prend pas fin pour autant, car le demandeur doit prouver l'atteinte à la sécurité de sa personne et la non-conformité de cette atteinte aux principes de justice fondamentale. De simples hypothèses ne sauraient établir le lien de causalité, mais placer la barre trop haut risque de faire obstacle à des demandes fondées. Le lien doit être suffisant eu égard au contexte considéré.

(b) *Is the Causal Connection Negated by Choice or the Role of Third Parties?*

[79] The Attorneys General of Canada and Ontario argue that prostitutes choose to engage in an inherently risky activity. They can avoid both the risk inherent in prostitution and any increased risk that the laws impose simply by choosing not to engage in this activity. They say that choice — and not the law — is the real cause of their injury.

[80] The Attorneys General contend that Parliament is entitled to regulate prostitution as it sees fit. Anyone who chooses to sell sex for money must accept these conditions. If the conditions imposed by the law prejudice their security, it is their choice to engage in the activity, not the law, that is the cause.

[81] What the applicants seek, the Attorneys General assert, is a constitutional right to engage in risky commercial activities. Thus the Attorney General of Ontario describes the s. 7 claim in this case as a "veiled assertion of a positive right to vocational safety" (factum, at para. 25).

[82] The Attorneys General rely on this Court's decision in *Malmo-Levine*, which upheld the constitutionality of the prohibition of possession of marijuana on the basis that the recreational use of marijuana was a "lifestyle choice" and that lifestyle choices were not constitutionally protected (para. 185).

[83] The Attorneys General buttress this argument by asserting that if this Court accepts that these laws can be viewed as causing prejudice to the applicants' security, then many other laws that leave open the choice to engage in risky activities by only partially or indirectly regulating those activities will be rendered unconstitutional.

b) *Le lien de causalité est-il rendu inexistant par le choix de se prostituer ou les actes de tiers?*

[79] Le procureur général du Canada et celui de l'Ontario soutiennent que les prostituées font le choix de se livrer à une activité intrinsèquement risquée. Elles peuvent se soustraire à la fois aux risques inhérents à la prostitution et à tout risque supplémentaire causé par la loi en choisissant simplement de ne pas se livrer à cette activité. Selon eux, c'est le choix de la prostitution — et non la loi — qui est la cause véritable du préjudice.

[80] Les procureurs généraux prétendent que le législateur peut réglementer la prostitution selon ce qu'il juge opportun. La personne qui décide d'offrir ses services sexuels contre de l'argent doit accepter les règles établies, et lorsque celles-ci portent atteinte à sa sécurité, elle doit s'en prendre à son choix de se livrer à cette activité, non à la loi.

[81] Ils ajoutent que les demanderesses revendiquent le droit constitutionnel de se livrer à une activité commerciale risquée. Le procureur général de l'Ontario voit d'ailleurs dans l'allégation fondée sur l'art. 7 la [TRADUCTION] « revendication à mots couverts du droit à la sécurité professionnelle » (mémoire, par. 25).

[82] Les procureurs généraux invoquent l'arrêt *Malmo-Levine* dans lequel notre Cour confirme la constitutionnalité de l'interdiction de posséder de la marihuana au motif que sa consommation à des fins récréatives constitue un « choix de mode de vie », un choix que ne protège pas la Constitution (par. 185).

[83] Pour étayer leur thèse, les procureurs généraux font valoir que si notre Cour reconnaît que les dispositions en cause peuvent porter atteinte à la sécurité des demanderesses, de nombreuses autres dispositions qui permettent de se livrer ou non à une activité risquée en réglementant celle-ci partiellement ou indirectement deviendront du coup inconstitutionnelles.

[84] Finally, in a variant on the argument that the impugned laws are not the cause of the applicants' alleged loss of security, the Attorneys General argue that the source of the harm is third parties — the johns who use and abuse prostitutes and the pimps who exploit them.

[85] For the following reasons, I cannot accept the argument that it is not the law, but rather prostitutes' choice and third parties, that cause the risks complained of in this case.

[86] First, while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself "to make enough money to at least feed myself" (cross-examination of Ms. Bedford, J.A.R., vol. 2, at p. 92). As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population (paras. 458 and 472). Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice — what the Attorney General of Canada called "constrained choice" (transcript, at p. 22) — these are not people who can be said to be truly "choosing" a risky line of business (see *PHS*, at paras. 97-101).

[87] Second, even accepting that there are those who freely choose to engage in prostitution, it must be remembered that prostitution — the exchange of sex for money — is not illegal. The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in

[84] Enfin, ils recourent à une variante de la prétention suivant laquelle les dispositions contestées ne sont pas la cause de l'atteinte alléguée à la sécurité des demanderesses, à savoir que le préjudice est imputable à des tiers, en l'occurrence les hommes qui ont recours aux services des prostituées et qui maltraitent celles-ci, ainsi que les proxénètes qui les exploitent.

[85] Pour les motifs qui suivent, je ne puis convenir que ce n'est pas la loi, mais plutôt le choix de se prostituer et les actes de tiers qui sont à l'origine des risques dénoncés en l'espèce.

[86] Premièrement, bien que certaines prostituées puissent correspondre au profil de celle qui choisit librement de se livrer à l'activité économique risquée qu'est la prostitution — ou qui fait ce choix à un moment de sa vie —, de nombreuses prostituées n'ont pas vraiment d'autre solution que la prostitution. M[me] Bedford déclare s'être d'abord prostituée [TRADUCTION] « afin de faire assez d'argent pour au moins [s]e nourrir » (contre-interrogatoire de M[me] Bedford, d.c.d., vol. 2, p. 92). Comme le dit la juge de première instance, les prostituées de la rue forment, à quelques exceptions près, une population particulièrement marginalisée (par. 458 et 472). Que ce soit à cause du désespoir financier, de la toxicomanie, de la maladie mentale ou de la contrainte exercée par un proxénète, elles n'ont souvent guère d'autre choix que de vendre leur corps contre de l'argent. Dans les faits, même si elles peuvent conserver un certain pouvoir minimal de choisir — [TRADUCTION] « un choix limité » selon le procureur général (transcription, p. 22) —, on ne peut dire qu'elles « choisissent » véritablement une activité commerciale risquée (voir *PHS*, par. 97-101).

[87] Deuxièmement, à supposer même que des personnes choisissent librement de se livrer à la prostitution, il faut se rappeler que cette activité — l'échange de services sexuels contre de l'argent — n'est pas illégale. La question qui se pose sur le plan de la causalité est celle de savoir si les dispositions contestées accroissent le risque couru par la personne qui se prostitue. On peut faire une analogie avec la disposition qui interdirait aux cyclistes le

making that activity riskier. The challenged laws relating to prostitution are no different.

[88] Nor is it accurate to say that the claim in this case is a veiled assertion of a positive right to vocational safety. The applicants are not asking the government to put into place measures making prostitution safe. Rather, they are asking this Court to strike down legislative provisions that aggravate the risk of disease, violence and death.

[89] It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

[90] The government's call for deference in addressing the problems associated with prostitution has no role at this stage of the analysis. Calls for deference cannot insulate legislation that creates serious harmful effects from the charge that they negatively impact security of the person under s. 7 of the *Charter*. The question of deference arises under the principles of fundamental justice, not at the early stage of considering whether a person's life, liberty, or security of the person is infringed.

[91] Finally, recognizing that laws with serious harmful effects may engage security of the person does not mean that a host of other criminal laws will be invalidated. Trivial impingements on security of the person do not engage s. 7 (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 59). As already discussed, the applicant must show that the impugned law is sufficiently connected to the prejudice suffered before s. 7 is engaged. And even if s. 7 is found to be engaged, the applicant must

port du casque. Malgré le choix des cyclistes d'utiliser leurs bicyclettes, il demeurerait que c'est la disposition qui rendrait l'activité plus risquée. Il en va de même des dispositions contestées sur la prostitution.

[88] Il n'est pas non plus exact d'affirmer que la demande formulée en l'espèce revient à revendiquer à mots couverts le droit à la sécurité professionnelle. L'objectif des demanderesses n'est pas que l'État adopte des mesures qui fassent de la prostitution une activité sûre, mais plutôt que notre Cour invalide des dispositions qui accroissent le risque de maladie, de violence et de décès.

[89] Le fait que le comportement des proxénètes et des clients soit la source immédiate des préjudices subis par les prostituées n'y change rien. Les dispositions contestées privent des personnes qui se livrent à une activité risquée, mais légale, des moyens nécessaires à leur protection contre le risque couru. La violence d'un client ne diminue en rien la responsabilité de l'État qui rend une prostituée plus vulnérable à cette violence.

[90] Le respect auquel nous exhorte l'État quant aux décisions qu'il prend pour contrer les problèmes liés à la prostitution n'est pas pertinent à ce stade de l'analyse. Il ne saurait faire obstacle à l'allégation qu'une mesure législative a de graves effets préjudiciables et porte atteinte au droit à la sécurité de la personne garanti à l'art. 7 de la *Charte*. Cette considération vaut lorsqu'il s'agit de savoir s'il y a conformité aux principes de justice fondamentale, et non pour déterminer au préalable s'il y a atteinte au droit à la vie, à la liberté ou à la sécurité de la personne de l'intéressé.

[91] Enfin, reconnaître qu'une disposition gravement préjudiciable peut mettre en jeu le droit à la sécurité de la personne n'emportera pas l'invalidation d'une foule d'autres dispositions criminelles. L'atteinte anodine à ce droit ne met pas en jeu l'art. 7 (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 59). Rappelons que le demandeur doit démontrer l'existence d'un lien suffisant entre la disposition contestée et le préjudice subi pour que s'applique l'art. 7. Et même si l'on conclut que

then show that the deprivation of security is not in accordance with the principles of fundamental justice.

[92] For all these reasons, I reject the arguments of the Attorneys General that the cause of the harm is not the impugned laws, but rather the actions of third parties and the prostitutes' choice to engage in prostitution. As I concluded above, the laws engage s. 7 of the *Charter*. That conclusion remains undisturbed.

(3) Principles of Fundamental Justice

(a) *The Applicable Norms*

[93] I have concluded that the impugned laws deprive prostitutes of security of the person, engaging s. 7. The remaining step in the s. 7 analysis is to determine whether this deprivation is in accordance with the principles of fundamental justice. If so, s. 7 is not breached.

[94] The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty, or security of the person must meet. As Lamer J. put it, "[t]he term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 ("*Motor Vehicle Reference*"), at p. 512).

[95] The principles of fundamental justice have significantly evolved since the birth of the *Charter*. Initially, the principles of fundamental justice were thought to refer narrowly to principles of natural justice that define procedural fairness. In the *Motor Vehicle Reference*, this Court held otherwise:

> . . . it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice . . . . To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated

l'art. 7 s'applique, le demandeur doit démontrer que l'atteinte à sa sécurité n'est pas conforme aux principes de justice fondamentale.

[92] Pour tous ces motifs, je rejette la prétention des procureurs généraux selon laquelle le préjudice allégué n'est pas attribuable aux dispositions contestées, mais bien aux actes de tiers et au choix de se prostituer. J'estime toujours que les dispositions en cause font intervenir l'art. 7 de la *Charte*.

(3) Principes de justice fondamentale

a) *Normes applicables*

[93] J'arrive à la conclusion que les dispositions contestées portent atteinte au droit à la sécurité de la personne des prostituées et qu'elles mettent ainsi en jeu l'art. 7. Reste donc à savoir si, au regard de l'art. 7, cette atteinte est conforme ou non aux principes de justice fondamentale. Dans l'affirmative, il n'y a pas d'atteinte au droit garanti à l'art. 7.

[94] Les principes de justice fondamentale définissent les conditions minimales auxquelles doit satisfaire la loi qui a un effet préjudiciable sur le droit à la vie, à la liberté ou à la sécurité de la personne. Selon le juge Lamer, « [l]'expression "principes de justice fondamentale" constitue non pas un droit, mais un modificatif du droit de ne pas se voir porter atteinte à sa vie, à sa liberté et à la sécurité de sa personne; son rôle est d'établir les paramètres de ce droit » (*Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486 (« *Renvoi sur la MVA* »), p. 512).

[95] Les « principes de justice fondamentale » ont beaucoup évolué depuis l'adoption de la *Charte*. Au départ, on les réduisait aux principes de justice naturelle qui définissent l'équité procédurale. Dans le *Renvoi sur la MVA*, notre Cour en a jugé autrement :

> . . . il serait erroné d'interpréter l'expression « justice fondamentale » comme synonyme de justice naturelle [. . .] Ce faire aurait pour conséquence de dépouiller les intérêts protégés de tout leur sens ou presque et de laisser le « droit » à la vie, à la liberté et à la sécurité de la

state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, *per* Estey J., and *Hunter v. Southam Inc.*, *supra*. [pp. 501-2]

[96] The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

[97] The concepts of arbitrariness, overbreadth, and gross disproportionality evolved organically as courts were faced with novel *Charter* claims.

[98] Arbitrariness was used to describe the situation where there is no connection between the effect and the object of the law. In *Morgentaler*, the accused challenged provisions of the *Criminal Code* that required abortions to be approved by a therapeutic abortion committee of an accredited or approved hospital. The purpose of the law was to protect women's health. The majority found that the requirement that all therapeutic abortions take place in accredited hospitals did not contribute to the objective of protecting women's health and, in fact, caused delays that were detrimental to women's health. Thus, the law violated basic values because the effect of the law actually contravened the objective of the law. Beetz J. called this "manifest unfairness" (*Morgentaler*, at p. 120), but later cases interpreted this as an "arbitrariness" analysis (see *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 133, *per* McLachlin C.J. and Major J.).

personne dans un état d'atrophie déplorable. Un tel résultat serait incompatible avec le style affirmatif et général dans lequel ces droits sont énoncés et également incompatible avec le point de vue que cette Cour a adopté, en ce qui concerne l'interprétation des droits garantis par la *Charte*, dans l'arrêt *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357 (le juge Estey), et dans l'arrêt *Hunter c. Southam Inc.*, précité. [p. 501-502]

[96] Dans le *Renvoi sur la MVA*, la Cour reconnaît que les principes de justice fondamentale s'entendent des valeurs fondamentales qui sous-tendent notre ordre constitutionnel. L'analyse fondée sur l'art. 7 s'attache à débusquer les dispositions législatives intrinsèquement mauvaises, celles qui privent du droit à la vie, à la liberté ou à la sécurité de la personne au mépris des valeurs fondamentales que sont censés intégrer les principes de justice fondamentale et dont la jurisprudence a défini la teneur au fil des ans. Dans la présente affaire, les valeurs fondamentales qui nous intéressent s'opposent à l'arbitraire, à la portée excessive et à la disproportion totale.

[97] Les notions d'arbitraire, de portée excessive et de disproportion totale ont connu une évolution endogène au fur et à mesure que les tribunaux ont été saisis d'allégations nouvelles fondées sur la *Charte*.

[98] On a qualifié d'« arbitraire » la disposition dont l'effet n'avait aucun lien avec son objet. Dans l'affaire *Morgentaler*, l'accusé contestait les dispositions du *Code criminel* qui exigeaient qu'un avortement soit approuvé par le comité de l'avortement thérapeutique d'un hôpital agréé. L'objet des dispositions était de protéger la santé des femmes. Or, selon les juges majoritaires de la Cour, l'exigence que tout avortement thérapeutique soit pratiqué dans un hôpital agréé ne contribuait pas à la réalisation de cet objectif et causait en fait des délais nuisibles à la santé des femmes. Par conséquent, les dispositions portaient atteinte aux valeurs fondamentales en ce que leur effet allait en fait à l'encontre de leur objectif. Le juge Beetz a alors parlé d'« iniquité manifeste » (*Morgentaler*, p. 120), et la Cour y a vu ensuite un « caractère arbitraire » (voir *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791, par. 133, la juge en chef McLachlin et le juge Major).

[99] In *Chaoulli*, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. The purpose of the provision was to protect the public health care system and prevent the diversion of resources from the public system. The majority found, on the basis of international evidence, that private health insurance and a public health system could co-exist. Three of the four-judge majority found that the prohibition was "arbitrary" because there was no real connection on the facts between the effect and the objective of the law.

[100] Most recently, in *PHS*, this Court found that the Minister's decision not to extend a safe injection site's exemption from drug possession laws was arbitrary. The purpose of drug possession laws was the protection of health and public safety, and the services provided by the safe injection site actually contributed to these objectives. Thus, the effect of not extending the exemption — that is, prohibiting the safe injection site from operating — was contrary to the objectives of the drug possession laws.

[101] Another way in which laws may violate our basic values is through what the cases have called "overbreadth": the law goes too far and interferes with some conduct that bears no connection to its objective. In *R. v. Heywood*, [1994] 3 S.C.R. 761, the accused challenged a vagrancy law that prohibited offenders convicted of listed offences from "loitering" in public parks. The majority of the Court found that the law, which aimed to protect children from sexual predators, was overbroad; insofar as the law applied to offenders who did not constitute a danger to children, and insofar as it applied to parks where children were unlikely to be present, it was unrelated to its objective.

[102] In *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, the challenged provisions of the

[99] Dans *Chaoulli*, le demandeur contestait des dispositions québécoises qui interdisaient de souscrire une assurance maladie privée pour l'obtention de services offerts dans le réseau public. Les dispositions en cause avaient pour objet la protection du système de santé public et le maintien de ses ressources. Sur la foi de la preuve concernant la situation dans d'autres pays, les juges majoritaires concluent qu'assurance maladie privée et système de santé public peuvent coexister. Trois d'entre eux jugent l'interdiction « arbitraire » vu l'absence, selon les faits mis en preuve, d'un lien réel entre l'effet de la loi et son objectif.

[100] Plus récemment, dans *PHS*, notre Cour a jugé arbitraire le refus du ministre de prolonger l'exemption dont bénéficiait un centre d'injection supervisée relativement à l'application des dispositions sur la possession de drogue. Ces dispositions avaient pour objet la protection de la santé et de la sécurité publiques, et les services fournis par le centre d'injection supervisée contribuaient en fait à l'atteinte de cet objectif. L'effet du refus de prolonger l'exemption — à savoir empêcher le fonctionnement du centre d'injection supervisée — allait à l'encontre des objectifs des dispositions relatives à la possession de drogue.

[101] Une disposition peut aussi violer nos valeurs fondamentales du fait de ce que les tribunaux appellent la « portée excessive », c'est-à-dire lorsqu'elle va trop loin et empiète sur un comportement sans lien avec son objectif. Dans *R. c. Heywood*, [1994] 3 R.C.S. 761, l'accusé contestait une disposition sur le vagabondage qui interdisait aux délinquants reconnus coupables de l'une des infractions énumérées de « flâner » dans les parcs publics. Les juges majoritaires de la Cour concluent que la portée de la disposition, dont l'objet était de protéger les enfants contre les prédateurs sexuels, est trop grande; la disposition n'a pas de lien avec son objectif dans la mesure où elle s'applique à des délinquants qui ne présentent pas un danger pour les enfants et à des parcs qui ne sont pas susceptibles d'être fréquentés par des enfants.

[102] Dans *R. c. Demers*, 2004 CSC 46, [2004] 2 R.C.S. 489, les dispositions contestées du *Code*

Criminal Code prevented an accused who was found unfit to stand trial from receiving an absolute discharge, and subjected the accused to indefinite appearances before a review board. The purpose of the provisions was "to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial" (para. 41). The Court found that insofar as the law applied to permanently unfit accused, who would never become fit to stand trial, the objective did "not apply" and therefore the law was overbroad (paras. 42-43).

[103] Laws are also in violation of our basic values when the effect of the law is grossly disproportionate to the state's objective. In *Malmo-Levine*, the accused challenged the prohibition on the possession of marijuana on the basis that its effects were grossly disproportionate to its objective. Although the Court agreed that a law with grossly disproportionate effects would violate our basic norms, the Court found that this was not such a case: ". . . the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action" (para. 175).

[104] In *PHS*, this Court found that the Minister's refusal to exempt the safe injection site from drug possession laws was not in accordance with the principles of fundamental justice because the effect of denying health services and increasing the risk of death and disease of injection drug users was grossly disproportionate to the objectives of the drug possession laws, namely public health and safety.

[105] The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty, or security of the person by laws that violate these

criminel empêchaient l'accusé jugé inapte à subir son procès de bénéficier d'une libération inconditionnelle et l'obligeaient à comparaître périodiquement devant une commission d'examen pendant une période indéfinie. Les dispositions avaient pour objet « de fournir à l'accusé un traitement ou une évaluation continus afin de le rendre éventuellement apte à subir son procès » (par. 41). Selon la Cour, dans la mesure où les dispositions s'appliquaient malgré l'inaptitude permanente de l'accusé — qui ne deviendrait jamais apte à subir son procès —, leur objectif « ne s'appliqu[ait] pas » et leur portée était donc excessive (par. 42-43).

[103] La disposition dont l'effet est totalement disproportionné à l'objectif de l'État viole aussi nos valeurs fondamentales. Dans *Malmo-Levine*, l'accusé contestait l'interdiction de posséder de la marihuana au motif que ses effets étaient totalement disproportionnés à son objectif. La Cour reconnaît qu'une disposition aux effets totalement disproportionnés viole nos normes fondamentales, mais elle conclut que tel n'est pas le cas en l'espèce : « . . . les effets sur les accusés des dispositions actuelles, y compris la possibilité d'emprisonnement, n'excèdent pas la vaste latitude que la Constitution accorde au Parlement » (par. 175).

[104] Dans l'arrêt *PHS*, notre Cour conclut que le refus du ministre de soustraire le centre d'injection supervisée à l'application des dispositions sur la possession de drogue n'est pas conforme aux principes de justice fondamentale parce que le refus de services de santé et l'augmentation du risque de décès et de maladie chez les consommateurs de drogues injectables sont totalement disproportionnés aux objectifs des dispositions sur la possession de drogue, à savoir la santé et la sécurité publiques.

[105] L'enseignement primordial de la jurisprudence veut qu'une disposition aille à l'encontre de nos valeurs fondamentales lorsque les moyens mis en œuvre par l'État pour atteindre son objectif comportent une faille fondamentale en ce qu'ils sont arbitraires ou ont une portée trop générale, ou encore, ont des effets totalement disproportionnés à l'objectif législatif. Il n'est pas conforme

norms is not in accordance with the principles of fundamental justice.

[106] As these principles have developed in the jurisprudence, they have not always been applied consistently. The Court of Appeal below pointed to the confusion that has been caused by the "commingling" of arbitrariness, overbreadth, and gross disproportionality (paras. 143-51). This Court itself recently noted the conflation of the principles of overbreadth and gross disproportionality (*R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at paras. 38-40; see also *R. v. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57, at para. 72). In short, courts have explored different ways in which laws run afoul of our basic values, using the same words — arbitrariness, overbreadth, and gross disproportionality — in slightly different ways.

[107] Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls "failures of instrumental rationality" — the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 151). As Peter Hogg has explained:

> The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality", by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.
>
> ("The Brilliant Career of Section 7 of the Charter" (2012), 58 *S.C.L.R.* (2d) 195, at p. 209 (citation omitted))

aux principes de justice fondamentale de priver un citoyen du droit à la vie, à la liberté ou à la sécurité de sa personne au moyen d'une disposition ainsi irrégulière.

[106] Au fil de l'évolution jurisprudentielle, ces principes n'ont pas toujours été appliqués uniformément. En l'espèce, la Cour d'appel signale la confusion créée par l'[TRADUCTION] « amalgame » du caractère arbitraire, de la portée excessive et de la disproportion totale (par. 143-151). Notre Cour relevait elle-même récemment que l'on confond portée excessive et disproportion totale (*R. c. Khawaja*, 2012 CSC 69, [2012] 3 R.C.S. 555, par. 38-40; voir également *R. c. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57, par. 72). Ainsi, les tribunaux ont employé les mêmes mots — caractère arbitraire, portée excessive et disproportion totale — avec quelques variantes pour explorer les différentes manières dont une disposition législative peut aller à l'encontre de nos valeurs fondamentales.

[107] Bien qu'il y ait un chevauchement important entre le caractère arbitraire, la portée excessive et la disproportion totale, et que plus d'une de ces trois notions puissent bel et bien s'appliquer à une disposition, il demeure que les trois correspondent à des principes distincts qui découlent de ce que Hamish Stewart appelle un [TRADUCTION] « manque de logique fonctionnelle », à savoir que la disposition « n'est pas suffisamment liée à son objectif ou, dans un certain sens, qu'elle va trop loin pour l'atteindre » (*Fundamental Justice : Section 7 of the Canadian Charter of Rights and Freedoms* (2012), p. 151). Peter Hogg explique :

> [TRADUCTION] Les principes liés à la portée excessive, à la disproportion et au caractère arbitraire visent tous au fond à pallier ce que Hamish Stewart appelle un « manque de logique fonctionnelle », en ce sens que le tribunal reconnaît l'objectif législatif, mais examine le moyen choisi pour l'atteindre. Si ce moyen ne permet pas logiquement d'atteindre l'objectif, la disposition est dysfonctionnelle eu égard à son propre objectif.
>
> (« The Brilliant Career of Section 7 of the Charter » (2012), 58 *S.C.L.R.* (2d) 195, p. 209 (renvoi omis))

[108] The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.

[109] The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.

[110] Against this background, it may be useful to elaborate on arbitrariness, overbreadth and gross disproportionality.

[111] Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.

[112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to

[108] La jurisprudence relative au caractère arbitraire, à la portée excessive et à la disproportion totale s'attache à deux failles. La première est l'absence de lien entre l'atteinte aux droits et l'objectif de la disposition — lorsque l'atteinte au droit à la vie, à la liberté ou à la sécurité de la personne n'a aucun lien avec l'objet de la loi. Ce sont alors les principes liés au caractère arbitraire et à la portée excessive (l'absence de lien entre l'objet de la disposition et l'atteinte au droit garanti par l'art. 7) qui sont en cause.

[109] La seconde faille se présente lorsqu'une disposition prive une personne du droit à la vie, à la liberté ou à la sécurité de sa personne d'une manière totalement disproportionnée à son objectif. L'incidence sur le droit garanti à l'art. 7 a un lien avec l'objet, mais elle est si importante qu'elle viole nos normes fondamentales.

[110] Dans ce contexte, il peut être utile de développer les notions de caractère arbitraire, de portée excessive et de disproportion totale.

[111] Déterminer qu'une disposition est arbitraire ou non exige qu'on se demande s'il existe un lien direct entre son objet et l'effet allégué sur l'intéressé, s'il y a un certain rapport entre les deux. Il doit exister un lien rationnel entre l'objet de la mesure qui cause l'atteinte au droit garanti à l'art. 7 et la limite apportée au droit à la vie, à la liberté ou à la sécurité de la personne (Stewart, p. 136). La disposition qui limite ce droit selon des modalités qui n'ont *aucun lien* avec son objet empiète arbitrairement sur ce droit. Ainsi, dans *Chaoulli*, la Cour juge les dispositions arbitraires parce qu'interdire l'assurance maladie privée n'a aucun rapport avec l'objectif de protéger le système de santé public.

[112] Il y a portée excessive lorsqu'une disposition s'applique si largement qu'elle vise *certains* actes qui n'ont aucun lien avec son objet. La disposition est alors *en partie* arbitraire. Essentiellement, la situation en cause est celle où il n'existe aucun lien rationnel entre les objets de la disposition et *certains* de ses effets, mais pas tous. Par exemple, dans *Demers*, le texte législatif en cause exigeait

attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose.

[113] Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.

[114] It has been suggested that overbreadth is not truly a distinct principle of fundamental justice. The case law has sometimes said that overbreadth straddles both arbitrariness and gross disproportionality. Thus, in *Heywood*, Cory J. stated: "The effect of overbreadth is that in some applications the law is arbitrary or disproportionate" (p. 793).

[115] And in *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, the companion case to *Malmo-Levine*, Gonthier and Binnie JJ. explained:

> Overbreadth in that respect addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is grossly disproportionate to the state interest the legislation seeks to protect. Overbreadth in this aspect is, as Cory J. pointed out [in *Heywood*], related to arbitrariness. [Emphasis deleted; para. 38.]

[116] In part this debate is semantic. The law has not developed by strict labels, but on a case-by-case

que l'accusé inapte comparaisse périodiquement devant la commission d'examen. Il n'était dissocié de son objet que dans la mesure où il s'appliquait à un accusé inapte en permanence; ses effets étaient liés à l'objet dans le cas de l'accusé temporairement inapte.

[113] L'application de la notion de portée excessive permet au tribunal de reconnaître qu'une disposition est rationnelle sous certains rapports, mais que sa portée est trop grande sous d'autres. Malgré la prise en compte de la portée globale de la disposition, l'examen demeure axé sur l'intéressé et sur la question de savoir si l'effet sur ce dernier a un lien rationnel avec l'objet. Par exemple, lorsqu'une disposition est rédigée de manière générale et vise des comportements qui n'ont aucun lien avec son objet afin de faciliter son application, il n'y a pas non plus de lien entre l'objet de la disposition et son effet sur l'*intéressé*. Faciliter l'application pourrait justifier la portée excessive d'une disposition suivant l'article premier de la *Charte*.

[114] On a fait valoir que la portée excessive ne correspond pas vraiment à un principe distinct de justice fondamentale. Il appert de certains arrêts que la portée excessive empiète à la fois sur le caractère arbitraire et sur la disproportion totale. Dans *Heywood*, le juge Cory affirme par exemple ce qui suit : « Lorsqu'une loi a une portée excessive, il s'ensuit qu'elle est arbitraire ou disproportionnée dans certaines de ses applications » (p. 793).

[115] Dans *R. c. Clay*, 2003 CSC 75, [2003] 3 R.C.S. 735, l'arrêt connexe à *Malmo-Levine*, les juges Gonthier et Binnie expliquent :

> Dans ce contexte, la portée excessive s'attache aux atteintes potentielles à la justice fondamentale lorsque l'effet préjudiciable d'une mesure législative sur les personnes qu'elle touche est [totalement] disproportionné [. . .] à l'intérêt général que le texte de loi tente de protéger. À cet égard, comme l'a souligné le juge Cory [dans *Heywood*], la portée excessive est liée au caractère arbitraire. [Italiques omis; par. 38.]

[116] Le débat est en partie sémantique. Le droit a évolué non par le recours à des étiquettes

basis, as courts identified laws that were inherently bad because they violated our basic values.

[117] Moving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

[118] An ancillary question, which applies to both arbitrariness and overbreadth, concerns how significant the lack of correspondence between the objective of the infringing provision and its effects must be. Questions have arisen as to whether a law is arbitrary or overbroad when its effects are *inconsistent* with its objective, or whether, more broadly, a law is arbitrary or overbroad whenever its effects are *unnecessary* for its objective (see, e.g., *Chaoulli*, at paras. 233-34).

[119] As noted above, the root question is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose. This standard is not easily met. The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore "inconsistent" with the objective. Or the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore "unnecessary". Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.

[120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It

strictes, mais d'une décision à l'autre, lorsque les tribunaux ont jugé des dispositions intrinsèquement mauvaises parce qu'elles violaient nos valeurs fondamentales.

[117] Avant de passer au point suivant, toutefois, il peut être utile de voir dans la portée excessive un principe distinct de justice fondamentale lié au caractère arbitraire, l'*absence de lien* entre les effets d'une disposition et son objectif étant commune aux deux. La portée excessive permet seulement au tribunal de reconnaître l'absence de lien lorsqu'une disposition va trop loin en faisant tomber sous le coup de son application un comportement qui n'a aucun rapport avec son objectif.

[118] Une question accessoire, qui touche à la fois le caractère arbitraire et la portée excessive, concerne l'ampleur que doit revêtir l'absence de correspondance entre l'objectif de la disposition attentatoire et ses effets. On s'est demandé si une disposition était arbitraire ou avait une portée trop grande lorsque ses effets étaient *incompatibles* avec son objectif ou si, de manière générale, elle était arbitraire ou avait une portée trop grande lorsque ses effets *n'étaient pas nécessaires* à la réalisation de son objectif (voir, p. ex., *Chaoulli*, par. 233-234).

[119] Rappelons qu'il s'agit fondamentalement de déterminer si la disposition en cause est intrinsèquement mauvaise du fait de l'*absence de lien*, en tout ou en partie, entre ses effets et son objet. Satisfaire à cette norme n'est pas chose aisée. Comme dans l'affaire *Morgentaler*, la preuve peut démontrer que l'effet compromet en fait la réalisation de l'objectif et qu'il est donc « incompatible » avec celui-ci. Il peut aussi ressortir de la preuve, comme dans *Chaoulli*, qu'il n'y a tout simplement pas de lien entre l'effet et l'objectif, de sorte que l'effet « n'est pas nécessaire ». Peu importe la manière dont le juge qualifie cette absence de lien, la question demeure au fond de savoir si la preuve établit que la disposition viole des normes fondamentales du fait de l'*absence de lien* entre son effet et son objet. Il faut statuer en fonction du dossier et de la preuve offerte.

[120] La disproportion totale s'attache à d'autres éléments que ceux considérés pour le caractère

targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

[121] Gross disproportionality under s. 7 of the *Charter* does *not* consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law. As this Court said in *Malmo-Levine*:

> In effect, the exercise undertaken by Braidwood J.A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s. 7. [para. 181]

[122] Thus, gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.

[123] All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The

arbitraire et la portée excessive. Elle vise la seconde faille fondamentale, à savoir le fait que les effets de la disposition sur la vie, la liberté ou la sécurité de la personne sont si totalement disproportionnés à ses objectifs qu'ils ne peuvent avoir d'assise rationnelle. La règle qui exclut la disproportion totale ne s'applique que dans les cas extrêmes où la gravité de l'atteinte est sans rapport aucun avec l'objectif de la mesure. Pour illustrer cette idée, prenons l'hypothèse d'une loi qui, dans le but d'assurer la propreté des rues, infligerait une peine d'emprisonnement à perpétuité à quiconque cracherait sur le trottoir. Le lien entre les répercussions draconiennes et l'objet doit déborder complètement le cadre des normes reconnues dans notre société libre et démocratique.

[121] L'analyse de la disproportion totale au regard de l'art. 7 de la *Charte ne* tient *pas* compte des avantages de la loi pour la société. Elle met en balance l'effet préjudiciable sur l'intéressé avec l'objet de la loi, et *non* avec l'avantage que la société peut retirer de la loi. Comme le dit notre Cour dans *Malmo-Levine* :

> Dans les faits, le juge Braidwood a procédé à la pondération des effets bénéfiques et des effets préjudiciables de la Loi. En toute déférence, nous estimons qu'une telle démarche relève davantage de l'application de l'article premier. Il s'agit là de préjudices sociaux et économiques qui n'ont généralement pas leur place dans l'analyse fondée sur l'art. 7. [par. 181]

[122] Il peut y avoir disproportion totale indépendamment du nombre de personnes touchées; un effet totalement disproportionné sur une seule personne suffit.

[123] Les trois notions — le caractère arbitraire, la portée excessive et la disproportion totale — supposent la comparaison de l'atteinte aux droits causée par la loi avec l'objectif de la loi, et non avec son efficacité. Autrement dit, elles ne s'intéressent pas à la réalisation de l'objectif législatif ou au pourcentage de la population qui bénéficie de l'application de la loi. Elles ne tiennent pas compte des avantages accessoires pour la population en général. De plus, aucune ne requiert la détermination du

analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

pourcentage de la population qui est touchée par un effet préjudiciable. L'analyse est qualitative et non quantitative. La question à se poser dans le cadre de l'analyse fondée sur l'art. 7 est celle de savoir si une disposition législative intrinsèquement mauvaise prive *qui que ce soit* du droit à la vie, à la liberté ou à la sécurité de sa personne; un effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7.

(b) *The Relationship Between Section 7 and Section 1*

b) *Interaction entre l'art. 7 et l'article premier*

[124] This Court has previously identified parallels between the rules against arbitrariness, overbreadth, and gross disproportionality under s. 7 and elements of the s. 1 analysis for justification of laws that violate *Charter* rights. These parallels should not be allowed to obscure the crucial differences between the two sections.

[124] Notre Cour a déjà établi des parallèles entre les règles qui interdisent le caractère arbitraire, la portée excessive ou la disproportion totale au regard de l'art. 7 et les éléments de l'analyse, fondée sur l'article premier, de la justification d'une disposition qui porte atteinte à un droit garanti par la *Charte*. Ces parallèles ne doivent pas permettre d'occulter les différences cruciales entre ces deux articles.

[125] Section 7 and s. 1 ask different questions. The question under s. 7 is whether the law's negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose. Under s. 1, the question is different — whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1, but it plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights.

[125] L'article 7 et l'article premier appellent des questions différentes. Pour les besoins de l'art. 7, l'effet préjudiciable sur le droit à la vie, à la liberté ou à la sécurité de la personne est-il conforme aux principes de justice fondamentale? En ce qui concerne le caractère arbitraire, la portée excessive et la disproportion totale, il faut se demander si, de prime d'abord, l'objet de la disposition présente un lien avec ses effets et si l'effet préjudiciable est proportionné à cet objet. Pour les besoins de l'article premier, il faut plutôt se demander si l'effet préjudiciable sur les droits des personnes est proportionné à l'objectif urgent et réel de défense de l'intérêt public. La justification fondée sur l'objectif public prédominant constitue l'axe central de l'application de l'article premier, mais elle ne joue aucun rôle dans l'analyse fondée sur l'art. 7, qui se soucie seulement de savoir si la disposition contestée porte atteinte à un droit individuel.

[126] As a consequence of the different questions they address, s. 7 and s. 1 work in different ways. Under s. 1, the government bears the burden of showing that a law that breaches an individual's

[126] En raison des considérations différentes qui président à leur application, l'art. 7 et l'article premier opèrent différemment. Suivant l'article premier, il incombe à l'État de démontrer que

rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.

la disposition attentatoire peut être justifiée par l'objectif du législateur. Parce que la question est celle de savoir si l'intérêt public général justifie l'atteinte aux droits individuels, l'objectif doit être urgent et réel. Le volet de l'analyse fondée sur l'article premier qui porte sur l'existence d'un « lien rationnel » consiste à déterminer si, pour le législateur, la disposition représente un moyen rationnel d'atteindre son objectif. Le volet relatif à l'« atteinte minimale » établit si le législateur aurait pu concevoir une disposition moins attentatoire; il s'intéresse aux solutions de rechange raisonnables qui s'offrent au législateur. À l'étape finale de l'analyse fondée sur l'article premier, le tribunal soupèse l'effet préjudiciable de la disposition sur les droits des personnes et son effet bénéfique sur la réalisation de son objectif dans l'intérêt public supérieur. L'effet est apprécié sur les plans qualitatif et quantitatif. À la différence d'un demandeur individuel, l'État est bien placé pour présenter une preuve relevant des sciences humaines ainsi que le témoignage d'experts qui justifient les répercussions d'une disposition sur l'ensemble de la société.

[127] By contrast, under s. 7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person, in a manner that is not connected to the law's object or in a manner that is grossly disproportionate to the law's object. The inquiry into the purpose of the law focuses on the nature of the object, not on its efficacy. The inquiry into the impact on life, liberty or security of the person is not quantitative — for example, how many people are negatively impacted — but qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7. To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right.

[127] En revanche, l'art. 7 oblige le demandeur à démontrer que la disposition porte atteinte à son droit à la vie, à la liberté ou à la sécurité de sa personne d'une manière qui est sans lien avec l'objet de la disposition ou qui est totalement disproportionnée à celui-ci. La détermination de l'objet s'attache à sa nature et non à son efficacité. La détermination de l'effet sur le droit à la vie, à la liberté ou à la sécurité de la personne n'est pas quantitative, mais qualitative. On ne se demande donc pas combien de personnes subissent un effet préjudiciable. Il suffit d'un effet arbitraire, excessif ou totalement disproportionné sur une seule personne pour établir l'atteinte à un droit garanti à l'art. 7. Obliger la personne qui invoque l'art. 7 à démontrer l'efficacité de la loi par opposition à ses conséquences néfastes sur l'ensemble de la société revient à lui imposer le même fardeau que celui qui incombe à l'État pour l'application de l'article premier, ce qui ne saurait être acceptable.

[128] In brief, although the concepts under s. 7 and s. 1 are rooted in similar concerns, they are analytically distinct.

[128] En résumé, bien que l'art. 7 et l'article premier fassent intervenir des notions qui s'originent de préoccupations semblables, ils commandent des analyses distinctes.

[129] It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the *Charter* (*Motor Vehicle Reference*, at p. 518). The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play (see, e.g., *Malmo-Levine*, at paras. 96-98). Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.

(4) Do the Impugned Laws Respect the Principles of Fundamental Justice?

(a) *Section 210: The Bawdy-House Prohibition*

(i) The Object of the Provision

[130] The bawdy-house provision has remained essentially unchanged since it was moved to Part V of the *Criminal Code*, "Disorderly Houses, Gaming and Betting", in the 1953-54 *Code* revision (c. 51, s. 182). In *Rockert v. The Queen*, [1978] 2 S.C.R. 704, Estey J. found "little, if any, doubt" in the authorities that the disorderly house provisions were not directed at the mischief of betting, gaming and prostitution *per se*, but rather at the harm to the community in which such activities were carried on in a notorious and habitual manner (p. 712). This objective can be traced back to the common law origins of the bawdy-house provisions (see, e.g., E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1817, first published 1644), at pp. 205-6).

[131] The appellant Attorneys General argue that the object of this provision, considered alone and in conjunction with the other prohibitions, is to

[129] On a affirmé que la disposition qui violait un droit garanti à l'art. 7 avait peu de chances d'être justifiée en vertu de l'article premier de la *Charte* (*Renvoi sur la MVA*, p. 518). L'importance des droits fondamentaux protégés par l'art. 7 appuie cette remarque. Néanmoins, la jurisprudence reconnaît par ailleurs qu'il peut se présenter des situations dans lesquelles l'article premier a un rôle à jouer (voir, p. ex., l'arrêt *Malmo-Levine*, par. 96-98). On ne peut écarter la possibilité que l'État soit en mesure de démontrer que l'atteinte à un droit garanti à l'art. 7 est justifiée en vertu de l'article premier de la *Charte*, selon l'importance de l'objectif législatif et la nature de l'atteinte à un droit garanti par l'art. 7.

(4) Les dispositions législatives contestées respectent-elles les principes de justice fondamentale?

a) *Article 210 : Interdiction des maisons de débauche*

(i) Objet de la disposition

[130] La disposition relative aux maisons de débauche est demeurée pour l'essentiel inchangée depuis qu'elle figure à la partie V du *Code criminel* intitulée « Maisons de désordre, jeux et paris » par suite de la révision de 1953-1954 (ch. 51, art. 182). Dans l'arrêt *Rockert c. La Reine*, [1978] 2 R.C.S. 704, le juge Estey se dit d'avis que la jurisprudence « ne permet plus de douter » que le méfait visé par ces infractions n'est pas le pari, le jeu et la prostitution en soi, mais plutôt le préjudice porté aux intérêts de la collectivité dans laquelle ces activités s'exercent d'une manière notoire et habituelle (p. 712). On peut faire remonter cet objectif à la common law qui est à l'origine des dispositions sur les maisons de débauche (voir, p. ex., E. Coke, *The Third Part of the Institutes of the Laws of England : Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1817, publié pour la première fois en 1644), p. 205-206).

[131] Les procureurs généraux appelants soutiennent que, seule ou de concert avec les autres, cette interdiction vise à décourager la prostitution. Le

deter prostitution. The record does not support this contention; on the contrary, it is clear from the legislative record that the purpose of the prohibition is to prevent community harms in the nature of nuisance.

[132] There is no evidence to support a reappraisal of this purpose by Parliament. The doctrine against shifting objectives does not permit a new object to be introduced at this point (*R. v. Zundel*, [1992] 2 S.C.R. 731). On its face, the provision is only directed at in-call prostitution, and so cannot be said to aim at deterring prostitution generally. To find that it operates with the other *Criminal Code* provisions to deter prostitution generally is also unwarranted, given their piecemeal evolution and patchwork construction, which leaves out-calls and prostitution itself untouched. I therefore agree with the lower courts that the objectives of the bawdy-house provision are to combat neighbourhood disruption or disorder and to safeguard public health and safety.

(ii) Compliance With the Principles of Fundamental Justice

[133] The courts below considered whether the bawdy-house prohibition is overbroad, or grossly disproportionate.

[134] I agree with them that the negative impact of the bawdy-house prohibition on the applicants' security of the person is grossly disproportionate to its objective. I therefore find it unnecessary to decide whether the prohibition is overbroad insofar as it applies to a single prostitute operating out of her own home (C.A., at para. 204). The application judge found on the evidence that moving to a bawdy-house would improve prostitutes' safety by providing the "safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate" (para. 427). Balancing this against the evidence demonstrating

dossier n'appuie pas leur prétention; au contraire, il ressort du dossier législatif que l'interdiction a pour objet de faire obstacle au préjudice apparenté à la nuisance qui est infligé à la collectivité.

[132] Nul élément de preuve ne justifie la remise en cause de cet objectif. Le principe qui fait obstacle au changement d'objet ne permet pas de conclure maintenant à l'existence d'un nouvel objectif (*R. c. Zundel*, [1992] 2 R.C.S. 731). À première vue, la disposition ne vise que la prostitution pratiquée chez soi, de sorte qu'elle ne saurait viser à décourager la prostitution en général. Il n'y a pas lieu non plus de conclure qu'elle a pour effet, avec les autres dispositions du *Code criminel*, de décourager la prostitution en général, étant donné le caractère parcellaire de l'adoption et de l'évolution des dispositions qui a permis à la prostitution pratiquée chez autrui et à la prostitution comme telle d'échapper à la répression. Je conviens donc avec les juridictions inférieures que l'objectif de la disposition sur les maisons de débauche est de lutter contre les troubles de voisinage et de protéger la santé et la sécurité publiques.

(ii) Conformité aux principes de justice fondamentale

[133] Les juridictions inférieures se demandent si l'interdiction des maisons de débauche a une portée trop grande ou si elle est totalement disproportionnée.

[134] Je conviens avec elles que l'effet préjudiciable de l'interdiction sur le droit à la sécurité des demanderesses est totalement disproportionné à l'objectif. J'estime donc inutile de me prononcer sur sa portée excessive dans le cas de la prostituée qui travaille seule chez elle (C.A., par. 204). La juge de première instance conclut de la preuve que dispenser leurs services dans une maison de débauche accroîtrait la sécurité des prostituées en les faisant bénéficier [TRADUCTION] « de l'avantage sécuritaire de la proximité d'autres personnes, de la familiarisation avec les lieux, d'un personnel chargé de leur sécurité, de la télésurveillance en circuit fermé et de toute autre mesure que permet un lieu permanent

that "complaints about nuisance arising from indoor prostitution establishments are rare" (*ibid.*), she found that the harmful impact of the provision was grossly disproportionate to its purpose.

[135] The Court of Appeal acknowledged that empirical evidence on the subject is difficult to gather, since almost all the studies focus on street prostitution. However, it concluded that the evidence supported the application judge's findings on gross disproportionality — in particular, the evidence of the high homicide rate among prostitutes, with the overwhelming number of victims being street prostitutes. The Court of Appeal agreed that moving indoors amounts to a "basic safety precaution" for prostitutes, one which the bawdy-house provision makes illegal (paras. 206-7).

[136] In my view, this conclusion was not in error. The harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose.

(b) *Section 212(1)(j): Living on the Avails of Prostitution*

(i) The Object of the Provision

[137] This Court has held, *per* Cory J. for the majority in *Downey*, that the purpose of this provision is to target pimps and the parasitic, exploitative conduct in which they engage:

It can be seen that the majority of offences outlined in s. 195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section

situé à l'intérieur » (par. 427). Après avoir mis en balance ces éléments avec la preuve selon laquelle « rares sont les plaintes pour nuisance déposées contre un établissement où se pratique la prostitution » (*ibid.*), elle conclut que l'effet préjudiciable de la disposition est totalement disproportionné à son objectif.

[135] La Cour d'appel reconnaît qu'il est difficile de recueillir des données empiriques sur le sujet étant donné que la plupart des études s'intéressent surtout à la prostitution dans la rue. Elle conclut toutefois que la preuve étaye les conclusions de la juge sur la disproportion totale, en particulier en ce qui concerne le nombre élevé de meurtres de prostituées, en très grande majorité des prostituées travaillant dans la rue. Elle convient que travailler à l'intérieur constitue une [TRADUCTION] « précaution élémentaire » que la disposition sur les maisons de débauche rend illégale pour les prostituées (par. 206-207).

[136] À mon avis, cette conclusion n'est pas erronée. Les préjudices relevés par les juridictions inférieures sont totalement disproportionnés à l'objectif de réprimer le désordre public. Le législateur a le pouvoir de réprimer la nuisance, mais pas au prix de la santé, de la sécurité et de la vie des prostituées. La disposition qui empêche une prostituée de la rue de recourir à un refuge sûr comme Grandma's House alors qu'un tueur en série est soupçonné de sévir dans les rues est une disposition qui a perdu de vue son objectif.

b) *Alinéa 212(1)j) : Proxénétisme*

(i) Objet de la disposition

[137] Dans l'arrêt *Downey*, les juges majoritaires de la Cour (sous la plume du juge Cory) concluent que l'al. 212(1)*j*) vise à réprimer le proxénétisme, ainsi que le parasitisme et l'exploitation qui y sont associés :

On peut constater que la majorité des infractions mentionnées à l'art. 195 visent le proxénète qui entraîne ou encourage une personne à s'adonner à la prostitution

195(1)(*j*) [now s. 212(1)(*j*)] is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(*j*) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. [p. 32]

[138] The Attorneys General of Canada and Ontario argue that the true objective of s. 212(1)(*j*) is to target the commercialization of prostitution, and to promote the values of dignity and equality. This characterization of the objective does not accord with *Downey*, and is not supported by the legislative record. It must be rejected.

(ii) Compliance With the Principles of Fundamental Justice

[139] The courts below concluded that the living on the avails provision is overbroad insofar as it captures a number of non-exploitative relationships which are not connected to the law's purpose. The courts below also concluded that the provision's negative effect on the security and safety of prostitutes is grossly disproportionate to its objective of protecting prostitutes from harm.

[140] I agree with the courts below that the living on the avails provision is overbroad.

[141] The provision has been judicially restricted to those who provide a service or good to a prostitute because she is a prostitute, thus excluding grocers and doctors, for instance (*Shaw v. Director of Public Prosecutions*, [1962] A.C. 220 (H.L.)). It also has been held to require that exploitation be proven in the case of a person who lives with the prostitute, in order to exclude people in legitimate domestic relationships with a prostitute (*Grilo*). These refinements render the prohibition narrower than its words might suggest.

[142] The question here is whether the law nevertheless goes too far and thus deprives the applicants of their security of the person in a manner unconnected to the law's objective. The law punishes

ou la harcèle à cette fin. L'alinéa 195(1)*j*) [aujourd'hui remplacé par l'al. 212(1)*j*)] vise particulièrement ceux qui ont un intérêt financier dans les revenus d'un prostitué. On estime à juste titre, je crois, que la cible visée par l'al. 195(1)*j*) est la personne qui vit en parasite du revenu d'un prostitué, qu'on appelle communément et fort à propos le souteneur. [p. 32]

[138] Le procureur général du Canada et celui de l'Ontario soutiennent que le véritable objectif de l'al. 212(1)*j*) est de réprimer la commercialisation de la prostitution et de promouvoir les valeurs que sont la dignité et l'égalité. Leur prétention est contraire à l'arrêt *Downey* et n'est pas étayée par le dossier législatif. Elle doit donc être écartée.

(ii) Conformité avec les principes de justice fondamentale

[139] Les juridictions inférieures estiment que la portée de la disposition sur le proxénétisme est excessive en ce que sont ciblés des rapports dénués d'exploitation qui n'ont aucun lien avec l'objet de la disposition. Elles opinent en outre que l'effet préjudiciable de la disposition sur la sécurité des prostituées est totalement disproportionné à l'objectif de les protéger.

[140] Je conviens avec elles que la disposition sur le proxénétisme a une portée excessive.

[141] Les tribunaux n'ont appliqué la disposition qu'à la personne qui offre un service ou un bien à une prostituée parce qu'elle est une prostituée, ce qui exclut, par exemple, l'épicier ou le médecin (*Shaw c. Director of Public Prosecutions*, [1962] A.C. 220 (H.L.)). Ils ont également statué que, dans le cas d'une personne habitant avec une prostituée, l'exploitation devait être prouvée afin qu'un conjoint de fait légitime ne puisse être inquiété (*Grilo*). Leur démarche a pour effet de limiter la portée que l'interdiction pourrait avoir si l'on s'en tenait strictement à son libellé.

[142] La question qui se pose en l'espèce est celle de savoir si la disposition va néanmoins trop loin et porte ainsi atteinte au droit à la sécurité des demanderesses selon des modalités qui sont étrangères

everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is therefore overbroad.

[143] The appellant Attorneys General argue that the line between an exploitative pimp and a prostitute's legitimate driver, manager or bodyguard, blurs in the real world. A relationship that begins on a non-exploitative footing may become exploitative over time. If the provision were tailored more narrowly — for example, by reading in "in circumstances of exploitation" as the Court of Appeal did — evidentiary difficulties may lead to exploiters escaping liability. Relationships of exploitation often involve intimidation and manipulation of the kind that make it very difficult for a prostitute to testify. For these reasons, the Attorneys General argue, the provision must be drawn broadly in order to effectively capture those it targets.

[144] This argument is more appropriately addressed under the s. 1 analysis. As stated above, if a law captures conduct that bears no relation to its purpose, the law is overbroad under s. 7; enforcement practicality is one way the government may justify an overbroad law under s. 1 of the *Charter*.

[145] Having found that the prohibition on living on the avails of prostitution is overbroad, I find it unnecessary to consider whether it is also grossly disproportionate to its object of protecting prostitutes from exploitative relationships.

à l'objectif poursuivi. Est sanctionné quiconque vit des produits de la prostitution d'autrui sans que ne soit établie de distinction entre celui qui exploite une prostituée (tel le proxénète contrôlant et violent) et celui qui peut accroître la sécurité d'une prostituée (tel le chauffeur, le gérant ou le garde du corps véritable). La disposition vise également toute personne qui fait affaire avec une prostituée, y compris un comptable ou un réceptionniste. Certains actes sans aucun rapport avec l'objectif de prévenir l'exploitation des prostituées tombent aussi sous le coup de la loi. La disposition sur le proxénétisme a donc une portée excessive.

[143] Les procureurs généraux appelants font valoir que, dans la réalité, la ligne de démarcation entre le proxénète qui exploite une prostituée et le chauffeur, le gérant ou le garde du corps d'une prostituée est floue. Une relation qui n'est empreinte d'aucune exploitation au départ peut le devenir avec le temps. Si le libellé de la disposition était circonscrit davantage — par exemple en considérant que les mots « dans des situations d'exploitation » y sont employés, comme le préconise la Cour d'appel —, un exploiteur pourrait échapper à l'application de la loi du seul fait que sa responsabilité serait difficile à établir. L'exploitation comporte souvent manipulation et intimidation, ce qui rend très difficile l'obtention du témoignage d'une prostituée. Les procureurs généraux font donc valoir que la disposition doit avoir une grande portée afin de réprimer les actes qui sont censés l'être.

[144] Cette considération a davantage sa place dans l'analyse fondée sur l'article premier. Je le répète, une disposition a une portée excessive au regard de l'art. 7 lorsqu'elle s'applique à un comportement qui est sans rapport avec son objet; l'utilité pratique sur le plan de l'application est l'une des considérations que le gouvernement peut invoquer pour justifier la portée excessive d'une disposition suivant l'article premier de la *Charte*.

[145] Vu ma conclusion que la disposition sur le proxénétisme a une portée excessive, il me paraît inutile de déterminer si elle est aussi totalement disproportionnée à son objectif de protéger les prostituées contre l'exploitation.

(c) *Section 213(1)(c): Communicating in Public for the Purposes of Prostitution*

(i) The Object of the Provision

[146] The object of the communicating provision was explained by Dickson C.J. in the *Prostitution Reference*:

> Like Wilson J., I would characterize the legislative objective of s. 195.1(1)(*c*) [now s. 213(1)(*c*)] in the following manner: the provision is meant to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. My colleague Lamer J. finds that s. 195.1(1)(*c*) is truly directed towards curbing the exposure of prostitution and related violence, drugs and crime to potentially vulnerable young people, and towards eliminating the victimization and economic disadvantage that prostitution, and especially street soliciting, represents for women. I do not share the view that the legislative objective can be characterized so broadly. In prohibiting sales of sexual services in public, the legislation does not attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution. Rather, in my view, the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.
>
> The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. [pp. 1134-35]

[147] It is clear from these reasons that the purpose of the communicating provision is not to eliminate street prostitution for its own sake, but to take prostitution "off the streets and out of public view" in order to prevent the nuisances that street prostitution can cause. The *Prostitution Reference* belies the argument of the Attorneys General that

c) *Alinéa 213(1)c) : Communiquer en public à des fins de prostitution*

(i) Objet de la disposition

[146] Dans le *Renvoi sur la prostitution*, le juge en chef Dickson explique l'objet de la disposition sur la communication :

> Comme le juge Wilson, je suis d'avis de qualifier l'objectif législatif de l'al. 195.1(1)*c*) [aujourd'hui remplacé par l'al. 213(1)*c*)] de la façon suivante : la disposition vise la sollicitation dans les endroits publics et, à cette fin, tente de supprimer les diverses formes de nuisances sociales qui découlent de l'étalage en public de la vente de services sexuels. Mon collègue le juge Lamer conclut que l'al. 195.1(1)*c*) vise en réalité à empêcher que de jeunes personnes vraisemblablement vulnérables soient exposées à la prostitution, à la violence, aux drogues et au crime qui l'accompagnent et à éliminer l'oppression et la sujétion économique que la prostitution, et particulièrement la sollicitation de rue, représentent pour les femmes. Je ne partage pas l'opinion que l'objectif législatif puisse être qualifié de façon aussi large. En interdisant la vente de services sexuels dans les endroits publics, la loi ne tente pas, à tout le moins directement, de traiter le problème de l'exploitation, de la dégradation et de la subordination des femmes, qui font partie de la réalité quotidienne de la prostitution. À mon avis, la loi vise plutôt à empêcher que la sollicitation en vue de se livrer à la prostitution se fasse dans les rues et sous les regards du public.
>
> La disposition du *Code criminel* contestée en l'espèce répond clairement aux préoccupations des propriétaires de maison, des commerces et des habitants des secteurs urbains. La sollicitation en public aux fins de la prostitution est intimement associée à l'encombrement des rues ainsi qu'au bruit, au harcèlement verbal de ceux qui n'y participent pas et à divers effets généralement néfastes sur les passants et les spectateurs, particulièrement les enfants. [p. 1134-1135]

[147] Il s'ensuit clairement que la disposition sur la communication vise non pas à éliminer la prostitution dans la rue comme telle, mais bien « à sortir la prostitution de la rue et à la soustraire au regard du public » afin d'empêcher les nuisances susceptibles d'en découler. Le *Renvoi sur la prostitution* contredit la thèse des procureurs généraux selon laquelle

Parliament's overall objective in these provisions is to deter prostitution.

(ii) Compliance With the Principles of Fundamental Justice

[148] The application judge concluded that the harm imposed by the prohibition on communicating in public was grossly disproportionate to the provision's object of removing the nuisance of prostitution from the streets. This was based on evidence that she found established that the ability to screen clients was an "essential tool" to avoiding violent or drunken clients (application decision, at para. 432).

[149] The majority of the Court of Appeal found that the application judge erred in her analysis of gross disproportionality by attaching too little importance to the objective of s. 213(1)(*c*), and by incorrectly finding on the evidence that face-to-face communication with a prospective customer is essential to enhancing prostitutes' safety (paras. 306 and 310).

[150] In my view, the Court of Appeal majority's reasoning on this question is problematic, largely for the reasons set out by MacPherson J.A., dissenting in part. Four aspects of the majority's analysis are particularly troubling.

[151] First, in concluding that the application judge accorded too little weight to the legislative objective of s. 213(1)(*c*), the majority of the Court of Appeal criticized her characterization of the object of the provision as targeting "noise, street congestion, and the possibility that the practice of prostitution will interfere with those nearby" (C.A., at para. 306). But the application judge's conclusion was in concert with the object of s. 213(1)(*c*) established by Dickson C.J. in the *Prostitution Reference*, which the majority of the Court of Appeal endorsed earlier in their reasons (para. 286).

[152] Compounding this error, the majority of the Court of Appeal inflated the objective of the prohibition on public communication by referring to "drug possession, drug trafficking, public

l'objectif général de la disposition serait de décourager la prostitution.

(ii) Conformité aux principes de justice fondamentale

[148] La juge de première instance conclut que le préjudice causé par l'interdiction de communiquer en public est totalement disproportionné à l'objet de la disposition, à savoir mettre fin à la nuisance que constitue la prostitution dans la rue. Elle s'appuie sur des éléments de preuve qui, à son avis, démontrent que la possibilité de jauger les clients est [TRADUCTION] « essentielle » à la détection de ceux qui sont violents ou ivres (décision de première instance, par. 432).

[149] Les juges majoritaires de la Cour d'appel opinent que, dans son analyse de la proportionnalité, la juge de première instance commet l'erreur d'accorder trop peu d'importance à l'objectif de l'al. 213(1)*c*) et de conclure, à partir de la preuve, que la possibilité d'une communication entre les intéressés est essentielle à la sécurité des prostituées (par. 306 et 310).

[150] À mon avis, le raisonnement des juges majoritaires de la Cour d'appel sur ce point pose problème, en grande partie pour les motifs qu'invoque le juge MacPherson, dissident en partie. Leur analyse est problématique sous quatre rapports.

[151] Premièrement, pour conclure que la juge accorde trop peu d'importance à l'objectif de l'al. 213(1)*c*), les juges majoritaires de la Cour d'appel lui reprochent d'affirmer que la disposition vise [TRADUCTION] « le bruit, l'encombrement des rues et la possibilité que l'exercice de la prostitution gêne ceux qui se trouvent dans les lieux environnants » (C.A., par. 306). Or, la conclusion de la juge s'accorde avec l'objet de l'al. 213(1)*c*) reconnu par le juge en chef Dickson dans le *Renvoi sur la prostitution* et auquel les juges majoritaires souscrivent par ailleurs dans leurs motifs (par. 286).

[152] Pour ajouter à cette erreur, les juges majoritaires accroissent la portée de l'objectif de l'interdiction de la communication en public en mentionnant [TRADUCTION] « la possession de drogue, le

intoxication, and organized crime" (para. 307), even though Dickson C.J. explicitly *excluded* the exposure of "related violence, drugs and crime" to vulnerable young people from the objectives of s. 213(1)(*c*). At most, the provision's effect on these other issues is an ancillary benefit — and, as such, it should not play into the gross disproportionality analysis, which weighs the actual objective of the provision against its negative impact on the individual's life, liberty and security of the person.

trafic de stupéfiants, l'intoxication publique et le crime organisé » (par. 307). Pourtant, dans le *Renvoi sur la prostitution*, le juge en chef Dickson *écarte* explicitement des objectifs de l'al. 213(1)*c*) le fait d'empêcher que de jeunes personnes vulnérables soient exposées « à la prostitution, à la violence, aux drogues et au crime » qui accompagnent la prostitution. Tout au plus, l'effet de cette disposition sur ces autres aspects ne constitue qu'un avantage accessoire, de sorte qu'il ne devrait pas être pris en compte lorsque, dans le cadre de l'analyse de la proportionnalité, on soupèse l'objectif réel de la disposition et son effet préjudiciable sur le droit à la vie, à la liberté et à la sécurité de la personne.

[153] The three remaining concerns with the majority's reasoning relate to the other side of the balance: the assessment of the impact of the provision.

[153] Les trois autres failles du raisonnement de la majorité touchent l'autre plateau de la balance, soit l'effet de la disposition.

[154] First, the majority of the Court of Appeal erroneously substituted its assessment of the evidence for that of the application judge. It found that the application judge's conclusion that face-to-face communication is essential to enhancing prostitutes' safety was based only on "anecdotal evidence . . . informed by her own common sense" (para. 311). This was linked to its error, discussed above, in according too little deference to the application judge on findings of social and legislative facts. MacPherson J.A. for the minority, correctly countered that the evidence on this point came from both prostitutes' own accounts and from expert assessments, and provided a firm basis for the application judge's conclusion (paras. 348-50).

[154] Premièrement, les juges majoritaires de la Cour d'appel substituent à tort leur appréciation de la preuve à celle de la juge de première instance. Ils concluent que cette dernière se fonde sur [TRADUCTION] « des preuves anecdotiques [. . .] éclairées par son propre bon sens » (par. 311) pour conclure que la communication des intéressés est essentielle à la sécurité accrue des prostituées. Leur erreur est imputable à celle, mentionnée précédemment, de déférer trop peu aux conclusions de la juge sur des faits sociaux ou législatifs. Au nom des juges minoritaires, le juge MacPherson rétorque à juste titre que la preuve sur ce point est constituée à la fois de témoignages de prostituées et de témoignages d'experts, et qu'elle étaye solidement la conclusion tirée en première instance (par. 348-350).

[155] Second, the majority ignored the law's effect of displacing prostitutes to more secluded, less secure locations. The application judge highlighted this displacement (at para. 331), citing the evidence found in the report of the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws (*The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (2006)) on the effects of s. 213(1)(*c*). The majority's conclusion that the application judge did not have a proper basis to

[155] Deuxièmement, les juges majoritaires font fi des conséquences que la disposition a eues sur les prostituées en les faisant migrer vers des lieux isolés et moins sûrs. La juge de première instance met cette migration en évidence (par. 331) et cite les éléments de preuve tirés du rapport du Sous-comité de l'examen des lois sur le racolage du Comité permanent de la justice et des droits de la personne de la Chambre des communes (*Le défi du changement : Étude des lois pénales en matière de prostitution au Canada* (2006)) sur les effets de l'application de

conclude that face-to-face communication enhances safety may be explained in part by their failure to consider the impact of the provision on displacement.

[156] Related to this is the uncontested fact that the communication ban prevents street workers from bargaining for conditions that would materially reduce their risk, such as condom use and the use of safe houses.

[157] Finally, the majority of the Court of Appeal majority, in rejecting the application judge's conclusions, relied on its own speculative assessment of the impact of s. 213(1)(*c*):

> While it is fair to say that a street prostitute might be able to avoid a "bad date" by negotiating details such as payment, services to be performed and condom use up front, it is equally likely that the customer could pass muster at an early stage, only to turn violent once the transaction is underway. It is also possible that the prostitute may proceed even in the face of perceived danger, either because her judgment is impaired by drugs or alcohol, or because she is so desperate for money that she feels compelled to take the risk. [para. 312]

[158] It is certainly conceivable, as this passage suggests, that some street prostitutes would not refuse a client even if communication revealed potential danger. It is also conceivable that the danger may not be perfectly predicted in advance. However, that does not negate the application judge's finding that communication is an essential tool that can decrease risk. The assessment is qualitative, not quantitative. If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established.

[159] In sum, the Court of Appeal wrongly attributed errors in reasoning to the application judge and made a number of errors in considering gross disproportionality. I would restore the application

l'al. 213(1)*c*). La conclusion des juges majoritaires suivant laquelle la juge ne disposait pas d'éléments suffisants pour conclure que la communication entre les intéressés accroît la sécurité des prostituées peut s'expliquer en partie par leur omission de tenir compte de l'effet de la disposition sur la migration des prostituées.

[156] À cela s'ajoute le fait incontesté que l'interdiction de communiquer à des fins de prostitution empêche les prostituées de la rue de négocier des conditions susceptibles de réduire sensiblement le risque auquel elles s'exposent, telle l'utilisation du condom ou d'un lieu sûr.

[157] Enfin, les juges majoritaires de la Cour d'appel s'appuient sur leur propre appréciation spéculative des répercussions de l'al. 213(1)*c*) pour écarter les conclusions tirées en première instance :

> [TRADUCTION] Bien qu'il soit juste de dire qu'une prostituée de la rue pourrait éviter les incidents malheureux en négociant à l'avance des modalités comme le paiement, les services à rendre et l'utilisation d'un condom, il est également possible que le client jugé acceptable à ce stade préalable devienne ensuite violent lorsque la prestation est en cours. Il est également possible que la prostituée décide d'aller de l'avant malgré le danger pressenti, soit parce que son jugement est altéré par la drogue ou l'alcool, soit parce qu'elle a tellement besoin d'argent qu'elle se sent obligée de courir le risque. [par. 312]

[158] Même si on peut assurément concevoir, comme l'indique cet extrait, qu'une prostituée de la rue ne refuse pas un client même lorsque la communication révèle l'existence d'un risque, il est également concevable que le risque ne puisse être totalement prévisible. Pour autant, la conclusion de la juge selon laquelle la communication entre les intéressés est essentielle à la réduction du risque demeure valable. L'appréciation est qualitative, non quantitative. À supposer que l'évaluation préalable ait pu empêcher une seule femme de monter à bord de la voiture de Robert Pickton, la gravité des effets préjudiciables est démontrée.

[159] En somme, la Cour d'appel relève à tort des erreurs dans le raisonnement de la juge de première instance et elle en commet plusieurs au chapitre de la proportionnalité. Je suis d'avis de rétablir la

judge's conclusion that s. 213(1)(*c*) is grossly disproportionate. The provision's negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

C. *Do the Prohibitions Against Communicating in Public Violate Section 2(b) of the Charter?*

[160] Having concluded that the impugned laws violate s. 7, it is unnecessary to consider this question.

D. *Are the Infringements Justified Under Section 1 of the Charter?*

[161] The appellant Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1 of the *Charter*. Only the Attorney General of Canada addressed this in his factum, and then, only briefly. I therefore find it unnecessary to engage in a full s. 1 analysis for each of the impugned provisions. However, some of their arguments under s. 7 of the *Charter* are properly addressed at this stage of the analysis.

[162] In particular, the Attorneys General attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships, which can be difficult to identify. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships.

conclusion de la juge selon laquelle l'al. 213(1)*c*) est totalement disproportionné. L'effet préjudiciable de cette disposition sur le droit à la sécurité et à la vie des prostituées de la rue est totalement disproportionné au risque de nuisance causée par la prostitution de la rue.

C. *Les interdictions de communiquer en public portent-elles atteinte à une liberté garantie à l'al. 2b) de la Charte?*

[160] Comme je conclus que les dispositions contestées violent le droit garanti à l'art. 7, point n'est besoin de se prononcer à cet égard.

D. *Les atteintes sont-elles justifiées suivant l'article premier de la Charte?*

[161] Les procureurs généraux appelants ne prétendent pas sérieusement que si elles sont jugées contraires à l'art. 7, les dispositions en cause peuvent être justifiées en vertu de l'article premier de la *Charte*. Seul le procureur général du Canada aborde le sujet dans son mémoire, et ce, brièvement. Il m'apparaît donc inutile de me livrer à une analyse exhaustive au regard de l'article premier pour chacune des dispositions attaquées. Par contre, certaines des thèses qu'ils défendent en fonction de l'art. 7 de la *Charte* sont reprises à juste titre à cette étape de l'analyse.

[162] En particulier, les procureurs généraux tentent de justifier la disposition sur le proxénétisme par la nécessité d'un libellé général afin que tombent sous le coup de son application toutes les relations empreintes d'exploitation, lesquelles peuvent être difficiles à cerner. Or, la disposition vise non seulement le chauffeur ou le garde du corps, qui peut être en fait un proxénète, mais aussi la personne qui entretient avec la prostituée des rapports manifestement dénués d'exploitation (p. ex. un réceptionniste ou un comptable). La disposition n'équivaut donc pas à une atteinte minimale. Pour les besoins du dernier volet de l'analyse fondée sur l'article premier, son effet bénéfique — protéger les prostituées contre l'exploitation — ne l'emporte pas non plus sur l'effet préjudiciable qui empêche les prostituées de prendre des mesures pour accroître leur sécurité et, peut-être, leur sauver la vie.

[163] The Attorneys General have not raised any other arguments distinct from those considered under s. 7. I therefore find that the impugned laws are not saved by s. 1 of the *Charter*.

V. Result and Remedy

[164] I would dismiss the appeals and allow the cross-appeal. Section 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) are declared to be inconsistent with the *Canadian Charter of Rights and Freedoms* and hence are void. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only.

[165] I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure — for example, permitting prostitutes to obtain the assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.

[166] This raises the question of whether the declaration of invalidity should be suspended and if so, for how long.

[167] On the one hand, immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated.

[163] Les procureurs généraux n'invoquent pas d'éléments distincts de ceux examinés au regard de l'art. 7. Je conclus donc que les dispositions contestées ne sont pas sauvegardées par application de l'article premier de la *Charte*.

V. Dispositif et réparation

[164] Je suis d'avis de rejeter les pourvois et d'accueillir le pourvoi incident. L'article 210, en ce qui concerne la prostitution, et les al. 212(1)*j*) et 213(1)*c*) sont déclarés incompatibles avec la *Charte canadienne des droits et libertés* et sont par conséquent invalidés. Le mot « prostitution » est supprimé de la définition de « maison de débauche » figurant au par. 197(1) du *Code criminel* pour les besoins de l'art. 210 uniquement.

[165] Je conclus que, considérée isolément, chacune des dispositions contestées comporte des failles constitutionnelles qui portent atteinte à la *Charte*. Il ne s'ensuit pas que le législateur ne peut décider des lieux et des modalités de la prostitution. L'interdiction de tenir une maison de débauche, celle de s'adonner au proxénétisme et celle de communiquer aux fins de prostitution s'entremêlent. Chacune a une incidence sur l'autre. Atténuer l'une d'elles — par exemple en permettant aux prostituées de retenir les services de préposés à leur sécurité — peut influer sur la constitutionnalité de l'autre, comme celle des nuisances associées à la tenue d'une maison de débauche. L'encadrement de la prostitution est un sujet complexe et délicat. Il appartiendra au législateur, s'il le juge opportun, de concevoir une nouvelle approche qui intègre les différents éléments du régime actuel.

[166] La question se pose alors de savoir s'il doit y avoir invalidation avec effet suspensif et, dans l'affirmative, quelle doit être la durée de cet effet.

[167] L'invalidité avec effet immédiat ferait en sorte que la prostitution échappe à toute réglementation le temps que le législateur trouve une solution au problème épineux et délicat de l'encadrement de la prostitution. La question revêt un intérêt public considérable, et peu de pays s'abstiennent de toute

Whether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in *Schachter v. Canada*, [1992] 2 S.C.R. 679) may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.

[168] On the other hand, leaving the prohibitions against bawdy-houses, living on the avails of prostitution and public communication for purposes of prostitution in place in their present form leaves prostitutes at increased risk for the time of the suspension — risks which violate their constitutional right to security of the person.

[169] The choice between suspending the declaration of invalidity and allowing it to take immediate effect is not an easy one. Neither alternative is without difficulty. However, considering all the interests at stake, I conclude that the declaration of invalidity should be suspended for one year.

Appeals dismissed and cross-appeal allowed.

Solicitor for the appellant/respondent on cross-appeal the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the appellant/respondent on cross-appeal the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Osgoode Hall Law School of York University, Toronto; Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for the interveners the Pivot Legal Society, the Downtown Eastside Sex Workers United Against Violence Society and the PACE Society: Pivot Legal Society, Vancouver; Arvay Finlay,

réglementation en la matière. Il peut y avoir controverse quant à savoir si l'invalidité avec effet immédiat présenterait un danger pour le public ou compromettrait la primauté du droit (les facteurs favorables à la suspension invoqués dans *Schachter c. Canada*, [1992] 2 R.C.S. 679). Cependant, il est clair que passer carrément de la situation où la prostitution est réglementée à la situation où elle ne le serait pas du tout susciterait de vives inquiétudes chez de nombreux Canadiens.

[168] Par contre, laisser s'appliquer dans leur forme actuelle l'interdiction des maisons de débauche, celle du proxénétisme et celle de la communication en public aux fins de prostitution exposerait les prostituées à un risque accru durant la suspension, un risque qui porte atteinte à leur droit constitutionnel à la sécurité de la personne.

[169] Il n'est pas facile de choisir entre l'invalidation avec effet suspensif ou immédiat. L'une et l'autre des mesures comportent des inconvénients. Toutefois, au vu de l'ensemble des intérêts en jeu, je conclus à la nécessité de suspendre l'effet de la déclaration d'invalidité pendant un an.

Pourvois rejetés et pourvoi incident accueilli.

Procureur de l'appelant/intimé au pourvoi incident le procureur général du Canada : Procureur général du Canada, Toronto.

Procureur de l'appelant/intimé au pourvoi incident le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs des intimées/appelantes au pourvoi incident : Osgoode Hall Law School of York University, Toronto; Sack Goldblatt Mitchell, Toronto.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureurs des intervenantes Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society et PACE Society : Pivot Legal Society, Vancouver; Arvay Finlay, Vancouver;

Vancouver; Janes Freedman Kyle Law Corporation, Vancouver; Ratcliff & Company, North Vancouver; Harper Grey, Vancouver.

Solicitors for the intervener the Secretariat of the Joint United Nations Programme on HIV/AIDS: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Hunter Litigation Chambers, Vancouver.

Solicitor for the intervener the Evangelical Fellowship of Canada: Evangelical Fellowship of Canada, Ottawa.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS and the HIV & AIDS Legal Clinic Ontario: Cooper & Sandler, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Solicitors for the interveners the Canadian Association of Sexual Assault Centres, the Native Women's Association of Canada, the Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society: University of British Columbia, Vancouver; Fay Faraday, Toronto.

Solicitors for the interveners the Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada: Bennett Jones, Toronto.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: Arvay Finlay, Vancouver; David Asper Centre for Constitutional Rights, Toronto.

Solicitors for the intervener the Simone de Beauvoir Institute: Desrosiers, Joncas, Massicotte, Montréal.

Janes Freedman Kyle Law Corporation, Vancouver; Ratcliff & Company, North Vancouver; Harper Grey, Vancouver.

Procureurs de l'intervenant le Secrétariat du Programme commun des Nations Unies sur le VIH/sida : McCarthy Tétrault, Vancouver.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Hunter Litigation Chambers, Vancouver.

Procureur de l'intervenante l'Alliance évangélique du Canada : Alliance évangélique du Canada, Ottawa.

Procureurs des intervenants le Réseau juridique canadien VIH/sida, British Columbia Centre for Excellence in HIV/AIDS et HIV & AIDS Legal Clinic Ontario : Cooper & Sandler, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Procureurs des intervenants l'Association canadienne des centres contre les agressions à caractère sexuel, l'Association des femmes autochtones du Canada, l'Association canadienne des Sociétés Elizabeth Fry, l'Action ontarienne contre la violence faite aux femmes, la Concertation des luttes contre l'exploitation sexuelle, le Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel et Vancouver Rape Relief Society : University of British Columbia, Vancouver; Fay Faraday, Toronto.

Procureurs des intervenantes l'Alliance des chrétiens en droit, la Ligue catholique des droits de l'homme et REAL Women of Canada : Bennett Jones, Toronto.

Procureurs de l'intervenant David Asper Centre for Constitutional Rights : Arvay Finlay, Vancouver; David Asper Centre for Constitutional Rights, Toronto.

Procureurs de l'intervenant l'Institut Simone de Beauvoir : Desrosiers, Joncas, Massicotte, Montréal.

Solicitors for the intervener the AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution: Foy Allison Law Group, West Vancouver.

Solicitor for the intervener Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Procureurs de l'intervenante AWCEP Asian Women for Equality Society, exerçant ses activités sous le nom Asian Women Coalition Ending Prostitution : Foy Allison Law Group, West Vancouver.

Procureur de l'intervenante Aboriginal Legal Services of Toronto Inc. : Aboriginal Legal Services of Toronto Inc., Toronto.

2001 CarswellAlta 1854
Alberta Court of Queen's Bench [In Chambers]

Federation of Law Societies of Canada v. Canada (Attorney General)

2001 CarswellAlta 1854, [2001] A.J. No. 1697

Federation of Law Societies of Canada, Applicant and Attorney General of Canada, Respondent

Watson J.

Heard: December 6, 2001
Oral reasons: December 6, 2001
Docket: Edmonton 0103-24618

Counsel: *Ms M. Duckett*, for Applicant
Ms I. Hutton, Q.C., *W. Shafer*, for Respondent

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Professions and occupations
VIII Lawyers
VIII.4 Relationship with client
VIII.4.b Duty of confidentiality
Headnote
Barristers and solicitors --- Relationship with client — Duty of confidentiality
Applicant brought application for declaration that s. 5(i) and s. 5(j) of Proceeds of Crime (Money Laundering) Act is unconstitutional and of no force or effect to extent that reference to "persons and entities" in those subsections apply to legal counsel and for declaration that s. 5 of Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations is ultra vires Act and unconstitutional — Section 5 of Regulations provides that every legal counsel is subject to Part 1 of Act when he or she engages in certain activities on behalf of any person or entity — Section 5 of Regulations and Part 1 of Act have effect of requiring legal counsel to report suspicious transactions to federal agency within 30 days after suspicion arises — Applicant sought interlocutory order suspending operation of s. 5 of Regulations until hearing of application for declaratory relief — Application for interlocutory relief granted in part — Serious and triable issue existed with respect to impact of impugned provisions on solicitor-client relationship and solicitor-client privilege — Legislation would arguably place lawyers in untenable position of facing prosecution for non-compliance with Act or facing Law Society discipline if they complied with Act and infringed solicitor-client privilege — Appropriate remedy was order that lawyers provide documentation required under Regulation in sealed envelopes identifying file number but not file name to Law Society of Alberta for storage — Law Society not to be subject to any search warrants in respect of those documents — Proceeds of Crime (Money Laundering) Act, S.C. 2000, c. 17, ss. 5(i), 5(j) — Proceeds of Crime (Money Laundering) Suspicious Transactions Reporting Regulations, SOR/2001-317, s. 5.
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Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — considered

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R. v. McClure, 2001 SCC 14, 2001 CarswellOnt 496, 2001 CarswellOnt 497, 151 C.C.C. (3d) 321, 195 D.L.R. (4th) 513, 40 C.R. (5th) 1, 266 N.R. 275, [2001] 1 S.C.R. 445, 142 O.A.C. 201, 80 C.R.R. (2d) 217 (S.C.C.) — referred to

R. v. S. (R.J.), 36 C.R. (4th) 1, 26 C.R.R. (2d) 1, 177 N.R. 81, 21 O.R. (3d) 797 (note), 96 C.C.C. (3d) 1, [1995] 1 S.C.R. 451, 78 O.A.C. 161, 121 D.L.R. (4th) 589, 1995 CarswellOnt 2 (S.C.C.) — referred to

RJR-Macdonald Inc. c. Canada (Procureur général), (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* [1995] 3 S.C.R. 199, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 187 N.R. 1, 1995 CarswellQue 119, 1995 CarswellQue 119F (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 1 — referred to

s. 7 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 487 — referred to

s. 488 — referred to

s. 488.1 [en. R.S.C. 1985, c. 27 (1st Supp.), s. 71] — referred to

2001 CarswellAlta 1854, [2001] A.J. No. 1697

Proceeds of Crime (Money Laundering) Act, S.C. 2000, c. 17

Generally — referred to

Pt. I — referred to

s. 2 — referred to

s. 5(i) — considered

s. 5(j) — considered

s. 8 — referred to

s. 11 — referred to

s. 62 — considered

s. 63 — considered

s. 75 — referred to

Regulations considered:

Proceeds of Crime (Money Laundering) Act, S.C. 2000, c. 17

Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations, SOR/2001-317

Generally

s. 5

APPLICATION for interim stay of impugned legislation.

***The Honourable Justice J. Watson*:**

1 THE COURT: This particular case involves what I would have to say are manifestly important and even definitive social values in Canada. If one looks at the decision of the Supreme Court of Canada in the *Secession Reference*, the four key elements of our legal structure which defines Canada as a democratic nation and a free and democratic society within the meaning of section 1 of the Charter, amongst other things, are in fact Democracy, Federalism, Constitutionalism and the Rule of Law, and, of course, Respect for Minorities.

2 What occurs to me in relation to approaching this particular point is that constitutional values of considerable magnitude are being invoked on both sides of this particular argument and that those constitutional values are put forward on a basis that the other side of the equation is inconsistent therewith. This is not a prosaic legal debate about the potential differences between lawyers as a profession and other forms of trades or professions or occupations, but is a matter which is of considerable importance to the social order of Canada and also, though, to Canada's obligations as a nation on the planet.

3 Eloquent submissions have been made by both sides in relation to this matter and I therefore will provide now fairly lengthy oral reasons which I hope will be of some assistance to counsel in relation to interpreting what I am doing here.

4 The point I wish to emphasize at the outset in connection with this, of course, is that notwithstanding anything I might happen to say, I am not predeciding the substantive question raised by the Originating Notice of Motion in any way. I am looking at this as an application at this point for a form of interim remedy pending the ability of both sides to marshal their resources and put forward a full and complete argument on the issues in question.

5 I am cognizant of the fact, though, that Ms. Duckett has pointed out that the Federation of Law Societies of Canada has essentially marshalled its resources to a complete forum already and is in effect prepared to go. Nevertheless, the Parliament of

Canada is not a lower tribunal. It is composed of our elected representatives and through the Attorney General of Canada and Minister of Justice it is being represented here, in effect, in vindication of the legal choices that it made in service of what it determined to be the public interest. As mentioned before, that public interest as perceived by Parliament apparently touches not merely on what is in the best interests of Canadians and members of the polity of which we all belong, but also Canada's relationship with the rest of the international community.

6 Starting off, then, with the analytical approach that I think is most appropriate in giving my reasons, I should first indicate that these proceedings came before me initially on the basis of an Originating Notice of Motion which was filed by the Federation of Law Societies of Canada as applicant and with the Attorney General of Canada as respondent, which Originating Notice of Motion indicated that the intention of the Federation of Law Societies of Canada was to seek several forms of declaratory relief as well as the interlocutory order which is specifically before me at this particular time.

7 I do not find any reason to doubt the legitimacy of the Federation of Law Societies of Canada as an applicant in relation either to that Originating Notice of Motion or to the Notice of Motion which is subsidiary thereto, namely the one which relates to the particular motion that I am asked to deal with now, that is the motion for the interim interlocutory order.

8 I should indicate for the record that the Originating Notice of Motion provided for the following relief being sought. Firstly, that there be a "a declaration that sections 5(i) and 5(j) of the Proceeds of Crime (Money Laundering) Act, Statutes of Canada 2000, c. 17, are inconsistent with the Constitution of Canada and have no force or effect to the extent that the reference in those subsections to 'persons and entities' includes legal counsel."

9 I pause to mention that in relation to that particular paragraph in the Originating Notice of Motion there seems to me to be the potential for considerable argument about whether or not that notice is sufficient for the purposes of raising a claim under the Constitution of Canada inasmuch as it does not specifically identify which aspects of the Constitution of Canada are being taxed by the legislation. I do not raise that point as something that I have finally determined or to suggest that in any way, in fact, the Notice of Motion is inadequate.

10 I pause to mention in this context that, as we discussed during the course of our debate of this matter this morning the location of the role, shall we say, and constitutional value of the solicitor/client privilege and the relationship between a solicitor and client is perhaps somewhat difficult under our current legislative structure, including the Constitution of Canada. In that sense, therefore, I have no fault for the applicant, Federation of Law Societies of Canada, in formulating the Originating Notice of Motion in that language. Nevertheless, the language, being as it is, raises the concern that there is a legitimate reason for the Attorney of General of Canada to say, I wish to marshal a fairly wide-ranging case in answer to this motion, referring now to the Originating Notice of Motion not the particular motion that is before me.

11 I turn next to the second paragraph in the Originating Notice of Motion which provides "a declaration that sections 5(i) and 5(j) of the Act be read down so as to exclude legal counsel from the 'persons and entities' referred to in those subsections."

12 Paragraph 3 of the Originating Notice of Motion provided "a declaration that section 5 of the *Proceeds of Crime* (*Money Laundering*) *Suspicious Transaction Reporting Regulations*, SOR/2001-317 is *ultra vires* the Act and inconsistent with the Constitution of Canada, and is therefore of no force or effect."

13 I pause again at this point to say that this particular declaration raises two different forms of constitutional attack, namely a constitutional attack somewhat in accord with the initial one, namely the suggestion that there is a fundamental affront to a serious constitutional value in the *Regulations* themselves, but furthermore a secondary form of quasi constitutional attack, namely that the *Regulations* are *ultra vires* of the Act themselves.

14 This again raises, it seems to me, a set of arguments of considerable complexity and delicacy for which the Attorney General of Canada on behalf of the Parliament of Canada is entitled to have a reasonable amount of time to respond.

15 I should mention in relation to that point that the concern that is raised, however, by the Federation of Law Societies of Canada is that if one were to grant that considerable time period in order to marshal its resources to respond to those objections

to the legislation and the regulations, the net effect upon lawyers in this province could be extremely heavy from the negative point of view. I will turn to that again in a moment.

16 The fourth paragraph refers to the interlocutory order.

17 The fifth paragraph in the Originating Notice of Motion refers to "a declaration that sections 62 and 63 of the Act be read down so as to exclude legal counsel from the 'persons and entities' referred to in those sections."

18 Section 6 of the Originating Notice of Motion goes on to say (seek) "a declaration that section 64 of the Act is inconsistent with the Constitution of Canada and of no force or effect."

19 And paragraph 7 reads "a declaration of section 17 of the Act is inconsistent with the Constitution of Canada and of no force or effect." On that particular point, the main focus of the argument raised before me was concerned with section 5(i) and (j), in particular, and discussion was had about the current state, you might say, of judicial significance of sections 62 and 63 of the Act in particular. As I said before, that is the Originating Notice of Motion that starts the application going in this Court.

20 I should, at this point, address the question of whether or not the Federation of Law Societies of Canada is in some way to be criticized for choosing to proceed before this Court in connection with this issue. In addition to having done so in the Province of British Columbia, part of the debate which was raised by counsel before me turned on the question of whether or not the Attorney General of Canada was being nibbled to death by ducks in connection with numerous applications being made across Canada as opposed to being made in the Federal Court of Canada which, according to Ms. Hutton, would have jurisdiction of the larger sense.

21 The view I take of that particular element of the debate is that the Federation of Law Societies of Canada is properly before this particular Court, as it was properly before the Court in British Columbia. I say that because the lawyers represented by the Federation of Law Societies of Canada in Alberta are, of course, Alberta lawyers. The lawyers represented by the Federation of Law Societies of Canada in British Columbia were British Columbia lawyers.

22 While it may be that the Attorney General of Canada would have found it convenient had the Federation of Law Societies of Canada chosen to proceed in the Federal Court, the Federation of Law Societies of Canada is not required to choose its forum to suit the respondent on the application and can take it to a legitimately able forum before whom to make these applications. The material that has been provided to me, of course, adds that another such application is being made in the Superior Court of Ontario.

23 In the result, I do not think that it is somehow adjudicatively unfair to the Attorney General of Canada for the Federation of Law Societies of Canada to make an application to this particular Court, particularly in light of the history of the negotiations, for lack of a better way of describing it, between the Law Society of Alberta and the Attorney General respecting whether or not the Attorney General would voluntarily accede to the authority of the ruling of Madam Justice Allan in British Columbia and not attempt to enforce the terms of these particular provisions that are under challenge in the Province of Alberta while the proceedings were then pending in British Columbia.

24 I do not, in speaking to this particular point, wish to fault either side, incidentally. I think, as I said before, it is legitimate for the Federation of Law Societies of Canada to choose the forums that it wishes to choose. On the same token, I do not fault the Attorney General of Canada for saying, 'Well, we do not particularly want to be in a position to have to answer the same redundant arguments all across Canada.' It is interesting that the argument of the Attorney General of Canada in that sense, though, cuts both ways in that they are perfectly prepared to defend it in other parts of Canada as long as other parts of Canada follow a different course than Madam Justice Allan. However, I say that without any intention to be critical.

25 So I turn now, then, to the question of the specific Notice of Motion which was placed in front of me, and this, of course, was a Notice of Motion which sought "an interim interlocutory order preserving the status quo and suspending the operation of section 5 of the *Proceeds of Crime* (*Money Laundering*) *Suspicious Transaction Reporting Regulations*, SOR/2001-317 until the date fixed by this Court for the hearing of the application filed herein.

26 That Notice of Motion went on to say that an additional order that was sought was "an interlocutory order declaring that the decision of the Honourable Madam Justice M.J. Allan of the Supreme Court of British Columbia in the *Law Society (British Columbia) v. Canada (Attorney General)*[2001 CarswellBC 2569 (B.C. S.C. [In Chambers])] , dated November 20, 2001, should on grounds of comity and *res judicata* be declared to have effect outside of the Province of British Columbia and in particular in Alberta.

27 The supporting material that has been provided to me in relation to that particular Originating Notice of Motion consists of the Affidavit of Kenneth Nielsen, Q.C., the president elect of the Law Society of Alberta, which was sworn on December 4th of 2001, the Affidavit of Donald F. Thompson, the executive director of the Law Society of Alberta sworn on November 30th of 2001, plus a considerable body of material provided in the contents of the written submissions provided by both counsel very quickly, and to their credit I must say very quickly. And of course a set of documents which I do not think the word enormous necessarily does them justice, which relate to the proceedings in the British Columbia Supreme Court, Court of Appeal, because, of course, they contain a substantial body of material which not doubt would be agreed to as part of the substance of the fundamental challenge raised to the regulations and to the legislation that is before me at the present time.

28 Having set out that sort of background to the matter, I should indicate that the formal order that is sought under the Notice of Motion to which I have referred, which formal order has two parts, can be dealt with, it seems to me, in counter sequential order, that is to say I should deal with the question of the declaration, which is the second paragraph that I have just quoted as to the Notice of Motion. That particular declaration, as mentioned before, deals with the question of comity and *res judicata* and the specific declaration that was sought was to have the judgment "be declared to have effect outside of the Province of British Columbia, and in particular in Alberta."

29 The specific terminology selected in the Originating Notice of Motion is the driving force behind my approach to that particular paragraph. In my view, it would be wrong in law for me to hold that, either on the grounds of comity or *res judicata*, I could declare a judgment made by the Superior Court of jurisdiction in British Columbia to have effect in the Province of Alberta. As mentioned before, one of the issues in the *Secession Reference* had to do with Federalism and I do not think that there is any basis upon which I could declare that to be legally binding in the Province of Alberta.

30 That is not, of course, the same thing as the full faith and credit debate which has been raised by both counsel in connection with this point, unless you just reference the cases which had been the focus of the discussion in relation to full faith and credit. What I mean by this, is that in my view the concept of full faith and credit refers to judicial comity in its traditional form, namely that one Court should not lightly set aside the decision of another Court of co-equal or respectable jurisdiction simply because that particular judgment is not in legal effect in the province in which the judgment was made.

31 The idea of comity is associated very closely with the whole architecture of *stare decisis* in this country, and *stare decisis* is a concept which, it seems to me, has a measure of constitutional strength, whether it is a conventional form of constitution element or is a form of constitutional element which is contained within the constitution we inherited from Britain, which, as the Supreme Court of Canada held in the *Judges' Case*, is a part of the preamble giving rise to a considerable number of implications as to our judicial and legal inheritance.

32 Indeed, at some point, possibly, the argument of the Federation of Law Societies of Canada as applicant in this particular case may be that the preamble itself carries forward the claim of the constitutionality of the solicitor/client privilege and its importance insofar as the concept of Constitutionalism and the Rule of Law in Canada is concerned.

33 However, returning to the question of the cases that were invoked in connection with the subject of judicial comity and *res judicata*, I say firstly that *res judicata*, not having been argued, is really not a question here, and therefore it comes down to judicial comity. The first of those cases that was mentioned was, of course, the case of *Morguard Investments Ltd. v. De Savoye*[(1990), [1991] 2 W.W.R. 217 (S.C.C.)], reported at 1991, volume 2 of the Western Weekly Reports at page 217, written by Mr. Justice LaForest

The next case in the chronological history of the authorities that were provided to me was the decision of *George Ernest Hunt v. Lac d'Amiante du Québec Ltée*, much better known as *Hunt v. T & N plc*[(1993), [1994] 1 W.W.R. 129 (S.C.C.)], which is reported at 1994, volume 1 of the Western Weekly Reports at page 129.

34 The third of the authorities that was cited or particularly emphasized, I should say, in connection with this particular issue of judicial comity is the decision reference re the *Public Sector Pay Reduction Act of Prince Edward Island v. the Attorney General of Canada*, which is more famously known as the *Judges' Case* and was rendered by the Supreme Court of Canada on September 18th, 1997. The particular citation provided to me in written form was at volume *R. v. Campbell* (1997), 118 C.C.C. (3d) 193 (S.C.C.) . I will not read the quotations which were provided to me by counsel during the course of argument except to say that the gist and effect of those is that there is a high social value in one court of equal jurisdiction in one province giving respect to another court of equal jurisdiction in another province. This is a very important social value and, as I mentioned before, is one which does not involve a Court simply declaring the other Court to be irrelevant.

35 The concept, though, that (it seems to me that) it is at least partly at the heart of those cases has to do with accepting the legality of the judgment that was made in the other court. In other words, as part of the doctrine of *stare decisis* it is necessary to accept that in a federal state the rulings made by Superior Courts of criminal jurisdiction, given the cachet that they have been by the Supreme Court of Canada on various occasions, are part of the legal framework of the country. They are, therefore, part of the whole structure of law, whether provincial or federally based, which forms that constitution of -- body of laws, I should say, not constitution of laws, that we have to consider binding upon all of us.

36 The idea there is that everybody should be able to rely upon the law which is always speaking in a manner which gives them some guidance about how they should behave. This is particularly important in this particular instance because, of course, the legal profession represented by the applicant Federation of Law Societies of Canada is asking the Court to tell it how to behave in light of enactments of Parliament when it is suggesting that those enactments of Parliament are constitutionally unacceptable.

37 I do understand entirely what the Supreme Court of Canada was driving at in relation to asserting the essential necessity of judicial comity because there is a great danger to constitutional coherence and to the reputation of the law and to its ability to transmit predictable messages to the public if in fact judges simply disregard other law as if it was not there. That is a form of reverse *stare decisis*, which I would think would fall into the category of judicial mischief, as this Court of Appeal of Alberta has said from time to time is a serious problem.

38 I will not get into a long disposition about my views about how *stare decisis* has been perhaps given a uniquely Alberta flavour from time to time in the Breathalyzer law category, for instance, however, suffice it to say, I have to accede to the jurisdiction of the Supreme Court of Canada to tell me to behave myself and to give some respect to other rulings of comparable authority.

39 In that respect, however, it is clear that the Supreme Court of Canada did not mean to say that I am bound legally by the judgment of Madam Justice Allan. That point is, I think, well posed by counsel for the Attorney General of Canada because she says I should not consider myself bound by that judgment, not only because of its geographical distinction from my location, but because, in Ms. Hutton's very capable submissions, Madam Justice Allan's judgment should be considered to be faulty for several reasons. Ms. Hutton pointed out what she suggested to be five major reasons for that, but the fundamental one that she focused most of her argument upon was that in her submission Madam Justice Allan seriously misconceived the objectives of this particular legislation, its role in the structure and purposes of Canada's executive branch of government, shall we say, in preserving Canada from being a haven for criminals or being a place in which people can conduct crimes with impunity and particularly using lawyers as a shield or vehicle or means by which those crimes can be committed effectively.

40 In this respect, it seems relevant to observe that if one applies the doctrine set out in the Supreme Court of Canada's famous judgment in *Rizzo Shoes* that the objective of the particular piece of legislation that is before me now, and which will be the subject matter of a constitutional debate later, is as set out in the title. The *Proceeds of Crime* (*Money Laundering*) *Act* provides for the following title: It is "an act to facilitate combatting the laundering of proceeds of crime to establish the Financial

Transactions and Reports Analysis Centre of Canada and to amend and repeal certain acts in consequence." In other words, the essential theme as indicated by the title of that Act is to control by observation and by review the financial transactions inside Canada and between Canada and other places for the purposes of ensuring that the three forms of, or three stages of money laundering to which were referred, Ms. Hutton referred to in her debate, do not occur.

41 I think it is possible to take judicial notice of the fact that that particular form of activity is relatively prevalent in the world and that in fact it finances not only the activities of organized criminals, as set out in the material provided by Ms. Hutton, but in fact is now clearly related to the activities of terrorists across the world who are involved in mass murder. Consequently, one can understand, therefore, why the Parliament of Canada has been particularly anxious to address this particular point, noting in particular, as well, that there has been considerable pressure on the international stage on this issue.

42 Having said all that, I turn, then, back to the question of paragraph number 2 in the Notice of Motion, and as I have mentioned before, I do not believe that an interlocutory order declaring that the decision of Madam Justice Allan should have effect outside the Province of British Columbia is justified and I would not accede to that particular application.

43 That order brings me back, then, to paragraph 1 in the Notice of Motion which provides for an interim interlocutory order doing what counsel for the Federation of Law Societies of Canada called "preserving the status quo" and suspending the operation of section 5 of the *Proceeds of Crime* (*Money Laundering*) *Suspicious Transaction Reporting Regulations*. I will not try to repeat that title every time I say it, I will just call it the *Regulations*.

44 The point there is rather interesting in that it may well be part of the debate of this particular substantive motion when ultimately heard as to whether or not it does in fact maintain the *status quo*, as such. I will not get into that, but on the point of paragraph 1 of the current Notice of Motion, it is clear that there is a three-part test which the Supreme Court of Canada has specified for orders of that kind, because this is an injunctive order that would have the effect of stopping the operation of the legislation, in whole or in part.

45 Even the proposal that I made this morning, which has been discussed and inquired into by both counsel, would have the effect of stopping the effect of the law, or at least stopping the effect of this particular *Regulations* in some part. So I have to say that I am obliged, therefore, to give consideration to the test which has been set out in the decision of *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), and also *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.). And notably, recently, *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.)

46 I mention the *Harper* case because it has the interesting feature of involving what was suggested to be irreparable harm on both sides of the equation. Quite often the situation in relation to an application for a stay or injunction relates to irreparable harm on one side only. The irreparable harm arguments that are made before me are similar to *Harper* in the sense that the Attorney General of Canada strongly urges that irreparable harm will be done to the situation of the Law of Canada, and the details of which I will turn to in a second, and of course a fervent application was made of a similar sort on behalf of the lawyers of the Province of Alberta by the Federation of Law Societies of Canada.

47 Having said that, I am obliged firstly, however, before dealing with irreparable harm, to talk about the question of serious and triable issue. Ms. Hutton for the Attorney General of Canada has suggested that I should not reach the conclusion that was reached by Madam Justice Allan that there was a serious and triable issue in this matter because Madam Justice Allan's ruling was, in her submission, incorrect on the basis upon which she would conclude that there was a serious and triable issue.

48 Whether or not that is so, it does seem to me that I must conclude, nevertheless, that a serious and triable issue of various sorts exists in this case. At the core of this debate, as I mentioned at the very outset of my comments, we have a discussion as between the location of the rights of individuals to be able to consult with their clients -- sorry, to be able to consult with their lawyers without some concern that the lawyers will turn state's evidence secretly behind their back and then turn over documents to the government, the sincerity of which is not necessarily enthusiastically endorsed by the client. I make that observation only in passing. It does not really enter into the big picture.

49 My point is, though, that there is a serious and triable issue on the question of where the solicitor/client privilege is located in the Constitution. I mentioned earlier this morning the decision of *R. v. McClure*[2001 CarswellOnt 496 (S.C.C.)] , and Ms. Duckett mentioned the decision of *Law Society (British Columbia) v. Mangat*[2001 CarswellBC 2168 (S.C.C.)], both of which are recent decisions of the Supreme Court of Canada which certainly communicate a level of value of the solicitor/client privilege which, if not constitutional in nature, has a constitutional timbre to it and so there will be a considerable debate on that particular point.

50 If, in fact, solicitor/client privilege was not of a constitutional nature, it would be difficult to put forward the Originating Notice of Motion in this instance, and therefore the Notice of Motion in and of itself raises that question. That is a serious and triable issue. It is a serious and triable issue recently dealt with by the Supreme Court of Canada, albeit in different context. It is not one which, in my view, can be set aside during the course of this debate. It is also not one which is raised on some experimental basis by the Federation of Law Societies on a private reference. This is not a situation where the Federation of Law Societies is coming before the Court to sidestep the fact that it does not, like the Governments of Canada, have the ability to make References to the Courts for answers. It is genuinely coming here as a litigant saying, 'We are acting for the lawyers of the Province of Alberta. The lawyers of the Province of Alberta are concerned about how to guide themselves under the current regime of legislation, and they are afraid of the considerable penalties which are set out in the legislation that we are talking about here.'

51 I should, in that respect, refer to, specifically, what the applicant's written submissions very helpfully point out in relation to the implications of those Regulations and I am referring now to the written submissions filed on behalf of the Federation.

52 As pointed out by the Federation, section 5 of the Regulations provides that every legal counsel is subject to part 1 of the Act when they engage in certain activities on behalf of any person or entity. I pause to mention that we are talking about activities which are in the nature of transfer of funds, and movement of assets, and acquisition and sale of real estate, and a lot of the many things which would have to be considered to be fundamental to the actions of a solicitor, at least as historically understood in the history of the western world, shall we say.

53 Paragraph number 3 of the written submissions, the applicant goes on to say that legal counsel is defined by section 2 of the Act as in the Province of Quebec an advocate or notary, and in any other province a barrister and solicitor. Clearly, then, the standing of the Federation of Law Societies is clearly made out in that particular element of it.

54 It goes on to point out that section 5 of the *Regulations* and part 1 of the Act specifies that legal counsel are required to report to a federal agency, the Financial Transactions and Reports Analysis Centre referred to in argument as FINTRAC. The requirement to report concerns information regarding transactions engaged in on behalf of clients when there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence. This is important to emphasize because, as mentioned before, the question of whether or not there is a serious and triable issue turns upon whether this is a question involving the relationship between a lawyer and a client. Clearly, that was intended by the *Regulations*. It has to do with lawyers and client, so at least in that sense, on the face of it, there is a serious and triable issue that connects to that point.

55 The applicant goes on to point out the information must be sent to FINTRAC within 30 days after the suspicion first arises. This is what creates the time limitation problem that we have right now because the law came into effect on November 8th of 2001, and indeed the first of the 30-day limitations will expire on Saturday.

56 The information is required to be provided to FINTRAC in accordance with a schedule to the *Regulations* and it, as pointed out by counsel for the Federation, is an extensive list of information. The Federation goes on to point out that section 8 of the *Act* prohibits legal counsel from disclosing to their clients that they have made suspicious transaction reports or from disclosing the contents of the report with intent to prejudice the criminal investigation, whether or not one has begun.

57 I pause to comment on that, that particular aspect of the *Act* which is implicitly under challenge with the rest of them. It is an interesting point because it raises a question which has been before the Court of Appeal of Alberta, at least recently, in connection with whether or not a person is entitled to notice of an evidentiary step being taken against them by the police

authorities. I am referring, in that respect, to a recent decision called *S.A.B.* in which the question of notice in relation to taking DNA tests was the subject matter of the case and there was a split decision by the Court of Appeal, which is now before the Supreme Court of Canada.

58 I only mention this in passing because it has to do with the ambit of section 8 and the fact that Parliament chose in this particular instance to ensure that not only would legal counsel be required to provide the information, but they would likewise be required to refrain from telling the client that they had done so.

59 The aspect of requiring legal counsel to refrain from doing so is somewhat reminiscent of the *ex parte* nature of search warrants and, therefore, it does touch upon the point, though, that is raised in the serious and triable issue level and on the irreparable harm issue raised by Ms. Duckett, because, as she pointed out both this morning and this afternoon, this element of it is one of the things which the clients of lawyers in the Province of Alberta would have to raise a concern in their minds about whether or not the government is extracting information behind their back.

60 The client, theoretically under this section, could not even ask the lawyer if they had done it and get an answer. Mind you, that would put the lawyer in a rather awkward position. I will go no further there because we will debate that later.

61 The submission of the applicant goes on to refer to section 11 of the Act which states that nothing in part 1 "requires a legal counsel to disclose any communication that is subject to solicitor/client privilege" and then they contend that nothing in the Act prevents the disclosure of solicitor/client confidential information but indeed compels disclosure of the information as listed in the schedule. In this particular respect, the ultimate argument, possibly, will be something reminiscent of the *Lavallee* decision before the Supreme Court of Canada in relation to the role of the lawyer and whether or not this creates a conflict between a lawyer and the client in relation to the handling of the obligations contained therein.

62 I mention in this respect those cases which are currently before the Supreme Court of Canada because one of the matters which was of concern to Mr. Justice Côté when he orders judgment here in the Court of Appeal had to do with the question of the -- create division of a wedge between a lawyer and a client in terms of a legal obligation and the -- I should just include in this particular reference to go on to say that as pointed out by the applicant Federation of Law Societies, a very substantial punishment is provided for under section 75 of the Act for noncompliance with this particular provision.

63 I recall mentioning the $25,000 fine and I can recall why I thought that. At the time, it seemed to me because of the provisions of the *Criminal Code* dealing with summary conviction offences that that popped into my head when we were debating the matter. But that is not the point that is important here, and suffice it to say that section 75 provides for an indictable offence which is also hybrid and could be proceeded by summary conviction.

64 So having said that by way of the background in relation to this case, I do think that there are serious and triable issues of a variety of sorts, but at least one is present, namely the impact that that would have on the solicitor/client relationship and its impact upon solicitor/client privilege as well, which is a somewhat more narrow concept.

65 Now, it is true that Ms. Hutton did suggest that solicitor/client privilege will not be affected by simply providing information as to the transfer of money from a client to a lawyer, or from a lawyer to a bank, or from one bank to another bank under some form of extension of the privilege, and I have to say there is some jurisprudence on this of recent note. Nevertheless, that offers no comfort whatsoever to Ms. Duckett and in light of section 8, which I have referred to, as well as section 11, it may not offer any comfort to the legal profession to know that.

66 So let's turn, then, to the question of irreparable harm. As I mentioned before, the irreparable harm is raised on both sides at this particular point. If I can oversimplify the submission made by Ms. Duckett in this particular respect, she set out three basic suggestions constituting irreparable harm. The first was there would be harm directly to the client. The second was that there would be harm to the lawyer. And the third, that there would be harm to the reputation of the bar and the very functioning of the relationship between lawyers and clients. These are three elements of the argument that she put forward. A lot of them centre around the question of creating divided loyalty between the client -- on the part of the lawyer toward the client and by requiring the lawyer to be a stool pigeon, in a sense, even for information of a somewhat neutral nature which might also, as

mentioned by Ms. Hutton, be largely obtained through examination of bank records which also will have to be provided to the FINTRAC under this particular legislation.

67 The distinction that is made in this respect between lawyers and other forms of professionals that is accused, or is suggested by Ms. Hutton to be one that is to be subject of criticism and would raise the eyebrows of the enlightened citizens of Canada is an interesting question. It is one that is advocated strongly by the affiant in the affidavit to which reference has been made, but I observe that in relation to lawyers the desire on the part of those who are advancing this particular piece of legislation to ensure that lawyers are equally dragooned into this particular service along with the other forms of economic contributors, you might say, of a professional nature, is based on the fact that lawyers have a unique advantage to this legislation. Of all the types of individuals who might be, as pointed out by the affidavits, in a position to provide useful information for the purposes of checking into money laundering, lawyers are right up there in terms of primary care candidates, and the interesting element of that, then, is that it suggests that the very nature of lawyers is unique and special even from the proponents of this enactment.

68 Having said that, then, one wonders about the validity of an argument that lawyers are not being singled out -- sorry, that the public is going to think that lawyers are being singled out for special treatment if they get an exemption that nobody else gets, if they are being singled out for special treatment for the application of this particular law. Now, that is something which will be debated in the future by us when we come to discussing this particular point. But in relation to the decision of whether or not irreparable harm is met as a criterion for the purposes of determining whether or not there should be some form of stay, I have to say that it seems to me that the position of lawyers is not being given any more special treatment than it has in almost every other cognizable venue in which the issue has arisen.

69 It is true that Jeremy Bentham thought that only lawyers could come up with the solicitor/client privilege to protect themselves, and only lawyers would dream up this sort of specialized location for them, but the late philosopher notwithstanding, we have lived with this now for at least 150 or more years. It is well reflected as a difference between lawyers and other forms of professionals who might deal in money with clients and I do not think that the enlightened public of Canada would think that somehow there is a special nature to lawyers as some sort of pristine persons of honour who are therefore being given a benefit of an assumption in their favour that is not available to other people. It is the special nature of a legal relationship which is being sedulously fostered and not lawyers themselves.

70 In that respect, I might observe that the British Columbia Court of Appeal's contribution to the *Lavallee* debate which is now before the Supreme Court of Canada divided to some extent of whether or not lawyers and law firms should be immune from section 487 of the *Criminal Code*, as well as section 488 -- as well as from the interpretation of section 488.1 of the *Criminal Code*. The dissenting opinion in the British Columbia Court of Appeal was that section 487 should still apply to lawyers, as well, so that lawyers were not getting any special treatment, at least from her point of view, as the possible subjects of ordinary search in an investigation of crime.

71 Indeed, Ms. Duckett's submission is that one should take into account in relation to deciding irreparable harm on the side of the government that in fact lawyers are indeed individuals who are subject to the law and must obey the law. In relation to that point I suppose I can summarize Ms. Duckett's contentions relative to irreparable harm to the government, and I use the word government loosely because I understand Ms. Hutton's point on government and state. Ms. Duckett appears to say the following, that the reason why there is no irreparable harm if a stay was entered in this instance to the government is because the government did not have this legislation before anyway and it has taken a considerable time period to get to it between 1999 and the present time. I do not, in mentioning that, propose to editorialize on whether the government operated too slowly or not. Ms. Duckett is simply making the point that the urgency of this hearing is not necessarily driven by urgency reflected before the enactment of the legislation.

72 The second point she made, as I mentioned before, was that lawyers have duties. They have to obey the law, they cannot obstruct justice, they cannot destroy evidence, they must in fact maintain records and so forth. In fact, she went on to embellish that particular point about maintaining records by referring to the fact that lawyers are obliged to keep accounting records and things of that sort. I would think that Ms. Hutton could riposte to that particular point by saying, 'Well, if in fact the obligation to report to FINTRAC is not present, why would the lawyers keep the records in the form and with the content which is required

by the Regulations. They would presumably just keep the information, if any, in the form that they normally would keep in any record keeping they do in their files.'

73 In that particular point, I have to say we discussed the question of whether there would be an evidentiary impact on the government's side if in fact the lawyers were not required to at least put the forms together in the forms required by the legislation. I have to say that I think there would be an evidentiary impact on the government if they were not required to at least put the forms together and that is something to be considered on the question of whether irreparable harm would follow from this.

74 Nevertheless, dealing with the points that Ms. Duckett has raised, as I mentioned before, it does seem to me relevant to say that it is not irrelevant to observe that lawyers do have to maintain certain records in relation to the transactions with which they are engaged.

75 Ms. Duckett went on to say as well that insofar as the harm question to the state in this matter is concerned if a stay was entered, the privilege that lawyers have only goes so far and that in fact lawyers might be subject to search and apprehension and inquiry and subpoena and all the rest of it.

76 So, in summary, then, and I have considerably oversimplified the position that Ms. Duckett has put forward in relation to irreparable harm, it is this, is that lawyers would be placed in a completely untenable 'Hobson's Choice.' They would face prosecution on the one side or face Law Society discipline on the other side, and that the divided loyalty situation would therefore directly hamper them professionally speaking. It would also directly hamper their client in a manner which could not be repaired simply by, for instance, the downstream immunity under section 7 of the *Charter* which was discussed earlier this morning.

77 In that respect, I am referring to the fact that if information is conscripted about the client, the derivative immunity in relation to that information would only apply, arguably, within the contours of the decision of the Supreme Court of Canada in *R. v. S. (R.J.)*[1995 CarswellOnt 2 (S.C.C.)] , and in *British Columbia (Securities Commission) v. Branch*[1995 CarswellBC 171 (S.C.C.)], and so forth, and there are certain limitations in relation to that, which I do not need to get into now.

78 In addition, the derivative immunity would not protect third parties that might be affected by that whose information might be contained in that documentation. Indeed, I have to say, that is exactly the point of this legislation. They want -- the authorities, with conservatively good motives -- want to find out precisely that sort of information. That is the whole idea. So in that sense there is a risk of harm to the client and that harm may not be trivial. The client himself might be an innocent dupe of some other criminal organization and the acquisition of that information *via* the lawyer of that client may in fact face great jeopardies for their client which the client might find more proximate and physical than we have not discussed.

79 As far as the reputation of the bar is concerned, there is the concern that the reliability of lawyers generally in this province would become dubious, shall we say, on the subject of whether or not they could be trusted to keep their mouths shut, which is what they are supposed to normally do in relation to their relationship with their clients are seeking advice.

80 On this point, I should mention, as well, since I have covered it briefly before, that while I agree that not every consultation between a lawyer and a client is necessarily something governed by the solicitor/client privilege, the ability to draw that fine distinction from case to case or situation to situation is not necessarily an easy one and the average citizen who is not a lawyer would probably have that concern about the reputation of the bar because they would not know what it is about their lawyer they could trust for sure and so there is the concern on that side.

81 So I will just say that is Ms. Duckett's position relative to the irreparable harm on her side and I have already mentioned her position relative to the irreparable harm on the side of the government. As I say, I apologize for using the term government. I do not think that is really the appropriate way of looking at it. It is the public interest which is really involved. So when I refer to the word government, I am referring to public interest.

82 Now, as I said before, though, this is a case with irreparable harm arguments on the other side. The public interest argument made on behalf of Canada by Ms. Hutton includes the types of damage which are not cosmetic. It is not a trivial matter to say that a piece of legislation shall be suspended in its operation when it is a law of general application and a law of high motive and

a law of clear purpose and a law that has a fairly discrete, almost mathematical structure to it, at least insofar as its requirements are concerned. And I do not, in that respect, wish to dismiss an argument about vagueness or over breadth which might later on come, but what I mean is, that in specific terms the focus of this particular demand upon professionals, including lawyers, is to ensure that they report transactions and so at least we all understand what that essentially is involved.

83 As I mentioned before, I do not believe it is a simply cosmetic effect on the part of the government to have this law not in effect for a period of time, especially this period of time. The reason I say that is I have to, I think, take judicial notice of the fact that there is a worldwide investigation going on relative to the location of assets from terrorist organizations and there is nothing to suggest, of course, that any lawyers in the Province of Alberta have the vaguest of knowledge or participation or hint of any such in relation to such things.

84 However, on the international level there is a great deal of interest, not simply on the part of police agencies, but on the part of states generally in making sure that the sources of income, whether direct or indirect, or sideways or anything else, are dried up. That the ability of people to hide or park money for any of these purposes, including just routine organized crime, if there is such a thing, is not encouraged and the effect of Madam Justice Allan's judgment in British Columbia, I do not wish to make this as an interim comment about it, is taken by Canada as in a sense insulating the Province of British Columbia as a place in which that sort of information can now be pipelined through lawyers, at least safely, at least for the time being at least.

85 So it is not -- my point there, as I said before -- it is not simply a trivial matter from the point of view of the government in the practical application of this law. As I mentioned before, as well, the other side of that argument is that it is not a trivial matter relative to the repute or the authority of government, either. The public has in recent years had something to say about the role of courts in Canada in exercising their constitutional authority. This debate is a perfectly legitimate one in a democracy and I therefore have to consider whether or not the undermining of this particular piece of legislation would have some form of negative effect on the repute of the law by virtue of its effect on the authority of the government, shall we say.

86 I have to say, though, that I would not -- having said that -- I would not attach a whole lot of weight to that. Obviously it might have some effect on the government if they passed a law which was completely ridiculous about how to physically treat people and that got struck down by the courts and the public might think the courts are getting involved a little too much there, but I would not think the enlightened public would actually think about that very hard before deciding that the courts were right and that Parliament was off base.

87 So, passing from that point, then, having acknowledged that there are irreparable harm arguments on both sides of the question, I then have to turn to balance of convenience. Balance of convenience, of course, raises the question that I mentioned to counsel at the outset, which is, is there some form of remedy which can be offered which can address the concerns of irreparable harm on both sides. I sought to locate that in the approach that I mentioned, namely the idea of saying, 'Okay, we will not suspend the obligation of the lawyers to file the reports, we simply will not give the fruits of those reports to the government.' We will make sure that the terms of the *Regulation* are still in force and effect and are not in any way stymied for future reference while the application to challenge this legislation is ongoing. However, we will on the same token, not provide, in effect, the fundamental breach -- feed the concerns that Ms. Duckett has used as described by way of a fundamental breach or fundamental breakdown of the relationship between lawyers and clients.

88 The problem here is actually a very thorny one, I have to say, and it has caused me a lot of thought as to exactly how one would deal with this. I would not want to seize on my own suggestion as being the fount of all wisdom or anything, because it was merely an attempt on my part to attempt to determine some methodology which would not have a zero/sum character to it, in other words, you lose, you win kind of a result.

89 I do think that as mentioned before, that both sides of this particular argument are manifestly important, both of them have considerable weight, both of them invoke incredibly important social values in a constitutional democracy. The result, though, is that it seems to me that I cannot let international pressure, as it were, and the needs of the law, conformity objective that has been referred to very eloquently by Ms. Hutton, dilute or diminish the constitutional rights of Canadians, and where there is a reasonable argument that those rights are protected fundamentally by the rule of lawyers, I do not feel that I should yield to

that pressure and that philosophy, as strongly and well-placed and well-stated as it has been made, in somehow reducing the constitutional rights of Canadians.

90 That leads me to conclude, therefore, that a form of stay should be entered pending the grant of this particular hearing, holding of the hearing. And as I said before, therefore, it is a question of whether I use the form of stay that was considered by Madam Justice Allan or something of the sort that I raised myself.

91 I know that what is going to happen is that regardless of how I call this somebody is going to appeal and they will get before the Court of Appeal pretty quickly, and I am not too worried about that. I do my bit, they do theirs, but I conclude that in the end result it would not, in my view, endanger the repute of the legal profession if I was to make the direction that I proposed this morning, and that is therefore the stay will apply to this effect, that the obligation of lawyers under this particular *Regulation* is not ended, it is not stayed, however, it is to be done in this manner: They will provide the documentation in the form required by the regulation in sealed envelopes identifying their file number, not their file name, and the name of the lawyer. This will be provided to the Law Society of Alberta for storage.

92 The Law Society of Alberta will not be subject to any search warrants in relation to any of these documents. I will enjoin that, in other words, I will, if that is even within my jurisdiction, I would like to that, so I will do it and let somebody appeal it. And the effect, therefore, is that lawyers will be required to do this, carry out the legislation, but they will not be turning over their documentation to either the Court or to FINTRAC or other representatives of the government. And as I said before, the lawyers will not be obliged to provide on the outside of the envelope anything more than a file number by which the lawyer can determine who it is, who it is about, what the amounts involved are, or anything. It is, in other words, in a sense, a secret file that is to be provided to the Law Society, the Law Society having very kindly agreed to be a repository for this particular material.

93 I would ask the Law Society to simply file stamp the envelopes when they arrive, as to date of receipt. They do not have to keep any other records that they do not feel they want to in relation to it, they merely have to store the material and, as I said before, I would make an order directing that this material cannot be seized from the offices of the Law Society without consent of the Court. That is this Court. So, in other words, you cannot go to a Provincial Court Judge and get a search warrant, you would have to come back here to get a search warrant to get any of that stuff.

94 This order is subject to review at the time of the -- if there is a fuller application for review of the stay or at the time of the hearing of the actual motion challenging the Regulations and legislation. And is there anything else that counsel need to clarify that? Any other preservative suggestions that you would have, Ms. Duckett about that?

95 MS. DUCKETT: It may be implicit in the order, but I take it if the legislation is upheld then those documents are to be directed to FINTRAC, and if the legislation is successfully challenged the documents may be destroyed?

96 THE COURT: Well, actually, I would think they would be returned to the lawyers from whom they came, but destroyed, I imagine the lawyers would have copies in there anyways, so -- do I have to actually put that in the order, do you think?

97 MS. HUTTON: My Lord, perhaps the matter could be left to an application at the time that the final determination as to validity of the law is made. Parties appear and apply for an order for the proper disposition of the documents.

98 THE COURT: Right.

99 MS. DUCKETT: I suppose if it's clear that the documents will remain sealed until the final determination of the constitutional issue, then the disposition of the documents can be dealt with at that time.

100 THE COURT: Right. And I should indicate, too, that I guess for clarification, although it is no doubt not a comfortable thing, because I have not stayed the operation of the legislation and the regulation, the secrecy element of it still applies. In other words, when a lawyer has provided a secret envelope to the Law Society, the lawyer is not entitled to let the client know that he or she has done so. And that is, of course, subject to the ultimate determination of whether this law is valid or not, because

obviously if I was to rule, by the way, that this law is invalid, the envelopes are not subject to the stay anymore, then it would have to be somebody else who would have to take care of that after that, I would think.

101 So, are there any questions about that so as to clarify the effect of all that? I have talked for almost an hour, in fact more than an hour.

102 MS. HUTTON: My Lord, just a couple of thoughts. As to notifying the profession as to this order, perhaps something needs to happen there.

103 THE COURT: Well, I guess the Law Society presumably will do something, I do not know. They are not going to be happy. I cannot make it -- my advice is going to be worth about what they think it is worth at this point.

104 I might say one thing about this law, is that it has been in the public eye for some time and the people who are engaged in these transactions are already aware that the banks are not going to have this kind of exemption. So I think the people who might be suspicious that their lawyers might be doing this sort of thing as against their interests may as a result be somewhat cautious about what they try to pass through their lawyer's hands as a result, and I am afraid that that concerns me greatly, but I do not think the average citizen buying a house is going to be affected by this, you know, or whatever. But that is beside the point, I guess. So I do not have any suggestion, I guess, to make.

105 Any other comments that are -- or are we all worn out now? Okay. Thanks counsel. I appreciate that. This was a lot of hard work on the part of everybody, a lot of reading, I must say, by me, and I will get back to you and Ms. Hutton in a second. And I want to thank you all for this.

Application granted in part.

The Vancouver General Hospital and The Board of Trustees of the Vancouver General Hospital *Appellants*

v.

Isaac Wilfred Stoffman, William Philip Goldman, Victor Hertzman, Leslie George Cohen, Charles Sutherland Rennie, Clayton Robinson, Thomas William Acheson, Sidney Evans, Jermaine Vincent White, Murray Edgar, Jocoba Van Norden, Charles Schom, Elmer Jones and John Jacob Zack *Respondents*

and

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

INDEXED AS: STOFFMAN *v.* VANCOUVER GENERAL HOSPITAL

File No.: 20795.

1989: May 19; 1990: December 6.

Present: Chief Justice Dickson* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Applicability of Charter — Government — Whether or not hospital "government" so as to attract Charter review of policies — If so, whether or not mandatory retirement policy "law" — Canadian Charter of Rights and Freedoms, ss. 15, 32.

Constitutional law — Charter of Rights — Equality rights — Equality before the law — Age discrimination — Mandatory loss of hospital privileges at age 65 unless competence proven — Whether or not mandatory retirement policy "law" — If so, whether or not s. 15(1) of the Charter infringed — Canadian Charter of Rights and Freedoms, ss. 15, 32.

Respondents held admitting privileges at the Vancouver General Hospital. Medical Staff Regulation 5.04 at the Hospital required all physicians to retire at age 65 unless it could be shown that they had something unique

* Chief Justice at the time of hearing.

Le Vancouver General Hospital et Le Conseil d'administration du Vancouver General Hospital *Appelants*

c.

Isaac Wilfred Stoffman, William Philip Goldman, Victor Hertzman, Leslie George Cohen, Charles Sutherland Rennie, Clayton Robinson, Thomas William Acheson, Sidney Evans, Jermaine Vincent White, Murray Edgar, Jocoba Van Norden, Charles Schom, Elmer Jones et John Jacob Zack *Intimés*

et

Le procureur général du Canada, le procureur général de l'Ontario et le procureur général de la Colombie-Britannique *Intervenants*

RÉPERTORIÉ: STOFFMAN *c.* VANCOUVER GENERAL HOSPITAL

N° du greffe: 20795.

1989: 19 mai; 1990: 6 décembre.

Présents: Le juge en chef Dickson* et les juges Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier et Cory.

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

Droit constitutionnel — Charte des droits — Applicabilité de la Charte — Gouvernement — Un hôpital fait-il partie du gouvernement avec la conséquence que ses politiques sont sujettes à révision en vertu de la Charte? — Dans l'affirmative, la politique de retraite obligatoire est-elle une «loi»? — Charte canadienne des droits et libertés, art. 15, 32.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Égalité devant la loi — Discrimination fondée sur l'âge — Perte automatique à 65 ans des privilèges accordés par un hôpital à moins de preuve de compétence — La politique de retraite obligatoire est-elle une «loi»? — Dans l'affirmative, enfreint-elle l'art. 15(1) de la Charte? — Charte canadienne des droits et libertés, art. 15, 32.

Les intimés avaient des privilèges d'admission au Vancouver General Hospital. Le règlement 5.04 des Medical Staff Regulations de l'hôpital exige que tous les médecins prennent leur retraite à l'âge de 65 ans sauf

* Juge en chef à la date de l'audition.

to offer the Hospital. The Regulation was approved by the hospital's Board in May of 1984 and was subsequently approved by the Minister of Health as required by statute. The Board decided not to renew the admitting privileges of most of the respondents in May 1985.

Respondents were not employees of the Vancouver General but rather were retained by their patients and paid through the provincial medicare plan. They accordingly did not come within the protection against age-based discrimination found in the *Human Rights Act* because that protection is limited to employment situations. In Vancouver, doctors have privileges at only one hospital.

The hospital is run by a Board. The government had power to appoint 14 of the 16 members of the Board. The Minister's power with respect to the by-laws of the Vancouver General extended beyond the negative power of veto set out in the *Vancouver General Hospital Act* to the positive power under the *Hospital Act* to require the Board of Trustees to adopt new by-laws or change existing by-laws.

The respondents commenced these proceedings to set aside the Board's decision and to obtain a declaration that Regulation 5.04, either by its terms or by the manner of its application, violated ss. 7 and 15 of the *Charter* and the *Human Rights Act*. The British Columbia Supreme Court issued an interim injunction restraining the Board from removing respondents' admitting privileges pending the outcome of their application under the *Charter* and the *Human Rights Act*. The Court of Appeal upheld the issuance of the interim injunction. The British Columbia Supreme Court then granted respondents' application and the Court of Appeal also upheld that decision.

The constitutional questions before this Court queried: (1) whether the *Charter* applied to Vancouver General's establishing and administering Regulation 5.04; if so (2) whether the Regulation or (3) its administration contravened s. 15(1) of the *Charter*; and (4) given an affirmative answer to either questions 2 or 3, whether the Regulation or the manner of its administration was nevertheless justified under s. 1 of the *Charter*.

The Attorneys General of Canada, Ontario and British Columbia intervened.

s'ils peuvent démontrer qu'ils ont quelque chose d'unique à offrir à l'hôpital. Le conseil d'administration de l'hôpital a approuvé ce règlement en mai 1984 et le ministre de la Santé l'a approuvé plus tard conformément à la loi. Le conseil a décidé de ne pas renouveler les privilèges d'admission de la plupart des intimés en mai 1985.

Les intimés ne sont pas des employés du Vancouver General, mais ils sont retenus par leurs patients et sont payés par le régime d'assurance-maladie de la province. Ils ne jouissent donc pas de la protection contre la discrimination fondée sur l'âge conférée par la *Human Rights Act* puisque cette protection se limite aux situations liées à l'emploi. À Vancouver, les médecins ont des privilèges à un seul hôpital.

Un conseil d'administration dirige l'hôpital. Le gouvernement a le pouvoir de nommer 14 des 16 membres du conseil d'administration. Au-delà du pouvoir négatif de veto établi dans la *Vancouver General Hospital Act*, les pouvoirs du ministre relativement aux règlements du Vancouver General Hospital s'étendent au pouvoir réel en vertu de la *Hospital Act* d'exiger du conseil d'administration qu'il adopte de nouveaux règlements ou modifie les règlements existants.

Les intimés ont intenté cette action en vue d'annuler la décision du conseil d'administration et d'obtenir un jugement déclaratoire portant que le règlement 5.04, soit par sa formulation, soit dans son application, viole les art. 7 et 15 de la *Charte* et la *Human Rights Act*. La Cour suprême de la Colombie-Britannique a décerné une injonction provisoire pour empêcher le conseil de restreindre ou de supprimer les privilèges d'admission des intimés jusqu'à l'issue de la requête des intimés fondée sur la *Charte* et la *Human Rights Act*. La Cour d'appel a confirmé l'octroi de l'injonction intérimaire. La Cour suprême de la Colombie-Britannique a rendu jugement en faveur des intimés sur leur requête et la Cour d'appel a confirmé cette décision.

Les questions constitutionnelles soulevées devant notre Cour sont les suivantes: (1) la *Charte* s'applique-t-elle à l'adoption et à la mise en œuvre du règlement 5.04 par le Vancouver General? Dans l'affirmative (2) le règlement ou (3) son application enfreignent-ils le par. 15(1) de la *Charte*? (4) si la réponse aux questions 2 ou 3 est affirmative, le règlement et la façon dont il a été appliqué sont-ils néanmoins justifiés en vertu de l'article premier de la *Charte*?

Les procureurs généraux du Canada, de l'Ontario et de la Colombie-Britannique sont intervenus.

Held (Wilson, L'Heureux-Dubé and Cory JJ. dissenting): The appeal should be allowed and the plaintiffs' action dismissed.

Per Dickson C.J. and La Forest and Gonthier JJ.: The wording of s. 32 of the *Charter* clearly indicates that the *Charter* binds only government. The Vancouver General does not form part of government within the meaning of this section and accordingly its actions in adopting and administering Regulation 5.04 do not fall within the *Charter*'s ambit. It is an autonomous body. The provision of a public service, even one as important as health care, does not *per se* qualify as a governmental function under s. 32.

Regulation 5.04 did not arise because of executive or legislative action and accordingly did not attract *Charter* review. The requirement for ministerial approval was only supervisory in nature to ensure that the hospital's actions do not run counter to the government's powers to prescribe standards in respect of hospital administration. The Regulation was initiated by the Board and in no way represented ministerial policy with respect to the renewal of admitting privileges. The statutes under which the hospital operated did not require that it adopt a special policy respecting the renewal of privileges of doctors at age 65.

The Vancouver General did not form part of the "administrative branch" of government merely because it was incorporated to provide services mandated under the Province's responsibility for health care. A difference between ultimate or extraordinary and routine or regular control must be drawn. While the fate of the hospital is ultimately in the provincial government's hands, the responsibility for routine matters such as the policy on the renewal of admitting privileges lies with the Board and is not subject to government control, barring extraordinary circumstances. The Minister's power to require the hospital to adopt by-laws or to revise them does not undermine the hospital's responsibility for rules adopted on its own initiative. The Lieutenant Governor's power of appointment was simply a mechanism to ensure the balanced representation of these groups and organizations on the hospital's principal decision-making body. It was not a means to exercise regular government control over the hospital's day-to-day operations.

Arrêt (Les juges Wilson, L'Heureux-Dubé et Cory sont dissidents): Le pourvoi est accueilli et l'action des demandeurs est rejetée.

Le juge en chef Dickson et les juges La Forest et Gonthier: Le texte de l'art. 32 de la *Charte* indique fortement que seul le gouvernement est lié par la *Charte*. Le Vancouver General ne fait pas partie du gouvernement au sens de cet article et, en conséquence, l'adoption et l'application du règlement 5.04 ne relèvent pas de la portée de la *Charte*. C'est un organisme autonome. La prestation d'un service public, même s'il s'agit d'un service aussi important que les soins de santé, ne permet pas de la qualifier de fonction gouvernementale en vertu de l'art. 32.

Le règlement 5.04 ne découle pas d'une action du pouvoir exécutif ou du pouvoir législatif et en conséquence ne donne pas lieu à l'examen fondé sur la *Charte*. L'obligation d'obtenir l'approbation du ministre n'est qu'un simple pouvoir de contrôle pour veiller à ce que les actions de l'hôpital ne soient pas contraires aux pouvoirs conférés au gouvernement de prévoir des normes en matière d'administration hospitalière. Le règlement est l'œuvre du conseil d'administration et ne constitue nullement une politique ministérielle concernant le renouvellement des privilèges d'admission. Les lois qui régissent l'exploitation du Vancouver General ne l'obligeaient pas à adopter une politique particulière concernant le renouvellement des privilèges des médecins qui ont atteint l'âge de 65 ans.

Le Vancouver General ne fait pas partie de la «branche administrative» du gouvernement parce qu'il a été constitué en personne morale pour dispenser des services qui relèvent de la responsabilité de la province en matière de soins de santé. Il faut établir une différence entre le contrôle absolu ou extraordinaire et le contrôle routinier ou régulier. L'existence de l'hôpital relève en dernier ressort du gouvernement provincial, mais les aspects quotidiens du fonctionnement de l'hôpital, comme l'adoption d'une politique en matière de renouvellement des privilèges d'admission, relèvent du conseil d'administration et, sous réserve d'une situation extraordinaire, ne sont pas assujettis au contrôle du gouvernement. Le pouvoir que possède le ministre d'exiger l'adoption ou la révision par l'hôpital de règlements ne modifie pas la responsabilité de l'hôpital à l'égard des règlements qu'il adopte de sa propre initiative. Le pouvoir de nomination du lieutenant-gouverneur est simplement un mécanisme visant à assurer une représentation équilibrée de certains groupes et organismes au sein du principal organe décisionnel de l'hôpital. Il ne s'agit pas d'un moyen permettant au gouvernement de contrôler régulièrement les activités quotidiennes de l'hôpital.

Had the *Charter* been applicable, Regulation 5.04 would qualify as a law and the alleged inequality would therefore be one made by "law". The deprivations which arose because of the Board's policy were based on personal characteristics attributed to persons 65 and over and accordingly were discriminatory within the meaning of s. 15(1) of the *Charter*.

It was thus necessary to consider whether the Regulation and its associated practice constituted a reasonable limit under s. 1 of the *Charter*. Judicial evaluation of this issue will differ depending on whether the rights of a person have been infringed by the state as "singular antagonist" (as in the criminal law context) or by the state acting to reconcile the claims of competing individuals or groups or to allocate scarce government resources. The courts, in the former situation, will be able to determine with a considerable degree of certainty if the impugned law or other government conduct is the "least drastic means" for achieving the state interest. The same degree of certainty may not be achievable in the latter situation.

The fundamental objective of Regulation 5.04 was sufficiently important to warrant overriding a constitutionally protected guarantee: the promotion of excellence at the Vancouver General as a medical research and teaching centre and as the major acute care hospital in British Columbia.

Regulation 5.04 was rationally connected to the hospital's objective. Staff positions at any hospital are a scarce resource that does not expand at a rate proportionate with the growth in the medical profession. Regulation 5.04 ensured that staff positions would regularly become available for younger doctors recently trained in the latest medical procedures and that this turnover would occur before the decline of ability which usually accompanies advancing age.

Special considerations apply in cases concerned with measures that relate directly to the allocation of resources or that attempt to strike a balance between competing social groups. In such cases, neither the experience of judges nor the institutional limitations of judicial decision-making prepares a court to make a precise determination as to where the balance between legislative objective and the protection of individual or group rights and freedoms is to be drawn.

The Board had a "reasonable basis" for concluding that Regulation 5.04 and the policy by which it was applied impaired respondents' rights of equality "as little as possible" given its pressing and substantial

Si la *Charte* s'appliquait, le règlement 5.04 serait considéré comme une «loi» et l'inégalité reprochée découlerait d'une «loi». Les privations qui découlent de la politique du conseil d'administration dépendent de caractéristiques personnelles attribuées aux personnes de 65 ans et plus et sont, en conséquence, discriminatoires au sens du par. 15(1) de la *Charte*.

Il fallait donc examiner si le règlement et la pratique qui y est associée constituent une limite raisonnable, en vertu de l'article premier de la *Charte*. L'appréciation judiciaire de cette question différera selon que l'État est «l'adversaire singulier» de la personne dont les droits ont été violés (comme dans le contexte du droit criminel) ou qu'il cherche plutôt à concilier des revendications contraires de groupes ou d'individus ou à répartir des ressources gouvernementales limitées. Dans le premier cas, les tribunaux pourront déterminer avec un certain degré de certitude si la loi contestée ou toute autre conduite gouvernementale fait appel aux moyens les «moins radicaux» pour atteindre l'objectif de l'État. Il ne sera peut-être pas possible d'atteindre le même degré de certitude dans le second cas.

L'objectif fondamental du règlement 5.04 est suffisamment important pour justifier la suppression d'une garantie constitutionnelle: la recherche de l'excellence par le Vancouver General à titre de centre de recherche médicale et d'enseignement de la médecine et à titre de principal hôpital de soins de courte durée en Colombie-Britannique.

Le règlement 5.04 a un lien rationnel avec l'objectif de l'hôpital. Les postes dans un hôpital sont une ressource limitée qui ne peut augmenter proportionnellement à l'accroissement du personnel médical. Le règlement 5.04 fait en sorte qu'il sera possible d'offrir ces postes aux jeunes médecins récemment formés aux techniques médicales les plus récentes et que ce renouvellement se produira avant le déclin des capacités qui va ordinairement de pair avec l'avance en âge.

Des considérations particulières s'appliquent aux mesures qui portent directement sur la répartition des ressources ou qui tentent d'établir l'équilibre entre des groupes sociaux concurrents. Dans de tels cas, ni l'expérience judiciaire, ni les restrictions institutionnelles du processus décisionnel judiciaire ne préparent un tribunal à déterminer précisément le point d'équilibre entre l'objectif du législateur et la protection des droits et libertés d'un individu ou d'un groupe.

Le conseil était «raisonnablement fondé» à conclure que le règlement 5.04 et la politique en vertu de laquelle il est appliqué portaient le «moins possible» atteinte aux droits à l'égalité des intimés vu son objectif urgent et

objective. Regulation 5.04 attempts to strike a balance between young doctors seeking to commence a practice and doctors who have been engaged in practice for some time with respect to their mutual demand for privileges. The Board was amply justified, given the climate of budgetary restraint, in concluding that its ability to bring new doctors on staff depended on the timely retirement of some of those already there. Moreover, it acted reasonably in concluding that retirement policy would ensure the departure from staff of those who would generally be less able to contribute to the hospital's sophisticated practice. The Board recognized, however, that the assumption of declining ability with age would not hold true in all circumstances and provided for an exception where the physician had something unique to offer the hospital. This exemption necessarily operated with regard to the hospital's requirements, rather than with regard to each individual doctor's health and capabilities, because of the overriding objective of making staff positions available to doctors recently trained in the latest theories and methods.

The only alternative to Regulation 5.04 was a program of skills testing or performance evaluation. Such a program would be costly both to implement and operate and, more importantly, would have an invidious and disruptive effect on the medical staff's working environment.

Per Sopinka J.: The reasons of La Forest J. were agreed with except on the issue of whether Regulation 5.04 was law within the meaning of s. 15(1) of the *Charter*. That issue should not be decided on the basis of an assumption that the hospital is part of government.

Per Wilson J. (dissenting): Section 32 of the *Charter* extends the reach of the *Charter* to all those entities and activities that could be construed as "governmental". The criteria relevant in determining whether an entity is subject to the *Charter* include: (1) whether the legislative, executive or administrative branch of government exercises general control over the entity in question; (2) whether the entity performs a traditional government function or one recognized in more modern times as being a state responsibility; and (3) whether the entity acts pursuant to statutory authority specifically granted to further an objective that government seeks to promote in the broader public interest.

The fact that the Hospital is established and operates pursuant to statutory authority, is heavily regulated by government and discharges a traditional government function in the public interest brings it within the con-

réel. Le règlement 5.04 tente d'établir un équilibre entre les jeunes médecins qui veulent commencer à pratiquer et les médecins qui pratiquent depuis déjà un certain temps pour ce qui est de leurs demandes et de leurs privilèges respectifs. Le conseil était amplement justifié, compte tenu du climat actuel de restrictions budgétaires, de conclure que sa capacité d'attirer de nouveaux médecins dépendait de la retraite au moment opportun de certains médecins qui s'y trouvaient déjà. En outre, le conseil a agi de façon raisonnable en concluant qu'une politique de mise à la retraite garantirait le départ de ceux qui seraient en général moins capables de contribuer à la pratique spécialisée de l'hôpital. Le conseil a reconnu cependant que le principe de la détérioration des capacités en fonction de l'âge n'est pas toujours exact et il a établi une exception pour les médecins qui avaient quelque chose d'unique à offrir à l'hôpital. Cette exception a forcément été appliquée en fonction des exigences de l'hôpital plutôt qu'en fonction de la santé et des capacités de chaque médecin individuellement en raison de l'objectif prédominant d'offrir des postes aux médecins récemment formés aux théories et aux méthodes les plus nouvelles.

La seule solution de rechange au règlement 5.04 était un programme d'évaluation des aptitudes et du rendement. Un tel programme serait coûteux à instaurer et à appliquer et, ce qui est plus important, il aurait un effet néfaste et créerait un sentiment d'injustice dans le milieu de travail du personnel médical.

Le juge Sopinka: Le juge Sopinka souscrit aux motifs du juge La Forest, sauf quant à savoir si le règlement 5.04 est une loi au sens du par. 15(1) de la *Charte*. Cette question ne devrait pas être tranchée sur le fondement de l'hypothèse que l'hôpital fait partie du gouvernement.

Le juge Wilson (dissidente): L'article 32 de la *Charte* étend l'application de la *Charte* à toutes les entités et activités qu'on peut considérer comme «gouvernementales». Les critères qui servent à déterminer si une entité est assujettie à la *Charte* sont les suivants: (1) La branche législative, exécutive ou administrative du gouvernement exerce-t-elle un contrôle gé, éral sur l'entité en question? (2) L'entité exerce-t-elle une fonction gouvernementale traditionnelle ou une fonction qui, de nos jours, est considérée comme une responsabilité de l'État? (3) L'entité agit-elle conformément au pouvoir que la loi lui a expressément conféré en vue d'atteindre un objectif que le gouvernement vise à promouvoir dans le plus grand intérêt public?

Comme l'hôpital existe et fonctionne en vertu des lois, comme il est strictement réglementé par le gouvernement et remplit une fonction traditionnellement propre au gouvernement dans l'intérêt public, il s'inscrit dans la

cept of "government" for purposes of s. 32. The power to retire flowed from the *Vancouver General Hospital Act* and Regulation 5.04 which was passed pursuant to it. Regulation 5.04 was therefore subject to review under s. 15 of the *Charter*. It was not necessary to determine whether s. 15(1) would apply absent a legislative provision mandating the discriminatory action.

The Court should be wary of underestimating the discriminatory effect of any given measure when considering whether a provision violates s. 15(1). Here, the Regulation provided for non-discriminatory exceptions on its face and yet the principle behind the measure remained constitutionally unsound. By its terms Regulation 5.04 stipulated that staff were expected to retire at age 65. In this way the unarticulated premise remained that with increasing age comes increasing incompetence and decreasing ability. It was clearly discriminatory to impose the burden of disproving this stereotype upon those who already suffer the burden of stereotype and prejudice. That the Regulation provided for exceptions did not detract from the fact that the central concept animating the provision fell foul of s. 15(1). Exemption schemes are properly a matter for consideration under s. 1 of the *Charter*.

The objective of maintaining the Vancouver General as an acute care and teaching hospital with the highest standard of modern medical care, education and research was sufficiently important to override a *Charter* right and so meets the first branch of the *Oakes* test. The objective of promoting opportunities for other (younger) physicians to practise medicine, however, did not meet the first branch of the test. The Hospital's claim that its system was "closed" was not proven: constitutional rights will be curtailed only in response to real and not illusory problems.

Whether the foundations of prejudice are based upon observable, reliable facts must be approached in the most cautious manner. It is a matter of common knowledge that with the aging process comes some measure of change in ability, although the nature and extent of that change vary from individual to individual. A rational connection exists between the desire to provide top quality medical care and the decision to have such care provided substantially by younger members of the medical profession.

This was not an appropriate case for relaxing the minimal impairment test articulated in *Oakes* for the

notion de «gouvernement» pour les fins de l'art. 32. La capacité de mettre à la retraite découle de la *Vancouver General Hospital Act* et du règlement 5.04 adopté en vertu de cette dernière loi. Le règlement est donc susceptible de révision en vertu de l'art. 15 de la *Charte*. Il n'est pas nécessaire de décider si le par. 15(1) s'appliquerait en l'absence d'une disposition législative qui ordonne l'acte discriminatoire.

Pour déterminer si une disposition enfreint le par. 15(1), la Cour doit se garder de sous-estimer l'effet discriminatoire d'une mesure donnée. En l'espèce, le règlement prévoit des exceptions non discriminatoires par son texte même, mais la prémisse sous-entendue demeure viciée du point de vue constitutionnel. Selon son libellé, le règlement 5.04 dit que les médecins sont censés prendre leur retraite à 65 ans. De cette façon, la prémisse sous-entendue reste que le vieillissement entraîne peu à peu l'incompétence et la diminution des capacités. Il est manifestement discriminatoire d'imposer à ceux qui sont victimes d'un préjugé l'obligation de prouver que ce préjugé ne s'applique pas à eux. Même si le règlement prévoit des exceptions, il n'en reste pas moins que la notion principale sous-jacente à la disposition enfreint le par. 15(1). Les régimes d'exception relèvent à juste titre de l'examen fondé sur l'article premier de la *Charte*.

L'objectif de conserver au Vancouver General son statut d'hôpital qui dispense des soins de courte durée et de l'enseignement conformes aux normes contemporaines les plus strictes de soins, d'enseignement et de recherche en médecine est suffisamment important pour l'emporter sur un droit garanti par la *Charte* et satisfaire au premier volet du critère de l'arrêt *Oakes*. Par contre, l'objectif d'offrir à d'autres médecins (plus jeunes) la possibilité d'exercer leur profession ne satisfait pas à ce premier volet du critère. La prétention de l'hôpital qu'il s'agit d'un système «fermé» n'a pas été prouvée: les droits constitutionnels ne peuvent être limités qu'en raison de problèmes réels, et non de problèmes illusoires.

Il faut agir avec beaucoup de prudence quand il s'agit de savoir si le fondement d'une idée préconçue s'appuie sur des faits observables et exacts. Il est généralement reconnu que le vieillissement amène un certain changement des capacités, quoique la nature et l'étendue de ces changements varient d'une personne à l'autre. Il existe un lien rationnel entre l'intention de fournir des soins médicaux de haute qualité et la décision de faire prodiguer ces soins en grande partie par des médecins plus jeunes.

Il n'y a pas lieu en l'espèce d'assouplir le critère de l'atteinte minimale énoncé dans l'arrêt *Oakes* pour les

reasons given in *McKinney*. The Hospital was not a closed system and permitting physicians to retain their privileges would have no effect on the availability of practice opportunities for doctors embarking upon their careers. There was accordingly no reason in fact or in law for applying a deferential standard of review.

Other ways of achieving the objective of high quality medical care which recognizes the abilities of individual doctors aged 65 and over exist. Annual performance reviews were not shown to be unsatisfactory in "weeding out" incompetent doctors. Indeed, the primary reason for changing the practice was that it was administratively more convenient to remove incompetent physicians through the mechanism of mandatory retirement. Administrative convenience is not an adequate reason for sacrificing *Charter* rights.

In discrimination claims of the kind involved here, the guarantee of equality in s. 15(1) must at least mean that, wherever possible, an attempt be made to break free of the apathy of stereotyping and that a sincere effort be made to treat all individuals, whatever their colour, race, sex or age, as individuals deserving of recognition on the basis of their unique talents and abilities. Respect for the dignity of every member of society demands no less. Section 15(1) does not guarantee the right to work but the right to work absent discrimination. Accordingly, Regulation 5.04 would have been reasonable and demonstrably justifiable if it had provided in word and in effect for a *bona fide* exemption scheme contemplating the continued employment of those able and willing to work.

Per L'Heureux-Dubé J. (dissenting): Under the broad test developed by Wilson J. in *McKinney v. University of Guelph*, Vancouver General Hospital is acting as "government" for the purposes of s. 32 of the *Charter*. In Canada, both historically and even more so today in terms of function, hospitals are an "arm of government" and perform a government function. An appointed hospital board may enjoy a certain independence in formulating policies, as in Regulation 5.04, but the situation is similar to that of government departments setting up their own agenda and policies, subject only to general guidelines established by the legislature. This situation is totally different from that of universities where gov-

motifs exprimés dans l'arrêt *McKinney*. L'hôpital n'est pas un système fermé et permettre aux médecins intimés de garder leur privilège n'aurait aucun effet sur les possibilités d'exercice de la médecine qui s'offrent aux médecins qui commencent leur carrière. Il n'y a pas de motif de droit ou de fait d'appliquer un critère d'examen fondé sur la retenue.

Il existe d'autres moyens d'atteindre l'objectif visé de fournir des soins médicaux de haute qualité qui permettraient de reconnaître les capacités des médecins âgé de 65 ans et plus. On n'a pas démontré que l'examen annuel du rendement n'ait pas donné satisfaction lorsqu'il s'agissait d'éliminer les médecins incompétents. La raison principale du changement de méthode tient à la commodité administrative qu'il y a à écarter les médecins incompétents par le mécanisme de la retraite obligatoire. La commodité administrative n'est pas un motif valable de supprimer des droits garantis par la *Charte*.

Dans les affaires de discrimination du genre de celle de l'espèce, la garantie d'égalité en vertu du par. 15(1) doit au moins signifier que, chaque fois que cela est possible, on essaye de renoncer aux idées préconçues trop faciles et qu'un effort sincère sera fait pour traiter tous les individus, quels que soient leur couleur, leur race, leur sexe ou leur âge, comme des individus qui méritent d'être jugés selon leurs talents et leurs capacités propres. Le respect de la dignité de chaque personne dans la société n'en exige pas moins. Le paragraphe 15(1) ne garantit pas le droit de travailler, mais celui de travailler sans faire l'objet de discrimination. En conséquence, le règlement 5.04 aurait pu être raisonnable et susceptible de justification s'il avait comporté dans son texte et dans son application un régime légitime d'exception qui aurait permis à ceux qui étaient capables et désireux de travailler de continuer à travailler.

Le juge L'Heureux-Dubé (dissidente): En vertu du test large formulé par le juge Wilson dans l'arrêt *McKinney c. University of Guelph*, le Vancouver General Hospital agit comme un «gouvernement» au sens de l'art. 32 de la *Charte*. Tant sur le plan historique que (encore plus aujourd'hui) sur le plan fonctionnel, les hôpitaux au Canada sont une «branche du gouvernement» et exercent une fonction gouvernementale. Le conseil d'administration d'un hôpital peut bénéficier d'une certaine indépendance dans la formulation de ses politiques, comme dans le cas du règlement 5.04, mais il n'y a pas de différence entre cette situation et celle des ministères du gouvernement qui établissent leur propre programme et formulent leurs politiques, sous réserve des seules directives générales établies par le législateur. Cette situation est tout à fait différente de celle des universités où la participation du gouvernement est

ernment involvement is primarily limited to funding. There may be some instances, however, where a hospital would not constitute "government" and so not attract *Charter* review.

For the reasons given by La Forest J., Regulation 5.04 is "law" for the purposes of s. 15 of the *Charter* and clearly infringes s. 15(1) because it discriminates by reason of age. The Regulation was not saved by s. 1.

Regulation 5.04 was not rationally connected to its objectives. Forcing the end of a career based on age alone does not pass muster under the *Charter* for age is not determinative of capacity or competence. "New people" do not need to be infused into the Hospital's system to keep it relevant. Competence is threatened by many things, but age is not necessarily one of them.

Special considerations can apply when the courts are forced to choose between two competing social groups in applying the "minimum impairment" aspect of the *Oakes* formula. The choice to be made here was between competent medical practitioners who happen to be over 65 and competent doctors under 65 usually entering the medical practice. These circumstances did not warrant special considerations. The same standards should be applied to all practitioners in assessing competence. Different and more onerous standards for measuring competence for those over 65 are a grave intrusion into the right to be treated equally. In addition, the Board, did not have all the requisite characteristics of a legislative body considering resource allocation to warrant the application of these special considerations.

The health of the practitioner may be a factor in the review of a practitioner's abilities. Physical deterioration neither occurs at the "threshold" age of 65 nor is necessarily a factor affecting a practitioner's competence. A practitioner's ongoing health problems are a factor in any review of any individual's performance. The requirement that those practitioners over age 65 show they can make a "unique" contribution to the hospital is too onerous and is applied solely because the individual has reached 65. This method of impairing rights is too severe. Convenience in administrative procedures cannot be used as a possible justification for the breach of rights. Retirement can be encouraged while upholding the dignity of the individual by means more carefully tailored to impairing rights as little as possible.

essentielle au financement. Il peut y avoir des circonstances où un hôpital ne serait pas considéré comme un «gouvernement» et qui ne donneraient ainsi pas lieu à une révision fondée sur la *Charte*.

Pour les motifs énoncés par le juge La Forest, le règlement 5.04 est une «loi» aux fins de l'art. 15 de la *Charte* qui viole manifestement le par. 15(1) parce qu'il établit une discrimination fondée sur l'âge. Le règlement 5.04 n'est pas sauvegardé en vertu de l'article premier.

Le règlement 5.04 n'a pas de lien rationnel avec ses objectifs. Forcer une personne à mettre fin à sa carrière simplement en raison de son âge ne saurait résister à un examen fondé sur la *Charte* puisque l'âge ne détermine pas les capacités ou la compétence. L'apport de «nouveaux membres» n'est pas indispensable à l'hôpital pour qu'il demeure à jour. La compétence est menacée par plusieurs facteurs, mais l'âge n'en fait pas nécessairement partie.

Des considérations particulières peuvent s'appliquer dans l'examen du critère de «l'atteinte minimale» selon l'arrêt *Oakes* quand les tribunaux sont tenus de faire un choix entre les revendications de deux groupes concurrents. Le choix s'effectue entre des médecins compétents, qui se trouvent à avoir plus de 65 ans, et des médecins compétents de moins de 65 ans, qui débutent habituellement leur pratique médicale. Ces circonstances ne justifient pas l'application de considérations particulières. Les mêmes normes devraient être appliquées à tous les médecins dans l'évaluation de leur rendement. L'application de normes différentes et plus rigides dans l'examen de la compétence des médecins de plus de 65 ans porte gravement atteinte au droit à un traitement égal. De plus, le conseil n'a pas toutes les caractéristiques requises d'un organisme législatif, qui doit tenir compte de la répartition des ressources pour justifier l'application de ces considérations particulières.

La santé du médecin peut être un facteur à considérer dans l'examen de ses aptitudes. La détérioration physique ne commence pas nécessairement à 65 ans et elle n'a pas nécessairement de répercussions sur la compétence du médecin. Les problèmes de santé permanents seraient un facteur pertinent à tout examen de rendement de tout individu. L'obligation, pour les médecins âgés de plus de 65 ans, d'établir qu'ils peuvent faire une contribution «unique» à l'hôpital est trop exigeante et existe seulement parce que l'individu a atteint 65 ans. Cette façon de porter atteinte aux droits est trop drastique. La commodité de certaines procédures administratives ne peut servir de justification possible de la violation des droits. On peut favoriser la retraite, tout en protégeant la dignité de la personne, par des mesures plus adaptées pour porter le moins possible atteinte aux droits.

Per Cory J. (dissenting): The reasons and proposed disposition of Wilson J. were agreed with. For the reasons expressed by La Forest J., the balancing exercise which the Court must undertake in applying s. 1 must be sensitive and not mechanistic.

Substantial differences exist between universities and hospitals and those considerations which applied to universities did not have the same import in the case of hospitals. There was no employment contract struck between the doctors and the hospital and the mandatory retirement policy was not supported by the Medical Association.

Regulation 5.04 could not be justified under the *Oakes* test. The testing procedure in effect, whereby doctors are reviewed or tested once a year, was sufficient in itself to demonstrate that the s. 1 requirements could not be met. A continuous testing of the skills of all doctors regardless of age during the time of their association with a hospital is essential for the successful operation of the hospital. In the hospital setting this essential testing does not adversely affect any collegiality that may exist.

Cases Cited

By La Forest J.

Applied: *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; **considered**: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; **distinguished**: *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312; *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193; *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489; **referred to**: *R. v. Oakes*, [1986] 1 S.C.R. 103; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Roth v. United States*, 354 U.S. 476 (1957); *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

By Sopinka J.

Applied: *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

Le juge Cory (dissident): Le juge Cory souscrit aux motifs du juge Wilson et avec la façon dont elle statuerait en l'espèce. Pour les motifs exposés par le juge La Forest, la juste appréciation à laquelle doit se livrer la Cour dans l'examen de l'application de l'article premier doit être adaptée aux circonstances et non mécanique.

Il existe des différences importantes entre les universités et les hôpitaux. Les facteurs qui s'appliquent aux universités n'ont pas la même importance dans le cas des hôpitaux. Il n'y a pas de contrat d'emploi entre les médecins et l'hôpital et l'association des médecins n'est pas en faveur de la retraite obligatoire.

Le règlement 5.04 ne peut satisfaire au critère de l'arrêt *Oakes*. Le système d'évaluation en vertu duquel la compétence des médecins est appréciée une fois par année est en soi suffisant pour démontrer que les exigences de l'article premier ne peuvent être satisfaites. Un examen permanent des compétences des médecins qui a lieu sans égard à l'âge au cours des années où ils sont associés à un hôpital est essentiel pour le fonctionnement efficace de celui-ci. Dans le milieu hospitalier, la nécessité de cette évaluation n'a pas d'effet préjudiciable sur la collégialité qui peut exister.

Jurisprudence

Citée par le juge La Forest

Arrêts appliqués: *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; **arrêt examiné**: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; **distinction d'avec les arrêts**: *Procureur général du Québec c. Blaikie*, [1981] 1 R.C.S. 312; *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193; *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489; **arrêts mentionnés**: *R. c. Oakes*, [1986] 1 R.C.S. 103; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Roth v. United States*, 354 U.S. 476 (1957); *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *États-Unis d'Amérique c. Cotroni*, [1989] 1 R.C.S. 1469; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713.

Citée par le juge Sopinka

Arrêt appliqué: *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229.

By Wilson J. (dissenting)

McKinney v. University of Guelph, [1990] 3 S.C.R. 229; *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

By L'Heureux-Dubé J. (dissenting)

McKinney v. University of Guelph, [1990] 3 S.C.R. 229; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

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Human Rights Act, S.B.C. 1984, c. 22, s. 15.
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Regulations Governing the Medical and Allied Professional Staff and Practice Within the Hospital, Medical Staff Regulation 5.04.
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Vancouver General Hospital By-laws, Art. 2, s. 1, Art. 4, s. 2, Art. 6.

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APPEAL from a judgment of the British Columbia Court of Appeal (1988), 21 B.C.L.R. (2d) 165, 49 D.L.R. (4th) 727, [1988] 2 W.W.R. 708, 40 C.R.R. 236, dismissing an appeal from a judgment of Taylor J. (1986), 30 D.L.R. (4th) 700, [1986] 6 W.W.R. 23, 25 C.R.R. 16. Appeal allowed and the plaintiffs' action dismissed, Wilson, L'Heureux-Dubé and Cory JJ. dissenting.

Brian A. Crane, Q.C., and *Adam Whitcombe*, for the appellants.

Peter A. Gall, Donald J. Jordan, Q.C., Robin Elliot and *Susan P. Arnold*, for the respondents.

Duff Friesen, Q.C., and *Virginia McRae Lajeunesse*, for the intervener the Attorney General of Canada.

Janet E. Minor and *Robert E. Charney*, for the intervener the Attorney General for Ontario.

E. R. A. Edwards, Q.C., and *George H. Copley*, for the intervener the Attorney General of British Columbia.

The judgment of Dickson C.J. and La Forest and Gonthier JJ. was delivered by

LA FOREST J.—This appeal raises many of the same questions addressed in this Court's decision in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229. The application of s. 15(1) of the *Canadian Charter of Rights and Freedoms* to mandatory retirement is again in issue, although it arises in this appeal in the context of a decision by the Vancouver General Hospital not to renew the admitting privileges of doctors who reach the age of 65. Like *McKinney*, this appeal raises the following broad issues:

Vancouver General Hospital Act, S.B.C. 1970, ch. 55, art. 2, 2(1)a), b), c), d), 5, 6, 6b), 11, 32.
Vancouver General Hospital By-laws, art. 2, par. 1, art. 4, par. 2, art. 6.

Doctrine citée

McDougal, Myres S., Harold D. Lasswell and Lung-chu Chen. *Human Rights and World Public Order*. New Haven: Yale University Press, 1980.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1988), 21 B.C.L.R. (2d) 165, 49 D.L.R. (4th) 727, [1988] 2 W.W.R. 708, 40 C.R.R. 236, qui a rejeté l'appel de la décision du juge Taylor (1986), 30 D.L.R. (4th) 700, [1986] 6 W.W.R. 23, 25 C.R.R. 16. Pourvoi accueilli et action des demandeurs rejetée, les juges Wilson, L'Heureux-Dubé et Cory sont dissidents.

Brian A. Crane, c.r., et *Adam Whitcombe*, pour les appelants.

Peter A. Gall, Donald J. Jordan, c.r., Robin Elliot et *Susan P. Arnold*, pour les intimés.

Duff Friesen, c.r., et *Virginia McRae Lajeunesse*, pour l'intervenant le procureur général du Canada.

Janet E. Minor et *Robert E. Charney*, pour l'intervenant le procureur général de l'Ontario.

E. R. A. Edwards, c.r., et *George H. Copley*, pour l'intervenant le procureur général de la Colombie-Britannique.

Version française du jugement du juge en chef Dickson et des juges La Forest et Gonthier rendu par

LE JUGE LA FOREST—Ce pourvoi soulève plusieurs des mêmes questions examinées dans l'arrêt *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, rendu en même temps que celui-ci. Il est encore question de l'application du par. 15(1) de la *Charte canadienne des droits et libertés* à la retraite obligatoire, bien que ce pourvoi porte sur une décision du Vancouver General Hospital de ne pas renouveler les privilèges d'admission des médecins qui ont atteint 65 ans. Comme dans l'arrêt *McKinney*, ce pourvoi soulève les questions générales suivantes:

(a) whether s. 15 of the *Charter* applies to the Vancouver General;

(b) assuming it does, whether the hospital's policy of not renewing the admitting privileges of doctors who reach the age of 65 violates s. 15(1) of the *Charter*;

(c) whether, if such violation exists, it is justifiable under s. 1 of the *Charter*.

It should be noted that, unlike *McKinney*, no reference is made to the application of s. 15 to the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22. That is because the respondents were not employees of the Vancouver General in the way that the appellants in *McKinney* were employees of the respondent universities. This was conceded in argument before us. Independently of that concession, it is clear that the respondents did not receive or perform work at the direction of the hospital; nor were they paid by it. Their relationship to the hospital consisted solely of their admitting privileges. Of course, these privileges allowed for access to facilities which in turn assisted respondents in treating their patients, but this did not make them employees of the hospital. It follows that they do not come within the protection against age-based discrimination found in the Act, since that protection is limited to those who experience age-based discrimination in the context of employment. No issue, therefore, arises as to whether the limitation of the prohibition in the Act against discrimination in employment on grounds of age to persons between the ages of 40 and 65 violates s. 15(1) of the *Charter*.

I should also add that s. 7 of the *Charter* was originally relied on, but during the argument counsel for the respondents conceded that reliance on this provision was unnecessary and that it was not at issue in this appeal.

Facts

The appellant is the major acute care hospital for the Province of British Columbia and handles about 18,000 high risk patients per year. It is also one of the principal teaching hospitals in the Prov-

a) l'art. 15 de la *Charte* s'applique-t-il au Vancouver General?

b) en supposant qu'il s'y applique, la politique de l'hôpital de ne pas renouveler les privilèges d'admission des médecins qui ont atteint 65 ans viole-t-elle le par. 15(1) de la *Charte*?

c) dans l'affirmative, la limite est-elle justifiable en vertu de l'article premier de la *Charte*?

Il convient de souligner que contrairement à l'arrêt *McKinney* aucune mention n'est faite de l'application de l'art. 15 de la *Human Rights Act*, S.B.C. 1984, ch. 22, de la Colombie-Britannique. Il en est ainsi parce que les intimés ne sont pas des employés du Vancouver General au sens où les appelants, dans l'arrêt *McKinney*, étaient des employés des universités intimées. Ce fait a été admis devant nous au cours des plaidoiries. Indépendamment de cette reconnaissance, il est clair que les intimés n'exécutaient pas un travail sous la direction de l'hôpital; ils n'étaient pas rémunérés par celui-ci non plus. Leurs relations avec l'hôpital se limitaient à leurs seuls privilèges d'admission. Évidemment, ces privilèges leur permettaient d'avoir accès aux installations de l'hôpital, lesquelles à leur tour facilitaient la tâche des intimés dans le traitement de leurs patients, mais cela n'en faisait pas des employés de l'hôpital. Il s'ensuit qu'ils ne sont pas visés par la protection contre toute discrimination fondée sur l'âge établie dans la Loi puisque cette protection se restreint aux victimes d'une discrimination fondée sur l'âge en matière d'emploi. Il n'est donc pas question de déterminer si la limitation, dans la Loi, de l'interdiction de la discrimination fondée sur l'âge en matière d'emploi aux personnes âgées de 40 à 65 ans viole le par. 15(1) de la *Charte*.

Je dois également ajouter que l'on s'est d'abord appuyé sur l'art. 7 de la *Charte* mais, au cours des plaidoiries, l'avocat des intimés a reconnu qu'il n'était pas nécessaire d'invoquer cette disposition et qu'elle n'était pas en cause en l'espèce.

Les faits

L'appelant est le principal centre hospitalier de soins de courte durée de la Colombie-Britannique et traite quelque 18 000 patients à risque élevé par année. C'est également l'un des principaux hôpi-

ince. In 1985-86, it had an operating budget of $175 million and employed about 6,000 people. Nearly 1,000 doctors practise at the hospital, about three quarters of whom are specialists. With the exception of those who are general practitioners, all the doctors who practise there are required to hold a teaching appointment at the University of British Columbia.

As already mentioned, it would be incorrect to say that the Vancouver General employs doctors. Doctors are retained by their patients and are paid through the provincial medicare plan. Those who practise at the Vancouver General do so by virtue of admitting privileges granted to them on an annual basis. These privileges carry the right to book patients into the hospital, to assume primary responsibility for a patient's treatment and, in the case of a surgeon, to book operating rooms. They also allow doctors to have a voice in the affairs of the hospital. While it was at one time customary for doctors to have admitting privileges at more than one hospital, this is no longer the case, at least in Vancouver.

Decisions as to the granting and renewal of admitting privileges are made by the hospital's Board of Trustees which, by ss. 5 and 6 of the *Vancouver General Hospital Act*, S.B.C. 1970, c. 55, is empowered to manage the property and affairs of the hospital and to pass by-laws for the purpose. Under that Act, the Vancouver General, originally incorporated in 1902, is continued as a corporation endowed with the power to operate a hospital, acquire and dispose of land and personal property, and, subject to the approval of the Minister of Health, carry on a teaching function.

The composition of the Board of Trustees is laid down in the by-laws of the hospital. By the combined operation of Articles 2(1) and 4(2), it is comprised of the following members:

(a) Fourteen persons appointed for a term of three years by the Lieutenant-Governor in Council as follows:

taux d'enseignement dans la province. En 1985-1986, son budget de fonctionnement était de 175 millions de dollars et quelque 6 000 personnes étaient à son service. Près de 1 000 médecins pratiquent à l'hôpital et les trois quarts environ sont des spécialistes. À l'exception des généralistes, tous les médecins qui pratiquent dans cet hôpital doivent avoir une charge d'enseignement à l'Université de la Colombie-Britannique.

Comme je l'ai déjà souligné, il serait faux de dire que le Vancouver General emploie des médecins. Les médecins sont retenus par leurs patients et sont payés par le régime d'assurance-maladie de la province. Ceux qui pratiquent au Vancouver General le font en vertu de privilèges d'admission qui leur sont accordés sur une base annuelle. Ces privilèges leur permettent de faire admettre des patients à l'hôpital, d'être les premiers responsables du traitement de ceux-ci et, dans le cas des chirurgiens, de réserver des salles d'opération. Ces privilèges permettent également aux médecins d'avoir voix au chapitre des affaires de l'hôpital. Bien qu'à une certaine époque il était habituel que les médecins aient des privilèges d'admission dans plus d'un hôpital, ce n'est plus le cas maintenant, à tout le moins à Vancouver.

C'est le conseil d'administration de l'hôpital qui décide d'accorder et de renouveler les privilèges d'admission et les art. 5 et 6 de la *Vancouver General Hospital Act*, S.B.C. 1970, ch. 55, lui permettent de gérer les biens et les affaires de l'hôpital et d'adopter des règlements à cette fin. En vertu de cette loi, le Vancouver General, d'abord constitué en personne morale en 1902, existe toujours comme société ayant le pouvoir d'exploiter un hôpital, d'acquérir et d'aliéner des biens meubles et immeubles et, sous réserve de l'approbation du ministre de la Santé, d'exercer des fonctions d'enseignement.

La composition du Conseil d'administration est établie par règlement de l'hôpital. Par l'effet combiné des par. 2(1) et 4(2), le conseil d'administration est composé des membres suivants:

[TRADUCTION]

a) Quatorze personnes nommées pour un mandat de trois ans par le lieutenant-gouverneur en conseil de la façon suivante:

(i) Two persons appointed from nominees submitted by the President of The University of British Columbia;

(ii) Two persons appointed from nominees submitted by the British Columbia Health Association;

(iii) Two persons appointed from nominees submitted by the Board of Vancouver General Hospital;

(iv) One person appointed from nominees submitted by the British Columbia Institute of Technology;

(v) Seven persons appointed from the Community at large;

(b) The Chairman of the Medical Advisory Board; and

(c) The President appointed under these By-Laws.

As can be seen, the government has power to appoint 14 of the 16 members of the Board. It must be underlined, however, that half of these are really nominees of specific groups, including the hospital, and the remaining are intended to represent "the Community at large". The government appointees serve for rotating, but renewable, terms of three years; see Article 4(2). The other two members, the President and the Chairman of the hospital's Medical Advisory Board, are not government appointees, but are selected by the hospital.

The Act provides for a means for governmental supervision by requiring that the by-laws be approved by the Minister of Health before coming into effect (s. 6(b)). This is reinforced by the provisions of the general statute regulating hospitals in the Province, the *Hospital Act*, R.S.B.C. 1979, c. 176, to which the Vancouver General is also subject. For present purposes the relevant provisions of the latter Act are ss. 2 and 32. Section 2 provides, in part, as follows:

2. (1) Every hospital as defined under section 1, except hospitals owned by the Province or by Canada, shall

(a) make provision for the representation of the Provincial government and the board of the regional

(i) Deux personnes nommées parmi les candidats présentés par le président de l'Université de la Colombie-Britannique;

(ii) Deux personnes nommées parmi les candidats présentés par la British Columbia Health Association;

(iii) Deux personnes nommées parmi les candidats présentés par le Board of Vancouver General Hospital;

(iv) Une personne nommée parmi les candidats présentés par le British Columbia Institute of Technology;

(v) Sept personnes nommées parmi la collectivité en général;

b) Le président du Medical Advisory Board (le «Conseil consultatif médical»);

c) Le président (du conseil d'administration) nommé en vertu de ce règlement.

Comme on peut le constater, le gouvernement a le pouvoir de nommer 14 des 16 membres du conseil. Il convient cependant de souligner que la moitié de ces nominations provient en réalité de groupes spécifiques, y compris l'hôpital, et que l'autre moitié est censée représenter «la collectivité en général». Les membres nommés par le gouvernement exercent, par rotation, des mandats de trois ans qui sont renouvelables; voir le par. 4(2) de la Loi. Les deux autres membres, le président du conseil d'administration de l'hôpital et le président du «conseil consultatif médical», ne sont pas nommés par le gouvernement mais sont choisis par l'hôpital.

En exigeant que les règlements soient approuvés par le ministre de la Santé avant d'entrer en vigueur, la loi prévoit un mécanisme de contrôle gouvernemental (al. 6b)). Ce mécanisme se trouve renforcé par les dispositions de la loi générale régissant les hôpitaux dans la province, la *Hospital Act*, R.S.B.C. 1979, ch. 176, à laquelle le Vancouver General est également assujetti. Aux fins du présent pourvoi, les art. 2 et 32 sont les dispositions pertinentes de cette Loi. L'article 2 prévoit en partie ce qui suit:

[TRADUCTION] **2.** (1) Tous les hôpitaux visés à l'article premier, sauf les hôpitaux appartenant à la province ou au Canada, doivent

a) prévoir, de la manière prescrite, la représentation du gouvernement provincial et du conseil du dis-

hospital district on the board of management of the hospital to the extent and in the manner provided;

. . .

(c) have a properly constituted board of management and bylaws or rules thought necessary by the minister for the administration and management of the hospital's affairs and the provision of a high standard of care and treatment for patients, and the constitution and bylaws or rules of a hospital are not effective until approved by the minister;

(d) comply with further conditions prescribed by the Lieutenant Governor in Council.

. . .

(3) Notwithstanding any other Act, or the constitution, bylaws or rules of a hospital, for this section, the Lieutenant Governor in Council may appoint a person or persons to represent the Provincial government on the board of management of a hospital for a term not exceeding 2 years or until his successor is appointed.

Section 32 provides:

32. The minister may require that the bylaws or rules of a hospital or a society or corporation having among its objects the provision of hospital facilities or the operation of a hospital be revised in a manner satisfactory to him in order to meet changing conditions and policies, and to provide for greater uniformity and efficiency in all matters concerning the administration and operation of hospitals.

The effect of these provisions may thus be summarized. Section 2(1)(c) and s. 32 extend the Minister's power in respect to the by-laws of the Vancouver General beyond the negative power of veto set out in s. 6 of the *Vancouver General Hospital Act*. Together, they confer on the Minister the positive power to require the Board of Trustees to adopt new by-laws or change existing by-laws. Sections 2(1)(a) and (3) provide for the direct representation of the provincial government on the Board, the former imposing an obligation on the hospital to allow for such representation, the latter conferring a power of appointment on the Lieutenant Governor in Council.

trict hospitalier régional au conseil d'administration de l'hôpital;

. . .

c) avoir un conseil d'administration dûment constitué et des règlements ou des règles que le ministre estime nécessaires à l'administration et à la gestion des affaires de l'hôpital, ainsi qu'à la prestation de soins et de traitements de première qualité; l'acte constitutif et les règlements ou règles d'un hôpital n'entrent en vigueur qu'après approbation du ministre;

d) se conformer aux autres conditions prescrites par le lieutenant-gouverneur en conseil.

. . .

(3) Nonobstant toute autre loi, l'acte constitutif, les règlements ou règles d'un hôpital, le lieutenant-gouverneur en conseil peut, aux fins du présent article, nommer une ou plusieurs personnes pour représenter le gouvernement provincial au conseil d'administration d'un hôpital pour un mandat n'excédant pas deux ans ou jusqu'à la nomination de leur successeur.

L'article 32 prévoit:

[TRADUCTION] **32.** Le ministre peut exiger que les règlements ou règles d'un hôpital, d'une société ou d'une compagnie dont l'un des objets est de fournir des services hospitaliers ou d'exploiter un hôpital soient examinés d'une manière qu'il estime satisfaisante en vue de répondre à des conditions et des politiques en évolution et d'apporter plus d'uniformité et d'efficacité dans les domaines relevant de l'administration et de l'exploitation des hôpitaux.

L'effet de ces dispositions peut être résumé ainsi. L'alinéa 2(1)c) et l'art. 32 étendent la portée des pouvoirs du ministre relativement aux règlements du Vancouver General au-delà du pouvoir négatif de veto établi à l'art. 6 de la *Vancouver General Hospital Act*. Ensemble, ils confèrent au ministre le pouvoir réel d'imposer au conseil d'administration l'adoption de nouveaux règlements ou la modification des règlements existants. L'alinéa 2(1)a) et le par. (3) prévoient que le gouvernement provincial est directement représenté au conseil d'administration puisque la première disposition oblige l'hôpital à prévoir cette représentation et la deuxième confère un pouvoir de nomination au lieutenant-gouverneur en conseil.

In this legislative context, the Board approved Medical Staff Regulation 5.04 in May of 1984, which was then approved by the Minister of Health. Regulation 5.04 provides as follows:

5.04 Retirement: Members of the Staff shall be expected to retire at the end of the appointment year in which they pass their 65th birthday. Members of the Staff who wish to defer their retirement may make special application to the Board. The Board shall request the Medical Advisory Committee for a recommendation in each such case. The Medical Advisory Committee shall, in making its recommendation, consider the report of a personal interview which shall take place between the applicant and the Department Head concerned which shall include a review of the health and continuing performance of the applicant.

In implementing this Regulation, the Board seems to have operated on the view that all physicians were expected to retire on their 65th birthday unless it could be shown that they "had something unique to offer the hospital". On this basis the Board, on May 31, 1985, decided not to renew the admitting privileges of most of the respondents to this appeal, all of whom had turned 65 and most of whom were general practitioners.

The respondents commenced these proceedings to set aside the decision of the Board and to obtain a declaration that Regulation 5.04, either by its terms or by the manner of its application, violated ss. 7 and 15 of the *Charter*. The respondents also argued that the Regulation or the manner of its application was contrary to the *Human Rights Act*. An interim injunction restraining the Board from limiting or removing the admitting privileges of the respondents pending the outcome of respondents' application under the *Charter* and the *Human Rights Act* was issued by McKenzie J. of the British Columbia Supreme Court on June 27, 1985. His decision was upheld by the British Columbia Court of Appeal. Judgment in favour of the respondents' application was later given by Taylor J. of the same court on July 23, 1986, and the British Columbia Court of Appeal dismissed the appellants' appeal in a decision rendered on

Dans ce contexte législatif, le conseil d'administration a approuvé le règlement 5.04 des Medical Staff Regulations en mai 1984, lequel a ensuite été approuvé par le ministre de la Santé. Le règlement 5.04 prévoit ce qui suit:

[TRADUCTION] 5.04 La retraite: Les membres du personnel sont censés prendre leur retraite à la fin de l'année d'exercice au cours de laquelle ils atteignent 65 ans. Les membres du personnel qui veulent reporter leur mise à la retraite peuvent présenter une demande spéciale au conseil d'administration, qui demande la recommandation du «conseil consultatif médical» dans chaque cas. Avant de faire sa recommandation, le conseil consultatif médical tient compte du rapport d'une entrevue personnelle entre le requérant et le chef de département concerné, y compris le rapport de l'état de santé et du rendement continu du requérant.

Dans la mise en œuvre de ce règlement, le conseil d'administration semble avoir tenu pour acquis que tous les médecins étaient censés prendre leur retraite à leur 65e anniversaire de naissance, sauf s'ils pouvaient démontrer qu'ils [TRADUCTION] «avaient quelque chose d'unique à offrir à l'hôpital». C'est en fonction de ce critère que, le 31 mai 1985, le conseil d'administration a décidé de ne pas renouveler les privilèges d'admission de la plupart des intimés en l'espèce, lesquels avaient tous atteint 65 ans et étaient pour la plupart des généralistes.

Les intimés ont intenté cette action en vue d'annuler la décision du conseil d'administration et d'obtenir un jugement déclaratoire portant que le règlement 5.04, soit par sa formulation, soit dans son application, violait les art. 7 et 15 de la *Charte*. Les intimés ont également soutenu que le règlement ou son application étaient contraires à la *Human Rights Act*. Le 27 juin 1985, le juge McKenzie de la Cour suprême de la Colombie-Britannique a décerné une injonction provisoire pour empêcher le conseil de restreindre ou de supprimer les privilèges d'admission des intimés jusqu'à l'issue de la requête des intimés fondée sur la *Charte* et la *Human Rights Act*. La Cour d'appel de la Colombie-Britannique a confirmé cette décision. Le 23 juillet 1986, le juge Taylor de la Cour suprême de la Colombie-Britannique a rendu jugement en faveur des intimés et la Cour d'appel de la Colombie-Britannique a rejeté l'appel des appe-

January 6, 1988. In doing so, it found it unnecessary to reach any conclusion as to the effect or application of the *Human Rights Act*. Leave to appeal to this Court was granted on April 21, 1988.

Judicial History

British Columbia Supreme Court (1986), 30 D.L.R. (4th) 700

Taylor J., we saw, found in favour of the respondents' application. He held that the *Charter* applied both to the enactment of Regulation 5.04 and the manner in which it was applied by the Board. In respect to the former conclusion, he pointed to the facts that 14 of the 16 trustees who adopted the Regulation were appointed directly by the Lieutenant Governor in Council, and that under the *Vancouver General Hospital Act*, by-laws of the Board only came into effect if approved by the Minister of Health. From this he concluded, at p. 704, that "the provincial government effectively controls the affairs of the hospital". Taylor J. amplified this conclusion, at p. 704, by pointing to the "broad ministerial supervision" to which the Vancouver General was subject by virtue of the terms of the *Hospital Act*. After noting that s. 2(1)(c) of the latter Act required the Board to "have such by-laws and other rules as the Minister deems necessary", he concluded, at pp. 704-705, that the phrase "government of each province" in s. 32(1)(*b*) of the *Charter*

> ... extends not only to actual provincial ministries and to entities created by a provincial government which exercise governmental authority, but also to agencies set up by a provincial government which carry out government functions under government control without exercising governmental powers, that is to say those vested only with organizational powers which provide government services to the public, provided at least that the conduct in question relates to the provision of government services.

Applying this conclusion to the case, Taylor J. found, at p. 705, that the "management of the Vancouver General Hospital is for practical purlants dans une décision rendue le 6 janvier 1988. Ce faisant, elle a jugé inutile de tirer une conclusion sur l'effet ou l'application de la *Human Rights Act*. Le 21 avril 1988, notre Cour accordait l'autorisation de pourvoi.

L'historique judiciaire

La Cour suprême de la Colombie-Britannique (1986), 30 D.L.R. (4th) 700

Nous avons vu que le juge Taylor a statué en faveur des intimés. Il a conclu que la *Charte* s'appliquait tant à l'adoption du règlement 5.04 qu'à la manière dont le conseil l'avait appliqué. Quant à la première conclusion, il a souligné que 14 des 16 membres du conseil d'administration qui avaient adopté le règlement avaient été nommés directement par le lieutenant-gouverneur en conseil et qu'en vertu de la *Vancouver General Hospital Act* les règlements internes du conseil d'administration n'entraient en vigueur que sur approbation du ministre de la Santé. Il a donc conclu, à la p. 704, que [TRADUCTION] «le gouvernement provincial contrôle effectivement les affaires de l'hôpital». À la page 704, le juge Taylor a réaffirmé cette conclusion en mentionnant le [TRADUCTION] «contrôle ministériel étendu» dont faisait l'objet le Vancouver General en raison des termes de la *Hospital Act*. Après avoir souligné que l'al. 2(1)c) de cette loi exigeait du conseil d'administration d'avoir [TRADUCTION] «les règlements ou les règles que le ministre estime nécessaires», il a conclu, aux pp. 704 et 705, que l'expression «gouvernement de chaque province» à l'al. 32(1)*b*) de la *Charte*

> [TRADUCTION] ... s'étend non seulement aux ministères provinciaux existants et aux entités créées par un gouvernement provincial qui exercent un pouvoir gouvernemental, mais également aux organismes mis sur pied par un gouvernement provincial exerçant des fonctions gouvernementales sous le contrôle du gouvernement sans exercer de pouvoirs gouvernementaux, c'est-à-dire ceux qui n'ont que des pouvoirs organisationnels en vue d'offrir au public des services gouvernementaux, pourvu à tout le moins que leurs fonctions en question se rapportent à la prestation de services gouvernementaux.

Appliquant cette conclusion en l'espèce, le juge Taylor a conclu que [TRADUCTION] «la gestion du Vancouver General Hospital relève à toutes fins

poses as fully under provincial government direction and control as would have been the case had it been operated within a ministry".

As to the question of whether the *Charter* applied to the conduct of the Board in implementing Regulation 5.04, Taylor J. was of the opinion, at p. 705, that "since regulations made by the trustees are, as I have found, governmental in nature, and therefore subject to the Charter, it follows that the way in which those rules are applied must be subject to the same constraints". He added that the "enactment, approval and application of the regulation involved the creation and administration of 'law' as that word is used in s. 15(1)" of the *Charter*.

Turning to s. 15(1) and the argument of the respondents that they had been discriminated against on the basis of age, Taylor J. held that Regulation 5.04 did not by itself constitute a contravention of s. 15(1). After holding that age-based distinctions were to be found discriminatory if it were shown that "age is entirely irrelevant in the context" or that the consequences for those affected by the distinction "are clearly beyond anything which can reasonably and fairly be justified by any legitimate purpose served" (p. 708), Taylor J. found nothing discriminatory in the Vancouver General's use of the concept of an "expected retirement age" in the making of decisions as to the renewal of admitting privileges. This was because it was obvious that age was relevant to one's ability to practise medicine. As well, the burden it placed on older doctors was consistent with their duty, as professionals, to ensure that others were trained in their calling and to pass on their own practices while they were themselves still able to practise efficiently. With respect to the question of whether 65 was the appropriate "expected retirement age", Taylor J. concluded, at p. 708, that it was within "a range which reasonable, fair-minded people would accept". As a

pratiques autant du contrôle du gouvernement provincial que si son exploitation relevait d'un ministère» (p. 705).

Quant à la question de savoir si la *Charte* s'appliquait à la façon dont le conseil d'administration a mis en œuvre le règlement 5.04, le juge Taylor était d'avis que [TRADUCTION] «puisque le règlement pris par les membres du conseil d'administration est, comme je l'ai conclu, de nature gouvernementale, et donc assujetti à la *Charte*, il s'ensuit qu'il en est de même pour la façon dont ce règlement est appliqué» (p. 705). Il a ajouté que [TRADUCTION] «l'adoption, l'approbation et l'application du règlement impliquaient la création et l'application d'une 'loi' au sens du par. 15(1)» de la *Charte*.

Examinant le par. 15(1) et l'argument des intimés qu'ils ont été victimes de discrimination fondée sur l'âge, le juge Taylor a conclu que le règlement 5.04 ne contrevenait pas en soi au par. 15(1). Après avoir décidé que les distinctions fondées sur l'âge sont discriminatoires si on établit que [TRADUCTION] «l'âge n'est absolument pas pertinent dans le contexte» ou que les conséquences pour les personnes visées par les distinctions [TRADUCTION] «vont clairement au-delà de tout ce qui peut raisonnablement et équitablement être justifié dans la poursuite d'un objectif légitime» (p. 708), le juge Taylor a conclu que le recours par le Vancouver General à la notion d'un [TRADUCTION] «âge prévu pour la retraite» pour décider du renouvellement des privilèges d'admission n'avait rien de discriminatoire. Et ce, parce qu'il était évident que l'âge avait un rapport avec les capacités d'une personne de pratiquer la médecine. En outre, le fardeau imposé aux médecins plus âgés était conforme à leur devoir, comme professionnels, de veiller à ce que les autres reçoivent la formation nécessaire à leur profession et de transmettre leur propre expertise alors qu'ils étaient eux-mêmes encore capables de pratiquer efficacement. Quant à la question de savoir s'il était approprié de fixer à 65 ans [TRADUCTION] «l'âge prévu pour la retraite», le juge Taylor a conclu, à la p. 708, que celui-ci se trouvait dans [TRADUCTION] «une catégorie que les gens raisonnables et impartiaux accepteraient». Par conséquent, il était

result, he thought, it would be inappropriate for the court to substitute its opinion as to an appropriate "expected age of retirement" for that of the hospital's Board of Trustees.

Taylor J. came to a different conclusion respecting the respondents' argument that s. 15(1) had been contravened by the manner in which the Board applied Regulation 5.04. With respect to the Board's policy decision not to renew the admitting privileges of any doctor who came within the Regulation unless it was shown that they "had something unique to offer the hospital", he stated, at pp. 716-17:

> By deciding to reject the applications of all doctors over 65 who lack unique skills, the trustees added a requirement which effectively denied those over 65 the right to be judged on the basis of "health and continuing performance", the criteria which the regulation indicated would be considered in deciding whether their privileges would be continued. The plaintiffs were plainly denied the benefit of Reg. 5:04, and equal benefit of the hospital regulations generally, solely on the basis of age, and with no concomitant benefit to others. The policy was adopted essentially for administrative convenience. I find that this was neither reasonable nor, in the relevant sense, "fair".

On these grounds Taylor J. concluded that the application of Regulation 5.04 amounted to discrimination on the basis of age within the meaning of s. 15(1) of the *Charter*. He also found that the application of the Regulation constituted a deprivation of liberty within the meaning of s. 7 of the *Charter* that was not in accordance with "the principles of fundamental justice".

With respect to s. 1 of the *Charter*, Taylor J. held, at p. 718, that the qualification the Board placed on Regulation 5.04 was not a "limit prescribed by law", as was required by s. 1, but rather "a limit which they placed on law". He added that even if he had found the policy of the Board to be a "limit prescribed by law", it had not been shown to meet the requirements of s. 1 as a "reasonable limit" on the respondents' rights under ss. 15 and 7.

d'avis qu'il ne serait pas approprié que le tribunal substitue son opinion à celle du conseil d'administration de l'hôpital quant au caractère approprié de [TRADUCTION] «l'âge prévu pour la retraite».

Le juge Taylor est parvenu à une conclusion différente quant à l'argument des intimés que le conseil d'administration avait contrevenu au par. 15(1) dans l'application du règlement 5.04. En ce qui concerne la politique du conseil de ne pas renouveler les privilèges d'admission des médecins visés par le règlement à moins qu'ils n'établissent qu'ils «avaient quelque chose d'unique à offrir à l'hôpital», il a affirmé, aux pp. 716 et 717:

> [TRADUCTION] En décidant de rejeter les demandes de tous les médecins de plus de 65 ans qui ne possèdent pas de compétences uniques, les membres du conseil d'administration ont ajouté une condition qui privait dans les faits les personnes de plus de 65 ans du droit d'être jugé en fonction de «[leur] état de santé et [de leur] rendement continu», le critère qui devait être applicable selon le règlement au renouvellement de leurs privilèges. Les intimés ont été clairement privés du bénéfice du règlement 5.04, et du même bénéfice des règlements de l'hôpital en général pour la seule raison de l'âge et sans bénéfice concomitant aux autres. C'est essentiellement pour des raisons administratives que la politique a été adoptée. Je trouve que cela n'est ni raisonnable ni, au sens propre, «équitable».

Pour ces motifs, le juge Taylor a conclu que l'application du règlement 5.04 constituait une discrimination fondée sur l'âge au sens du par. 15(1) de la *Charte*. Il a également conclu que l'application du règlement privait les intimés du droit à la liberté au sens de l'art. 7 de la *Charte* d'une façon non conforme aux «principes de justice fondamentale».

Quant à l'article premier de la *Charte*, le juge Taylor a conclu, à la p. 718, que la restriction apportée au règlement 5.04 par le conseil d'administration ne constituait pas une «limite prescrite par une règle de droit», comme l'exige l'article premier, mais plutôt [TRADUCTION] «une limite apportée à la règle de droit». Il a ajouté que même s'il avait conclu que la politique du conseil était une «limite prescrite par une règle de droit», on n'avait pas démontré qu'elle satisfaisait aux exigences de l'article premier comme une «limite raisonnable» aux droits des intimés reconnus par les art. 15 et 7.

The Court of Appeal (1988), 21 B.C.L.R. (2d) 165

On appeal, the British Columbia Court of Appeal held that the *Charter* applied to the hospital both in respect of its passage of Regulation 5.04 and of its application of that Regulation. It was of the opinion, at p. 168, that the "control exercised by the government over the operation of the hospital generally, and the formulation of its retirement policy in particular, put the question beyond doubt". Citing this Court's decision in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, the Court of Appeal stated that the question to be answered was whether the alleged infringement was an act of the legislative, executive or administrative branches of government or was connected to an act of one of these branches of government in a direct and precisely-defined way. It answered this question in the affirmative, stating, at p. 169:

> The regulation at issue in these proceedings, Reg. 5:04, was approved by the minister in October 1984. That approval suffices, in our opinion, to establish the direct and precisely defined connection with government referred to in *Dolphin Delivery* as bringing the act of a non-governmental body under the Charter. The impugned regulation was initiated by an act of the hospital, but it came into force only upon the approval of the executive arm of the provincial government.

The court concluded its consideration of the application issue by stating, at p. 169, that "If Reg. 5:04 falls under the Charter, so does the conduct of those bodies charged with administering it". In its view, this brought the policy of the Board of only renewing the admitting privileges of those doctors who were over 65 who "had something unique to offer the hospital" within the purview of the *Charter*.

Turning to s. 15(1) of the *Charter*, the Court of Appeal found that Regulation 5.04 came within the right to equality "before and under the law" guaranteed by that section. This was because Regulation 5.04 was "a rule or system of rules formulated by government and imposed upon the whole or a segment of society" (p. 169), with the result that it was a law for the purposes of s. 15.

La Cour d'appel (1988), 21 B.C.L.R. (2d) 165

En appel, la Cour d'appel de la Colombie-Britannique a conclu que la *Charte* s'appliquait à l'hôpital tant à l'égard de l'adoption du règlement 5.04 que de son application. Elle était d'avis que [TRADUCTION] «le contrôle exercé par le gouvernement sur l'exploitation de l'hôpital en général et la formulation de sa politique de retraite en particulier ne soulevaient aucun doute» (p. 168). Citant l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, de notre Cour, la Cour d'appel a affirmé que la question était de savoir si la violation alléguée était un acte du pouvoir législatif, exécutif ou administratif du gouvernement ou s'il se rattachait à un acte de l'une de ces branches du gouvernement d'une manière directe et définie précisément. Elle a répondu par l'affirmative, à la p. 169:

> [TRADUCTION] Le règlement contesté en l'espèce, le règlement 5.04, a été approuvé par le ministre en octobre 1984. À notre avis, cette approbation suffit pour établir le lien direct et précisément défini avec le gouvernement dont il était question dans l'arrêt *Dolphin Delivery*, et qui assujettit à la *Charte* l'action d'un organisme non gouvernemental. Le règlement contesté découle d'une action de l'hôpital, mais il n'est entré en vigueur qu'à la suite de l'approbation du pouvoir exécutif du gouvernement provincial.

La cour a conclu son examen de la question de l'application de la *Charte* en affirmant, à la p. 169, que [TRADUCTION] «[s]i le règlement 5.04 est visé par la Charte, il en est de même des actes des organismes responsables de son application». À son avis, cela signifiait que la *Charte* s'appliquait à la politique du conseil de ne renouveler les privilèges d'admission des médecins de plus de 65 ans que s'ils avaient [TRADUCTION] «quelque chose d'unique à offrir à l'hôpital».

Examinant le par. 15(1) de la *Charte*, la Cour d'appel a conclu que le règlement 5.04 relevait du droit à l'égalité [TRADUCTION] «devant la loi» devant la loi garanti par cet article. Il en était ainsi parce que le règlement 5.04 constituait [TRADUCTION] «une règle ou un système de règles formulé par le gouvernement et imposé à tout ou partie de la société» (p. 169), ce qui en faisait une loi aux

As to whether a violation of s. 15(1) had been shown, the Court of Appeal stated, at p. 170, that the question "is whether Reg. 5:04 makes a distinction adverse to the plaintiffs, which can be said to be unreasonable and unfair having due regard to their interests and the interests of others affected by the regulations". Citing evidence showing that the failure of the hospital to renew the admitting privileges of the respondents had meant the curtailment or end of their professional practices, the court found that Regulation 5.04 clearly made a distinction based on age which was adverse to those to whom it applied. It then found that this distinction could not be said to be reasonable and fair. After noting that there was no evidence that any of the respondents were incompetent or had prevented other physicians from obtaining admitting privileges or that physicians over 65 were, as a general rule, unable to perform to the high standards of the hospital, the court held, at pp. 171-72, that:

> A regulation terminating admitting privileges at age 65 cannot logically be justified merely because it will prevent the possibility of an incompetent physician being associated with the hospital at some point thereafter. To justify such a provision, a correlation must be shown between the age of 65 and incompetence or other detriment to the operation of the hospital. In the absence of such a correlation, we cannot say that the distinction entailed in requiring retirement at age 65 is reasonable and fair.

The court then considered and rejected the argument that Regulation 5.04 did not lay down a mandatory retirement policy, but simply provided a method for determining whether those over 65 remained fit to practise. In this respect, it observed that although Regulation 5.04 stipulated that "health and continuing performance" were to be considered in determining whether a particular doctor was to be allowed to defer retirement, it did not confine its consideration to those factors. It also observed that Regulation 5.04 was interpreted and applied by the Board as a mandatory retirement provision, since only those doctors with

fins de l'art. 15. Quant à savoir si la violation du par. 15(1) avait été démontrée, la Cour d'appel a affirmé, à la p. 170, que la question [TRADUCTION] «est de savoir si le règlement 5.04 établit une distinction préjudiciable aux appelants que l'on peut qualifier d'abusive ou d'injuste compte tenu de leurs intérêts et des intérêts des autres personnes visées par les règlements». Produisant des éléments de preuve démontrant que le refus de l'hôpital de renouveler les privilèges d'admission des intimés revenait à restreindre leur pratique professionnelle, ou à y mettre fin, la cour a conclu que le règlement 5.04 établissait clairement une distinction fondée sur l'âge qui était préjudiciable à ceux qu'il visait. Elle a ensuite conclu que cette distinction ne pouvait être qualifiée de raisonnable et d'équitable. Après avoir souligné qu'il n'y avait aucune preuve que les intimés étaient incompétents ou avaient empêché d'autres médecins d'obtenir des privilèges d'admission ou que les médecins de plus de 65 ans étaient, de façon générale, incapables de respecter les normes élevées de l'hôpital, la cour a conclu ce qui suit, aux pp. 171 et 172:

> [TRADUCTION] En toute logique, on ne peut justifier un règlement mettant fin aux privilèges d'admission à partir de 65 ans simplement parce que cela écartera la possibilité qu'un médecin incompétent soit rattaché à l'hôpital par la suite. Pour justifier une telle disposition, un rapport doit être établi entre l'âge de 65 ans et l'incompétence des médecins ou un autre préjudice portant atteinte à l'exploitation de l'hôpital. En l'absence d'un tel rapport, nous ne pouvons affirmer que la distinction établie par la mise à la retraite obligatoire à 65 ans est raisonnable et équitable.

La cour a ensuite examiné et rejeté l'argument que le règlement 5.04 n'établissait pas une politique de retraite obligatoire, mais constituait simplement une façon de déterminer ceux qui demeuraient habiles à pratiquer après 65 ans. À cet égard, la cour a souligné que bien que le règlement 5.04 précise que [TRADUCTION] «l'état de santé et le rendement continu» devaient être examinés pour décider de permettre à un médecin de reporter la date de sa retraite, le règlement ne restreignait pas l'examen à ces facteurs. Elle a également souligné que le conseil d'administration interprétait et appliquait le règlement 5.04 comme une disposi-

"unique skills" were in fact allowed to defer retirement.

Turning to s. 1 of the *Charter*, the court held that the objective of Regulation 5.04—the maintenance of the highest standards of medical care and instruction—was sufficiently important to warrant overriding a constitutionally-protected right. But it found that it had not been shown that the means chosen to achieve this objective were demonstrably justified, having regard to the guidelines set out in this Court's decision in *R. v. Oakes*, [1986] 1 S.C.R. 103. This was because Regulation 5.04 "must be viewed as unfair and arbitrary in the absence of evidence or other clear indication that there is a correlation between the age of 65 and the inability to practise medicine properly or other detriment to the hospital's operations" (p. 173). It was also because the failure to show the above-mentioned correlation meant that it "cannot be said that denial of admitting privileges to all physicians who reach that age impairs the rights of those physicians as little as possible having regard to the aim of maintaining high medical standards at the hospital" (p. 173). Finally, there was a lack of overall proportionality between the object Regulation 5.04 sought to achieve and the means it employed, in which respect the court again returned to the "lack of a convincing link between the age of 65 and the ability of the hospital to deliver the high level of care, teaching and research to which it aspires" (p. 174).

Having found in favour of the respondents on the s. 15 argument, the Court of Appeal found it unnecessary to consider whether an infringement of s. 7 of the *Charter* could also be established.

Leave to appeal to this Court was granted and the following constitutional questions were stated by Chief Justice Dickson on August 30, 1988:

1. Do the provisions of the *Canadian Charter of Rights and Freedoms* apply to the actions of the Vancouver

tion de mise à la retraite obligatoire puisque seuls les médecins aux [TRADUCTION] «compétences particulières» avaient en réalité la permission de reporter leur retraite.

Examinant l'article premier de la *Charte*, la cour a conclu que l'objectif du règlement 5.04—la prestation de soins médicaux et d'une formation médicale de première qualité—était suffisamment important pour justifier la suppression d'un droit protégé par la Constitution. Mais elle a décidé qu'on n'avait pas établi que les mesures choisies pour parvenir à cet objectif étaient de celles dont la justification peut se démontrer, compte tenu des directives formulées par notre Cour dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. Et ce, parce que le règlement 5.04 [TRADUCTION] «doit être considéré comme injuste et arbitraire en l'absence d'une preuve ou d'une autre indication claire qu'il y a un rapport entre l'âge de 65 ans et l'incapacité à pratiquer correctement la médecine ou un autre préjudice portant atteinte au fonctionnement de l'hôpital» (p. 173). Autre motif de la cour, le défaut d'établir le rapport en question signifiait qu'on [TRADUCTION] «ne pouvait pas affirmer que le retrait des privilèges d'admission aux médecins qui atteignent cet âge porte le moins possible atteinte à leurs droits compte tenu de l'objectif poursuivi, le maintien des normes médicales de première qualité à l'hôpital» (p. 173). Enfin, il y avait une absence de proportionnalité générale entre l'objectif que visait à atteindre le règlement 5.04 et les mesures employées, ce qui a amené la cour à réaffirmer [TRADUCTION] «l'absence d'un lien convaincant entre l'âge de 65 ans et la capacité de l'hôpital de respecter les normes de première qualité auxquelles il aspire en matière de soins, d'enseignement et de recherche» (p. 174).

Ayant statué en faveur des intimés à l'égard de l'argument fondé sur l'art. 15, la Cour d'appel a conclu qu'il n'était pas nécessaire d'examiner s'il y avait violation de l'art. 7 de la *Charte*.

Notre Cour a accordé l'autorisation de pourvoi et le juge en chef Dickson a formulé les questions constitutionnelles suivantes le 30 août 1988:

1. Les dispositions de la *Charte canadienne des droits et libertés* s'appliquent-elles aux actions du Vancouver

General Hospital in establishing and administering Regulation 5.04 of the Medical Staff Regulations?

2. If the answer to question 1 is yes, is Regulation 5.04 of the Medical Staff Regulations contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to question 1 is yes, was the administration of Regulation 5.04 of the Medical Staff Regulations by the Vancouver General Hospital contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

4. If the answer to either questions 2 or 3 is yes, is Regulation 5.04 of the Medical Staff Regulations or the manner of its administration by the Vancouver General Hospital nevertheless justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

The Attorneys General of Canada, Ontario and of British Columbia intervened.

The Application of the *Charter*

The question of whether or not the *Charter* applies in a particular case is to be answered in light of s. 32(1), which reads:

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

As I commented in *McKinney*, these words give a strong message that only government is to be bound by the *Charter*. Various explanations can be advanced as to why the decision to so limit the *Charter* was taken, some of which I outlined in *McKinney*. These include the historical association of bills of rights with the struggle to constrain the exceptional power of government to impose its will upon the individual or minority groups; the belief that the values which a bill of rights seeks to promote and protect can be better and more flexibly achieved in the private sphere if left to the various specialized administrative or quasi-judicial bodies which are mandated and equipped to deal with discrimination in specific social and economic

General Hospital relativement à la rédaction et à la mise en œuvre du règlement 5.04 des Medical Staff Regulations?

2. Si la réponse à la question 1 est affirmative, le règlement 5.04 des Medical Staff Regulations est-il contraire au par. 15(1) de la *Charte canadienne des droits et libertés*?

3. Si la réponse à la question 1 est affirmative, l'application du règlement 5.04 des Medical Staff Regulations par le Vancouver General Hospital est-elle contraire au par. 15(1) de la *Charte canadienne des droits et libertés*?

4. Si la réponse aux questions 2 ou 3 est affirmative, le règlement 5.04 des Medical Staff Regulations ou la façon dont il est appliqué par le Vancouver General Hospital sont-ils néanmoins justifiés en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

Les procureurs généraux du Canada, de l'Ontario et de la Colombie-Britannique sont intervenus.

L'application de la *Charte*

Pour décider de l'application de la *Charte* dans un cas particulier, il faut tenir compte du par. 32(1) qui se lit ainsi:

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Comme je l'ai dit dans l'arrêt *McKinney*, ces mots indiquent fortement que seul le gouvernement est lié par la *Charte*. Diverses explications peuvent être apportées pour justifier la décision de restreindre ainsi la *Charte*, et j'en ai mentionné quelques-unes dans l'arrêt *McKinney*. Parmi celles-ci, on note les liens historiques entre les déclarations des droits et les luttes pour restreindre le pouvoir exceptionnel du gouvernement d'imposer sa volonté aux individus ou groupes minoritaires; la croyance que les valeurs qu'une déclaration des droits vise à promouvoir et à protéger peut se réaliser mieux et de manière plus souple dans le domaine privé, si on s'en remet aux divers organismes administratifs ou quasi judiciaires spécialisés

contexts; the concomitant apprehension that a generally applicable bill of rights would have an unduly chilling effect on the confidence which is essential to the meaningful enjoyment of the individual freedom a bill of rights seeks to protect; and the heavy if not impossible burden which application of the *Charter* to private conduct would impose on the courts.

Other considerations of this sort could and have been suggested. The challenge for the courts is to find a principled basis on which to give effect to the deliberate choice that has been made in favour of a Charter of Rights and Freedoms that applies only to government and its emanations. The leading authority in this respect is, of course, this Court's decision in *RWDSU v. Dolphin Delivery Ltd., supra.* There McIntyre J., speaking for the Court, observed, at p. 598, that s. 32(1) treated Parliament and the legislatures "as separate or specific branches of government, distinct from the executive branch of government", from which it followed that "where the word 'government' is used in s. 32 it refers not to government in its generic sense—meaning the whole of the governmental apparatus of the state— but to a branch of government". On this basis he concluded that "The word 'government', following as it does the words 'Parliament' and 'Legislature', must ... refer to the executive or administrative branch of government", a conclusion he buttressed by referring to the manner in which the word "government" was used in the *Constitution Act, 1867.*

In short, McIntyre J. was of the view that the references in s. 32(1) to the "government of Canada" and the "government of each province" could not be interpreted as bringing within the ambit of the *Charter* the whole of that amorphous entity which in contemporary political theory might be thought of as "the state". Instead, they were to be interpreted as references to what has traditionally been thought of as the institutions of government—those bodies and offices upon which the Constitution confers power to make and enforce laws generally applicable across the body politic. This did not mean that the *Charter* was only to

qui sont tenus et capables de traiter de la discrimination dans des contextes sociaux et économiques particuliers; la crainte concomitante qu'une déclaration des droits d'application générale aurait un effet trop paralysant sur la confiance qui est essentielle au véritable exercice de la liberté individuelle qu'une charte des droits vise à protéger; et le lourd sinon impossible fardeau que l'application de la *Charte* aux actions de nature privée imposerait aux tribunaux.

D'autres considérations de ce genre pourraient être apportées et l'ont été. Le défi des tribunaux est de trouver un principe sur lequel fonder la décision délibérée de n'appliquer une charte des droits et libertés qu'au gouvernement et à ses émanations. L'arrêt de principe à cet égard est évidemment l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, précité, de notre Cour. Dans cet arrêt, le juge McIntyre, au nom de la Cour, a souligné, à la p. 598, que le par. 32(1) considère le Parlement et les législatures «comme des branches de gouvernement séparées ou spécifiques, distinctes de l'exécutif» et que, par conséquent, le terme «gouvernement» utilisé à l'art. 32 désigne non pas le gouvernement au sens général—c'est-à-dire au sens de l'ensemble de l'appareil gouvernemental de l'État—mais plutôt une branche de gouvernement». D'où sa conclusion que «[l]e terme 'gouvernement', qui suit les termes 'Parlement' et 'législature', doit alors [...] désigner la branche exécutive ou administrative du gouvernement», une conclusion qu'il étaye en mentionnant la manière dont le terme «gouvernement» a été utilisé dans la *Loi constitutionnelle de 1867.*

En résumé, le juge McIntyre était d'avis que les mentions au par. 32(1) du «gouvernement du Canada» et du «gouvernement de chaque province» ne pouvaient être interprétées de manière à faire relever de la *Charte* l'ensemble de cette entité vague que l'on désigne parfois de nos jours en science politique comme [TRADUCTION] «l'État». Ces mentions devaient plutôt être interprétées comme désignant ce que l'on a traditionnellement considéré être les institutions du gouvernement—ces organismes auxquels la Constitution confère le pouvoir d'adopter et d'appliquer des lois d'application générale aux entités politiques. Ce qui ne veut

apply to Parliament, Legislatures and Ministers of the Crown. For although this Court was not called upon in *Dolphin Delivery* to delineate the circumstances in which the *Charter* applies to the actions of subordinate bodies that are created, supported or supervised by government, McIntyre J. clearly countenanced the application of the *Charter* to such bodies by including the "administrative branch" within his definition of the word "government". More specifically, he said, at p. 602:

> It would also seem that the *Charter* would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures.

Nor did the Court in *Dolphin Delivery* preclude the possibility of a successful reliance on the *Charter* by a party to a dispute between private individuals, provided it could be shown that the party against whom the *Charter* was invoked relied upon some form of governmental action. As to the question of what would amount to a sufficient element of governmental intervention, McIntyre J. was not called upon to give a determinative answer. However, in the course of a consideration of the circumstances in which the *Charter* would apply to court orders in private litigation, he did note, at p. 601, that a "more direct and a more precisely-defined connection between the element of government action and the claim advanced" than was shown by the appellant in *Dolphin Delivery* was required.

The respondents argued that it is unnecessary in this appeal to consider whether the Vancouver General is one of the subordinate bodies to which the *Charter* applies. They argue that because Regulation 5.04 could only take effect upon the approval of the Minister of Health, its adoption and subsequent administration must be characterized as actions of the executive branch of government, to which the *Charter* obviously applies. In support of this argument, they cite this Court's decision in *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312 (*Blaikie No. 2*).

pas dire que la *Charte* devait seulement s'appliquer au Parlement, aux législatures et aux ministres de la Couronne. Car bien que la Cour n'ait pas été appelée dans l'arrêt *Dolphin Delivery* à déterminer les circonstances dans lesquelles la *Charte* s'applique aux actions des organismes subordonnés créés, financés ou contrôlés par le gouvernement, le juge McIntyre s'est clairement prononcé en faveur de l'application de la *Charte* à ces organismes en incluant la «branche administrative» dans sa définition du terme «gouvernement». Plus précisément, il a dit, à la p. 602:

> Il semblerait aussi que la *Charte* s'appliquerait à plusieurs formes de législation déléguée, de réglementation, de décrets, peut-être de règlements municipaux et de règlements administratifs et généraux d'autres organes créés par le Parlement et les législatures.

La Cour, dans l'arrêt *Dolphin Delivery*, n'a pas non plus écarté la possibilité qu'une partie à un litige privé puisse avoir gain de cause en invoquant la *Charte*, pourvu qu'elle puisse démontrer que la partie contre qui la *Charte* a été invoquée devait recourir à une certaine forme d'action gouvernementale. Quant à savoir ce qui constituerait une intervention gouvernementale suffisante, le juge McIntyre n'avait pas à donner de réponse définitive. Cependant, alors qu'il examinait les circonstances dans lesquelles la *Charte* s'appliquerait aux ordonnances judiciaires dans un litige entre particuliers, il a souligné, à la p. 601, qu'un «lien plus direct et mieux défini entre l'élément d'action gouvernementale et la revendication qui est faite» était nécessaire, ce qui n'avait pas été établi par l'appelant dans l'arrêt *Dolphin Delivery*.

En l'espèce, les intimés ont soutenu qu'il n'était pas nécessaire d'examiner si le Vancouver General constitue l'un de ces organismes subordonnés auxquels la *Charte* s'applique. Ils soutiennent que parce que le règlement 5.04 ne pouvait entrer en vigueur que sur approbation du ministre de la Santé, son adoption et son application ultérieure doivent être qualifiées comme des actions du pouvoir exécutif du gouvernement auquel la *Charte* s'applique évidemment. À l'appui de cet argument, ils citent l'arrêt *Procureur général du Québec c. Blaikie*, [1981] 1 R.C.S. 312 (l'affaire *Blaikie no. 2*), de notre Cour.

I do not think that the question of the applicability of the *Charter* to the facts of this case can be so easily disposed of. To my mind, the fact that Regulation 5.04 only came into effect when approved by the Minister of Health does not alter its character as a regulation for the internal management of the hospital and its staff, which was developed, written and adopted by the authorities entrusted with the ongoing management of the hospital's internal affairs by the terms of the *Vancouver General Hospital Act*. The evidence does not show that Regulation 5.04 was instigated by the Minister of Health, or that it in any way represents ministerial policy with respect to the renewal of admitting privileges. Instead, it shows that Regulation 5.04 was the end result of an internal review of policies relating to the retirement of medical staff which the hospital undertook at the initiative of its Board of Trustees in 1979. Leaving aside for the moment the question whether the Board should itself be regarded as part of government by virtue of the fact that the vast majority of its members are appointed by the Lieutenant Governor in Council, Regulation 5.04 can, in these circumstances, be interpreted as a recognition that the hospital is accorded a large degree of autonomy with respect to matters relating to its internal management. To put it somewhat differently, there is no reason to assign greater weight to the fact that Regulation 5.04 took effect after being approved by the Minister of Health than is assigned to the fact that it emerged from an internal policy review undertaken independently of the ministry or overall government policy. I agree with the appellants that this view is supported by the evidence that there is considerable variety between the hospital by-laws dealing with retirement that have obtained ministerial approval in British Columbia. This evidence suggests that retirement policy is left to the judgment of those entrusted with the responsibility of managing individual hospitals.

It is particularly difficult to see how the need for ministerial approval can be said to lead to the conclusion that the administration of Regulation 5.04 must be regarded as an action of the executive branch of government. There is absolutely no evidence that the policy of the Board to only renew

Je ne crois pas que l'on puisse décider aussi facilement la question de l'applicabilité de la *Charte* aux faits de l'espèce. À mon avis, le fait que le règlement 5.04 ne soit entré en vigueur que lorsqu'il a été approuvé par le ministre de la Santé ne modifie pas sa nature de règlement de gestion interne de l'hôpital et de son personnel, qui a été conçu, rédigé et adopté par les autorités responsables de la gestion quotidienne des affaires internes de l'hôpital selon la *Vancouver General Hospital Act*. La preuve n'indique pas que le règlement 5.04 a été adopté à la demande du ministre de la Santé ni qu'il constitue d'une façon quelconque une politique ministérielle concernant le renouvellement des privilèges d'admission. La preuve indique plutôt que le règlement 5.04 est le produit d'un examen interne entrepris par l'hôpital à la demande de son conseil d'administration en 1979 concernant la retraite du personnel médical. Sans traiter pour l'instant de la question de savoir si le conseil d'administration devrait lui-même être considéré comme un élément du gouvernement parce que la vaste majorité de ses membres sont nommés par le lieutenant-gouverneur en conseil, on peut dire, dans ces circonstances, que le règlement 5.04 témoigne que l'hôpital jouit d'une large marge d'autonomie dans sa gestion interne. En d'autres termes, il n'y a aucune raison d'accorder une importance plus considérable au fait que le règlement 5.04 est entré en vigueur après approbation du ministre de la Santé qu'au fait qu'il résulte d'un examen des politiques internes de l'hôpital entrepris indépendamment du ministère ou de l'ensemble de la politique gouvernementale. Je suis d'accord avec les appelants que cette opinion est étayée par la preuve que les règlements portant sur la retraite qui ont reçu l'approbation ministérielle en Colombie-Britannique varient considérablement d'un hôpital à l'autre. Ce qui laisse entendre que la politique de la retraite est laissée à l'appréciation des responsables de la gestion de chaque hôpital.

Il est particulièrement difficile de voir comment la nécessité de l'approbation ministérielle peut entraîner la conclusion qu'il faille considérer l'application du règlement 5.04 comme une action du pouvoir exécutif du gouvernement. Il n'y a absolument aucune preuve que la politique du conseil

the admitting privileges of those who came within Regulation 5.04 if they "had something unique to offer the hospital" even came to the attention of the Minister or his staff. The only sense in which the adoption and application of that policy could be said to be the action of the Minister is that it was not precluded by the wording of the by-law approved by the Minister, assuming for the moment that such approval could by itself have made Regulation 5.04 a governmental act. On that reasoning, however, the organs of government would be responsible, and the *Charter* would apply, to all actions which in any way turned on the interpretation of the Regulation.

I do not think the respondents' argument in this respect is assisted by *Blaikie No. 2*, *supra*. The question in that case was as to the scope of s. 133 of the *Constitution Act, 1867*. This Court held that s. 133 applied not only to statutes enacted by the Legislature of the Province of Quebec, but also to the regulations and orders of statutory bodies, provided there was some connection between those regulations or orders, apart from the delegation of the power to enact them, and the Quebec Legislature to which s. 133 is by its terms limited. Citing the principle that "in our constitutional system the enactments of the Government should be assimilated with the enactments of the Legislature", the Court concluded, at p. 329, that subsidiary regulations and orders fell within s. 133 whenever "these other regulations are made subject to the approval of the Government". It stated, at p. 329:

> The particular form of words used in this respect by various statutes matters little. Whether it be provided that some regulations "shall have no force and effect until approved and sanctioned by the Lieutenant-Governor in Council" or "shall not be carried into execution until approved by the Lieutenant-Governor in Council" or "shall not have force and effect until confirmed by the Lieutenant-Governor in Council", they can be assimilated with the enactments of the Government and therefore of the Legislature as long as positive action of the Government is required to breathe life into them.

d'administration de ne renouveler les privilèges d'admission des médecins visés par le règlement 5.04 que s'ils [TRADUCTION] «avaient quelque chose d'unique à offrir à l'hôpital» a même été portée à l'attention du ministre ou de son personnel. La seule façon de dire que l'adoption et l'application de cette politique résultent de l'action du ministre est qu'elles n'étaient pas interdites par le texte du règlement approuvé par le ministre, en supposant pour l'instant que cette approbation pouvait en soi avoir fait du règlement 5.04 une action gouvernementale. Cependant, d'après ce raisonnement, les organes du gouvernement seraient responsables de toutes les actions qui porteraient d'une façon quelconque sur l'interprétation du règlement et la *Charte* s'appliquerait à toutes ces actions.

Je ne crois pas que l'arrêt *Blaikie no. 2*, précité, puisse être d'aucun secours à la position des intimés à cet égard. La question dans cet arrêt concernait la portée de l'art. 133 de la *Loi constitutionnelle de 1867*. Notre Cour a conclu que l'art. 133 s'appliquait non seulement aux lois adoptées par la législature de la province de Québec, mais également aux règlements et aux ordonnances des organismes statutaires, pourvu qu'il y ait un certain lien entre d'une part, ces règlements ou ordonnances, mis à part le pouvoir délégué de les adopter, et d'autre part, la législature du Québec à laquelle l'art. 133 est restreint selon ses termes. Citant le principe que «dans notre régime constitutionnel, les mesures édictées par le gouvernement doivent être assimilées aux mesures adoptées par la Législature», la Cour a conclu, à la p. 329, que les règlements et ordonnances subsidiaires relevaient de l'art. 133 chaque fois que «ces autres règlements sont soumis à l'approbation du gouvernement». Elle a affirmé, à la p. 329:

> Le texte particulier des différentes lois importe peu à cet égard. Que la loi dispose que certains règlements «n'entreront en vigueur que lorsqu'ils auront été approuvés et sanctionnés par le lieutenant-gouverneur en conseil» ou «ne seront pas mis à exécution avant d'avoir été approuvés par le lieutenant-gouverneur en conseil» ou «n'auront aucun effet avant d'avoir été confirmés par le lieutenant-gouverneur en conseil», ils peuvent être assimilés à des mesures du gouvernement et, par conséquent, de la Législature tant qu'une action positive du gouvernement est nécessaire pour leur insuffler la vie.

Without such approval or confirmation, they are a nullity . . . or at least inoperative.

Relying on this statement, the respondents argue that the fact that the by-laws of the Vancouver General only come into force on receiving the approval of the Minister of Health should bring them within the compass of s. 32(1) of the *Charter* in the same way that the need for executive approval brings the regulations and orders of subsidiary bodies of the Government of Quebec within the compass of s. 133. It must be remembered however, that whereas s. 133 relates to the scope of a specific, albeit important, interest or right, s. 32(1) relates to the scope of a comprehensive bill of rights encompassing many different types of rights and freedoms and, thus, many different aspects of government activity. I do not think that what the Court has said with regard to the scope of the former is neatly transferable to the task of delimiting the scope of the latter. It should also be noted that the following statement appears in the introduction to this Court's decision in *Blaikie No. 2*, at p. 319:

It must be emphasized that regulations or orders in issue in the case at bar are regulations or orders which constitute delegated legislation properly so called and not rules or directives of internal management.

Pursuant to what I have said above, I would think it clear that Regulation 5.04, concerned as it is with the retirement of medical staff, is not delegated legislation, but is quintessentially a "rule or directive of internal management". It follows that it is not the type of regulation the Court had in mind when setting out the boundaries of s. 133. The requirement of approval by the government is nothing more than a mechanism to ensure that the hospital's actions do not run counter to the powers conferred on the government by the legislature to prescribe standards in respect of hospital administration. It is a mere supervisory power to that end. It does not displace the ongoing responsibility of its Board to manage the affairs of the hospital for the benefit of the community.

Sans cette approbation ou confirmation, ils sont nuls [. . .] ou à tout le moins inopérants.

S'appuyant sur cette affirmation, les intimés soutiennent que le fait que les règlements du Vancouver General n'entrent en vigueur qu'après avoir reçu l'approbation du ministre de la Santé devrait les faire relever du par. 32(1) de la *Charte* de la même façon que la nécessité de l'approbation du pouvoir exécutif fait relever de l'art. 133 les règlements et ordonnances des organismes subsidiaires du gouvernement du Québec. Il convient cependant de rappeler que, alors que l'art. 133 concerne la portée d'un intérêt ou d'un droit précis, bien qu'important, le par. 32(1) concerne la portée d'une déclaration des droits générale englobant plusieurs types de droits et de libertés différents et donc plusieurs aspects de l'activité du gouvernement. Je ne crois pas que ce que la Cour a affirmé en ce qui concerne la portée de l'art. 133 se transpose facilement pour délimiter la portée du par. 32(1). Il convient également de souligner que l'affirmation suivante se retrouve dans l'introduction des motifs de notre Cour dans l'arrêt *Blaikie no. 2*, à la p. 319:

Il importe de souligner qu'il s'agit dans la présente affaire de règlements qui constituent de la législation déléguée proprement dite et non pas des règles ou directives de régie interne.

Conformément à ce que j'ai déjà dit, je pense qu'il est clair que le règlement 5.04, traitant comme il le fait de la retraite du personnel médical, n'est pas une disposition législative déléguée, mais fait partie essentiellement des «règles ou directives de régie interne». Il s'ensuit qu'il ne s'agit pas du type de règlements dont se préoccupait la Cour lorsqu'elle établissait les paramètres de l'art. 133. L'obligation d'obtenir l'approbation du gouvernement n'est rien de plus qu'un mécanisme pour veiller à ce que les actions de l'hôpital ne soient pas contraires aux pouvoirs conférés au gouvernement par la législature de prévoir des normes en matière d'administration hospitalière. Il ne s'agit que d'un simple pouvoir de contrôle destiné à cette fin. Il ne modifie pas la responsabilité permanente du conseil d'administration de gérer les affaires de l'hôpital à l'avantage de la collectivité.

In light of the foregoing, I would conclude that neither Regulation 5.04 or its administration can properly be said to be acts of the executive branch of government. I take it to be self-evident that they cannot be regarded as acts of the legislative branch of government, as there does not appear to be any provision in either of the statutes under which the Vancouver General operates that requires it to adopt a special policy respecting the renewal of admitting privileges of doctors who have reached the age of 65. There is certainly nothing in the relevant statute law that requires the adoption of the particular policy which the hospital has in fact adopted. The question therefore becomes whether the Vancouver General is part of what McIntyre J. designated the "administrative branch" of government.

This question cannot be answered by simply pointing out that the provision of health care and hospital services is an important part of the legislative mandate of provincial governments, and that the Vancouver General was incorporated for the express purpose of providing such care and services. If that was by itself sufficient to bring the hospital and all other bodies and individuals concerned with the provision of health care or hospital services within the reach of the *Charter*, a wide range of institutions and organizations commonly regarded as part of the private sector, from airlines, railways, and banks, to trade unions, symphonies and other cultural organizations, would also come under the *Charter*. For each of these entities, along with many others, are concerned with the provision of a service which is an important part of the legislative mandate of one or the other level of government.

In short, as in *McKinney*, we must look beyond the fact that the Vancouver General is an incorporated body which performs an important public service. In this regard the respondents adopt the findings of the Court of Appeal as to the degree and significance of government involvement in the operation of the Vancouver General. In concluding that the hospital was controlled by the Government of British Columbia and therefore subject to

Compte tenu de ce qui précède, je suis d'avis de conclure que ni le règlement 5.04 ni son application ne peuvent être véritablement considérés comme des actes du pouvoir exécutif du gouvernement. J'estime qu'il est évident qu'ils ne peuvent être considérés comme des actes du pouvoir législatif du gouvernement puisqu'il ne semble pas y avoir de disposition dans l'une ou l'autre des lois régissant l'exploitation du Vancouver General qui l'oblige à adopter une politique particulière concernant le renouvellement des privilèges d'admission des médecins qui ont atteint 65 ans. Il n'y a certainement rien dans la législation applicable qui exige l'adoption de la politique particulière que l'hôpital a de fait adoptée. La question est donc de savoir si le Vancouver General fait partie de ce que le juge McIntyre a appelé la «branche administrative» du gouvernement.

On ne peut simplement y répondre en soulignant que la prestation des soins de santé et des services hospitaliers constitue une partie importante du mandat législatif des gouvernements provinciaux, et que le Vancouver General a été constitué en personne morale dans le but précis de fournir ces soins et ces services. Si cela suffisait en soi pour rendre la *Charte* applicable à l'hôpital et aux autres organismes et individus visés par les soins de santé ou les services hospitaliers, un vaste éventail d'institutions et d'organismes considérés habituellement comme faisant partie du secteur privé, allant des compagnies aériennes, des chemins de fer et des banques aux syndicats, aux orchestres et aux autres organismes culturels, relèverait également de la *Charte*. En effet, chacune de ces entités, ainsi que plusieurs autres, ont pour but de fournir un service qui constitue un élément important du mandat législatif de l'un ou l'autre palier de gouvernement.

En résumé, comme dans l'arrêt *McKinney*, nous ne devons pas nous arrêter uniquement au fait que le Vancouver General est un organisme constitué en personne morale qui offre un important service public. À cet égard, les intimés adoptent les conclusions de la Cour d'appel quant à la mesure et l'importance de la participation du gouvernement dans l'exploitation du Vancouver General. En concluant que l'hôpital était contrôlé par le gouverne-

the *Charter*, the Court of Appeal summarized, at pp. 168-69, what it took to be the relevant provisions of the *Hospital Act* in the following terms:

Section 2(1) requires the hospital to make room for government representation on its management board in whatever manner the government thinks necessary; to have a board and by-laws thought necessary by the minister and any constitution, by-laws or rules are ineffective without ministerial approval; and to comply with the conditions prescribed by the Lieutenant Governor in Council—a provision which leaves it open for the Lieutenant Governor to set virtually any requirement deemed appropriate.

Section 2(3) gives government an unassailable right to appoint persons to the hospital management board. Section 32 states that the minister may require that by-laws be revised to his satisfaction and s. 36(1) permits the Lieutenant Governor to make any additional regulations he thinks necessary—regulations which under s. 36(3) may include virtually all aspects of running the hospital. Section 41(1) provides for additional ministerial control where hospitals receive money for building, and s. 44(4) and (6) allows the government to appoint a public administrator to manage the hospital and displace the board. That administrator can be given total control of the hospital (s. 44(5)), governed by conditions set by the Lieutenant Governor in Council.

The effective control of the hospital by the government is affirmed by the *Vancouver General Hospital Act*, which states that by-laws passed by the hospital's board come into force only when approved by the minister: s. 6.

While I accept this summary as substantially accurate, I respectfully disagree with the view of the Court of Appeal that it reveals governmental control of a character and quality that would justify application of the *Charter*. I have already given my opinion as to the limited significance of the requirement that the hospital's by-laws be approved by the Minister of Health. I also think that it is not very significant that the *Hospital Act* provides for ministerial control in respect of the use which the hospital makes of any grant received from the Province toward, in the words of s. 41(1), "the planning, constructing, reconstructing, purchasing and equipping of a hospital ... or the

ment de la Colombie-Britannique et donc assujetti à la *Charte*, la Cour d'appel a résumé comme suit, aux pp. 168 et 169, ce qu'elle estimait être les dispositions pertinentes de la *Hospital Act*:

[TRADUCTION] Le paragraphe 2(1) oblige l'hôpital à prévoir la représentation du gouvernement au conseil de gestion, de la manière que le gouvernement estime nécessaire; à avoir un conseil et des règlements que le ministre juge nécessaires, tout acte constitutif, règlement ou règle étant inopérants sans l'approbation du ministre; et à se conformer aux conditions établies par le lieutenant-gouverneur en conseil—une disposition qui permet au lieutenant-gouverneur d'imposer pratiquement toute exigence qu'il estime appropriée.

Le paragraphe 2(3) accorde au gouvernement un droit absolu de nommer les personnes au conseil de gestion de l'hôpital. L'article 32 prévoit que le ministre peut exiger que les règlements soient examinés d'une manière qu'il estime satisfaisante et le par. 36(1) permet au lieutenant-gouverneur d'adopter tout autre règlement qu'il estime nécessaire—des règlements qui peuvent viser pratiquement tous les aspects de l'exploitation d'un hôpital en vertu du par. 36(3). Le paragraphe 41(1) prévoit un contrôle ministériel supplémentaire lorsque les hôpitaux reçoivent des subsides à des fins de construction et les par. 44(4) et (6) permettent au gouvernement de nommer un administrateur public pour gérer l'hôpital et remplacer le conseil. Cet administrateur peut se voir accorder le contrôle entier de l'hôpital (par. 44(5)), sous réserve des conditions établies par le lieutenant-gouverneur en conseil.

Le contrôle réel de l'hôpital par le gouvernement est confirmé par l'art. 6 du *Vancouver General Hospital Act* qui prévoit que les règlements adoptés par le conseil de l'hôpital n'entrent en vigueur que sur approbation du ministre.

Bien que ce résumé m'apparaisse essentiellement exact, avec égards, je ne puis partager l'opinion de la Cour d'appel qu'il implique l'existence d'un contrôle gouvernemental d'une nature et d'une qualité qui justifieraient l'application de la *Charte*. J'ai déjà exprimé mon opinion quant à l'importance relative de la nécessité de l'approbation du règlement de l'hôpital par le ministre de la Santé. J'estime également peu important que la *Hospital Act* prévoie un contrôle ministériel quant à l'emploi par l'hôpital des subventions reçues de la province et affectées, selon les termes du par. 41(1), [TRADUCTION] «à la planification, la construction, la reconstruction, l'achat et l'équipement

acquiring of land or buildings for hospital purposes". The fact that the Vancouver General is not autonomous when it comes to the use of money given to it by the government for specific capital investments says little regarding the degree of autonomy it enjoys overall. If anything, it suggests that direct government involvement in hospital decision-making is the exception rather than the rule.

This point can be made with even greater force with respect to s. 36(1), which permits the Lieutenant Governor in Council to make such additional regulations as he thinks necessary, and s. 44, which provides for the appointment of a public administrator and the displacement of the Board. When it is considered that the power of the Minister under s. 36(1) is to make "any regulations deemed necessary for the carrying out of the provisions of this Act to meet any contingency not expressly provided for in it" (emphasis added), it becomes clear that both provisions have nothing to do with the day-to-day operation of the hospitals to which they apply. Instead, they make allowance for those exceptional circumstances where a high degree of direct government involvement in the management of a hospital is deemed to have become necessary. Again, the fact that the Act makes special allowance for ministerial intervention in these situations indicates that it assumes that the management of a hospital would ordinarily be a matter for the judgment of its own Board of Trustees.

In sum, it is crucial in assessing the statutory framework summarized by the Court of Appeal to bear in mind the difference between ultimate or extraordinary, and routine or regular control. While it is indisputable that the fate of the Vancouver General is ultimately in the hands of the Government of British Columbia, I do not think it can be said that the *Hospital Act* makes the daily or routine aspects of the hospital's operation, such as the adoption of policy with respect to the renewal of the admitting privileges of medical staff, subject to government control. On the contrary, it

d'un hôpital [. . .] ou à l'acquisition de bien-fonds ou d'édifices pour les hôpitaux». Le fait que le Vancouver General ne soit pas autonome lorsqu'il est question de l'utilisation des sommes qui lui sont remises par le gouvernement à des fins d'investissements en capital déterminés ne révèle rien du degré d'autonomie dont l'hôpital bénéficie dans l'ensemble. Cela indique plutôt que la participation directe du gouvernement dans le processus décisionnel de l'hôpital est l'exception plutôt que la règle.

Cet argument peut même s'appliquer plus vigoureusement en ce qui concerne le par. 36(1), qui permet au lieutenant-gouverneur en conseil d'adopter les autres règlements qu'il estime nécessaires, et l'art. 44, qui prévoit la nomination d'un administrateur public et le remplacement du conseil d'administration. Lorsque l'on comprend que le pouvoir du ministre en vertu du par. 36(1) est d'adopter [TRADUCTION] «tout autre règlement qu'il estime nécessaire aux fins de l'application des dispositions de cette Loi pour répondre aux situations d'urgence que celle-ci ne prévoit pas expressément» (je souligne), il devient clair que les deux dispositions n'ont rien à voir avec l'exploitation quotidienne des hôpitaux auxquels elles s'appliquent. Elles prévoient plutôt les circonstances exceptionnelles où l'on estime nécessaire la participation directe et importante du gouvernement dans la gestion d'un hôpital. Encore une fois, le fait que la loi prévoie spécialement l'intervention du ministre dans ces situations indique qu'elle suppose que la gestion d'un hôpital est une question qui relève habituellement du jugement de son conseil d'administration.

En résumé, il est capital dans l'évaluation du cadre législatif résumé par la Cour d'appel d'avoir présent à l'esprit la différence entre le contrôle absolu ou extraordinaire et le contrôle routinier ou régulier. Bien qu'on ne puisse contester que l'existence du Vancouver General relève en dernier ressort du gouvernement de la Colombie-Britannique, je ne crois pas que l'on puisse affirmer que la *Hospital Act* assujettit les aspects quotidiens ou routiniers du fonctionnement de l'hôpital, comme l'adoption d'une politique en matière de renouvellement des privilèges d'admission accordés au per-

implies that the responsibility for such matters will, barring some extraordinary development, rest with the Vancouver General's Board of Trustees. It could in fact be said to contain an explicit recognition to this effect, in that it defines "board of management" as "the directors, managers, trustees or other body of persons having the control and management of a hospital" (s. 1). To similar effect is s. 5 of the *Vancouver General Hospital Act*, which provides that the "property and affairs of the corporation shall be managed by a Board of Trustees". These two provisions would be meaningless unless the *Hospital Act* is interpreted in accordance with the distinction between ultimate or extraordinary, and routine or regular control which I have described above.

sonnel médical, au contrôle du gouvernement. Au contraire, cela signifie que la responsabilité en ces matières, sous réserve d'une situation extraordinaire, relève du conseil d'administration du Vancouver General. On pourrait d'ailleurs affirmer qu'elle le reconnaît expressément, en ce qu'elle définit le terme [TRADUCTION] «conseil d'administration» comme [TRADUCTION] «les directeurs, gestionnaires, fiduciaires ou autre groupe de personnes ayant le contrôle et la gestion d'un hôpital» (art. 1). L'article 5 de la *Vancouver General Hospital Act* va dans le même sens puisqu'il prévoit que [TRADUCTION] «les biens et les affaires de la société sont gérés par un conseil d'administration». Ces deux dispositions seraient inutiles à moins que la *Hospital Act* ne soit interprétée conformément à la distinction entre les contrôles ultimes ou extraordinaires et les contrôles routiniers ou réguliers que j'ai déjà décrits.

To this, it may be objected that the Board of Trustees is itself an extension of the Minister of Health and an instrument of government policy. Such an objection could draw support from s. 2(1) of the *Hospital Act*, which imposes a duty on all hospitals to have the "bylaws or rules thought necessary by the minister for the administration and management of the hospital's affairs and the provision of a high standard of care and treatment for patients". It could also draw support from s. 32, which empowers the Minister to "require that the bylaws or rules of a hospital . . . be revised in a manner satisfactory to him in order to meet changing conditions and policies, and to provide for greater uniformity and efficiency in all matters concerning the administration and operation of hospitals". Finally, it could be said that the subservient status of the Board of Trustees is plainly indicated by s. 2(3), which gives the government what the Court of Appeal called an "unassailable right to appoint persons to the hospital management board". As the respondents point out, the government appoints 14 of the 16 members of the Vancouver General's Board of Trustees.

À cet argument, on peut opposer que le conseil d'administration est en soi une extension du ministre de la Santé et un instrument de la politique du gouvernement. Cette objection pourrait s'appuyer sur le par. 2(1) de la *Hospital Act*, qui impose à tous les hôpitaux l'obligation d'avoir [TRADUCTION] «des règlements ou des règles que le ministre estime nécessaires à l'administration et à la gestion des affaires de l'hôpital ainsi qu'à la prestation de soins et de traitements de première qualité». Elle pourrait également s'appuyer sur l'art. 32 qui confère au ministre le pouvoir [TRADUCTION] «d'exiger que les règlements ou règles d'un hôpital [. . .] soient examinés d'une manière qu'il estime satisfaisante en vue de répondre à des conditions et des politiques en évolution et d'apporter plus d'uniformité et d'efficacité dans les domaines relevant de l'administration et de l'exploitation des hôpitaux». Enfin, on pourrait dire que le rôle subordonné du conseil d'administration ressort clairement du par. 2(3), lequel accorde au gouvernement ce que la Cour d'appel qualifie de «droit absolu de nommer les personnes au conseil de gestion de l'hôpital». Comme les intimés le soulignent, le gouvernement nomme 14 des 16 membres du conseil d'administration du Vancouver General.

To this argument I would make the following rejoinders. First, I do not think the fact that the Board of Trustees can be required to adopt by-laws that are thought necessary by the Minister of Health can undermine its responsibility for by-laws or rules, such as Regulation 5.04, which it adopts on its own initiative and pursuant to its own sense of what is in the best interests of the Vancouver General. The same can be said with respect to the Minister's power to order a revision of a hospital's by-laws, at least until such revision has actually been ordered.

As to the Lieutenant Governor's power to appoint members of the Board, while it is true, as noted, that the hospital's by-laws provide for the appointment of fourteen members of the Board of Trustees by the Lieutenant Governor in Council, it then specifies that two are to be appointed from each of the lists of nominees submitted by the President of The University of British Columbia, the British Columbia Health Association and the Board of the Vancouver General itself. One is to be appointed from nominees submitted by the British Columbia Institute of Technology, while seven members are to be appointed "from the Community at large". What this shows, I think, is that the Lieutenant Governor's power of appointment is far less discretionary than the respondents contend. It also shows, especially when it is remembered that the two remaining members of the Board are the hospital's President and the Chairman of the hospital's Medical Advisory Committee, that no member of the Board sits as the representative of the Minister of Health or the government generally. Instead, each sits as a representative of one of the groups or organizations that have a direct interest in the Vancouver General and the service it provides. It is not going too far to say that the Lieutenant Governor's power of appointment is, in light of Article 2, simply a mechanism to ensure the balanced representation of these groups and organizations on the hospital's principal decision-making body. It is not a means for the exercise of regular government control over the day-to-day operations of the hospital. This

Je statuerais sur cet argument de la façon suivante. Premièrement, je ne crois pas qu'obliger le conseil d'administration à adopter des règlements que le ministre de la Santé estime nécessaires modifie sa responsabilité à l'égard des règlements ou des règles, comme le règlement 5.04, qu'il adopte de sa propre initiative et conformément à ce qu'il estime être les meilleurs intérêts du Vancouver General. On peut dire la même chose du pouvoir du ministre d'ordonner l'examen des règlements de l'hôpital, à tout le moins jusqu'à ce que cet examen soit effectivement ordonné.

Quant au pouvoir du lieutenant-gouverneur de nommer les membres du conseil d'administration, bien qu'il soit vrai, comme je l'ai déjà noté, que le règlement de l'hôpital prévoit la nomination de 14 membres du conseil d'administration par le lieutenant-gouverneur en conseil, il précise ensuite que deux membres doivent être nommés à partir de chacune des listes de candidats présentées respectivement par le président de l'Université de la Colombie-Britannique, la British Columbia Health Association et le conseil d'administration du Vancouver General lui-même. L'un des membres doit être nommé à partir des candidats présentés par le British Columbia Institute of Technology, alors que sept membres doivent provenir «de la collectivité en général». Je pense que cela signifie que le pouvoir de nomination du lieutenant-gouverneur est bien loin d'être aussi discrétionnaire que les intimés le prétendent. Cela indique également, surtout lorsqu'on se rappelle que les deux autres membres du conseil d'administration sont le président de l'hôpital et le président du conseil consultatif médical de l'hôpital, qu'aucun membre du conseil d'administration ne représente le ministre de la Santé ou le gouvernement en général. Chacun représente plutôt l'un des groupes ou des organismes qui ont un intérêt direct dans le Vancouver General et les services qu'il offre. Il n'est pas exagéré de dire que le pouvoir de nomination du lieutenant-gouverneur est simplement, compte tenu de l'art. 2, un mécanisme visant à assurer une représentation équilibrée de ces groupes et organismes au sein du principal organisme décisionnel de l'hôpital. Il ne s'agit pas d'un moyen permettant au gouvernement de contrôler régulièrement les activités quotidiennes de l'hôpital. Cette conclu-

conclusion is supported by the fact that under s. 2 of Article 2, appointments to the Board are for fixed terms.

On the basis of the foregoing, I would conclude that the appellant hospital does not form part of government within the meaning of s. 32 of the *Charter*. It follows that its actions in adopting and administering Regulation 5.04 do not fall within the ambit of the *Charter*. I would add that there can be no question of the Vancouver General's being held subject to the *Charter* on the ground that it performs a governmental function, for it follows from what I have said above that the provision of a public service, even if it is one as important as health care, is not the kind of function which qualifies as a governmental function under s. 32. The case differs in this respect from the cases of *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (Ont. H.C.), and *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.), assuming those cases to have been correctly decided. I would also add that this is not a case for the application of the *Charter* to a specific act of an entity which is not generally bound by the *Charter*. The only specific connection between the actions of the Vancouver General in adopting and applying Regulation 5.04 and the actions of the Government of British Columbia was the requirement that Regulation 5.04 receive ministerial approval. In light of what I have said above in regard to this requirement, a "more direct and a more precisely-defined connection", to borrow McIntyre J.'s phrase used in *Dolphin Delivery*, would have to be shown before I would conclude that the *Charter* applied on this ground.

Compte tenu de ce qui précède, je suis d'avis que l'hôpital appelant ne fait pas partie du gouvernement au sens de l'art. 32 de la *Charte*. Il s'ensuit que son adoption et son application du règlement 5.04 ne relèvent pas de la portée de la *Charte*. J'ajouterais qu'il ne peut être question que le Vancouver General soit assujetti à la *Charte* parce qu'il exerce une fonction gouvernementale, car il découle de ce que j'ai déjà dit que la prestation d'un service public, même s'il s'agit d'un service aussi important que les soins de santé, ne relève pas du genre de fonction que l'on peut qualifier de fonction gouvernementale en vertu de l'art. 32. À cet égard, cette affaire diffère des situations visées dans les décisions *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (H.C. Ont.), et *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489 (C. Div. Ont.), à supposer qu'elles soient bien fondées. J'ajouterais également qu'il ne s'agit pas d'une affaire où la *Charte* s'applique à une action précise d'un organisme qui n'est pas généralement lié par la *Charte*. Le seul lien précis entre les actions du Vancouver General relativement à l'adoption et à l'application du règlement 5.04 et les actions du gouvernement de la Colombie-Britannique était l'exigence selon laquelle le règlement 5.04 devait recevoir l'approbation du ministre. Compte tenu de ce que j'ai déjà dit au sujet de cette obligation, «un lien plus direct et mieux défini», pour reprendre les propos du juge McIntyre dans l'arrêt *Dolphin Delivery*, devrait être démontré pour m'inciter à conclure que la *Charte* s'applique à cet égard.

These conclusions are sufficient to dispose of this appeal in favour of the appellant hospital. However, as in *McKinney*, I shall also deal with the case on the assumption that the Vancouver General is a part of government and discuss the issue of whether Regulation 5.04 and the actions taken in its application violate s. 15 of the *Charter*.

Ces conclusions suffisent pour disposer du pourvoi en faveur de l'hôpital appelant. Cependant, comme dans l'arrêt *McKinney*, je vais également examiner l'affaire en supposant que le Vancouver General fait partie du gouvernement et analyser la question de savoir si le règlement 5.04 et les mesures prises pour l'appliquer violent l'art. 15 de la *Charte*.

Section 15 of the *Charter*

On the assumption that the Vancouver General is part of government within the meaning of s. 32, I now propose to deal with the question whether its policy of not renewing the admitting privileges of doctors who have reached the age of 65 unless they have "something unique to offer the hospital" violates s. 15 of the *Charter*.

In the first instance, the answer to this question depends on whether the alleged inequality is one made by "law". I think it obvious that Regulation 5.04, if made by government, would qualify as a law, and that it is unnecessary to explain its characterization as such at any great length. This is in this respect a much clearer case than *McKinney*, as there is no question in this case of the challenged conduct's being the outcome of negotiations with the representatives of those who claim a violation of their s. 15 rights. It is also clear that the "law" in question comprehends not just Regulation 5.04 alone, but the policy which is followed in its application to those who come within its terms as well. It would be incongruous if our entitlement to equality "before and under the law" and to the "equal protection and equal benefit of the law" did not reach the manner in which a law was interpreted and enforced by those charged with its operation. It will often be this process of interpretation and enforcement that determines the impact that a law has on the lives of those who come within its scope. These views accord with this Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, as well as with the remarks of Linden J. in *Re McCutcheon and City of Toronto*, *supra*, at p. 202. They also accord with the jurisprudence of the Supreme Court of the United States, in which it is clear that constitutional protection against discriminatory state action is not limited to the legislative context; see *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Roth v. United States*, 354 U.S. 476 (1957).

Having determined that Regulation 5.04 and the policy that the Board of Trustees adopted as a guide to its application come within the sphere of constitutional protection afforded by s. 15, the

L'article 15 de la *Charte*

En supposant que le Vancouver General fait partie du gouvernement au sens de l'art. 32, je vais maintenant examiner la question de savoir si sa politique de ne pas renouveler les privilèges d'admission des médecins qui ont atteint 65 ans à moins qu'ils n'aient «quelque chose d'unique à offrir à l'hôpital» viole l'art. 15 de la *Charte*.

Tout d'abord, pour répondre à cette question, il faut déterminer si l'inégalité reprochée découle d'une «loi». Je pense qu'il est évident que si le règlement 5.04 avait été adopté par le gouvernement, il serait considéré comme une loi, et il n'est pas nécessaire d'expliquer cette qualification en détail. À cet égard, il s'agit d'une affaire beaucoup plus claire que l'affaire *McKinney*, car en l'espèce la conduite contestée n'est pas le résultat de négociations avec les représentants de ceux qui prétendent que les droits que leur reconnaît l'art. 15 sont violés. Il est aussi clair que la «loi» en question ne comprend pas seulement le règlement 5.04 mais aussi la politique suivie en l'appliquant à ceux qui y sont assujettis. Il serait absurde que notre droit à l'égalité «devant la loi» et à «la même protection et au même bénéfice de la loi» ne comprenne pas la manière dont une loi est interprétée et appliquée par les responsables de son application. C'est souvent ce processus d'interprétation et d'application qui détermine les répercussions d'une loi sur la vie de ceux qu'elle vise. Ces opinions sont conformes à la décision de notre Cour dans l'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, ainsi qu'aux remarques du juge Linden dans la décision *Re McCutcheon and City of Toronto*, précité, à la p. 202. Elles sont également conformes à la jurisprudence de la Cour suprême des États-Unis, qui reconnaît clairement que la protection constitutionnelle contre l'action discriminatoire de l'État ne se restreint pas au contexte législatif; voir les arrêts *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Roth v. United States*, 354 U.S. 476 (1957).

Ayant conclu que le règlement 5.04 et la politique adoptée par le conseil d'administration comme guide pour son application relèvent de la protection constitutionnelle conférée par l'art. 15, la

question becomes whether they are discriminatory in light of this Court's decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. As in the case of the university policies of mandatory retirement considered in *McKinney*, I think it would be difficult to argue that they are not. They make a distinction based on age, one of the personal characteristics enumerated in s. 15(1). It is a distinction which is clearly discriminatory within the test set out by this Court in *Andrews*. In this regard, the following statement, taken from the reasons of McIntyre J., at pp. 174-75, is representative of the Court's reasoning:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

There is no doubt that Regulation 5.04 and the associated policy of the Vancouver General's Board of Trustees impose a burden on doctors who practise at the hospital and who have turned 65 which is not imposed on their colleagues of a younger age. The evidence shows that for most of the respondents, the hospital's refusal to renew their admitting privileges will mean that they will have to drastically curtail their practices. For some, it will mean the end of their practices. In short, Regulation 5.04 as applied by the Board of Trustees will mean that the respondents are being forced either into partial or full retirement. The loss this can entail for a person's physical and psychological well-being is serious. In *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, employment was described in the following terms, at p. 368:

question est de savoir s'ils sont discriminatoires compte tenu de la décision de notre Cour dans l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143. Comme c'est le cas pour les politiques de retraite obligatoire des universités qui ont été examinées dans l'arrêt *McKinney*, je pense qu'il serait très difficile de prétendre qu'ils ne le sont pas. Ils établissent une distinction fondée sur l'âge, l'une des caractéristiques personnelles énumérées au par. 15(1). Il s'agit d'une distinction clairement discriminatoire au sens du critère formulé par notre Cour dans l'arrêt *Andrews*. À cet égard, l'affirmation suivante, tirée des motifs du juge McIntyre, aux pp. 174 et 175, illustre le raisonnement de la Cour:

> J'affirmerais alors que la discrimination peut se décrire comme une distinction, intentionnelle ou non, mais fondée sur des motifs relatifs à des caractéristiques personnelles d'un individu ou d'un groupe d'individus, qui a pour effet d'imposer à cet individu ou à ce groupe des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux possibilités, aux bénéfices et aux avantages offerts à d'autres membres de la société. Les distinctions fondées sur des caractéristiques personnelles attribuées à un seul individu en raison de son association avec un groupe sont presque toujours taxées de discriminatoires, alors que celles fondées sur les mérites et capacités d'un individu le sont rarement.

Il n'y a pas de doute que le règlement 5.04 et la politique du conseil d'administration du Vancouver General qui en découle imposent aux médecins qui pratiquent à l'hôpital et qui ont atteint 65 ans un fardeau qui n'est pas imposé à leurs collègues plus jeunes. La preuve indique que, pour la plupart des intimés, le refus de l'hôpital de renouveler leurs privilèges d'admission signifie qu'ils devront restreindre de manière draconienne l'exercice de leur profession. Pour certains, cela signifie la fin de leur pratique médicale. En résumé, le règlement 5.04, tel qu'il est appliqué par le conseil d'administration, impose aux intimés une retraite partielle ou complète. Les répercussions qu'entraîne cette politique sur le bien-être physique et psychologique d'un individu sont graves. Dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, on a décrit le travail de la façon suivante, à la p. 368:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

McDougal, Lasswell and Chen, *Human Rights and World Public Order* (1980), have described the "traumatic impact of the sudden loss of accustomed roles, precipitated by involuntary retirement" (p. 781). The effect of Regulation 5.04 and the associated policy of the Board of Trustees is to impose these deprivations on the basis of a personal characteristic attributed to individuals solely because of his association with a group, that is, those over 65. They are for that reason discriminatory within the meaning of s. 15(1) of the *Charter*.

The argument of the appellants respecting this branch of the case was essentially that there was no discrimination because Regulation 5.04 and the policy decision under which it was implemented were reasonable having regard to the purposes they were designed to serve. In this regard, counsel drew our attention to the testimony of various expert witnesses who appeared at trial regarding the effect of age on a doctor's capabilities. He also drew attention to what he described as the "institutional concerns" of the Vancouver General, which he argued Regulation 5.04 addressed. These were: the need to control the size of the medical staff in order to foster the staff cohesiveness that was essential to the hospital's team approach to the provision of medical treatment, the role which a regular turnover in staff played in keeping the hospital at the leading edge of research and acute care technique, and the need to ensure that the hospital's limited resources were made available to those who could make most efficient and productive use of them. These various concerns, he maintained, were especially important in the case of the Vancouver General given its role and responsibilities as a research, teaching and acute care institution. Together with the evidence as to the effects of aging, he added, they showed that the actions of the hospital in adopting and applying Regulation

Le travail est l'un des aspects les plus fondamentaux de la vie d'une personne, un moyen de subvenir à ses besoins financiers et, ce qui est tout aussi important, de jouer un rôle utile dans la société. L'emploi est une composante essentielle du sens de l'identité d'une personne, de sa valorisation et de son bien-être sur le plan émotionnel.

McDougall, Lasswell et Chen dans leur ouvrage, *Human Rights and World Public Order* (1980), ont décrit les [TRADUCTION] «répercussions traumatisantes de la perte subite des rôles habituels, précipitées par une retraite forcée» (p. 781). L'effet du règlement 5.04 et de la politique du conseil d'administration qui en découle est d'imposer ces privations en fonction d'une caractéristique personnelle attribuée aux individus en raison seulement de leur appartenance à un groupe, c'est-à-dire, à celui des gens âgés de plus de 65 ans. Ils sont pour cette raison discriminatoires au sens du par. 15(1) de la *Charte*.

L'argument des appelants concernant cet aspect de l'affaire est essentiellement qu'il n'y a pas discrimination parce que le règlement 5.04 et la décision de politique en vertu de laquelle il a été appliqué sont raisonnables compte tenu des fins qu'ils visent. À cet égard, l'avocat des appelants a attiré notre attention sur le témoignage de divers témoins experts qui ont comparu à l'audience concernant l'effet de l'âge sur les aptitudes d'un médecin. Il a également attiré notre attention sur ce qu'il a décrit comme les [TRADUCTION] «préoccupations institutionnelles» du Vancouver General qu'il prétendait être visées par le règlement 5.04. Ces préoccupations sont: la nécessité de contrôler la taille du personnel médical pour favoriser sa cohésion, qui est essentielle à la pratique de l'hôpital de s'adresser à des équipes dans la prestation des traitements médicaux, le rôle qu'un changement régulier de personnel joue pour permettre à l'hôpital d'être à la fine pointe de la recherche et des techniques de soins de courte durée, et la nécessité de voir à ce que les ressources limitées de l'hôpital soient mises à la disposition de ceux qui peuvent en faire l'usage le plus efficace et le plus productif. Selon lui, ces diverses préoccupations sont particulièrement importantes dans le cas du Vancouver General compte tenu de son rôle et de ses responsabilités comme institution de recherche,

5.04 were entirely reasonable. From this it followed that the respondents had not been discriminated against.

The problem with this argument can be quickly stated; it confuses the question of whether discrimination has taken place with that of whether the discrimination is "demonstrably justified in a free and democratic society". The evidence and "institutional concerns" referred to address the latter question and, as such, fall to be considered under s. 1 of the *Charter*. They do not go to the question of whether or not there has been a violation of s. 15(1). Accordingly, I now turn to s. 1.

Section 1 of the *Charter*

General

As noted in *McKinney*, this Court first set out a detailed approach for the application of s. 1 in *R. v. Oakes*, *supra*. The onus of justifying a limitation to a *Charter* right rests on the parties seeking to uphold the limitation. The starting point of the inquiry is an assessment of the objectives of the law to determine whether they are sufficiently important to warrant the limitation of a constitutional right. The challenged law is then subjected to a proportionality test in which the objective of the impugned law is balanced against the nature of the right it violates, the extent of the infringement and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society.

As this Court recently pointed out in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, and as I reiterated in *McKinney*, this balancing task should not be approached in a mechanistic fashion. At pages 1489-90 of *Cotroni*, it was said that "While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a par-

de formation et de soins de courte durée. Il a ajouté que ces préoccupations, jointes à la preuve sur les effets du vieillissement, indiquent que les actions de l'hôpital dans l'adoption et l'application du règlement 5.04 sont tout à fait raisonnables. Il s'ensuit donc que les intimés n'ont pas été victimes de discrimination.

Le problème que soulève cet argument peut être rapidement formulé; il confond la question de savoir s'il y a eu discrimination avec celle de savoir si la discrimination peut se justifier «dans une société libre et démocratique». La preuve et les [TRADUCTION] «préoccupations institutionnelles» mentionnées portent sur cette dernière question et, comme telles, doivent être considérées en vertu de l'article premier de la *Charte*. Elles ne répondent pas à la question de savoir s'il y a eu violation du par. 15(1). Par conséquent, j'examine maintenant l'article premier.

L'article premier de la *Charte*

Généralités

Comme je l'ai souligné dans l'arrêt *McKinney*, c'est dans l'arrêt *R. c. Oakes*, précité, que notre Cour a présenté pour la première fois un mode détaillé d'application de l'article premier. L'obligation de justifier la limite apportée à un droit reconnu par la *Charte* incombe aux parties qui veulent la maintenir. Le point de départ de l'analyse consiste à évaluer les objectifs de la loi pour déterminer s'ils sont suffisamment importants pour justifier la limitation du droit garanti par la Constitution. La loi contestée est ensuite assujettie à un critère de proportionnalité où l'objectif de cette loi est soupesé en fonction de la nature du droit, de l'étendue de sa violation et de la mesure dans laquelle la limite apportée favorise d'autres droits ou politiques importants dans une société libre et démocratique.

Comme notre Cour l'a récemment affirmé dans l'arrêt *États-Unis d'Amérique c. Cotroni*, [1989] 1 R.C.S. 1469, et comme je l'ai répété dans l'arrêt *McKinney*, cette tâche ne devrait pas être envisagée d'une manière mécaniste. Aux pages 1489 et 1490 de l'arrêt *Cotroni*, on a dit que «[b]ien qu'il faille accorder priorité dans l'équation aux droits garantis par la *Charte*, les valeurs sous-jacentes

ticular context against other values of a free and democratic society sought to be promoted by the legislature". Early in the development of the balancing test, Dickson C.J. underlined this point by stating: "Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards". See *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 768-69. I elaborated on this in the specific context of s. 15(1) in the following passage from *Andrews v. Law Society of British Columbia*, *supra*, at p. 198:

> The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes. The matter must, as earlier cases have held, involve a test of proportionality. In cases of this kind, the test must be approached in a flexible manner. The analysis should be functional, focussing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.

As in *McKinney*, it is important in considering the issues raised by a case like the present to note that judicial evaluation of the state's interest will differ depending on whether the state is the "singular antagonist" of the person whose rights have been violated, as it usually will be where the violation occurs in the context of the criminal law, or whether it is instead defending legislation or other conduct concerned with "the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources". See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 994. In the former situation, the courts will be able to determine whether the impugned law or other government conduct is the "least drastic means" for the achievement of the state interest with a considerable measure of certainty, given their familiarity with the values and operation of the criminal justice system and the

doivent être, dans un contexte particulier, évaluées délicatement en fonction d'autres valeurs propres à une société libre et démocratique que le législateur cherche à promouvoir». Au début de la formulation de ce critère d'évaluation, le juge en chef Dickson a souligné que «[t]ant dans son élaboration de la norme de preuve que dans sa description des critères qui comprennent l'exigence de proportionnalité, la Cour a pris soin d'éviter de fixer des normes strictes et rigides. Voir l'arrêt *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, aux pp. 768 et 769. Dans le contexte particulier du par. 15(1), j'ai précisé ce point dans l'extrait suivant de l'arrêt *Andrews c. Law Society of British Columbia*, précité, à la p. 198:

> Il n'est pas facile de vérifier jusqu'à quel point une société libre et démocratique comme le Canada devrait tolérer la différenciation fondée sur des caractéristiques personnelles. Il y aura rarement, si jamais il peut y en avoir, de correspondance parfaite entre les moyens et les fins sauf si la loi a des objectifs discriminatoires. Comme il ressort de décisions antérieures, un critère de proportionnalité doit jouer. Dans des cas comme celui-ci, le critère doit être abordé d'une manière souple. L'analyse devrait être pratique et porter sur la nature de la classification en question, l'importance des intérêts lésés sur les plans de la Constitution et de la société, l'importance relative que revêt pour les individus touchés l'avantage dont ils sont privés et l'importance de l'intérêt de l'État.

Comme je l'ai souligné dans l'arrêt *McKinney*, il est important dans l'examen des questions soulevées par une affaire comme celle-ci de souligner que l'appréciation judiciaire de l'intérêt de l'État différera selon que l'État est «l'adversaire singulier» de la personne dont les droits ont été violés, comme ce sera habituellement le cas lorsque la violation se produit dans le contexte du droit criminel, ou selon qu'il cherche plutôt à défendre une loi ou une autre conduite portant sur «la conciliation de revendications contraires de groupes ou d'individus ou la répartition de ressources gouvernementales limitées»: voir l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, à la p. 994. Dans le premier cas, les tribunaux pourront déterminer avec un certain degré de certitude si la loi contestée ou toute autre conduite gouvernementale fait appel aux «moyens les moins radicaux» pour atteindre l'objectif de l'État,

judicial system generally. As this Court has noted in *Irwin Toy*, however, the same degree of certainty may not be achievable in the latter situation.

I now turn to the objectives of the "law" at hand.

Objectives

Given that counsel for the appellants addressed his arguments as to the reasonableness of Regulation 5.04 and the policy under which it was applied to the question of whether there was discrimination within the meaning of s. 15 of the *Charter*, he did not specifically define their underlying objectives for the purposes of a s. 1 analysis. He did, however, enumerate the "institutional concerns" which he said the Board of Trustees hoped to address through the adoption of Regulation 5.04. These consisted of the need to limit the growth of the hospital's staff to take account of budgetary and resource limitations under which the Vancouver General must operate, the desire to limit the size of staff so as to encourage and preserve a cohesive staff capable of taking a team approach to the practice of medicine, and the need to make some of the hospital's staff positions and resources available to younger doctors recently trained in the latest approaches to medical practice.

It is this final "institutional concern" which points towards what I regard to be the fundamental objective of Regulation 5.04 and the policy that was adopted with respect to its application. In this respect, Regulation 5.04 is akin to the policies of mandatory retirement considered in *McKinney*. Just as those policies were directed toward the achievement of excellence in the universities' pursuit of higher learning, Regulation 5.04 and its attendant policy were intended to maintain and enhance the quality of medical care the Vancouver General is capable of providing. They were, in a word, intended to promote excellence in the hospital's pursuit of its mandate as a centre of medical

compte tenu de leur connaissance des valeurs et du fonctionnement du système de justice criminelle et du système judiciaire en général. Cependant, comme notre Cour l'a souligné dans l'arrêt *Irwin Toy*, il ne sera peut-être pas possible d'atteindre le même degré de certitude dans le second cas.

J'examine maintenant les objectifs de la «loi» en question.

Les objectifs

Puisque les arguments de l'avocat des appelants quant au caractère raisonnable du règlement 5.04 et de la politique en vertu de laquelle ce dernier a été appliqué ont porté sur la question de savoir s'il y avait discrimination au sens de l'art. 15 de la *Charte*, il n'a pas défini précisément leurs objectifs sous-jacents aux fins d'un examen fondé sur l'article premier. Il a cependant énuméré les [TRADUCTION] «préoccupations institutionnelles» que, selon lui, le conseil d'administration avait à l'esprit en adoptant le règlement 5.04. Font partie de ces préoccupations la nécessité de restreindre l'accroissement du personnel de l'hôpital pour tenir compte des restrictions en matière de budget et de ressources en vertu desquelles le Vancouver General doit fonctionner, la volonté de restreindre la taille du personnel pour encourager et maintenir la cohésion d'un personnel capable de pratiquer la médecine dans un esprit d'équipe, et la nécessité d'offrir aux jeunes médecins récemment formés selon les dernières techniques médicales certains des postes et des ressources de l'hôpital.

C'est cette dernière «préoccupation institutionnelle» qui porte sur ce que j'estime être l'objectif fondamental du règlement 5.04 et de sa politique d'application. À cet égard, le règlement 5.04 est semblable aux politiques de retraite obligatoire examinées dans l'arrêt *McKinney*. Tout comme ces politiques faisaient partie de la recherche de l'excellence dans les universités en matière de haut savoir, le règlement 5.04 et la politique qui s'y rattache visaient à maintenir et à promouvoir la qualité des soins médicaux que pouvait offrir le Vancouver General. Bref, ils faisaient partie de la recherche de l'excellence par l'hôpital dans le cadre de son mandat comme centre de recherche et

research and teaching and as the major acute care hospital in the Province of British Columbia.

I have little doubt that this objective meets the "objectives test" as it has been developed in the jurisprudence; it is an objective that warrants the overriding of constitutional guarantees, provided it can satisfy the other requirements of the s. 1 test. Excellence in the practice of medicine and the provision of hospital services is certainly a highly important goal, one that produces obvious social benefits. It is crucial in this regard to emphasize the special responsibilities that devolve upon the Vancouver General by virtue of its mandate as the major acute care hospital in the Province with its extensive involvement in teaching and research. From this it is fair to assume that the specialized care it provides is beyond the capabilities of most, if not all, the other hospitals in the Province. Consequently, the ability of people in all parts of the Province to obtain high quality medical care when they most seriously require it may be said to depend on the quality of treatment available at the Vancouver General. Just as importantly, the teaching and research function carried out at the hospital is crucial to the future availability of competent and well-trained doctors in every part of the Province.

Accordingly, having determined that a pressing and substantial government objective lies behind Regulation 5.04 and its attendant policy, I turn to the question whether the Regulation and policy are appropriate or proportionate to the objective they seek to promote.

Proportionality

As Dickson C.J. stated in *R. v. Edwards Books and Art Ltd.*, *supra*, a three-step approach to the question of proportionality as between objectives and means is ordinarily to be followed. He set out this approach, at p. 768 of his judgment, where he stated:

de formation médicales et comme principal hôpital de soins de courte durée dans la province de la Colombie-Britannique.

Je ne doute pas que cet objectif réponde au [TRADUCTION] «critère des objectifs» tel qu'il a été formulé dans la jurisprudence; il s'agit d'un objectif qui justifie la suppression de garanties constitutionnelles, pourvu qu'il satisfasse aux autres exigences du critère de l'article premier. L'excellence dans la pratique de la médecine et dans la prestation des services médicaux constitue certainement un objectif très important qui apporte évidemment des avantages à la société. Il est capital à cet égard de souligner les responsabilités particulières qui incombent au Vancouver General en raison de son mandat comme principal hôpital de soins de courte durée dans la province et de sa participation importante en matière de formation et de recherche. Il est donc juste de présumer que les soins spécialisés qu'il offre dépassent les possibilités de la plupart des autres hôpitaux de la province, sinon de tous. Par conséquent, on peut dire que la possibilité pour les gens de toutes les régions de la province d'obtenir des soins médicaux de grande qualité lorsqu'ils en ont le plus besoin dépend de la qualité des traitements qu'offre le Vancouver General. Et de façon toute aussi importante, la formation et la recherche assurées par l'hôpital sont essentielles pour que chaque région de la province ait à l'avenir des médecins compétents et bien formés.

Par conséquent, ayant déterminé que le règlement 5.04 et la politique qui s'y rattache constituent un objectif gouvernemental urgent et important, je vais maintenant déterminer si le règlement et sa politique sont appropriés ou proportionnels à l'objectif qu'ils visent à promouvoir.

La proportionnalité

Comme le juge en chef Dickson l'a formulé dans l'arrêt *R. c. Edwards Books and Art Ltd.*, précité, il faut habituellement suivre une démarche en trois étapes pour déterminer si les mesures appliquées sont proportionnelles aux objectifs fixés. Il a établi cette démarche dans ses motifs, à la p. 768, lorsqu'il a affirmé:

Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

I will now consider the case at bar in light of each of these "aspects" of the proportionality requirement: rationality, minimal impairment and deleterious effects, or as it has sometimes been referred to, overall proportionality.

Rationality

Regulation 5.04 and the policy under which it was applied have much the same relation to the Vancouver General's pursuit of excellence in the provision of medical treatment and medical teaching and research as was found to exist in *McKinney*, *supra*, between a policy of mandatory retirement and the pursuit of academic excellence in universities. It allows for regular staff renewal and the intellectual invigoration that flows from it. What I had to say in *McKinney*, at p. 284, with respect to the case of universities seems, with slight modification, applicable here:

> Mandatory retirement not only supports the tenure system which undergirds the specific and necessary ambience of university life. It ensures continuing faculty renewal, a necessary process to enable universities to be centres of excellence. Universities need to be on the cutting edge of new discoveries and ideas, and this requires a continuing infusion of new people. In a closed system with limited resources, this can only be achieved by departures of other people. Mandatory retirement achieves this in an orderly way that permits long-term planning both by the universities and the individual. [Emphasis in original.]

Leaving aside the reference to the system of academic tenure for the moment, I think a similar analysis can be made of Regulation 5.04 and its associated policy of implementation. For obvious

En second lieu, les moyens choisis pour atteindre ces objectifs doivent être proportionnels ou appropriés à ces fins. La proportionnalité requise, à son tour, comporte normalement trois aspects: les mesures restrictives doivent être soigneusement conçues pour atteindre l'objectif en question, ou avoir un lien rationnel avec cet objectif; elles doivent être de nature à porter le moins possible atteinte au droit en question et leurs effets ne doivent pas empiéter sur les droits individuels ou collectifs au point que l'objectif législatif, si important soit-il, soit néanmoins supplanté par l'atteinte aux droits.

Je vais maintenant examiner l'espèce en fonction de chacun de ces «aspects» du critère de proportionnalité: le lien rationnel, l'atteinte minimale et les effets préjudiciables ou, comme on l'indique parfois, la proportionnalité générale.

La rationalité

Le règlement 5.04 et sa politique d'application ont sensiblement le même lien avec la recherche de l'excellence par le Vancouver General en matière de traitements médicaux, de recherche et de formation en matière médicale que celui qui existe dans l'arrêt *McKinney*, précité, entre une politique de retraite obligatoire et la recherche de l'excellence en matière d'enseignement dans les universités. Ce rapport permet le renouvellement régulier du personnel et l'apport intellectuel qui en découle. Ce que j'ai dit dans l'arrêt *McKinney*, à la p. 284, dans le cas des universités semble s'appliquer en l'espèce avec de légères modifications:

> La retraite obligatoire ne justifie pas seulement le système de la permanence qui détermine l'ambiance particulière et essentielle de la vie universitaire. Elle assure le renouvellement continu des membres du corps professoral, un processus nécessaire pour permettre aux universités d'être des centres d'excellence. Les universités doivent être à la fine pointe des découvertes et des nouvelles idées, et cela exige l'injection permanente de nouvelles ressources humaines. Dans un système fermé ayant des ressources limitées, on ne peut y parvenir qu'avec le départ d'autres personnes. La retraite obligatoire réalise cela d'une façon méthodique qui permet une planification à long terme tant par les universités que par l'individu. [Souligné dans l'original.]

Mettant de côté pour l'instant la question du système de la permanence, je pense qu'on peut faire un examen semblable du règlement 5.04 et de la politique d'application qui s'y rattache. Pour des

reasons, hospitals as much as universities, "need to be on the cutting edge of new discoveries and ideas". If anything, it is even more important that hospitals remain fully apprised of the latest developments, given that human life and health may depend upon it, and that developments in medical knowledge and method occur at such a rapid pace. These rather trite observations, which apply to hospitals generally, are especially pertinent in the case of a hospital concerned with the provision of the kind of sophisticated and specialized treatment that is the responsibility of the Vancouver General. They also apply with special force to a hospital which, like the Vancouver General, carries out an important research and teaching function.

raisons évidentes, les hôpitaux, tout comme les universités, «doivent être à la fine pointe des découvertes et des nouvelles idées». Il serait même plus important que les hôpitaux soient toujours au courant des progrès les plus récents, puisque la vie et la santé humaines peuvent en dépendre et que les découvertes en matière de savoir médical et de techniques médicales progressent à un rythme si rapide. Ces remarques plutôt évidentes, qui s'appliquent aux hôpitaux en général, sont particulièrement pertinentes dans le cas d'un hôpital qui offre le genre de soins délicats et spécialisés dont est responsable le Vancouver General. Elles s'appliquent également avec une rigueur particulière à un hôpital comme le Vancouver General qui exerce des fonctions de recherche et de formation importantes.

It is equally obvious that hospitals are like universities in that their ability to remain abreast of new discoveries and ideas "requires a continuing infusion of new people". More particularly, and as was recognized by the courts below, it depends on their ability to regularly make room on their staffs for younger doctors who, by virtue of their recent training, are fully conversant with the latest theories, discoveries and techniques. And since hospitals are, as much as universities, a "closed system with limited resources", this regular infusion with the vitality and perspective of the young can only be achieved by the corresponding departure of some of those already on staff. I note in this respect the submission of counsel for the appellants to the effect that the resource limitations under which the Vancouver General must operate was one of the "institutional concerns" motivating the adoption of Regulation 5.04 and the actions taken in respect of its implementation.

Il est de même évident que les hôpitaux sont comme les universités en ce que leur capacité de se maintenir à la fine pointe des découvertes et des nouvelles idées «exige le concours permanent de nouveaux membres». Elle dépend plus particulièrement, comme l'ont reconnu les tribunaux d'instance inférieure, de leur capacité d'accueillir régulièrement au sein de leur personnel des jeunes médecins qui, en raison de leur formation récente, sont pleinement au courant des dernières théories, découvertes et techniques. Et comme les hôpitaux sont tout autant que les universités un «système fermé ayant des ressources limitées», cet apport régulier que fournissent les jeunes avec leur vitalité et leurs idées ne peut être réalisé que par le départ concomitant de certains des membres qui font déjà partie du personnel. Je souligne à cet égard la prétention de l'avocat des appelants que les ressources limitées en vertu desquelles le Vancouver General doit fonctionner faisaient partie des «préoccupations institutionnelles» à l'origine de l'adoption du règlement 5.04 et des mesures prises pour son application.

So viewed, I think it clear that Regulation 5.04 and the policy under which it was applied are "rationally connected" to the objective that lies behind them. Together they ensure that staff positions for younger doctors will regularly become available as members of the existing staff reach the age of 65. It is valuable in this respect to think

Vu sous cet angle, je pense qu'il est clair que le règlement 5.04 et sa politique d'application ont «un lien rationnel» avec l'objectif qui les sous-tend. Ensemble, ils permettent aux jeunes médecins d'occuper des postes de façon régulière au fur et à mesure que les membres du personnel actuel atteindront 65 ans. Il est utile à cet égard d'envisa-

of a staff position at the Vancouver General or any other hospital as a resource which is allocated through decisions as to the granting, renewal or non-renewal of admitting privileges. The resource is "scarce" in that it does not expand at a rate proportionate with the growth in the medical profession. It follows that it will not be allocated to those younger doctors who are needed on staff if a hospital is to remain "on the cutting edge of new discoveries and ideas", unless it is regularly and predictably relinquished by some of those who already have possession of it. Regulation 5.04 ensures that this will occur.

To the above I would add that Regulation 5.04 and its attendant policy are "rationally connected" to their underlying objective in an even more direct fashion. For they ensure not only that room is made on staff for younger and recently trained doctors, but also that it is made by the departure from staff of those who, by reason of advancing age, will be increasingly unable to function at the high level the Vancouver General must demand of its doctors. Common experience teaches that there will be considerable variety between individuals as to the rate at which the skills and aptitudes essential to the practice of medicine deteriorate. But it also teaches, and the evidence broadly confirms, that as a general rule such deterioration will accelerate as a person enters the later stages of life. It follows that a rule, which provides for the retirement of doctors before such deterioration will normally undermine their ability to function as full and competent members of medical staff, is "rationally connected" to the determination of the Vancouver General to provide hospital care and medical instruction conforming to the highest standards of professional competence and expertise.

Minimal Impairment

In approaching the question whether Regulation 5.04 and the policy by which it was implemented violated the respondents' s. 15 rights "as little as possible", I would reiterate what I have said above regarding the special considerations that apply in cases concerned with measures that relate directly

ger un poste au Vancouver General ou à tout autre hôpital comme une ressource offerte à la suite de la décision d'accorder ou de renouveler ou non des privilèges d'admission. La ressource est «limitée» en ce qu'elle ne peut augmenter de manière proportionnelle à l'accroissement du personnel médical. Il s'ensuit qu'elle ne sera pas offerte aux jeunes médecins dont un hôpital a besoin pour demeurer «à la fine pointe des découvertes et des nouvelles idées», à moins que certains de ceux qui en jouissent déjà n'y renoncent régulièrement et de manière prévisible. Le règlement 5.04 fait en sorte qu'il en sera ainsi.

À ce qui précède, j'ajouterais que le règlement 5.04 et la politique qui s'y rattache ont un «lien rationnel» avec leur objectif sous-jacent d'une manière encore plus directe. En effet, grâce à eux non seulement des places seront-elles accordées aux jeunes médecins récemment formés, mais encore elles s'offriront à la suite du départ de membres du personnel qui, en raison de leur âge, seront de moins en moins capables de faire preuve de la haute compétence que le Vancouver General attend de ses médecins. L'expérience de tous les jours montre que le rythme de détérioration des compétences et des aptitudes essentielles à la pratique de la médecine varie considérablement d'un individu à l'autre. Mais elle enseigne également, et la preuve le confirme généralement, qu'en règle générale cette détérioration s'accentuera lorsqu'une personne atteindra les dernières étapes de sa vie. Il s'ensuit qu'une règle qui prévoit la retraite des médecins avant que cette détérioration porte normalement atteinte à leur capacité de fonctionner pleinement et de manière compétente comme membres du personnel médical, a «un lien rationnel» avec la volonté du Vancouver General d'offrir des soins de santé et une formation médicale conformes aux normes les plus élevées de la compétence et de l'expertise professionnelles.

L'atteinte minimale

Pour aborder la question de savoir si le règlement 5.04 et sa politique d'application violent «le moins possible» les droits que reconnaît l'art. 15 aux intimés, je répéterais ce que j'ai déjà dit au sujet des considérations particulières applicables aux mesures qui portent directement sur la réparti-

to the allocation of resources or that attempt to strike a balance between competing social groups. In such cases, neither the experience of judges nor the institutional limitations of judicial decision making prepares a court to make a precise determination as to where the balance between legislative objective and the protection of individual or group rights and freedoms is to be drawn. As the majority of this Court observed in *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, at p. 993:

> ... in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck.

Accordingly, it is only appropriate that the courts have exhibited considerable flexibility in assessing legislation of this sort through the lens of s. 1 of the *Charter*. That is so not only out of recognition of the difficulty of the choice that has to be made but also because such legislation impacts on many different and interrelated aspects of society and government policy. It is also because there are inherent advantages in a democratic society of having representative institutions deal with matters such as the division of scarce social resources between competing groups. This was expressly recognized in *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*. There the majority put it this way, at pp. 993-94:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or

tion des ressources ou qui tentent d'établir un équilibre entre les revendications contraires de groupes concurrents. Dans ces cas, ni l'expérience des juges ni les restrictions institutionnelles du processus décisionnel judiciaire ne préparent un tribunal à déterminer précisément le point d'équilibre entre l'objectif du législateur et la protection des droits et libertés d'un individu ou d'un groupe. Comme les juges de notre Cour, à la majorité, l'ont souligné dans l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, précité, à la p. 993:

> ... en faisant correspondre les moyens et les fins, et en se demandant s'il a été porté le moins possible atteinte aux droits ou aux libertés, le législateur en arbitrant entre les revendications de groupes concurrents, sera encore obligé de trouver le point d'équilibre sans pouvoir être absolument certain d'où il se trouve.

Par conséquent, il sied donc que les tribunaux aient fait preuve d'une très grande souplesse dans l'examen d'une loi de ce genre en fonction de l'article premier de la *Charte*. Il en est ainsi non seulement parce que les tribunaux reconnaissent qu'il est difficile de faire un choix, mais également parce que cette loi a des répercussions sur des aspects très différents et reliés de la société et de la politique du gouvernement. Il en est également ainsi parce que dans une société démocratique il y a des avantages inhérents à laisser aux institutions représentatives le soin de traiter de questions comme le partage de ressources sociales limitées entre des groupes concurrents. On l'a reconnu expressément dans l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, précité. Voici comment les juges de la majorité se sont exprimés, aux pp. 993 et 994:

> Pour trouver le point d'équilibre entre des groupes concurrents, le choix des moyens, comme celui des fins, exige souvent l'évaluation de preuves scientifiques contradictoires et de demandes légitimes mais contraires quant à la répartition de ressources limitées. Les institutions démocratiques visent à ce que nous partagions tous la responsabilité de ces choix difficiles. Ainsi, lorsque les tribunaux sont appelés à contrôler les résultats des délibérations du législateur, surtout en matière de protection de groupes vulnérables, ils doivent garder à l'esprit la fonction représentative du pouvoir législatif. Par exemple «en réglementant une industrie ou un commerce, il est loisible au législateur de limiter sa réforme législative

to constituencies that seem especially needy" (*Edwards Books and Art Ltd.*, *supra*, at p. 772).

In short, as the Court went on to say, the question is whether the hospital authorities had a reasonable basis for concluding that it impaired the relevant right as little as possible in its attempts to achieve its pressing and substantial objectives. The following statement from *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, at p. 994, regarding the limitation of freedom of expression that was there in question is of general application:

> In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective. [Emphasis added.]

Returning to the case at bar, it follows from what I have said that Regulation 5.04 and its attendant policy attempt to strike a balance between young doctors seeking to commence a practice and doctors who have been engaged in practice for some time. It seeks to strike a balance with respect to their mutual demand for access to the resource that is the *sine qua non* of a full medical practice, a position on a hospital medical staff. Remembering that the courts are not to attempt an artificial precision in assessing whether "the correct balance" has been struck, I would nevertheless suggest that the Board of Trustees of the Vancouver General had a "reasonable basis" for concluding that Regulation 5.04 and the policy by which it was applied impaired respondents' rights of equality "as little as possible" given its pressing and substantial objective.

In my view, the Board was amply justified, given the current climate of budgetary restraint pervasive in the public sector, in concluding that its ability to bring new doctors on staff depended on the timely retirement of some of those already

à des secteurs où il semble y avoir des préoccupations particulièrement urgentes ou à des catégories où cela semble particulièrement nécessaire» (*Edwards Books and Art Ltd.*, précité, à la p. 772).

En résumé, comme la Cour l'a affirmé par la suite, la question est de savoir si les responsables de l'hôpital étaient raisonnablement fondés à conclure qu'ils portaient le moins possible atteinte au droit visé dans la poursuite de leurs objectifs urgents et réels. L'extrait suivant de l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, précité, à la p. 994, concernant la restriction de la liberté d'expression dont il était question dans cet arrêt est d'application générale:

> En l'espèce, la Cour est appelée à évaluer des preuves contradictoires, qui relèvent des sciences humaines, quant aux moyens appropriés de faire face au problème de la publicité destinée aux enfants. La question est de savoir si le gouvernement était raisonnablement fondé, compte tenu de la preuve offerte, à conclure qu'interdire toute publicité destinée aux enfants portait le moins possible atteinte à la liberté d'expression étant donné l'objectif urgent et réel que visait le gouvernement. [Je souligne.]

Pour en revenir aux faits de l'espèce, il découle de ce que j'ai dit que le règlement 5.04 et sa politique d'application tentent d'établir un équilibre entre les jeunes médecins qui veulent commencer à pratiquer et les médecins qui pratiquent depuis déjà un certain temps. Le règlement tente d'établir un équilibre entre leur demande mutuelle d'accès à une ressource essentielle à une pleine pratique médicale, soit un poste au sein du personnel médical de l'hôpital. Me rappelant que les tribunaux ne doivent pas tenter d'atteindre une précision artificielle pour déterminer si «l'équilibre approprié» a été établi, je suis toutefois d'avis que le conseil d'administration du Vancouver General était «raisonnablement fondé» à conclure que le règlement 5.04 et sa politique d'application portaient «le moins possible atteinte» aux droits à l'égalité des intimés compte tenu de son objectif urgent et réel.

À mon avis, le conseil était amplement justifié, compte tenu du climat actuel de restrictions budgétaires dans le secteur public, de conclure que sa capacité d'attirer de nouveaux médecins dépendait de la retraite au moment opportun de certains des

there. Moreover, it cannot be said to have acted unreasonably in concluding that the retirement, as a matter of course, of those who had reached the age of 65 would ensure the departure from staff of those who would generally be less able to contribute to the hospital's sophisticated practice. It must be stressed that the policy of applying Regulation 5.04 without exception, save in those "special cases where the physician had something unique to offer the hospital", was an attempt by the Board to recognize that the assumption of declining capabilities in those 65 and over would not always hold true. Although it operated with regard to the hospital's requirements rather than with regard to each individual doctor's health and capabilities, this was probably necessary given the overriding objective of making staff positions available to doctors recently trained in the latest theories and methods.

It cannot be denied that Regulation 5.04 and the associated policy of implementation imposes a heavy loss on those who reach the age of 65 and who wish to continue in practice. The evidence clearly shows that those who are denied a renewal of their admitting privileges pursuant to Regulation 5.04 will be unable to continue their practices in the manner and to the extent that they have become accustomed. In some cases, failure to obtain a renewal will mean the complete cessation of long-standing practices and the end of professional careers. But the anguish and sense of loss this entails cannot be considered in isolation from the frustration and anger younger doctors would experience if they were prevented from entering into a full practice upon completion of long years of arduous study and preparation.

The dynamics of the equation are not significantly altered by throwing the fate of the patients of those forced to retire into the balance, as counsel for the respondents does. Given the deterioration which is an undeniable characteristic of increasing age, the only hardships Regulation 5.04 can be said to impose on these patients is to force them to change their doctors sooner than they might otherwise have done. More importantly, any loss thereby incurred must surely be more than

médecins qui s'y trouvaient déjà. En outre, on ne peut dire que le conseil a agi de façon déraisonnable en concluant que la mise à la retraite réglementaire de ceux qui ont atteint 65 ans garantirait le départ de ceux qui seraient en général moins capables de contribuer à la pratique spécialisée de l'hôpital. Il convient de souligner qu'en appliquant sans exception le règlement 5.04, sauf dans les «cas particuliers où un médecin a quelque chose d'unique à offrir à l'hôpital», le conseil tentait de reconnaître que le principe de la détérioration des capacités de ceux qui ont 65 ans et plus n'était pas toujours exact. Bien que le règlement ait été appliqué en fonction des exigences de l'hôpital plutôt que de la santé et des capacités de chaque médecin individuellement, cela était probablement nécessaire compte tenu de l'objectif prédominant d'offrir des postes aux médecins récemment formés aux théories et aux méthodes les plus récentes.

On ne peut nier que le règlement 5.04 et sa politique d'application imposent une lourde perte à ceux qui ont 65 ans et souhaitent continuer à pratiquer. La preuve démontre clairement que ceux qui sont privés du renouvellement de leurs privilèges d'admission par suite de l'application du règlement 5.04 seront incapables de continuer à pratiquer la médecine de la manière et dans la mesure où ils l'avaient fait jusqu'à maintenant. Dans certains cas, le non-renouvellement signifie la cessation complète de pratiques établies depuis longtemps et la fin de carrières professionnelles. Mais l'angoisse et le sentiment de perte que cela comporte ne peuvent être considérés indépendamment de la frustration et de la colère que les jeunes médecins connaîtraient s'ils étaient empêchés de pratiquer pleinement après de longues années de préparation et d'études sérieuses.

Les éléments de l'équation ne sont pas véritablement modifiés si, comme le fait l'avocat des intimés, on tient compte du sort des patients de ceux qui sont obligés de prendre leur retraite. Compte tenu de la détérioration qui est une caractéristique incontestable du vieillissement, on peut dire que le seul préjudice que le règlement 5.04 impose à ces patients, c'est de les obliger à changer de médecin plus tôt qu'ils ne l'auraient fait autrement. Plus important encore, tout préjudice ainsi subi est

compensated for by the benefit that they and all other clients of the British Columbia health system derive from the regular infusion of new talent and new ideas into the Province's major acute care and research hospital.

This view of Regulation 5.04 and the associated policy is confirmed when the question of whether they strike a reasonable balance between competing resource users is viewed from the point of view of alternative measures. The only alternative that appears to have been mooted was the suggestion that the Vancouver General could have instituted a program of skills testing or performance evaluation. The evidence suggests that such a program would be costly both to implement and operate, a not unimportant consideration given the financially straitened circumstances in which most hospitals and the health care system generally must now operate. But more important is the invidious and disruptive effect such a program would have on the environment in which all members of the hospital's medical staff must work. As I explained in *McKinney*, skills testing and performance evaluation can be demeaning, especially when applied to highly trained and senior members of a professional community. As a trigger for the application of a rule of mandatory retirement, they would be the very antithesis of the kind of dignified departure that should be the crowning moment of a professional career. Just as detrimental is the added pressure which performance-based retirement would introduce into what must already be a very high pressure work environment. Nor is it difficult to imagine how such a scheme could sow suspicion and dissension among a hospital staff.

It is important in this regard to note that the development of a cohesive staff whose members are comfortable working as members of a team was one of the "institutional concerns" the Vancouver General had in mind in passing Regulation 5.04. While counsel seemed to relate this concern

certainement plus que compensé par les avantages que ces patients et tous les autres bénéficiaires du système de santé de la Colombie-Britannique tirent de l'apport régulier de nouveaux talents et de nouvelles idées au sein du principal hôpital de la province spécialisé en soins de courte durée et en recherche.

Cette façon de considérer le règlement 5.04 et la politique qui s'y rattache est confirmée lorsque la question de savoir s'ils établissent un équilibre raisonnable entre les usagers concurrents des ressources en cause est abordée dans l'optique des autres mesures possibles. La seule autre mesure qui semble avoir été envisagée était l'idée que le Vancouver General ait pu mettre sur pied un programme d'évaluation des aptitudes et du rendement. La preuve indique qu'un tel programme serait coûteux tant en ce qui concerne sa mise en œuvre que son fonctionnement, un facteur qui n'est pas négligeable compte tenu de la situation financière difficile dans laquelle la plupart des hôpitaux et les services de soins de santé doivent maintenant fonctionner en général. Mais ce qui est plus important, c'est le sentiment d'injustice et l'effet néfaste qu'un tel programme provoquerait dans le milieu de travail de tous les membres du personnel médical de l'hôpital. Comme je l'ai expliqué dans l'arrêt *McKinney*, les évaluations d'aptitudes et de rendement peuvent être humiliantes, surtout lorsqu'elles sont appliquées à des professionnels chevronnés et expérimentés. Comme facteur d'application d'une règle de retraite obligatoire, elles iraient tout à fait à l'encontre de la dignité du départ qui devrait couronner une carrière professionnelle. La tension qu'ajouterait un système de retraite fondé sur le rendement dans un milieu de travail qui comporte déjà énormément de pression serait tout aussi préjudiciable. Il n'est pas difficile non plus d'imaginer comment un tel système susciterait la méfiance et la dissension au sein du personnel de l'hôpital.

À cet égard, il est important de souligner que la cohésion d'un personnel hospitalier dont les membres se plaisent à travailler au sein d'une équipe était l'une des «préoccupations institutionnelles» à l'origine de l'adoption du règlement 5.04 par le Vancouver General. Bien que l'avocat des appe-

exclusively to a desire to limit the number of doctors on staff, I think it is also clearly relevant to the desire to avoid the disruptive effects of performance-related retirement. What I have said in *McKinney* regarding the role that mandatory retirement plays in the preservation of the "necessary ambience of university life" is also applicable to the present case, notwithstanding that the institution of tenure, and the animosity toward regular performance evaluation it engenders, is not *per se* part of the hospital setting.

As a final comment on this branch of the appeal, I would simply say that it is not appropriate for this Court to "second-guess" the government's determination that 65 is the appropriate age at which to implement its policy of *de facto* mandatory retirement. On this issue, I refer to the comments made in *R. v. Edwards Books and Art Ltd.*, *supra*, at pp. 781-82, 800-801, to the effect that the exercise of "line-drawing" was one that should generally be left to the legislature.

Deleterious Effects

It is evident from what I have said in relation to "minimal impairment" that the effects of Regulation 5.04 and its attendant policy are not so severe as to outweigh the government's pressing and substantial objectives. In the circumstances, and given that a full explanation would cover the ground already covered under the previous heading, I find it unnecessary to say anything further regarding deleterious effects.

Conclusion and Disposition

I would dispose of this appeal on the ground that the appellant hospital is not a part of government within the meaning of s. 32 of the *Charter*. It is therefore not bound by the *Charter*. Even if the hospital were a part of government, I would hold that although Regulation 5.04 and the policy the Board of Trustees of the Vancouver General followed in applying it are discriminatory under s. 15

lants semble relier cette préoccupation au seul désir de limiter le nombre de médecins, je pense qu'elle est également tout à fait pertinente à la volonté d'éviter les effets perturbateurs d'une mise à la retraite fondée sur l'évaluation du rendement. Ce que j'ai dit dans l'arrêt *McKinney* sur le rôle que la retraite obligatoire joue dans le maintien de «l'ambiance [. . .] essentielle de la vie universitaire» s'applique également en l'espèce, peu importe que le système de la permanence, et l'animosité à l'égard des évaluations régulières de rendement qu'elle engendre, ne fasse pas partie en soi du milieu hospitalier.

À titre de dernière remarque sur cet aspect du pourvoi, j'ajouterais simplement qu'il n'est pas approprié que notre Cour [TRADUCTION] «se prononce après coup» sur la conclusion du gouvernement que 65 ans est l'âge approprié pour mettre en œuvre sa politique de retraite obligatoire dans les faits. Sur cette question, je mentionne les remarques faites dans l'arrêt *R. c. Edwards Books and Art Ltd.*, précité, aux pp. 781 et 782, 800 et 801, selon lesquelles la tâche d'établir une «ligne de démarcation» devrait généralement être laissée au législateur.

Les effets préjudiciables

Il découle clairement de ce que j'ai dit de «l'atteinte minimale» que les effets du règlement 5.04 et de la politique qui s'y rattache ne sont pas sévères au point de l'emporter sur les objectifs urgents et réels du gouvernement. Dans ces circonstances, et parce qu'une explication complète reprendrait ce qui a déjà été dit dans la section précédente, je conclus qu'il n'est pas nécessaire d'ajouter quoi que ce soit concernant les effets préjudiciables du règlement contesté et de sa politique d'application.

Conclusion et dispositif

Je suis d'avis de disposer de ce pourvoi en affirmant que l'hôpital appelant ne fait pas partie du gouvernement au sens de l'art. 32 de la *Charte*. Il n'est donc pas lié par la *Charte*. Même si l'hôpital faisait partie du gouvernement, je suis d'avis de conclure que, bien que le règlement 5.04 et sa politique d'application suivie par le conseil d'administration du Vancouver General soient dis-

of the *Charter*, they are saved under s. 1 as a "reasonable [limit] prescribed by law" which is "demonstrably justified in a free and democratic society".

I would, therefore, allow the appeal, reverse the decisions of the trial judge and the Court of Appeal, and dismiss the plaintiffs' action with costs. I would answer the constitutional questions as follows:

1. Do the provisions of the *Canadian Charter of Rights and Freedoms* apply to the actions of the Vancouver General Hospital in establishing and administering Regulation 5.04 of the Medical Staff Regulations?

No.

2. If the answer to question 1 is yes, is Regulation 5.04 of the Medical Staff Regulations contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

If the Regulation had been enacted by government, it would be contrary to s. 15(1) of the *Charter*.

3. If the answer to question 1 is yes, was the administration of Regulation 5.04 of the Medical Staff Regulations by the Vancouver General Hospital contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

If the policy had been adopted by government, it would be contrary to s. 15(1).

4. If the answer to either questions 2 or 3 is yes, is Regulation 5.04 of the Medical Staff Regulations or the manner of its administration by the Vancouver General Hospital nevertheless justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

If questions 2 and 3 had been answered in the affirmative, the Regulation and policy would nevertheless be justified under s. 1 of the *Charter*.

The following are the reasons delivered by

WILSON J. (dissenting)—I have had the benefit of the reasons of my colleague La Forest J. and, for the reasons I gave in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, I must respectfully

criminatoires en vertu de l'art. 15 de la *Charte*, ils sont justifiés en vertu de l'article premier parce qu'il s'agit d'une «règle de droit» qui est restreinte «dans des limites [...] raisonnables» et dont «la justification [peut] se démontrer dans le cadre d'une société libre et démocratique».

Je suis donc d'avis d'accueillir le pourvoi, d'infirmer les décisions du juge de première instance et de la Cour d'appel et de rejeter l'action des intimés. Je suis d'avis de répondre aux questions constitutionnelles de la façon suivante:

1. Les dispositions de la *Charte canadienne des droits et libertés* s'appliquent-elles aux actions du Vancouver General Hospital relativement à la rédaction et à la mise en œuvre du règlement 5.04 des Medical Staff Regulations?

Non.

2. Si la réponse à la question 1 est affirmative, le règlement 5.04 des Medical Staff Regulations est-il contraire au par. 15(1) de la *Charte canadienne des droits et libertés*?

Si le règlement avait été adopté par le gouvernement, il serait contraire au par. 15(1) de la *Charte*.

3. Si la réponse à la question 1 est affirmative, l'application du règlement 5.04 des Medical Staff Regulations par le Vancouver General Hospital est-elle contraire au par. 15(1) de la *Charte canadienne des droits et libertés*?

Si la politique avait été adoptée par le gouvernement, elle serait contraire au par. 15(1).

4. Si la réponse aux questions 2 ou 3 est affirmative, le règlement 5.04 des Medical Staff Regulations ou la façon dont il est appliqué par le Vancouver General Hospital sont-ils néanmoins justifiés en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

Si la réponse aux questions 2 ou 3 avait été affirmative, le règlement et la politique seraient néanmoins justifiés en vertu de l'article premier de la *Charte*.

Version française des motifs rendus par

LE JUGE WILSON (dissidente)—J'ai eu l'avantage de lire les motifs de jugement de mon collègue le juge La Forest et, pour les motifs que j'ai exprimés dans l'arrêt *McKinney c. Université de*

disagree with him that the *Canadian Charter of Rights and Freedoms* has no application to the Vancouver General Hospital. In my view, the *Charter* does apply and as a consequence the appellant's policy of mandatory retirement is unconstitutional. While the questions raised by these appeals are generally similar to those this Court addressed in *McKinney*, there are some important differences and I wish to deal with those.

I. Application of the *Charter* to the Vancouver General Hospital

The scope of application of the *Charter* is governed by s. 32(1) which provides:

> **32.** (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In *McKinney*, I discussed s. 32(1) at some length. I found that the purpose of the section was to extend the reach of the *Charter* to all those entities and activities that could be construed as "governmental". I identified the criteria I thought were relevant in determining whether an entity is subject to the *Charter* under s. 32. I indicated at p. 370 that:

> . . . I would favour an approach that asks the following questions about entities that are not self-evidently part of the legislative, executive or administrative branches of government:
>
> 1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
>
> 2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
>
> 3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

Guelph, [1990] 3 R.C.S. 229 rendus en même temps que les présents pourvois, je ne saurais, avec égards, être de son avis que la *Charte canadienne des droits et libertés* ne s'applique pas au Vancouver General Hospital. À mon avis, la *Charte* s'applique et, en conséquence, la politique de retraite obligatoire instaurée par l'hôpital appelant est inconstitutionnelle. Bien que les questions soulevées par les présents pourvois soient, dans l'ensemble, semblables à celles que notre Cour a examinées dans l'arrêt *McKinney*, il y a d'importantes différences que je veux analyser.

I. L'application de la *Charte* au Vancouver General Hospital

Le paragraphe 32(1) définit la portée d'application de la *Charte*.

> **32.** (1) La présente charte s'applique:
>
> *a*) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;
>
> *b*) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Dans l'arrêt *McKinney*, j'ai assez longuement analysé le par. 32(1). J'ai conclu que ce paragraphe avait pour objet d'étendre l'application de la *Charte* à toutes les entités et activités qu'on peut considérer comme «gouvernementales». J'ai défini les critères qui, selon moi, servaient à déterminer si une entité est assujettie à la *Charte* en vertu de l'art. 32. J'y ai dit à la p. 370 que:

> . . . je favoriserais une méthode qui soulève les questions suivantes quant aux entités dont il n'est pas évident en soi qu'elles font partie des branches législative, exécutive ou administrative du gouvernement:
>
> 1. La branche législative, exécutive ou administrative du gouvernement exerce-t-elle un contrôle général sur l'entité en question?
>
> 2. L'entité exerce-t-elle une fonction gouvernementale traditionnelle ou une fonction qui, de nos jours, est reconnue comme une responsabilité de l'État?
>
> 3. L'entité agit-elle conformément au pouvoir que la loi lui a expressément conféré en vue d'atteindre un objectif que le gouvernement cherche à promouvoir dans le plus grand intérêt public?

In my respectful view, the application of these three tests leads inexorably to a finding that the *Charter* applies to the Vancouver General Hospital.

1. *Application of the Criteria to the Vancouver General Hospital*

(a) The "Control" Test

A review of the various connections between the Province and the Hospital leads me to conclude that the provincial government exercises a substantial amount of control over the appellant. In particular, the government has exercised control over the Vancouver General Hospital in three areas: (1) governing structure; (2) policy; and (3) funding.

Dealing first with control over the governing structure of the Hospital, the *Hospital Act*, R.S.B.C. 1979, c. 176, sets out the function and powers of the Hospital and its constituent elements. Section 30 provides that the Lieutenant Governor may appoint inspectors whose function it is to inspect the accounts, books, equipment and any other thing on or about the hospital. Section 37 provides that the Lieutenant Governor may, by regulation, establish one or more medical appeal boards. These boards are vested with the jurisdiction to review management decisions regarding permits to practise medicine or dentistry in the Hospital. Under s. 2(1)(c) of the Act every hospital is required to have a properly constituted board of management. It is in this Board that the governance of hospital affairs is largely reposed.

The composition of the Board is dealt with under both the *Hospital Act* and the *Vancouver General Hospital Act*, S.B.C. 1970, c. 55. Under s. 2(1)(a) of the former Act, the Hospital is obliged to make provision for, *inter alia*, representation of the provincial government on the Board. This directive has been carried out under s. 5 of the *Vancouver General Hospital Act* which provides that the Board shall consist of those persons appointed under the *Hospital Act*. The actual composition of the Board is dealt with in Article 4, s. 2, of the Vancouver General Hospital by-laws.

Avec égards, j'estime que l'application de ces trois critères nous amène forcément à conclure que la *Charte* s'applique au Vancouver General Hospital.

1. *Application de ces critères au Vancouver General Hospital*

a) Le critère du «contrôle»

L'examen des différents liens qui existent entre la province et l'hôpital appelant m'amène à conclure que le gouvernement provincial exerce un contrôle important sur celui-ci. Plus précisément, le gouvernement exerce un contrôle sur le Vancouver General Hospital dans trois domaines: (1) l'administration interne, (2) les politiques et (3) le financement.

Commençons par le contrôle sur l'administration interne de l'hôpital; la *Hospital Act*, R.S.B.C. 1979, ch. 176, établit le rôle et les pouvoirs de l'hôpital appelant et de ses éléments constituants. L'article 30 prescrit que le lieutenant-gouverneur en conseil peut nommer des inspecteurs dont le rôle consiste à examiner les comptes, les registres et le matériel et toute autre chose ayant trait à l'hôpital. L'article 37 édicte que le lieutenant-gouverneur en conseil peut, par règlement, établir un ou plusieurs comités médicaux d'appel. Ces comités ont la compétence d'exercer un contrôle sur toutes les décisions de l'administration au sujet des questions relatives à l'exercice de la médecine ou de l'art dentaire à l'hôpital appelant. En vertu de l'al. 2(1)c) de la Loi, tout hôpital est tenu d'avoir un conseil d'administration régulièrement constitué. Ce conseil voit dans une grande mesure à l'administration générale de l'hôpital.

La *Hospital Act* et la *Vancouver General Hospital Act*, S.B.C. 1970, ch. 55, déterminent la composition du conseil d'administration. En vertu de l'al. 2(1)a) de la première Loi, l'hôpital appelant est tenu de prévoir, notamment, la représentation du gouvernement provincial au conseil d'administration. Cette disposition est mise en œuvre en vertu de l'art. 5 de la *Vancouver General Hospital Act* qui dispose que le conseil d'administration est composé de personnes nommées en vertu de la *Hospital Act*. La composition même du conseil est régie par le par. 4(2) du règlement du

Section 2 (in combination with Article 2, s. 1) provides that the Lieutenant Governor shall appoint 14 of the Board's 16 members, the appointees to be chosen from several specified communities. If, however, any of the specified organizations fail to submit candidates, the Lieutenant Governor may appoint whomever he or she wishes (s. 3).

The authority of the Board of Trustees is broad and diverse. Section 2(1)(b) provides that the Board is to have full control over the revenue and expenditure of the Hospital. The Hospital is also to have by-laws or rules thought necessary by the Minister for carrying out the administration and management of the Hospital's affairs and providing a high standard of care (s. 2(1)(c)). Under s. 6 of the *Vancouver General Hospital Act*, the power to pass such by-laws has been reposed in the Hospital's Board of Trustees. The Hospital enjoys special government-like powers in a number of respects and the exercise of these would presumably fall under the jurisdiction of the Board. For example, the property of the Hospital is protected from expropriation under s. 45 of the *Hospital Act* and s. 11 of the *Vancouver General Hospital Act*.

The powers of the Board of Trustees are subject to the authority of the Lieutenant Governor and the Minister of Health. Both the Lieutenant Governor and the Minister have the power to intervene in significant ways in the operations of the Board. The Lieutenant Governor may order the Hospital to comply with any conditions in addition to those enumerated in the *Hospital Act* as he or she may prescribe (s. 2(1)(d)). He may also make any additional regulations he thinks necessary (s. 36(1)). As well, under s. 2(1)(c) of that Act by-laws or rules *et cetera* passed by hospital boards are ineffective without ministerial approval and this requirement is repeated in s. 6 of the *Vancouver General Hospital Act*. The Minister may require that any by-law be revised to his satisfaction (s. 32). As well, the composition of the governing bodies of the Hospital may be radically altered by the Minister and the Lieutenant governor. Section 2(3) of the *Hospital Act* provides that the Lieutenant Governor may appoint to the Board any number of persons to represent the provincial

Vancouver General Hospital. L'article 2 (et le par. 2(1)) édicte que le lieutenant-gouverneur en conseil nomme 14 des 16 membres du conseil d'administration, les personnes ainsi nommées devant être choisies dans différents groupes déterminés. Si, cependant, un groupe déterminé ne propose pas de candidat, le lieutenant-gouverneur en conseil peut nommer qui il veut (art. 3).

La compétence du conseil d'administration est générale et diversifiée. L'alinéa 2(1)b) prescrit que le conseil a plein contrôle sur les recettes et les dépenses de l'hôpital appelant. Celui-ci doit aussi avoir le règlement que le ministre estime nécessaire à l'administration de l'hôpital et à la prestation de soins de haute qualité (al. 2(1)c)). En vertu de l'art. 6 de la *Vancouver General Hospital Act*, la compétence d'adopter ce règlement est attribuée au conseil d'administration. L'hôpital appelant dispose de pouvoirs spéciaux apparentés à ceux d'un gouvernement à bon nombre d'égards et l'exercice de ces pouvoirs relève présumément du conseil d'administration. Par exemple, les biens-fonds de l'hôpital appelant ne sont pas sujets à l'expropriation en vertu de l'art. 45 de la *Hospital Act* et de l'art. 11 de la *Vancouver General Hospital Act*.

Les pouvoirs du conseil d'administration sont subordonnés à l'autorité du lieutenant-gouverneur en conseil et du ministre de la Santé. Le lieutenant-gouverneur en conseil et le ministre ont le pouvoir d'intervenir de façon importante dans l'administration du conseil. Le lieutenant-gouverneur en conseil peut enjoindre à l'hôpital appelant de respecter toute obligation qui s'ajoute à celles que la *Hospital Act* impose (al. 2(1)d)). Il peut aussi édicter tout règlement supplémentaire qu'il estime nécessaire (par. 36(1)). De plus, en vertu de l'al. 2(1)c) de la Loi, les dispositions réglementaires adoptées par les conseils d'administration des hôpitaux sont inopérantes jusqu'à ce qu'elles aient été approuvées par le ministre; cette exigence est aussi reprise par l'art. 6 de la *Vancouver General Hospital Act*. Le ministre peut exiger que tout règlement soit modifié dans le sens qu'il souhaite (art. 32). Le ministre et le lieutenant-gouverneur en conseil peuvent aussi modifier radicalement la composition des corps dirigeants de l'hôpital appelant. Le paragraphe 2(3) de la *Hospital Act* édicte

government notwithstanding any other Act or the constitution, by-laws or rules of any hospital. Finally, and perhaps most tellingly, the Province may simply "take over" the running of the Hospital. The Minister may under s. 44(1) appoint an examining board to examine any aspect of the Hospital's operations. Upon receipt of the examining board's report the Minister may make recommendations to the Lieutenant Governor who in turn under s. 44 may appoint a public administrator and completely usurp the Board of Trustees.

With respect to Hospital policy, I believe that the Province exercises a significant amount of control in this area as well. For instance, under the *Hospital Act* the Hospital is prohibited from refusing to admit any person on account of their indigent circumstances (s. 4). Hospitals are precluded from admitting any person with a communicable disease unless the Minister is satisfied that the hospital has sufficient facilities for the handling of such a person (s. 3). All persons being treated in hospital for tuberculosis of the respiratory tract are subject to supervision by a medical health officer appointed by the Lieutenant Governor. Every hospital is under a statutory obligation to keep detailed patient records (s. 18). Further, certain hospitals including the appellant must provide reasonable facilities for giving clinical instruction to medical students. If the hospital and the university are unable to agree as to the nature and extent of the facilities to be granted the dispute is determined by the Lieutenant Governor. Under the regulations passed pursuant to the *Hospital Act* (*Hospital Act Regulations*, B.C. Reg. 289/73 as am.), a number of provisions were passed by the Lieutenant Governor dealing with procedures for admission and discharge of patients (ss. 2 and 3) and the substantive requirements that must be met before hospitals can treat patients (s. 4). Further,

que le lieutenant-gouverneur en conseil peut nommer au conseil un nombre quelconque de personnes pour représenter le gouvernement de la province en dépit de toute autre loi, ou de l'acte constitutif et du règlement de tout hôpital. Enfin, ce qui est peut-être le plus significatif, la province peut tout simplement prendre en charge le fonctionnement de l'hôpital appelant. En vertu du par. 44(1), le ministre peut nommer un comité d'enquête pour examiner tout aspect quelconque du fonctionnement de l'hôpital appelant. Sur réception du rapport du comité d'enquête, le ministre peut faire des recommandations au lieutenant-gouverneur en conseil qui, à son tour, peut, en vertu de l'art. 44, nommer un administrateur public et évincer complètement le conseil d'administration.

À l'égard des politiques de l'hôpital appelant, je crois que la province exerce là aussi une mesure importante de contrôle. Par exemple, en vertu de la *Hospital Act*, l'hôpital appelant ne peut refuser d'admettre une personne parce qu'elle n'a pas de ressources financières (art. 4). Les hôpitaux ne sont pas autorisés à admettre une personne atteinte d'une maladie contagieuse à moins que le ministre ne soit convaincu que l'hôpital dispose des installations nécessaires pour soigner cette personne (art. 3). Toutes les personnes traitées à l'hôpital pour la tuberculose des voies respiratoires sont soumises à une surveillance de la part d'un agent de santé désigné par le lieutenant-gouverneur en conseil. Tout hôpital a l'obligation légale de tenir un dossier médical détaillé des patients (art. 18). De plus, certains hôpitaux, dont l'hôpital appelant, ont l'obligation de fournir des installations suffisantes pour donner une formation clinique à des étudiants en médecine. Si l'hôpital et l'université ne peuvent se mettre d'accord sur la nature et l'étendue des installations à affecter à cette fin, le lieutenant-gouverneur en conseil tranche la question. En vertu des règlements adoptés sous l'empire de la *Hospital Act*, (*Hospital Act Regulations*, B.C. Reg. 289/73 et modifications), le lieutenant-gouverneur en conseil a édicté un certain nombre de dispositions relatives aux procédures d'admission et de congé des patients (art. 2 et 3) et aux conditions de fond qui doivent être respectées avant que les hôpitaux puissent traiter des patients (art. 4). De plus, les règlements régissent l'organi-

the regulations make provision for the organization of medical staff and delineate the duties which such staff organizations must perform (s. 5).

As I demonstrated above, even although the Board of Trustees is vested with a large amount of authority respecting the operations of the hospital, the Minister and the Lieutenant Governor have each been granted broad powers to impose their will upon the Board and thus to enforce government policy. The following provisions illustrate how extensive these powers are. Section 32 provides:

32. The minister may require that the bylaws or rules of a hospital or society or corporation having among its objects the provision of hospital facilities or the operation of a hospital be revised in a manner satisfactory to him in order to meet changing conditions and policies, and to provide for greater uniformity and efficiency in all matters concerning the administration and operation of hospitals.

Section 36 indicates the scope of the Lieutenant Governor's regulation-making power:

36. (1) The Lieutenant Governor in Council may make any regulations deemed necessary for the carrying out of the provisions of this Act to meet any contingency not expressly provided for in it, and providing for the returns to be rendered by the secretary or other executive officer of a hospital.

(2) All regulations under this section shall be presented to the Legislative Assembly.

(3) The power to make regulations under this section extends to prescribing, for any hospital as defined under any of the provisions of this Act, the

(a) proportion of the accommodation which shall be used as public or standard ward accommodation;

(b) number or proportion of persons who, being persons in receipt of social services as defined in the *Guaranteed Available Income for Need Act*, are to be provided with the necessary care and accommodation at the rates payable under that Act;

(c) rules or standards for the ownership, capital debt, maintenance, operation and management of hospitals or licensed hospitals;

sation du corps médical et définissent les fonctions que ces organismes médicaux doivent remplir (art. 5).

Comme je l'ai déjà indiqué, bien que le conseil d'administration soit doté de pouvoirs étendus à l'égard du fonctionnement de l'hôpital, le ministre et le lieutenant-gouverneur en conseil disposent de pouvoirs généraux d'imposer leur volonté au conseil d'administration et d'appliquer de la sorte les politiques du gouvernement. Les dispositions suivantes montrent l'ampleur de ces pouvoirs. L'article 32 est ainsi conçu:

[TRADUCTION] **32.** Le ministre peut exiger que les règlements ou règles d'un hôpital, d'une société ou d'une compagnie dont l'un des objets est de fournir des services hospitaliers ou d'exploiter un hôpital soient examinés d'une manière qu'il estime satisfaisante en vue de répondre à l'évolution des conditions et des politiques et d'apporter plus d'uniformité et d'efficacité dans les domaines relevant de l'administration et de l'exploitation des hôpitaux.

L'article 36 fait état de l'étendue du pouvoir de réglementation du lieutenant-gouverneur en conseil:

[TRADUCTION] **36.** (1) Le lieutenant-gouverneur en conseil peut prendre tout règlement qu'il juge nécessaire à l'application des dispositions de la présente loi afin de faire face à toute situation d'urgence non expressément prévue à la présente loi et pour déterminer les rapports que le secrétaire ou tout autre administrateur d'un hôpital doit faire.

(2) Tous les règlements pris en vertu du présent article seront déposés auprès de l'Assemblée législative.

(3) Le pouvoir de prendre des règlements conféré en vertu du présent article s'étend à celui de prescrire, à l'égard de tout hôpital, tel que défini en vertu d'une disposition de la présente loi,

a) la proportion des lits dudit hôpital qui devra servir aux salles d'hôpital publiques—ou conventionnelles;

b) le nombre ou la proportion de personnes qui, étant des personnes recevant l'assistance sociale suivant la définition donnée dans la *Guaranteed Available Income for Need Act*, doivent y recevoir les soins nécessaires et le logement aux taux payables en vertu de cette loi;

c) les règles ou les normes relatives à la propriété, à la dette d'établissement, à l'entretien, à l'exploitation et à la gestion des hôpitaux ou des hôpitaux licenciés;

(d) issue, by the board of management, of permits authorizing the treatment of patients by physicians, dentists or paramedical personnel;

(e) establishment of medical staff organizations and other bodies comprised of persons to whom permits are issued under paragraph (d) and the promulgation, by a board of management, of bylaws or rules governing those organizations or other bodies;

(f) requirements governing the admission to and discharge from hospitals of patients;

(g) rules or standards regarding the care and treatment of patients;

(h) records and documents respecting patients kept by a hospital or supplied by a medical practitioner or dentist to a hospital, and the minimum period for the retention of the records and documents by a hospital;

(i) powers, duties and responsibilities of a public administrator appointed under section 44, and any matter respecting a hospital corporation for which the appointment is made; and

(j) terms and conditions of the planning and operation of a hospital following public administration under section 44.

(4) Where regulations are made,

(a) each hospital to which the regulations are applicable shall observe them, and

(b) the person having charge of admissions to a hospital to which regulations made under subsection (3)(b) are applicable shall, if the number or proportion of the persons to whom that paragraph refers accommodated in that hospital is less than the number or proportion prescribed, give preference of admission to those persons.

Apart from the extraordinary powers of the Lieutenant Governor, the routine discharge of the Board's function involves the articulation and implementation of hospital policy by a body dominated by government representatives. With respect to its managerial responsibilities, the Board is obliged under s. 8 of B.C. Reg. 289/73 to appoint an administrator who shall be the representative of the Board and shall execute all orders of the Board concerning the administration of the Hospital. With respect to policies concerning the provision

d) la délivrance, par le conseil de gestion, des permis autorisant le traitement des patients par les médecins, les dentistes et le personnel paramédical;

e) la constitution de conseils de professionnels de la santé et d'autres organismes formés de personnes à qui des permis sont délivrés en vertu de l'alinéa d), et la promulgation par un conseil de gestion des règles ou règlements régissant ces organismes ou d'autres organismes;

f) les conditions d'admission et de congé des patients;

g) les règles ou normes applicables aux soins et aux traitements prodigués aux patients;

h) les dossiers ou pièces établis et conservés à l'égard des patients par l'hôpital ou ceux fournis à l'hôpital par un médecin ou un dentiste et la durée minimale de conservation par l'hôpital des dossiers et archives;

i) les pouvoirs, les devoirs et les responsabilités de l'administrateur public nommé en application de l'article 44 et tout autre sujet relatif à une institution hospitalière à l'égard de laquelle la nomination est faite;

j) les conditions de planification et d'exploitation d'un hôpital après la nomination d'un administrateur en vertu de l'article 44.

(4) Dès la promulgation des règlements,

a) tout hôpital auquel les règlements s'appliquent est tenu de les observer et

b) les personnes responsables de l'admission des patients à un hôpital auquel s'appliquent les règlements pris en vertu de l'alinéa 3b), doivent, si le nombre ou la proportion des personnes mentionnées à cet alinéa et admises à cet hôpital est moindre que le nombre ou la proportion prescrite, accorder la préférence d'admission à ces personnes.

Outre les pouvoirs extraordinaires dont dispose le lieutenant-gouverneur en conseil, l'exercice quotidien des fonctions du conseil d'administration comporte la formulation et la mise en œuvre des politiques de l'hôpital par un organisme dominé par les représentants du gouvernement. En vertu de ses responsabilités de gestion, le conseil d'administration est tenu, en vertu de l'art. 8 du B.C. Reg. 289/73 de nommer un administrateur qui représente le conseil et applique toutes ses directives afférentes à l'administration de l'hôpital appe-

of medical services, the Board is obliged under s. 6 of the regulations to make provision for medical staff procedures in the by-laws. Under Article 6 of the Vancouver General Hospital By-Laws, the Board of Trustees has delegated this function to a number of specialized committees who report back to the Board.

With respect to the issue of funding, the evidence discloses that the operating costs of the Hospital are borne almost entirely by the Province. The provision of these funds has gone hand in hand with the Regulation. Under the *Hospital Act* provisions exist for the supervision of hospital expenditures. Section 40 provides that the Lieutenant Governor may withhold amounts payable to the Hospital where the board of management refuses or neglects to comply with the Act or the regulations or fails to administer the Hospital in a manner satisfactory to the Minister. Section 41 prescribes the conditions applicable upon the Hospital's receiving financial assistance toward the planning, constructing, reconstructing, purchasing and equipping of the hospital.

Finally, the Province also subsidizes the Hospital's clientele, the patients. As has been mentioned by my colleague La Forest J., the physicians who initiated this action are not, strictly speaking, employees of the Hospital. Instead, they are paid by the Province on a fee for service basis. That is, they are paid by the government for the treatments they administer to their patients. Thus, the Province directly finances the provision of health care at the Vancouver General Hospital.

In my view, the extensive supervisory power which the Province exercises over the Hospital supports the conclusion that the appellant is a government entity for the purposes of s. 32(1) of the *Charter*. Before leaving this branch of the s. 32(1) inquiry, however, I would like to address the question whether, regardless of the Hospital's status as a governmental entity, the particular action complained of here is or is not government action.

lant. Pour ce qui a trait aux politiques de prestation des soins de santé, le conseil d'administration est tenu, en vertu de l'art. 6 du règlement, d'établir, par règlement, les règles que le personnel médical doit observer. En vertu de l'art. 6 du règlement du Vancouver General Hospital, le conseil d'administration a délégué cette tâche à plusieurs comités spécialisés qui font rapport au conseil.

Quant à la question du financement, la preuve révèle que la province défraie presque entièrement les coûts d'exploitation de l'hôpital appelant. La fourniture de ces fonds va de pair avec la réglementation. En effet, la *Hospital Act* prévoit la surveillance des dépenses des hôpitaux. L'article 40 dispose que le lieutenant-gouverneur en conseil peut retenir les sommes affectées à l'hôpital si le conseil de gestion refuse ou néglige de se conformer à une disposition de la Loi ou du règlement ou n'administre pas l'hôpital à la satisfaction du ministre. L'article 41 détermine les conditions en vertu desquelles l'hôpital peut recevoir des subventions de planification, de construction, de reconstruction, d'achat de fournitures et d'équipement.

Enfin, la province défraie aussi les dépenses des clients de l'hôpital, c'est-à-dire les patients. Comme mon collègue le juge La Forest l'a mentionné, les médecins qui ont intenté la présente action ne sont pas, au sens strict, des employés de l'hôpital appelant. Ils sont plutôt rémunérés par la province selon un système d'honoraires. En effet, ils sont payés par le gouvernement en fonction des traitements qu'ils administrent à leurs patients. Ainsi, la province finance directement la prestation des soins médicaux au Vancouver General Hospital.

À mon avis, l'étendue des pouvoirs de surveillance que la province exerce sur l'hôpital étaye la conclusion que l'hôpital appelant est une entité gouvernementale pour les fins du par. 32(1) de la *Charte*. Avant de laisser cet aspect de l'examen fondé sur le par. 32(1), cependant, j'aborderai la question de savoir si, indépendamment du statut d'entité gouvernementale de l'hôpital, l'action contestée en l'espèce constitue ou non un acte du gouvernement.

The respondents submit that because Regulation 5.04 could only take effect upon the approval of the Minister, its enactment and subsequent application must be characterized as an act of government. They rely on the decision of this Court in *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312 (*Blaikie No. 2*) in support of this submission.

In *Blaikie No. 2* the Court was asked to decide whether regulations and orders issued by statutory bodies are Acts of the Legislature within the meaning of s. 133 of the *Constitution Act, 1867* which reads:

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

The Court concluded that delegated legislation fell within the compass of s. 133. It stated at p. 329:

The particular form of words used in this respect by various statutes matters little. Whether it be provided that some regulations "shall have no force and effect until approved and sanctioned by the Lieutenant-Governor in Council" or "shall not be carried into execution until approved by the Lieutenant-Governor in Council" or "shall not have force and effect until confirmed by the Lieutenant-Governor in Council", they can be assimilated with the enactments of the Government and therefore of the Legislature as long as positive action of the Government is required to breathe life into them. Without such approval or confirmation, they are a nullity . . . or at least inoperative.

My colleague La Forest J. has distinguished *Blaikie No. 2* on the basis that it was decided in the context of a constitutional provision protecting certain defined and restricted rights (i.e., the right

Les intimés soutiennent que, puisque le règlement 5.04 ne devenait applicable qu'après son approbation par le Ministre, son adoption et son application subséquente doivent être qualifiées d'action du gouvernement. Ils invoquent l'arrêt de notre Cour *Procureur général du Québec c. Blaikie*, [1981] 1 R.C.S. 312 (*Blaikie nº 2*), à l'appui de cette prétention.

Dans *Blaikie nº 2*, notre Cour devait déterminer si les règlements et les décrets pris par les organismes constitués en vertu des lois sont des lois de la législature au sens de l'art. 133 de la *Loi constitutionnelle de 1867*, ainsi conçu:

133. Dans les chambres du parlement du Canada et les chambres de la législature de Québec, l'usage de la langue française ou de la langue anglaise, dans les débats, sera facultatif; mais, dans la rédaction des archives, procès-verbaux et journaux respectifs de ces chambres, l'usage de ces deux langues sera obligatoire; et dans toute plaidoirie ou pièce de procédure par-devant les tribunaux ou émanant des tribunaux du Canada qui seront établis sous l'autorité de la présente loi, et par-devant tous les tribunaux ou émanant des tribunaux de Québec, il pourra être fait également usage, à faculté, de l'une ou de l'autre de ces langues.

Les lois du parlement du Canada et de la législature de Québec devront être imprimées et publiées dans ces deux langues.

Notre Cour a conclu que la législation par délégation tombe sous le coup de l'art. 133. Elle dit, à la p. 329:

Le texte particulier des différentes lois importe peu à cet égard. Que la loi dispose que certains règlements «n'entreront en vigueur que lorsqu'ils auront été approuvés et sanctionnés par le lieutenant-gouverneur en conseil» ou «ne seront pas mis à exécution avant d'avoir été approuvés par le lieutenant-gouverneur en conseil» ou «n'auront aucun effet avant d'avoir été confirmés par le lieutenant-gouverneur en conseil», ils peuvent être assimilés à des mesures du gouvernement et, par conséquent, de la Législature tant qu'une action positive du gouvernement est nécessaire pour leur insuffler la vie. Sans cette approbation ou confirmation ils sont nuls [. . .] ou à tout le moins inopérants.

Mon collègue le juge La Forest établit une distinction entre l'arrêt *Blaikie nº 2* et l'espèce parce que celui-ci porte sur l'interprétation d'une disposition constitutionnelle qui protège certains

to use either the French or the English language in certain defined circumstances) whereas the present appeals are to be decided in the context of s. 32(1) which affects the scope of every guarantee in the *Charter*. I agree with La Forest J. that because *Blaikie No. 2* was decided in a different constitutional context and in relation to a different constitutional guarantee its usefulness in construing s. 32(1) is limited.

In *McKinney* I noted that it was not necessary that there be a clear nexus between government and the particular impugned activity in order that the control test be met. On the other hand, I observed at p. 363:

> The evidence that one is dealing with government action will, of course, be even stronger if one can point to a direct nexus between government and the activity in question. But I do not think that the specific questions the control test poses about the presence of such a nexus are in any sense necessary conditions for a finding that there is government action. I am quite prepared to accept that, even in the absence of such a nexus, there may be sufficient government control to enable one to conclude that government action is in issue.

In my respectful view, the conclusion I have reached respecting the general relationship of control which the Province has with the Hospital is strengthened when it is recognized that the government also has specific control over the particular action in issue in these appeals. Regulation 5.04 would be totally ineffectual without the prior written approval of the Minister. Indeed, had the Minister not been prepared to approve the Regulation, he had the power to forestall its enactment and compel the Board of Trustees to enact a by-law more to his liking. In such circumstances I fail to see how the Regulation could be characterized as beyond government control or as anything other than a simple reflection of government policy. To my mind, the fact that the Province through the Minister had the power to treat the by-law in this way provides an exceedingly strong indication that what is at issue in these appeals is government action. Indeed, in this case I might be prepared to find that the requirements of s. 32(1)

droits définis et restreints (c'est-à-dire le droit de se servir du français ou de l'anglais dans certaines circonstances déterminées) alors que les présents pourvois dépendent de l'interprétation du par. 32(1), lequel détermine la portée de tous les droits garantis par la *Charte*. Je suis d'accord avec le juge La Forest pour dire que, parce que l'arrêt *Blaikie n° 2* a été décidé dans un contexte constitutionnel différent et en fonction d'une garantie constitutionnelle différente, son utilité pour l'interprétation du par. 32(1) est limitée.

Dans l'arrêt *McKinney*, j'ai souligné qu'il n'était pas nécessaire qu'il y ait un lien apparent entre le gouvernement et l'activité précise mise en cause pour satisfaire au critère du contrôle. D'autre part, j'ai fait remarquer ceci à la p. 363:

> La preuve qu'il s'agit d'une action gouvernementale sera évidemment plus solide si l'on peut déceler un lien direct entre le gouvernement et l'activité en question. Mais je ne crois pas que les questions précises que soulève le critère du contrôle quant à l'existence d'un tel lien soient de toute façon des conditions nécessaires pour conclure à l'existence d'une action gouvernementale. Je suis tout à fait disposée à reconnaître que, même en l'absence d'un tel lien, le gouvernement peut exercer suffisamment de contrôle pour conclure qu'il s'agit d'une action gouvernementale.

À mon avis, la conclusion à laquelle j'en suis venue au sujet du contrôle que la province exerce sur l'hôpital appelant est étayée lorsque l'on reconnaît que le gouvernement a aussi un contrôle exprès sur l'action particulière contestée dans les présents pourvois. Le règlement 5.04 serait totalement sans effet sans l'approbation préalable donnée par écrit par le ministre. De plus, si le ministre n'avait pas voulu approuver le règlement, il avait le pouvoir d'empêcher son adoption et de forcer le conseil d'administration à en adopter un autre qui lui aurait plu davantage. Dans ces circonstances, je ne vois pas comment on peut dire que le règlement échappe au contrôle du gouvernement ou qu'il reflète autre chose que la politique du gouvernement. Selon moi, la façon dont la province pouvait, par l'entremise du ministre, traiter le règlement donne une indication très forte que ce qui est contesté en l'espèce est une action du gouvernement. En l'espèce, je pourrais être prête à conclure que les conditions exigées en vertu du par. 32(1)

are met on the basis of the control test alone. It is not necessary to do so, however, since in my view the government function test and the government entity test provide further support for my conclusion that the *Charter* applies to the Vancouver General Hospital.

(b) The "Government Function" Test

As I indicated in *McKinney*, in applying the "government function" test, the general principle is that a function becomes governmental because a government has decided to perform it, not because the function is inherently governmental.

Public health in general and hospitals in particular have been supported by local and provincial governments in Canada since pre-Confederation times. In 1830, for example, the legislature of Upper Canada provided funding for the hospital at York established by the Lieutenant Governor, Sir John Colborne: see *An Act to grant a sum of Money to His Majesty in aid of the York Hospital*, S.U.C. 1830, c. 31. In British Columbia the legislature enacted in 1869 a statute conferring on the Governor-in-Council power to establish local health boards and to regulate sanitary and other conditions in hospitals: see *An Ordinance for promoting the Public Health in the Colony of British Columbia*, C.S.B.C. 1877, c. 83. The legislature of British Columbia also passed the *Insane Asylums Act*, C.S.B.C. 1888, c. 61, providing for the establishment of mental hospitals in the Province. Finally, in 1888 it instituted a complete regime of public health under the *Health Act*, R.S.B.C. 1897, c. 91. In 1832 the legislature of Lower Canada passed an Act to support certain hospitals: see *An Act to appropriate certain sums of money for the support of the Emigrant Hospital at Quebec and of the Fever Hospital at Point Levi, and for other purposes therein mentioned*, S.L.C. 1832, c. 15. And in New Brunswick the legislature established a Board of Health in the City and County of St. John and conferred on the Board authority to "purchase, build or hire" hospitals and power to regulate them: see *An Act to estab-*

sont remplies en raison du seul critère du contrôle. Il n'est cependant pas nécessaire que je le fasse puisque, selon moi, les critères de la fonction gouvernementale et de l'organisme gouvernemental renforcent encore la conclusion à laquelle j'arrive que la *Charte* s'applique au Vancouver General Hospital.

b) Le critère de la «fonction gouvernementale»

Comme je l'ai indiqué dans l'arrêt *McKinney*, le principe général régissant l'application du critère de la «fonction gouvernementale» veut qu'une fonction devienne gouvernementale parce que le gouvernement a décidé de la remplir, non parce que la fonction est gouvernementale de par sa nature même.

Au Canada, les gouvernements locaux et provinciaux ont pris en charge la santé publique en général et les hôpitaux en particulier depuis une époque antérieure à la Confédération. En 1830, par exemple, la législature du Haut-Canada affectait des fonds à l'hôpital de York fondé par le lieutenant-gouverneur sir John Colborne: voir *An Act to grant a sum of Money to His Majesty in aid of the York Hospital*, S.U.C. 1830, ch. 31. En Colombie-Britannique, l'assemblée législative a adopté en 1869 une loi qui accordait au lieutenant-gouverneur en conseil le pouvoir de créer des commissions locales d'hygiène et de réglementer les conditions d'hygiène et autres conditions dans les hôpitaux: voir *An Ordinance for promoting the Public Health in the Colony of British Columbia*, C.S.B.C. 1877, ch. 83. L'assemblée législative de la Colombie-Britannique a aussi adopté la *Insane Asylums Act*, C.S.B.C. 1888, ch. 61, pour pourvoir à l'établissement d'hôpitaux psychiatriques dans la province. Enfin, en 1888, elle a établi un régime complet de santé publique en vertu de la *Health Act*, R.S.B.C. 1897, ch. 91. En 1832, l'assemblée législative du Bas-Canada a adopté une loi pour pourvoir au fonctionnement de certains hôpitaux: voir *Acte pour affecter certaines sommes d'argent pour le soutien de l'Hôpital des Émigrés à Québec, et de l'Hôpital pour les cas de Fièvres à la Pointe Lévi, et pour d'autres fins y mentionnées*, S.B.-C. 1832, ch. 15. Au Nouveau-Brunswick, l'assemblée législative a créé une Commis-

lish a Board of Health in the City and County of Saint John, S.N.B. 1855, c. 40, s. 11.

Section 92(7) of the *Constitution Act, 1867*, gives the provinces exclusive jurisdiction over

92. . . .

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

Pursuant to this grant of authority provincial legislatures have become increasingly involved over the years in the public health and hospital area. For example, in Manitoba the legislature enacted *The General Hospital Act*, C.S.M. 1880, c. 26, which established the Winnipeg General Hospital. The Nova Scotia legislature, through Title VI of the R.S.N.S. 1900, set up a regime of hospitals and public health regulation. Chapter 47 [*Of Local Hospitals*] Title IV provides that municipal and town councils shall be authorized to establish and support local public hospitals. In Ontario, the legislature provided financial aid to a number of hospitals through *The Charity Aid Act*, R.S.O. 1877, c. 223. They also ensured the government's right to inspect such facilities through *The Prison and Asylum Inspection Act*, R.S.O. 1877, c. 224, s. 14.

Finally, the administration of hospitals in the provinces is under the general authority of provincial Ministers of Health: see, for example, *Public Hospitals Act*, R.S.O. 1980, c. 410; *Hospitals Act*, R.S.A. 1980, c. H-11; *The Hospital Standards Act*, R.S.S. 1978, c. H-10; and *An Act Respecting the Ministère de la santé et des services sociaux*, R.S.Q., c. M-19.2.

This brief overview of the legislation in place both before and after Confederation leads me to conclude that the establishment and maintenance

sion d'hygiène dans la ville et le comté de St. John et lui a octroyé le pouvoir d'[TRADUCTION] «acquérir, construire ou louer» des hôpitaux et celui de les réglementer: voir *An Act to establish a Board of Health in the City and County of Saint John*, S.N.-B. 1855, ch. 40, art. 11.

Le paragraphe 92(7) de la *Loi constitutionnelle de 1867* accorde aux provinces la compétence exclusive sur

92. . . .

7. L'établissement, l'entretien et l'administration des hôpitaux, asiles, institutions et hospices de charité dans la province, autres que les hôpitaux de marine;

En raison de cette attribution de compétence, les autorités provinciales se sont occupées de plus en plus au fil des ans de la santé publique et des hôpitaux. Par exemple, au Manitoba, l'assemblée législative a adopté *The General Hospital Act*, C.S.M. 1880, ch. 26 qui établit l'Hôpital général de Winnipeg. L'assemblée législative de la Nouvelle-Écosse a établi, en vertu du Titre VI des R.S.N.S. 1900, une réglementation des hôpitaux et de la santé publique. Le chapitre 47 [*Of Local Hospitals*] du Titre VI édicte que les conseils municipaux des villes et villages auront l'autorité d'établir des hôpitaux publics locaux et de pourvoir à leur fonctionnement. En Ontario, l'assemblée législative a accordé une aide financière à plusieurs hôpitaux en vertu de *The Charity Aid Act*, R.S.O. 1877, ch. 223. L'Assemblée a aussi accordé au gouvernement le droit d'inspecter ces installations en vertu de *The Prison and Asylum Inspection Act*, R.S.O. 1877, ch. 224, art. 14.

Enfin, l'administration des hôpitaux dans les provinces relève de la compétence générale des ministres de la santé provinciaux: voir *Loi sur les hôpitaux publics*, L.R.O. 1980, ch. 410; la *Hospitals Act*, R.S.A. 1980, ch. H-11; *The Hospital Standards Act*, R.S.S. 1978, ch. H-10; et la *Loi sur le ministère de la santé et des services sociaux*, L.R.Q., ch. M-19.2.

Ce bref survol des lois adoptées avant et après la Confédération m'amène à conclure que la création

of hospitals is a traditional function of government.

(c) The "Statutory Authority and the Public Interest" Test

It has already been established that the Hospital is broadly empowered to conduct its affairs through its "enabling" statutes. It has also been established that government has traditionally assumed a responsibility for the provision of basic medical services to its citizens. Justification for state involvement in the public health field is not hard to find. Simply put, government has recognized for some time that access to basic health care is something no sophisticated society can legitimately deny to any of its members. Less philosophically, government has also recognized that the promotion and protection of health is crucial to the maintenance of a viable and productive society.

I believe that the fact that the Hospital is established and operates pursuant to statutory authority, is heavily regulated by government and discharges a traditional government function in the public interest brings it within the concept of "government" for purposes of s. 32. Regulation 5.04 is therefore subject to review under s. 15 of the *Charter*.

II. Does the Hospital's Mandatory Retirement Policy Infringe Section 15 of the *Charter*?

The Hospital's power to retire the physicians who practise at the Hospital is found in ss. 5 and 6 of the *Vancouver General Hospital Act* which empowers the Board of Trustees to pass by-laws for the purposes of managing the property and affairs of the Hospital. The Board approved of Medical Staff Regulation 5.04 which was further approved by the Minister. Regulation 5.04 provides:

5.04 Retirement: Members of the Staff shall be expected to retire at the end of the appointment year in which they pass their 65th birthday. Members of the Staff who wish to defer their retirement may make special application to the Board. The Board shall request the Medical Advisory Committee for a recommendation in each such case. The Medical Advisory Committee shall, in making its recommendation, consider the report of a personal

et l'entretien des hôpitaux est une fonction traditionnelle de gouvernement.

c) Le critère de la «compétence législative et de l'intérêt public»

Il a déjà été mentionné que l'hôpital appelant possède des pouvoirs généraux relativement à son exploitation en vertu de ses lois «habilitantes». Il a aussi été établi que le gouvernement a, par tradition, joué un rôle dans la prestation des soins médicaux essentiels à ses citoyens. La justification de l'intervention de l'État dans le domaine de la santé publique n'est pas difficile à établir. En bref, le gouvernement a reconnu depuis un certain nombre d'années que l'accès aux soins de santé essentiels est un service dont aucune société évoluée ne peut légitimement priver ses citoyens. D'une façon plus pratique, le gouvernement reconnaît aussi que l'avancement et la protection de la santé favorisent le maintien d'une société productive et saine.

À mon sens, comme l'hôpital appelant existe et fonctionne en vertu de lois, comme il est strictement réglementé par le gouvernement et remplit une fonction traditionnellement propre au gouvernement dans l'intérêt public, il s'inscrit dans la notion de «gouvernement» pour les fins de l'art. 32. Le règlement 5.04 est donc susceptible de révision en vertu de l'art. 15 de la *Charte*.

II. La politique de retraite obligatoire de l'hôpital appelant enfreint-elle l'art. 15 de la *Charte*?

La capacité qu'a l'hôpital appelant de mettre à la retraite les médecins qui y exercent découle des art. 5 et 6 de la *Vancouver General Hospital Act* qui accorde au conseil d'administration le droit d'adopter des règlements relatifs à la gestion des biens et des affaires de l'hôpital. Le conseil a approuvé le règlement 5.04 des Medical Staff Regulations, qui a aussi été approuvé par le ministre. Le règlement 5.04 est ainsi conçu:

[TRADUCTION] 5.04 La retraite: Les membres du personnel sont censés prendre leur retraite à la fin de l'année d'exercice au cours de laquelle ils atteignent 65 ans. Les membres du personnel qui veulent reporter leur mise à la retraite peuvent présenter une demande spéciale au conseil d'administration, qui demande la recommandation du «conseil consultatif médical» dans chaque cas. Avant de faire sa recommandation, le conseil con-

interview which shall take place between the applicant and the Department Head concerned which shall include a review of the health and continuing performance of the applicant.

As was the case in *McKinney*, it is unnecessary for me to determine whether s. 15(1) would apply in the absence of a legislative provision mandating or permitting the discriminatory action complained of. In the context of these appeals it is evident that the power to retire flows from the *Vancouver General Hospital Act* and the Regulation passed pursuant to it.

Turning now to the question whether Regulation 5.04 infringes s. 15(1), it is to be noted that the constitutional questions posed by Chief Justice Dickson regarding the application of s. 15(1) of the *Charter* embrace two possibilities: whether Regulation 5.04 is on its face contrary to s. 15(1); and whether the way in which the Regulation is administered violates the equality guarantee. The constitutional questions are posed in this way because of the unique structure of the Regulation. The Regulation differs from the provisions at issue in *McKinney* in that it contemplates by its terms exceptions to the general rule that members of the medical staff are required to retire at age 65. Specifically, the Regulation stipulates that members of the staff who wish to retain their admitting privileges may make special application to the Medical Advisory Committee to permit them to stay on at the Hospital. The Regulation provides that the Committee shall conduct a personal interview which shall include a review of the health and continuing performance of the applicant. Based on this interview the Committee makes a recommendation to the Board.

Is the Regulation, apart from the manner in which it has been administered, contrary to s. 15(1)? In *McKinney* the provisions at issue were found to infringe s. 15(1) because they reinforced the stereotype of older workers as incompetent and were therefore discriminatory within the meaning of s. 15(1): see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, and *R. v. Turpin*, [1989] 1 S.C.R. 1296. Senior academics were

sultatif médical tient compte du rapport d'une entrevue personnelle entre le requérant et le chef de département concerné, y compris un rapport de l'état de santé et du rendement continu du requérant.

Comme dans l'arrêt *McKinney*, il n'est pas nécessaire que je décide si le par. 15(1) s'appliquerait en l'absence d'une disposition législative qui permet ou ordonne l'acte discriminatoire contesté. Dans le contexte des présents pourvois, il est évident que le pouvoir qu'a l'hôpital appelant de mettre à la retraite découle de la *Vancouver General Hospital Act* et de son règlement d'application.

Quant à ce qui est de savoir si le règlement 5.04 enfreint le par. 15(1), il faut remarquer que les questions constitutionnelles établies par le juge en chef Dickson au sujet de l'application du par. 15(1) de la *Charte* envisagent deux possibilités: que le règlement 5.04 soit contraire au par. 15(1) de la *Charte* par sa rédaction même et que la façon d'appliquer le règlement viole la garantie d'égalité. Les questions constitutionnelles sont ainsi formulées vu la conception particulière du règlement. Celui-ci se distingue des dispositions contestées dans l'arrêt *McKinney* en ce que le règlement lui-même prévoit une exception à la règle générale qui oblige le personnel médical à prendre sa retraite à l'âge de 65 ans. Le règlement dit précisément que les médecins qui veulent conserver leurs privilèges d'admission peuvent présenter une demande spéciale au conseil consultatif médical afin d'être autorisés à continuer d'exercer leur profession à l'hôpital appelant. Le règlement précise que le conseil doit faire subir une entrevue personnelle qui comporte un examen de la santé et du rendement du demandeur. En fonction des résultats de l'entrevue, le conseil consultatif soumet une recommandation au conseil d'administration.

Le règlement est-il contraire au par. 15(1) indépendamment de la manière dont il est appliqué? Dans l'arrêt *McKinney*, les dispositions contestées ont été jugées contraires au par. 15(1) parce qu'elles renforcent le préjugé que les travailleurs âgés sont incompétents et, par conséquent, ont été jugées discriminatoires au sens du par. 15(1): voir *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143 et *R. c. Turpin*, [1989] 1

compelled to retire irrespective of their individual capabilities and solely upon the basis of their having advanced in years. The interests which the guarantee of equality embodied in s. 15 were meant to protect, i.e., human dignity and the sense of self-worth and self-esteem, were thus violated. In this case, on the other hand, provision has in fact been made to permit senior physicians to retain their hospital privileges and thus continue the practice of their profession so long as they are capable of performing satisfactorily. The question therefore becomes whether Regulation 5.04 is discriminatory in spite of the fact that it provides an exception for those who can demonstrate individual capacity to perform. Put another way, can it be said that the Regulation discriminates even although it invokes the concept of individual merit and ability rather than the stereotype of older physicians as incompetent? In my view, the answer to this question is "yes".

It seems to me that in considering whether a provision violates s. 15(1) the Court should be wary of underestimating the discriminatory effect of any given measure. Here, for instance, even although the Regulation provides on its face for non-discriminatory exceptions, the principle behind the measure remains constitutionally unsound. By its terms Regulation 5.04 stipulates that staff are expected to retire at age 65. In this way the unarticulated premise remains that with increasing age comes increasing incompetence and decreasing ability. That the Regulation provides for exceptions does not, in my view, detract from the fact that the central concept animating the provision falls foul of s. 15(1).

This difficulty with the Regulation is compounded by the fact that it goes on to direct those who wish to continue to work to demonstrate that the stereotype does not apply to them. It seems to me clearly discriminatory to impose this burden upon those who already suffer the burden of stereotype and prejudice (and who thereby have suffered a blow to their sense of self-worth and self-esteem as useful and productive citizens).

R.C.S. 1296. Les professeurs d'université âgés étaient tenus de prendre leur retraite quelles que soient leurs capacités personnelles uniquement parce qu'ils avaient atteint un âge déterminé. Les intérêts que le droit à l'égalité consacré par l'art. 15 vise à protéger, c'est-à-dire la dignité et le sens de l'estime de soi et de sa propre valeur, se trouvaient violés. En l'espèce, d'autre part, le règlement donne aux médecins âgés la possibilité de conserver leurs privilèges auprès de l'hôpital et ainsi de continuer à exercer leur profession pourvu que leur rendement soit satisfaisant. La question est donc de savoir si le règlement 5.04 est discriminatoire même s'il permet une exception en faveur de ceux qui se montrent capables d'exercer leur profession. Autrement dit, peut-on dire que le règlement est discriminatoire même s'il fait appel aux notions de mérite individuel et de compétence plutôt qu'au stéréotype du médecin âgé, donc incompétent? À mon avis, la réponse à cette question est «oui».

Il me semble que pour déterminer si une disposition enfreint le par. 15(1) la Cour doit se garder de sous-estimer l'effet discriminatoire d'une mesure donnée. En l'espèce, par exemple, même si le règlement prévoit des exceptions non discriminatoires, le principe de la mesure contestée demeure vicié du point de vue constitutionnel. Par sa rédaction même, le règlement 5.04 affirme que les médecins sont censés prendre leur retraite à 65 ans. De cette façon, la prémisse sous-entendue reste que le vieillissement entraîne peu à peu l'incompétence et la diminution des capacités. Bien que le règlement prévoie des exceptions, il n'en reste pas moins, selon moi, que la notion principale sous-jacente à la disposition enfreint le par. 15(1).

Ce problème que le règlement pose est amplifié du fait qu'il exige en plus de ceux qui veulent continuer d'exercer leur profession qu'ils démontrent que le préjugé en cause ne s'applique pas à eux. Il me semble manifestement discriminatoire d'imposer ce fardeau à ceux qui sont déjà victimes d'un préjugé (et qui, en conséquence, sont déjà atteints dans l'estime qu'ils se portent et dans la perception de leur valeur propre en tant que citoyens utiles et productifs).

The Court of Appeal also found that Regulation 5.04 was on its face in violation of s. 15(1) although for different reasons. The Court of Appeal noted that the operation of the exemption contained in the Regulation was not confined to issues of competence alone and therefore permitted consideration of irrelevant factors by the Board. In other words, health and continuing performance were factors to be included in the determination of whether a particular individual would be allowed to retain his or her admitting privileges, but they were not the sole basis upon which these reviews were to be conducted. I agree with this analysis and find that it provides further support for my conclusion that Regulation 5.04 is discriminatory on its face.

I should add, however, that I do not consider schemes such as that embodied in this Regulation to be on the same footing as "blanket rules" like those at issue in *McKinney*. In my opinion, any mechanism which seeks to take account of individual differences is preferable to one that flatly denies opportunities on the basis of stereotypical and prejudicial notions of ability. It should be emphasized, however, that the merits of exemption schemes are irrelevant to whether or not there has been a violation of s. 15(1). Exemption schemes such as that contemplated by Regulation 5.04 are properly a matter for consideration under s. 1 of the *Charter*.

Turning now to the question whether Regulation 5.04 was administered in a manner contrary to the *Charter*, I think the answer to this question is also "yes". The evidence is clear that the Regulation has been applied by the Board in a discriminatory fashion. The Court of Appeal found that the Board interpreted the provision as a mandatory retirement policy. Its practice was to terminate admitting privileges at age 65 subject to a finding not only that the applicant was of good health and performing satisfactorily, but also that the applicant possessed "unique" skills. Clearly the manner of application of Regulation 5.04 adopted by the Board is discriminatory because it perpetuates and reinforces the stereotype identified earlier of older workers as incompetent.

La Cour d'appel a aussi conclu, quoique pour des motifs différents, que le règlement 5.04 enfreint le par. 15(1) par sa rédaction même. Elle a signalé que l'application de l'exception portée au règlement ne se limitait pas exclusivement à des questions de compétence, mais qu'elle permettait au conseil de prendre en compte des facteurs non pertinents. En d'autres termes, la santé et le rendement constant d'une personne en particulier comptaient au nombre des facteurs servant à déterminer si elle pouvait être autorisée à conserver ses privilèges d'admission, mais ils ne constituaient pas les seuls sujets de l'examen. Je souscris à cette analyse et je trouve qu'elle étaye la conclusion à laquelle j'arrive que le règlement 5.04 est discriminatoire par sa rédaction même.

Je dois ajouter cependant que je ne considère pas que les régimes semblables à celui que ce règlement contient sont sur le même pied que les «règles générales» contestées dans l'arrêt *McKinney*. À mon avis, tout mécanisme qui cherche à tenir compte des différences particulières est préférable à celui qui écarte carrément toute possibilité en vertu de notions d'habileté fondées sur des idées préconçues et des préjugés. Il faut cependant souligner que le bien-fondé des régimes d'exception n'est pas pertinent à la question de savoir s'il y a ou non violation du par. 15(1). Les régimes d'exception comme celui que prévoit le règlement 5.04 sont des questions qui se prêtent à un examen fondé sur l'article premier de la *Charte*.

Quant à savoir si le règlement 5.04 a été appliqué d'une manière contraire à la *Charte*, je crois qu'il faut aussi répondre «oui». La preuve indique manifestement que le conseil d'administration a appliqué le règlement de manière discriminatoire. La Cour d'appel a conclu que le conseil a vu dans ces dispositions une politique de retraite obligatoire. Il avait l'habitude de mettre fin aux privilèges d'admission des médecins ayant atteint 65 ans sauf si, en plus d'être en bonne santé et de bien remplir leurs fonctions, ils possédaient une compétence «particulière». Manifestement, la façon dont le conseil appliquait le règlement était discriminatoire parce qu'elle perpétuait et renforçait le stéréotype déjà mentionné voulant que les travailleurs âgés soient incompétents.

I find that Regulation 5.04 violates s. 15(1) both in terms and in the manner in which those terms have been interpreted and applied.

III. Is the Hospital's Mandatory Retirement Policy Reasonable and Demonstrably Justifiable Under Section 1 of the *Charter*?

Section 1 of the *Charter* provides:

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

The factors to be considered by the Court in applying s. 1 were first set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. The *Oakes* "test" was succinctly summarized by Dickson C.J. in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 768, as follows:

> Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

It is this test that must be applied in ascertaining whether the Hospital's mandatory retirement policy meets the requirements of s. 1 of the *Charter*.

1. *Objectives*

The Hospital cites two objectives which its policy of retiring physicians at age 65 is meant to serve. First, it maintains that it is crucial that the

Je conclus que le règlement 5.04 enfreint le par. 15(1) tant par son libellé que par la façon dont il a été interprété et appliqué.

III. La politique de retraite obligatoire appliquée par l'hôpital appelant est-elle raisonnable et justifiable en vertu de l'article premier de la *Charte*?

L'article premier de la *Charte* est ainsi conçu:

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

Les facteurs dont la Cour doit tenir compte dans l'application de l'article premier sont énoncés dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. Le juge en chef Dickson a bien résumé le critère de l'arrêt *Oakes* dans l'arrêt *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, à la p. 768:

> Pour établir qu'une restriction est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique, il faut satisfaire à deux exigences. En premier lieu, l'objectif législatif que la restriction vise à promouvoir doit être suffisamment important pour justifier la suppression d'un droit garanti par la Constitution. Il doit se rapporter à des «préoccupations urgentes et réelles». En second lieu, les moyens choisis pour atteindre ces objectifs doivent être proportionnels ou appropriés à ces fins. La proportionnalité requise, à son tour, comporte normalement trois aspects: les mesures restrictives doivent être soigneusement conçues pour atteindre l'objectif en question, ou avoir un lien rationnel avec cet objectif; elles doivent être de nature à porter le moins possible atteinte au droit en question et leurs effets ne doivent pas empiéter sur les droits individuels ou collectifs au point que l'objectif législatif, si important soit-il, soit néanmoins supplanté par l'atteinte aux droits.

C'est ce critère qu'il faut appliquer pour déterminer si la politique de retraite obligatoire de l'hôpital appelant satisfait aux exigences de l'article premier de la *Charte*.

1. *Les objectifs*

L'hôpital appelant mentionne deux objectifs que sa politique de retraite obligatoire des médecins à 65 ans vise à atteindre. D'abord, l'hôpital soutient

Hospital, as an acute care and teaching hospital, provide the highest standard of modern medical care, education and research. The evidence establishes that the Vancouver General Hospital has developed as a highly specialized institution providing unique treatment services which other hospitals in the Province are unable to offer. It is a hospital of last resort, so to speak, for patients with specialized medical problems. I do not think it can be seriously questioned that this objective is of sufficient importance to override *Charter* rights and freedoms. It is an objective of "pressing and substantial" proportions and therefore meets the first branch of the *Oakes* test.

qu'il est essentiel qu'à titre d'hôpital d'enseignement et de soins de courte durée, les soins médicaux, la formation et la recherche qu'il dispense répondent aux normes contemporaines les plus élevées. La preuve démontre que le Vancouver General Hospital est devenu un établissement hautement spécialisé qui dispense des traitements uniques que les autres hôpitaux de la province ne peuvent offrir. C'est un hôpital de dernier recours, dans un certain sens, pour les patients ayant des problèmes médicaux particuliers. Je ne crois pas qu'on puisse sérieusement contester que cet objectif a suffisamment d'importance pour l'emporter sur les droits et libertés garantis par la *Charte*. C'est donc un objectif assez «urgent et réel» pour satisfaire à la première partie du critère de l'arrêt *Oakes*.

The Hospital also suggests that another objective of Regulation 5.04 is the promotion of opportunities for other (younger) physicians to practise medicine. The appellant argues that the Hospital can only accommodate a fixed number of medical personnel. Accordingly, if senior physicians are permitted to retain their admitting privileges, opportunities will as a necessary consequence be denied to younger physicians. In *McKinney* a similar argument was raised respecting the reduction of employment opportunities for younger academics. As in that case, my colleague La Forest J. has accepted that the Hospital is a "closed system" and therefore that permitting senior physicians to continue their relationship with the Hospital will necessarily result in junior physicians being denied opportunities. The evidence in this case, however, does not support this. It was accepted by both the trial judge and the Court of Appeal that permitting the respondents to retain their hospital privileges would not prevent other physicians from gaining admitting privileges.

L'hôpital appelant mentionne aussi que le règlement 5.04 vise à offrir à d'autres médecins (plus jeunes) la possibilité d'exercer leur profession. En effet, l'hôpital appelant soutient qu'il ne peut recevoir qu'un nombre limité de médecins. Conséquemment, s'il permet aux médecins plus âgés de garder leurs privilèges d'admission, les médecins plus jeunes auront forcément moins de possibilités. Dans l'arrêt *McKinney*, on a invoqué un argument semblable au sujet de la diminution des possibilités d'emploi pour les professeurs plus jeunes. Comme dans cette affaire-là, mon collègue le juge La Forest a accepté l'argument que l'hôpital appelant constitue un «système fermé» et que s'il est permis aux médecins plus âgés de continuer à y exercer, il en résultera forcément moins de chances d'avancement pour les médecins plus jeunes. La preuve en l'espèce n'étaye toutefois pas cet argument. Le juge de première instance et la Cour d'appel ont conclu l'un et l'autre que permettre aux intimés de garder les privilèges que l'hôpital leur accorde n'empêcherait pas d'autres médecins d'avoir le privilège de faire admettre des patients.

This Court has recognized that in some situations evidence need not be led to prove government's assertion that there exists a pressing and substantial concern that must be addressed. Indeed, the gravity of a problem may be self-evident and the Court may simply take judicial notice of it. Where, however, a serious question is raised

Notre Cour a déjà reconnu que, dans certaines situations, il n'est pas nécessaire de présenter des éléments de preuve au soutien de l'affirmation du gouvernement qu'il existe une préoccupation «urgente et réelle». En effet, la gravité d'un problème peut être évidente et la Cour peut simplement en prendre connaissance d'office. Cependant, lors-

as to whether a pressing concern as alleged in fact exists, it is incumbent on the party bearing the burden of proof under s. 1 to establish the pressing and substantial concern. In my view, where there is no evidence to support the allegation that a significant problem exists, the first branch of the *Oakes* test will not be met. The purpose behind this branch of the *Oakes* test is to ensure that constitutional rights and freedoms will only be sacrificed where it is reasonable and justifiable to do so. The concept of constitutional entrenchment requires that rights and freedoms be curtailed only in response to real and not illusory problems. In my view, therefore, this Court cannot, absent some form of proof, give effect to the Hospital's claim that its system is "closed". Consequently, it remains to be determined whether the infringement of the respondent physician's equality rights is proportional to the Hospital's aim of providing high quality health care.

2. *Means*

(a) Rational Connection

Is there a rational connection between the imposition of mandatory retirement and ensuring a high standard of medical care, education and research? The appellant Hospital argues that the infusion of young physicians carries with it the infusion of new discoveries and new ideas. It maintains that retiring senior physicians from and introducing junior physicians to the hospital system will upgrade the quality of medical service. I accept that there is a rational connection in this case between the objective sought to be achieved and the means adopted to achieve it. However, I wish to deal briefly with the implications of this conclusion.

First, it should be emphasized that the question whether a basis exists for treating groups in a discriminatory manner is not a concern of s. 15 but of s. 1. Section 15 deals with prejudice, disadvantage and stereotype regardless of its origin and s. 1 deals with its justification.

que l'existence de la préoccupation urgente invoquée suscite un doute sérieux, il incombe à la partie chargée du fardeau de la preuve en vertu de l'article premier d'établir qu'il existe bien une préoccupation urgente et réelle. À mon avis, quand il n'y a pas de preuve pour étayer l'allégation qu'il existe un problème important, le premier volet du critère de l'arrêt *Oakes* n'est pas respecté. L'objet de ce premier volet est d'assurer que les droits et libertés garantis par la Constitution ne seront sacrifiés que s'il est raisonnable et justifiable de le faire. La notion de la consécration des droits et libertés par la constitution exige que ceux-ci ne soient limités qu'en raison de problèmes réels et non illusoires. J'estime donc que notre Cour ne peut, sans aucune sorte de preuve, admettre la prétention de l'hôpital appelant qu'il constitue un système «fermé». En conséquence, il reste à déterminer s'il existe un lien de proportionnalité entre la violation des droits à l'égalité des médecins intimés et le but visé par l'hôpital de fournir des soins de haute qualité.

2. *Les moyens*

a) Le lien rationnel

Existe-t-il un lien rationnel entre l'imposition de la retraite obligatoire et la recherche de l'excellence en matière de formation, de recherche et de soins médicaux? L'hôpital appelant soutient que la présence de jeunes médecins implique l'apport de nouvelles découvertes et de nouvelles idées. Il soutient que la mise à la retraite des médecins âgés et la venue de jeunes médecins à l'hôpital aura pour effet d'améliorer la qualité des soins médicaux. Je reconnais qu'il y a un lien rationnel en l'espèce entre l'objectif poursuivi et les moyens adoptés pour le réaliser. Cependant, je veux expliquer brièvement les conséquences de cette conclusion.

D'abord, il faut souligner que la question de savoir s'il existe un motif de traiter des groupes de façon discriminatoire ne relève pas de l'art. 15, mais de l'article premier. L'article 15 porte sur les préjugés, les désavantages et les stéréotypes quelle que soit leur origine et l'article premier porte sur leur justification.

I believe also that the question whether the foundations of prejudice are based upon observable, reliable facts is one which this Court should approach in the most cautious manner. Throughout these appeals the parties have grappled with the question of the extent to which age and ability correlate. It is, in my view, a matter of common knowledge that with the aging process comes some measure of change in ability, although, of course, the nature and extent of that change varies from individual to individual. Even although I am prepared to accept that the rational connection branch of the *Oakes* test has been met in this case, I would not wish to be understood as suggesting that all infringements of equality have some basis in fact and that a rational connection between various objectives and stereotypes will in all cases be established. Indeed, this Court will doubtless be obliged in future to address whether other forms of discrimination based on different grounds have any foundation in biology or whether they are premised instead on misplaced notions about the nature and abilities of various groups. This is a most delicate determination. History unfortunately demonstrates how easily such misperceptions can be accepted with untold costs. It cannot be overemphasized, in my opinion, that this matter is fraught with difficulty and that the utmost care has to be taken in dealing with such questions.

Je crois aussi que notre Cour doit agir avec beaucoup de prudence quand il s'agit de savoir si le fondement d'une idée préconçue s'appuie sur des faits observables et exacts. Tout au long de ces pourvois, les parties se sont interrogées sur la mesure dans laquelle l'âge et l'habileté sont liés. Il est, d'après moi, généralement reconnu que le vieillissement amène un certain changement des capacités même si, il va de soi, la nature et l'étendue du changement varient d'une personne à l'autre. Même si je suis prête à reconnaître que l'exigence du critère de l'arrêt *Oakes* relative au lien rationnel est respectée en l'espèce, je ne veux pas que l'on comprenne que toutes les atteintes à l'égalité ont quelque fondement dans des faits et qu'un lien rationnel entre divers objectifs et idées préconçues sera prouvé dans tous les cas. Certes, notre Cour sera sans doute appelée plus tard à juger si d'autres formes de discrimination appuyées sur d'autres motifs ont un fondement biologique ou si elles sont plutôt fondées sur de fausses notions sur la nature et l'habilité de différents groupes. C'est une des questions les plus délicates à déterminer. L'histoire nous enseigne à quel point ces fausses idées peuvent être dommageables. On ne saurait trop souligner, selon moi, que ces sujets sont difficiles et qu'il faut les aborder avec une extrême prudence.

For example, close scrutiny of the rational connection being advanced may take place in at least two ways. Vigilance should be exercised in examining the nature of the correlation advanced. It seems to me that in this case the deleterious effects of age have been painted with too broad a brush. The Hospital argues that with increasing age comes a decrease in all skills associated with the practice of medicine. This cannot be so. Diagnostic ability, for example, may actually increase with years in practice. Similarly, the Court should carefully scrutinize assertions regarding the extent of the relationship between the grounds of the infringement and its justification. For example, in this case a line has been drawn by the appellant Hospital at age 65. It seems to me that different considerations might prevail had the retirement age been set at 80.

Ainsi, un examen minutieux du lien rationnel proposé peut se faire d'au moins deux façons. Il faut être prudent au moment d'examiner le lien proposé. Il me semble qu'en l'espèce on a dépeint à trop grands traits les effets néfastes du vieillissement. L'hôpital appelant soutient que le vieillissement emporte une diminution de toutes les capacités liées à l'exercice de la médecine. Ce ne peut pas être le cas. Par exemple, l'habilité d'établir un diagnostic peut de fait augmenter avec l'expérience. De même, la Cour doit-elle examiner de façon critique les prétentions au sujet de la solidité du lien entre les motifs de l'atteinte aux libertés et sa justification. En l'espèce, par exemple, l'hôpital appelant a établi une limite fixe à l'âge de 65 ans. Il me semble qu'il aurait fallu tenir compte d'autres facteurs si on avait fixé l'âge de la retraite à 80 ans.

All of this is merely to say that the role the rational connection branch of the proportionality test is meant to serve should not be forgotten. Its purpose is to engage the Court in an examination of whether government is proceeding logically in the pursuit of its aims. Technically, all the rational connection branch of s. 1 requires is a demonstration that there is some logical connection, however slight, between the objective and the means by which it is sought to be achieved. When, however, the inquiry turns to other elements of the *Oakes* test, the quality and extent of the connection becomes crucial.

In this case, as I have indicated, I am prepared to conclude that there does exist a rational connection between the desire to provide top quality medical care and the decision to have such care provided substantially by younger members of the medical profession. The real issue, in my view, is whether reliance upon these generalized notions of ability is justifiable. I turn then to consider whether the means chosen by the Hospital impairs the rights of the respondent doctors as little as possible.

(b) Minimal Impairment

In *Edwards Books, supra*, and *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, this Court recognized that a strict application of the minimal impairment branch of the *Oakes* test is not always appropriate. My colleague La Forest J. has characterized the issue at stake in this appeal as falling within the class of exceptional cases envisioned in *Edwards Books* and *Irwin Toy* and concluded therefore that the more generous standard of review contemplated by those decisions should apply. In effect, he sees the question which this Court must address as the efficacy of the policy of mandatory retirement in a closed system with limited resources. For the reasons I gave in *McKinney* I must respectfully disagree with him that this is an appropriate case for the relaxation of the minimal impairment test.

Tout ceci vise seulement à rappeler qu'il ne faut pas perdre de vue le rôle que doit jouer le volet du lien rationnel que comprend le critère de la proportionnalité. Son rôle consiste à inviter la Cour à déterminer si le gouvernement procède de façon logique dans la poursuite du but qu'il vise. Techniquement, tout ce qu'exige la partie de l'article premier quant au lien rationnel, c'est la démonstration d'un lien logique quelconque, si petit soit-il, entre l'objectif poursuivi et les moyens employés pour le réaliser. Cependant, au moment d'examiner les autres éléments du critère de l'arrêt *Oakes*, la vigueur et l'étendue du lien deviennent déterminants.

En l'espèce, comme je l'ai déjà mentionné, je suis prête à conclure qu'il existe un lien rationnel entre l'intention de fournir des soins médicaux de haute qualité et la décision de faire prodiguer ces soins en grande partie par des médecins plus jeunes. La vrai question en litige est, selon moi, de savoir si le recours à ces notions générales relatives aux capacités est fondé. Je me demanderai donc si le moyen choisi par l'hôpital appelant porte atteinte le moins possible aux droits des médecins intimés.

b) L'atteinte minimale

Dans les arrêts *Edwards Books*, précité, et *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, notre Cour a reconnu qu'il ne convient pas toujours d'appliquer strictement la partie du critère de l'arrêt *Oakes* qui porte sur l'atteinte minimale. Mon collègue, le juge La Forest, a estimé que la question en litige dans les présents pourvois appartient à la catégorie des cas d'exception dont parlent les arrêts *Edwards Books* et *Irwin Toy*, et il a donc conclu qu'il faut appliquer la norme d'examen plus généreuse énoncée dans ces arrêts. En somme, il considère que la question que notre Cour doit résoudre est celle qui porte sur l'efficacité d'une politique de retraite obligatoire dans un système fermé disposant de ressources limitées. Pour les motifs que j'ai exposés dans l'arrêt *McKinney*, je ne saurais partager son avis qu'il y a lieu, en l'espèce, d'assouplir le critère de l'atteinte minimale.

As I have already noted, it has not been established that the Hospital is in fact a "closed system". On the contrary, the evidence demonstrated that permitting the respondent physicians to retain their admitting privileges would have absolutely no effect on the availability of practice opportunities for doctors embarking upon their careers. That being the case, I see no reason in fact or in law for applying a deferential standard of review. For the same reasons as I expressed in *McKinney*, I hasten to add that, even if it were accepted in principle that the *Irwin Toy* standard should apply, the record simply does not reveal any evidentiary basis for deviating from *Oakes*. No suggestion has been made that positions freed up through retirement have been filled by younger physicians who would otherwise have experienced limited employment opportunities due to senior physicians being permitted to practise their profession beyond age 65. In my opinion, therefore, the minimal impairment test as articulated in *Oakes* should apply.

Comme je l'ai déjà fait remarquer, on n'a pas fait la preuve que l'hôpital appelant constitue en réalité un «système fermé». Au contraire, la preuve indique que permettre aux médecins intimés de garder leur privilège d'admission n'aurait aucun effet sur les possibilités d'exercice de la médecine qui s'offrent aux médecins qui commencent leur carrière. Puisqu'il en est ainsi, je ne vois pas de motif de fait ou de droit d'appliquer un critère d'examen déférentiel. Pour les mêmes motifs que j'ai exprimés dans l'arrêt *McKinney*, je me hâte d'ajouter que, même si l'on acceptait le principe que le critère de l'arrêt *Irwin Toy* devrait s'appliquer, le dossier ne comporte aucun élément de preuve qui permettrait de s'écarter du critère de l'arrêt *Oakes*. On n'a pas soutenu que les postes libérés par les mises à la retraite ont été occupés par des médecins plus jeunes qui autrement n'auraient pas eu les mêmes chances d'exercer leur profession, étant donné que des médecins plus âgés étaient autorisés à exercer leur profession au-delà de l'âge de 65 ans. Donc, à mon avis, le critère de l'atteinte minimale énoncé dans l'arrêt *Oakes* doit s'appliquer.

The issue therefore comes down to this: Even accepting that there is some correlation between age and ability (a correlation which has, in my view, been overstated by the Hospital), is there not some other way of achieving the objective of high quality medical care which recognizes and takes account of the abilities of individual doctors aged 65 and over? I think the answer to this question is plainly "yes".

La question en litige se ramène donc à ceci: même si l'on reconnaît qu'il existe un certain lien entre l'âge et les capacités (un lien sur lequel l'hôpital appelant a, selon moi, trop insisté), n'y a-t-il pas quelque autre moyen de fournir, tel que souhaité, des soins médicaux de haute qualité qui permettrait de reconnaître et de prendre en considération les capacités des médecins âgés de 65 ans et plus? Je crois que la réponse à cette question est manifestement «oui».

In *McKinney* the appellant professors suggested alternative ways of dealing with the objective of faculty renewal. The situation in these appeals is somewhat different in that the doctors are not suggesting that the Hospital attempt some new, untried mechanism for ensuring that the Hospital meet its goal of providing high quality medical care. Instead, they are merely asking that the Hospital revert back to its former way of implementing its objectives. Before Regulation 5.04 was enacted the Hospital dealt with the issue of physician competency in the following manner. Admitting privileges, once granted, were renewed on an

Dans l'arrêt *McKinney*, les professeurs appelants ont proposé des moyens subsidiaires d'arriver au renouvellement du corps enseignant. La situation dans les présents pourvois est un peu différente parce que les médecins n'ont pas proposé que l'hôpital appelant ait recours à un nouveau mécanisme non éprouvé pour fournir comme il le souhaite des soins médicaux de haute qualité. Il ont plutôt demandé que l'hôpital appelant revienne à son ancienne méthode de réaliser son objectif. Avant l'adoption du règlement 5.04, l'hôpital appelant réglait ainsi la question relative aux capacités des médecins. Les privilèges d'admission des

annual basis. Renewal was assured so long as the Board was satisfied that the staff member was in good health and had the ability to continue performing safely and competently. In addition, internal auditing procedures were in place under which Department Heads had responsibility for ensuring the competency of the staff. This practice, which applied to physicians of all ages, was changed in 1984 when the Minister approved Regulation 5.04.

Why did the Hospital change this practice of treating the competency of all doctors on the same footing? It would appear that the primary reason for the change was that it was administratively convenient to remove incompetent physicians through the mechanism of mandatory retirement rather than staging annual performance reviews as had previously been done. There is no evidence that the former practice had been unsatisfactory in terms of "weeding out" incompetent doctors.

This Court has established that administrative convenience is not an adequate reason for sacrificing *Charter* rights and freedoms. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, the federal government had adopted a procedure respecting immigration claims which violated s. 7 of the *Charter* and cited administrative convenience as the reason. At pages 218-19 of my reasons I stated:

> Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.

patients, une fois accordés, étaient renouvelables chaque année. Le renouvellement avait lieu à la condition que le conseil soit convaincu que l'intéressé était en bon état de santé et qu'il avait la capacité de continuer de remplir ses fonctions avec prudence et compétence. De plus, il existait des procédures de vérification interne qui rendaient les chefs des départements responsables du contrôle de la compétence du personnel. Cette méthode, qui s'appliquait aux médecins de tous âges a été modifiée en 1984 par l'approbation du règlement 5.04 par le ministre.

Pourquoi l'hôpital appelant a-t-il modifié sa méthode de traiter les capacités de tous les médecins de la même façon? Il semblerait que la raison principale du changement tient à la commodité administrative qu'il y à écarter les médecins incompétents par le mécanisme de la retraite obligatoire plutôt qu'en organisant des examens annuels du rendement comme on le faisait auparavant. Il n'y a pas d'élément de preuve indiquant que la pratique antérieure n'ait pas donné satisfaction lorsqu'il s'agissait d'éliminer les médecins incompétents.

Notre Cour a statué que la commodité administrative n'est pas un motif valable de supprimer des droits et libertés garantis par la *Charte*. Dans l'affaire *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, le gouvernement fédéral avait suivi une procédure applicable aux demandes d'immigration qui violait l'art. 7 de la *Charte* et il a invoqué la commodité administrative comme justification. J'ai dit, aux pp. 218 et 219 de mes motifs:

> Les garanties de la *Charte* seraient certainement illusoires s'il était possible de les ignorer pour des motifs de commodité administrative. Il est sans doute possible d'épargner beaucoup de temps et d'argent en adoptant une procédure administrative qui ne tient pas compte des principes de justice fondamentale, mais un tel argument, à mon avis, passe à côté de l'objet de l'art. 1. Les principes de justice naturelle et d'équité en matière de procédure que nos tribunaux ont adoptés depuis longtemps et l'enchâssement constitutionnel des principes de justice fondamentale à l'art. 7 comportent la reconnaissance implicite que la prépondérance des motifs de commodité administrative ne l'emporte pas sur la nécessité d'adhérer à ces principes.

In my opinion, these comments apply with equal force to the guarantee of equality embodied in s. 15(1). It seems to me that it will always be more convenient from an administrative point of view to treat disadvantaged groups in society as an indistinguishable mass rather than to determine individual merit. But s. 15(1) demands otherwise. In discrimination claims of the kind involved here, if the guarantee of equality is to mean anything, it must at least mean this: that wherever possible an attempt be made to break free of the apathy of stereotyping and that we make a sincere effort to treat all individuals, whatever their colour, race, sex or age, as individuals deserving of recognition on the basis of their unique talents and abilities. Respect for the dignity of every member of society demands no less.

À mon avis, ces commentaires s'appliquent avec autant de vigueur aux libertés garanties en vertu du par. 15(1). Il me semble qu'il sera toujours plus commode du point de vue administratif de traiter les groupes défavorisés de la société de façon impersonnelle plutôt que de se fonder sur le mérite individuel. Le paragraphe 15(1) exige toutefois que l'on procède autrement. Dans les affaires de discrimination du genre de celles de l'espèce, si la garantie d'égalité doit avoir un sens, il faut au moins qu'elle signifie ceci: que chaque fois que cela est possible, on doit essayer de renoncer aux idées préconçues trop faciles et faire l'effort sincère de traiter les particuliers, quels que soient leur couleur, leur race, leur sexe ou leur âge, comme des individus qui méritent d'être jugés selon leurs talents et leurs capacités propres. Le respect de la dignité de chaque personne dans la société n'en exige pas moins.

The comments made in *Singh* also have an important bearing on the issue of minimal impairment. Under this branch of the *Oakes* test the question is whether other means are available to achieve the objective which impinge upon *Charter* rights less severely. Here, the past practice of the appellant Hospital both served its objective and respected the Constitution. The high calibre of the medical staff was ensured by subjecting all physicians to regular review of their performance. And the equality rights of the respondents were ensured by not subjecting them to the arbitrary forces of prejudice. It seems to me indisputable that where the sole reason for a change from a constitutionally sound to a constitutionally unsound system is administrative convenience, the minimal impairment branch of the proportionality test cannot be satisfied.

Les commentaires de l'arrêt *Singh* ont aussi une grande portée sur le sujet de l'atteinte minimale. En vertu de cette partie du critère de l'arrêt *Oakes*, il faut se demander s'il est possible de réaliser le même objectif par des moyens moins contraires à la *Charte*. En l'espèce, l'ancienne pratique suivie par l'hôpital appelant remplissait cette condition et respectait la constitution. En assujettissant tous les médecins à un examen périodique de leur rendement, on s'assurait de leur haute compétence et on respectait leurs droits à l'égalité en ne les soumettant pas aux forces arbitraires des préjugés. Il me semble incontestable que lorsque le seul motif pour substituer une méthode inconstitutionnelle à une méthode constitutionnelle est la commodité administrative, il ne saurait y avoir respect de la condition d'atteinte minimale des droits visés exposée au critère de la proportionnalité.

I should note that these comments are in no way meant to suggest that the only constitutionally permissible method of dealing with the issue of incompetency is by way of annual reviews of performance. It must be emphasized that had Regulation 5.04 been phrased and interpreted as establishing 65 as the presumptive age of retirement but allowing those aged 65 and over to retain their hospital privileges so long as they were found

Je veux ajouter que ces commentaires ne signifient nullement que la seule méthode constitutionnelle de régler la question de l'incompétence réside dans l'examen annuel du rendement. Il faut souligner que si le règlement 5.04 avait été rédigé et interprété de façon à faire de l'âge de 65 ans l'âge ordinaire de la retraite, mais à laisser à ceux qui avaient atteint cet âge le privilège de faire admettre des patients aussi longtemps qu'ils conservaient

to be healthy and capable, I would think that an arguable case could be made that the minimal impairment test was met. The protection afforded by s. 15(1) is not a guarantee of the right to continue in employment during the later years of life irrespective of ability. What s. 15(1) guarantees is the right not to be ousted from employment on the basis of stereotypical assumptions about one's capabilities to perform in a satisfactory way. In other words, in a context such as this, s. 15(1) does not guarantee the right to work but the right to work absent discrimination. Accordingly, had Regulation 5.04 in word and in effect provided for a *bona fide* exemption scheme contemplating the continued employment of those able and willing to work, one would be hard pressed to say that the provision was not reasonable and demonstrably justifiable.

leur santé et leurs capacités, je crois qu'on aurait pu soutenir que la condition relative à l'atteinte minimale des droits exposée au critère susmentionné était respectée. Le paragraphe 15(1) ne garantit pas notre droit de continuer de travailler à un âge avancé sans égard à notre aptitude à le faire. Ce que le par. 15(1) garantit, c'est notre droit de ne pas être privés de notre travail en vertu de présomptions fondées sur des préjugés relatifs à notre capacité de donner un bon rendement. En d'autres termes, dans un contexte semblable à celui de l'espèce, le par. 15(1) ne garantit pas le droit de travailler, mais celui de travailler sans faire l'objet de discrimination. En conséquence, si le règlement 5.04 avait comporté dans son texte et son application un régime légitime d'exception qui aurait permis à ceux qui étaient encore capables de travailler, de continuer à le faire s'ils le souhaitaient, il aurait été difficile d'affirmer que la disposition n'était pas raisonnable et susceptible de justification.

In conclusion I find that the Regulation by its terms does not meet the requirement that it impair the rights of those adversely affected by it as little as possible. I find also that the Regulation has been administered in a manner which violates s. 15(1) of the *Charter*. It is not saved by s. 1.

En conséquence, je conclus que le règlement, comme il est rédigé, ne satisfait pas à la condition selon laquelle il doit être porté atteinte le moins possible aux droits de ceux qui en subissent les effets. Je conclus aussi que le règlement a été appliqué d'une façon qui viole le par. 15(1) de la *Charte*. Il n'est pas justifié en vertu de l'article premier.

IV. Disposition

I would dismiss the Hospital's appeal with costs.

Addressing the relief sought by the respondents in their statement of claim, I would grant the respondents a declaration that Regulation 5.04, by its terms and in the manner of its application, is contrary to s. 15(1) of the *Charter* and is accordingly of no force or effect. I would also grant them a declaration that the decisions of the appellants made pursuant to the Regulation terminating the admitting privileges of the respondents are null and void. I would direct the Vancouver General Hospital to reinstate the hospital admitting privileges of the respondents.

IV. Dispositif

Je suis d'avis de rejeter le pourvoi de l'hôpital avec dépens.

Quant au redressement recherché par les intimés dans leur déclaration, je suis d'avis de rendre un jugement déclarant que le règlement 5.04 est contraire au par. 15(1) de la *Charte* dans ses dispositions et son application et qu'il est par conséquent inopérant. Je suis également d'avis de rendre jugement déclarant que les décisions des appelants, prises en vertu du règlement, de mettre fin aux privilèges accordés aux intimés d'admettre des patients sont nulles. Je suis d'avis d'enjoindre au Vancouver General Hospital de rétablir les privilèges hospitaliers des intimés d'admettre des patients.

I would answer the constitutional questions posed by Chief Justice Dickson as follows:

1. Do the provisions of the *Canadian Charter of Rights and Freedoms* apply to the actions of the Vancouver General Hospital in establishing and administering Regulation 5.04 of the Medical Staff Regulations?

   Yes.

2. If the answer to question 1 is yes, is Regulation 5.04 of the Medical Staff Regulations contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

   Yes.

3. If the answer to question 1 is yes, was the administration of Regulation 5.04 of the Medical Staff Regulations by the Vancouver General Hospital contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

   Yes.

4. If the answer to either questions 2 or 3 is yes, is Regulation 5.04 of the Medical Staff Regulations or the manner of its administration by the Vancouver General Hospital nevertheless justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

   No.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting)—There is one principal issue in this case. That is whether Regulation 5.04, which was passed by the Trustees of the Hospital and approved by the Minister of Health according to the *Vancouver General Hospital Act*, S.B.C. 1970, c. 55, s. 6, is constitutional. The Regulation reads:

5.04 Retirement: Members of the Staff shall be expected to retire at the end of the appointment year in which they pass their 65th birthday. Members of the Staff who wish to defer their retirement may make special application to the Board. The Board shall request the Medical Advisory Committee for a recommendation in each such case. The Medical Advisory Committee shall, in making its recommendation, consider the report of a personal interview which shall take place between the applicant and the Department Head concerned which shall include a review of the health and continuing performance of the applicant.

Je suis d'avis de répondre comme suit aux questions constitutionnelles formulées par le juge en chef Dickson:

1. Les dispositions de la *Charte canadienne des droits et libertés* s'appliquent-elles aux actions du Vancouver General Hospital relativement à la rédaction et à la mise en œuvre du règlement 5.04 des Medical Staff Regulations?

   Oui.

2. Si la réponse à la question 1 est affirmative, le règlement 5.04 des Medical Staff Regulations est-il contraire au par. 15(1) de la *Charte canadienne des droits et libertés*?

   Oui.

3. Si la réponse à la question 1 est affirmative, l'application du règlement 5.04 des Medical Staff Regulations par le Vancouver General Hospital est-elle contraire au par. 15(1) de la *Charte canadienne des droits et libertés*?

   Oui.

4. Si la réponse aux questions 2 ou 3 est affirmative, le règlement 5.04 des Medical Staff Regulations ou la façon dont il est appliqué par le Vancouver General Hospital sont-ils néanmoins justifiés en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

   Non.

Les motifs suivants ont été rendus par

LE JUGE L'HEUREUX-DUBÉ (dissidente)—Ce pourvoi soulève la principale question de déterminer si le règlement 5.04, adopté par les administrateurs de l'hôpital et approuvé par le ministre de la Santé conformément à la *Vancouver General Hospital Act*, S.B.C. 1970, ch. 55, art. 6, est constitutionnel. Le règlement se lit ainsi:

[TRADUCTION] 5.04 La retraite: Les membres du personnel sont censés prendre leur retraite à la fin de l'année d'exercice au cours de laquelle ils atteignent 65 ans. Les membres du personnel qui veulent reporter leur mise à la retraite peuvent présenter une demande spéciale au conseil d'administration, qui demande la recommandation du «conseil consultatif médical» dans chaque cas. Avant de faire sa recommandation, le conseil consultatif médical tient compte du rapport d'une entrevue personnelle entre le requérant et le chef de département concerné, y compris le rapport de l'état de santé et du rendement continu du requérant.

Three questions need to be answered. First, does Vancouver General Hospital fall under "government" for the purposes of s. 32 of the *Canadian Charter of Rights and Freedoms* and is Regulation 5.04 "law" as understood in s. 52 of the *Constitution Act, 1982*? Second, if so, does Regulation 5.04 violate s. 15(1) of the *Charter*? Third, in the affirmative, can the Regulation be saved by s. 1 of the *Charter*?

I agree with my colleague Madame Justice Wilson that under the broad test she has developed in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, Vancouver General Hospital is acting in this case as "government" for s. 32 of the *Charter*. Both historically and (even more so today) in functional terms, hospitals in Canada are an "arm of government" and perform a government function. My only hesitation perhaps stems from the fact that the Hospital's Board of Governors enjoys a certain independence in formulating policies, including the policy which presided over Regulation 5.04. However, even though members of the Board are appointed by the government, I see no difference between this situation and that of government departments setting up their own agenda and policies, subject only to general guidelines established by the legislature. This situation is, in my view, totally different from that of universities. In the case of the universities, as demonstrated in *McKinney*, *supra*, government involvement is primarily limited to funding. I do not wish to suggest, however, that all actions of every hospital would attract review of the *Charter* under s. 32. There may be some instances where a hospital would not constitute "government". Nevertheless, in this case the Hospital is "government" for the purposes of s. 32.

Notwithstanding his conclusion that the appellants are not "government" for the purposes of s. 32 of the *Charter*, my colleague Justice La Forest goes on to discuss the constitutionality of Regula-

Trois questions se posent ici. Premièrement, le Vancouver General Hospital fait-il partie du «gouvernement» aux fins de l'art. 32 de la *Charte canadienne des droits et libertés* et le règlement 5.04 constitue-t-il une «règle de droit» au sens de l'art. 52 de la *Loi constitutionnelle de 1982*? Deuxièmement, dans l'affirmative, le règlement 5.04 viole-t-il le par. 15(1) de la *Charte*? Troisièmement, dans l'affirmative, le règlement peut-il se justifier en vertu de l'article premier de la *Charte*?

Je partage l'opinion de ma collègue le juge Wilson qu'en raison du test large qu'elle a formulé dans l'arrêt *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, le Vancouver General Hospital agit, dans la présente instance, en tant que «gouvernement» au sens de l'art. 32 de la *Charte*. Tant sur le plan historique que (encore plus aujourd'hui) sur le plan fonctionnel, les hôpitaux au Canada sont une «branche du gouvernement» et exercent une fonction gouvernementale. Ma seule hésitation découle peut-être du fait que le conseil d'administration de l'hôpital bénéficie d'une certaine indépendance dans la formulation de ses politiques, y compris celle à l'origine du règlement 5.04. Cependant, même si les membres du conseil d'administration sont nommés par le gouvernement, je ne vois aucune différence entre cette situation et celle des ministères du gouvernement qui établissent leur propre programme et formulent leurs politiques, sous réserve des seules directives générales établies par le législateur. J'estime que cette situation est à tout à fait différente de celle des universités. Dans le cas des universités, comme il ressort de l'arrêt *McKinney*, précité, la participation du gouvernement est essentiellement restreinte au financement. Je ne voudrais cependant pas laisser entendre que toutes les actions de tous les hôpitaux puissent être susceptibles d'examen en vertu de l'art. 32 de la *Charte*. Il peut y avoir des circonstances où un hôpital ne serait pas considéré comme «gouvernement». Quoi qu'il en soit, en l'espèce, l'hôpital fait partie du «gouvernement» aux fins de l'art. 32.

Malgré sa conclusion que les appelants ne font pas partie du «gouvernement» aux fins de l'art. 32 de la *Charte*, mon collègue le juge La Forest n'en examine pas moins la constitutionnalité du règle-

tion 5.04 under s. 15(1) of the *Charter*. For the purposes of my discussion of these topics, I agree with him, for the reasons that he gives, that Regulation 5.04 is "law" for the purposes of s. 15 of the *Charter*. I also agree with my colleague that Regulation 5.04 clearly infringes s. 15(1) of the *Charter* because it discriminates by reason of age, a prohibited ground of discrimination enumerated in s. 15(1).

Where I disagree with my colleague La Forest J., however, and agree in the result with my colleague Wilson J., is on the question of whether this Regulation is a reasonable limit in a free and democratic society as provided in s. 1 of the *Charter* and under the analysis enunciated in *R. v. Oakes*, [1986] 1 S.C.R. 103. In my opinion (and I differ in part from Wilson J.'s reasoning), Regulation 5.04 does not satisfy the requirements of *Oakes*, mainly because the objectives sought by the Regulation are not rationally connected to the means chosen to achieve those ends and, in addition, the minimal impairment test has not been respected.

Section 1 of the *Charter*

The approach recognized by this Court under s. 1 is well known and need not be repeated in detail here. It should be clear that the balancing which is undertaken under this section of the *Charter* involves the particular law in question, and the severity of the violation of the right or freedom under the application of that law. We look to whether the objective of the law is sufficiently important to warrant overriding a protected right, and whether the means used in the violation are appropriate in view of the right breached.

My colleague La Forest J. undertakes an analysis comparable to that in *McKinney* in assessing whether the hospital's Regulation and policy are reasonable limits for the purposes of s. 1. One proposed objective of Regulation 5.04 and its attendant policy is competence. La Forest J. states at p. 522:

ment 5.04 au regard du par. 15(1) de la *Charte*. Pour les fins de mon analyse de ces questions, je partage son avis, pour les motifs qu'il donne, que le règlement 5.04 est une «loi» aux fins de l'art. 15 de la *Charte*. Je partage également son avis que le règlement 5.04 contrevient clairement au par. 15(1) de la *Charte* parce qu'il établit une discrimination fondée sur l'âge, un motif prohibé de discrimination énuméré au par. 15(1).

Là où je suis en désaccord avec mon collègue le juge La Forest et où je souscris à la conclusion de ma collègue le juge Wilson, c'est sur la question de savoir si ce règlement constitue une limite raisonnable dans une société libre et démocratique en vertu de l'article premier de la *Charte* et en vertu du test formulé dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. À mon avis, (et je ne partage pas ici entièrement le raisonnement du juge Wilson) le règlement 5.04 ne satisfait pas aux exigences de l'arrêt *Oakes*, et ce, principalement parce que les objectifs visés par le règlement n'ont pas de lien rationnel avec les mesures choisies pour y parvenir et, en outre, parce que le critère de l'atteinte minimale n'a pas été respecté.

L'article premier de la *Charte*

La méthode retenue par notre Cour en vertu de l'article premier est bien connue et il n'est pas nécessaire d'y référer ici en détail. Il devrait être clair que l'exercice qui doit être entrepris en vertu de cette disposition de la *Charte* vise à soupeser la loi particulière en jeu au regard de la gravité de la violation du droit ou de la liberté résultant de l'application de cette loi particulière. Nous devons déterminer si l'objectif de la loi est suffisamment important pour justifier la suppression d'un droit protégé et si les moyens utilisés à cette fin sont appropriés compte tenu du droit qui est violé.

Mon collègue le juge La Forest entreprend une analyse comparable à celle de l'arrêt *McKinney* pour déterminer si le règlement et la politique de l'hôpital constituent des limites raisonnables aux fins de l'article premier. L'un des objectifs que visent le règlement 5.04 et la politique qui le sous-tend est la compétence. Le juge La Forest affirme, à la p. 522:

Just as those policies [in *McKinney*] were directed toward the achievement of excellence in the universities' pursuit of higher learning, Regulation 5.04 and its attendant policy were intended to maintain and enhance the quality of medical care the Vancouver General is capable of providing.

In addition to this concern over "quality", there is mention of the teaching and research functions carried out at the hospital. My colleague Wilson J. has found another possible objective, that of promoting opportunities for younger physicians to practise medicine. I agree with her that there is no evidence to suggest that the Hospital is a "closed system", and therefore this objective is not sufficiently pressing to warrant overriding a constitutionally protected right. Unlike Wilson J. however, I also question the attempt to justify the violation of the respondents' rights on the principal objective of competence.

One cannot oppose a hospital's efforts to maintain high levels of competence among its staff, and in few areas can this objective be seen as so important. When knowledge and skill are fundamental in some cases to the survival of a patient, we applaud high standards of competence in our hospitals. The question is, however, whether this is what is addressed by Regulation 5.04.

In *McKinney*, I expressed the view that forcing the end of a career based on age alone does not pass muster under the *Charter*, as age is surely not determinative of capacity or competence. One is no less competent the day after one's 65th birthday, than the day before. Fundamentally it is a question of personal dignity and fairness. I concluded also that the potential negative consequences of stopping the mandatory retirement practice were outweighed by the clear positive aspects of allowing perfectly competent persons who happen to be over 65, to continue in their positions. The same concerns can be raised in this case. Medical practitioners do not become incompetent at a given age. One falls below acceptable levels of proficiency through inattention to medical advances and, *inter alia*, inade-

Tout comme ces politiques [dans l'arrêt *McKinney*] faisaient partie de la recherche de l'excellence dans les universités en matière de haut savoir, le règlement 5.04 et la politique qui s'y rattache visaient à maintenir et à promouvoir la qualité des soins médicaux que pouvait offrir le Vancouver General.

En plus de cette préoccupation concernant la «qualité», on mentionne également la formation et la recherche qui sont effectuées à l'hôpital. Ma collègue le juge Wilson voit un autre objectif possible, celui de favoriser les chances d'emploi des jeunes médecins qui veulent pratiquer la médecine. Je partage son avis que rien dans la preuve n'indique que l'hôpital est un «système fermé»; cet objectif n'est donc pas suffisamment pressant pour justifier la suppression d'un droit protégé par la Constitution. Cependant, contrairement au juge Wilson, je mets également en doute la tentative de justifier la violation des droits des intimés en invoquant l'objectif principal de la compétence.

On ne saurait s'opposer aux efforts d'un hôpital en vue de maintenir un haut niveau de compétence au sein de son personnel, et il est peu de domaines où cet objectif doit être considéré comme aussi important. Lorsque la connaissance et la compétence sont aussi essentielles, dans certains cas à la survie d'un patient, il y a lieu de se féliciter des hauts standards de compétence de nos hôpitaux. La question est toutefois de savoir si c'est là ce que vise le règlement 5.04.

Dans l'arrêt *McKinney*, j'ai estimé que forcer une personne à mettre fin à sa carrière simplement en raison de son âge ne saurait résister à un examen fondé sur la *Charte* puisque l'âge ne détermine certainement pas les capacités ou la compétence d'une personne. On ne devient pas moins compétent le lendemain de son 65e anniversaire que la veille de celui-ci. Fondamentalement, il s'agit d'une question de dignité personnelle et de justice. J'en suis également venue à la conclusion que les conséquences possiblement défavorables de la suppression de la retraite obligatoire devaient céder le pas devant les aspects clairement positifs qu'il y a à permettre à des personnes parfaitement compétentes âgées de plus de 65 ans de continuer à exercer leurs fonctions. Les mêmes préoccupations se soulèvent en l'espèce. Les médecins ne devien-

quate physical stamina and health. But a forced retirement policy is arbitrary and simply sets a date for all this to occur. It confounds logic to suggest that these concerns simply occur on the passing of a given day in all cases.

In this particular case we are faced with a Regulation and policy which contain an element of ongoing testing for proficiency and competence. The health of the practitioner is considered. And a personal interview is held. At first glance, it seems that this is a more humane and rather effective way to manage the retirement of older medical employees. But on further examination and reflection, it becomes apparent that the treatment remains unfair and cannot justify the violations of the equality rights in question.

The Regulation and its attached policy serve to implement the Board of Trustees' retirement policy at an administrative level. No one will question efforts of the Board to maintain an efficient hospital. But the Regulation and its policy must be rationally connected to the objectives they seek to attain. In my view they are not so rationally connected. In his analysis my colleague La Forest J. applies his reasoning on this point in *McKinney*, at p. 524, to the effect that the policies allow for "regular staff renewal and the intellectual invigoration that flows from it". To keep on the "cutting edge" and to maintain research and teaching standards, the mandatory retirement of older workers attempts to infuse the hospitals with new people. My colleague states, at p. 525, that the ability of the hospital to remain up to date

> . . . depends on their ability to regularly make room on their staffs for younger doctors who, by virtue of their recent training, are fully conversant with the latest theories, discoveries and techniques. And since hospitals are, as much as universities, a "closed system with limited resources", this regular infusion with the vitality

nent pas incompétents à un âge donné. S'ils le deviennent, cela tient surtout au fait qu'ils ne se tiennent plus au courant des avances de la science médicale et, entre autres, que leur résistance physique et leur santé diminuent. Mais une politique de mise à la retraite obligatoire est arbitraire et ne fait qu'établir la date à laquelle cela est présumé se produire. C'est défier toute logique d'affirmer que dans tous les cas cet état de choses ne se produit que lors de l'avènement d'un jour précis.

Dans notre cas, nous faisons face à un règlement et une politique qui prévoient notamment l'évaluation permanente de l'efficacité et de la compétence. La santé du médecin est évaluée, et une entrevue personnelle est tenue. À première vue, cela semble être une façon plus humaine et plutôt efficace de procéder à la mise à la retraite des employés médicaux plus âgés. Mais si l'on pousse l'examen et la réflexion, on se rend compte que le traitement demeure injuste et ne peut justifier les violations des droits à l'égalité en question.

Le règlement et la politique qui s'y rattache visent à mettre en œuvre la politique de mise à la retraite du conseil d'administration sur le plan administratif. Personne ne peut douter des efforts du conseil afin de préserver l'efficacité de l'hôpital. Mais le règlement et sa politique d'application doivent avoir un lien rationnel avec les objectifs qu'ils visent à atteindre; j'estime que ce n'est pas le cas en l'espèce. Dans son analyse, mon collègue le juge La Forest applique à cet égard le raisonnement qu'il a tenu dans l'arrêt *McKinney* (à la p. 524), selon lequel les politiques permettent «le renouvellement régulier du personnel et l'apport intellectuel qui en découle». La retraite obligatoire des travailleurs plus âgés vise à faire profiter les hôpitaux de l'apport de nouveaux membres et, partant, à leur permettre de demeurer à «la fine pointe» et de maintenir les normes de recherche et de formation fixées. En effet, mon collègue affirme à la p. 525 que la capacité des hôpitaux de rester à la fine pointe

> . . . dépend [. . .] de leur capacité d'accueillir régulièrement au sein de leur personnel des jeunes médecins qui, en raison de leur formation récente, sont pleinement au courant des dernières théories, découvertes et techniques. Et comme les hôpitaux sont tout autant que les universités un «système fermé ayant des ressources limi-

and perspective of the young can only be achieved by the corresponding departure of some of those already on staff.

Even accepting the "closed system" argument, I cannot see why "new people" must be infused into the hospital's system to keep it relevant. Like many professionals, medical practitioners are faced every day with the need for ongoing training and must make continual efforts to remain abreast of new developments in the technology and the research. Basic university education provides only the groundwork for a successful and competent career. Medical practitioners must always be sensitive to new theories and discoveries. The fact that a practitioner has a 40th, 50th or 60th birthday alters this no more than the 65th birthday. Competence is threatened by many things, but age is not necessarily one of them.

My colleague La Forest J. also maintains that the hospital as an institution is forced to choose between "competing social groups" and, as a result, special considerations apply in considering the "minimal impairment" aspect of the *Oakes* formula. I agree that the Trustees do make a choice between groups in this situation. However, I cannot agree that in the present case the allocation of resources is a fundamental issue. That is not the kind of choice being made pursuant to this policy. The choice as I see it is made between competent medical practitioners who happen to be over 65, and competent doctors under 65, usually entering the medical practice. I do not see these circumstances warranting special considerations. I would add that the Board, even if it were a lawmaking body for the purposes of the *Charter*, does not have all the requisite characteristics of a legislative body considering resource allocation, to warrant these special considerations being applied.

tées», cet apport régulier que fournissent les jeunes avec leur vitalité et leurs idées ne peut être réalisé que par le départ concomitant de certains des membres qui font déjà partie du personnel.

Même en acceptant l'argument du «système fermé», je ne vois pas pourquoi l'hôpital a besoin de l'apport de «nouveaux membres» pour demeurer à jour. Comme plusieurs professionnels, les médecins font face tous les jours à la nécessité d'une formation permanente et doivent continuellement faire des efforts pour se tenir au fait des nouveaux progrès en matière de technologie et de recherche. La formation universitaire ordinaire ne sert que de fondement à une carrière brillante et compétente. Les médecins doivent toujours être conscients des nouvelles théories et découvertes. Le fait qu'un médecin célèbre ses 40, 50 ou 60 ans ne modifie pas plus cet état de choses que l'arrivée de son 65e anniversaire. La compétence est menacée par plusieurs facteurs, mais l'âge n'en fait pas nécessairement partie.

Mon collègue le juge La Forest affirme également que l'hôpital, comme institution, est tenu de faire un choix entre «les revendications de groupes concurrents» et, par conséquent, des considérations particulières s'appliquent dans l'examen du critère de «l'atteinte minimale» selon l'arrêt *Oakes*. Je reconnais que, dans cette situation, les administrateurs font ce choix entre différents groupes. Cependant, je ne suis pas d'accord qu'en l'espèce la répartition des ressources soit une question fondamentale. Ce n'est pas ce genre de choix qui est fait en application de cette politique. À mon avis, le choix s'effectue entre des médecins compétents qui se trouvent à avoir plus de 65 ans, et des médecins compétents de moins de 65 ans, qui débutent habituellement dans la pratique médicale. Je ne crois pas que ces circonstances justifient l'application de considérations particulières. J'ajouterais que le conseil d'administration, même s'il s'agissait d'un organisme investi du pouvoir de légiférer aux fins de la *Charte*, ne possède pas toutes les caractéristiques requises d'un organisme législatif qui doit tenir compte de la répartition des ressources pour justifier l'application de ces considérations particulières.

The Regulation, the policy and the evidence should be considered together. The Regulation mandates retirement on reaching one's 65th birthday. The policy puts a further onus on the practitioner to show he or she has something unique to offer the Hospital. One must make special application to the Board to ask that retirement be deferred. The Medical Advisory Committee considers the report of the Department Head who has arranged a personal interview and an assessment of the health and performance of the individual practitioner. The Committee recommends to the Board.

Some of the evidence on examination for discovery of Mr. James B. Flett was admitted and read in at the trial. Mr. Flett is President of the Vancouver General Hospital. This evidence reveals that, even prior to the Regulation's being passed, the heads of the clinical departments of the Hospital were responsible for ensuring that each practitioner past "a certain age" continued to have the ability to perform safely and efficiently, prior to recommending to the Medical Advisory Board that the practitioner be reappointed. Practitioners are reappointed annually. This was one aspect of the Hospital's existing internal audits of competence, along with the health of the applicant. There was no suggestion that the standards were inadequate. The respondents, for their part, take no issue with the general standards applied by the Hospital and accepted at the hearing before this Court that closer scrutiny may be necessary of those practitioners in their later years of practice. Respondents argue however, and I agree, that the same standards should be applied to all practitioners in assessing competence. Different and more onerous standards for measuring competence for those over 65 are a grave intrusion into the right to be treated equally.

Another factor considered in the process under Regulation 5.04 is health. My colleague La Forest J. suggests (p. 563) that "deterioration" is an "undeniable characteristic of increasing age". There is no evidence before us to suggest that age 65 is a threshold age for physical deterioration, nor

Le règlement, sa politique d'application et la preuve devraient être examinés comme un tout. Le règlement impose la retraite à l'âge de 65 ans. Sa politique d'application impose une obligation supplémentaire aux médecins, celle d'établir qu'ils ont quelque chose d'unique à offrir l'hôpital. Le report de la retraite doit faire l'objet d'une demande spéciale au conseil d'administration. Le conseil consultatif médical examine le rapport du chef de département qui s'est entretenu personnellement avec le médecin en cause et l'évaluation de la santé et du rendement de celui-ci. Le comité présente ses recommandations au conseil d'administration.

Une partie de l'examen au préalable de M. James B. Flett a été admise en preuve lors du procès. M. Flett est président du Vancouver General Hospital. Cette preuve révèle que, même avant l'adoption du Règlement, les chefs des départements cliniques de l'hôpital devaient s'assurer que chaque praticien ayant dépassé «un certain âge» continuait à avoir l'habileté requise pour pratiquer de façon sûre et efficace avant de recommander au conseil consultatif médical que le praticien soit renommé. Le renouvellement des privilèges des médecins se fait annuellement. C'était là l'un des aspects des vérifications internes de compétence de la part de l'hôpital, de même que la santé du médecin qui faisait application. Rien n'indique que les standards étaient inadéquats. De leur côté, les intimés ne contestent pas les normes générales appliquées par l'hôpital, et ils ont reconnu devant notre Cour qu'un examen plus attentif pourrait être nécessaire au cours des dernières années de pratique des médecins. Les intimés soutiennent cependant, et je partage leur avis, que les mêmes normes devraient être appliquées à tous les médecins dans l'évaluation de leur compétence. L'application de normes différentes et plus rigides dans l'examen de la compétence des médecins de plus de 65 ans porte gravement atteinte au droit à un traitement égal.

La santé est un autre facteur considéré dans le processus visé par le règlement 5.04. Mon collègue le juge La Forest laisse entendre que la «détérioration» est une «caractéristique incontestable du vieillissement» (p. 563). Il n'y a aucune preuve à l'effet que 65 ans est l'âge où commence la détério-

that this would necessarily affect the competence of the practitioner. The health of the practitioner may be a factor in the review of a practitioner's abilities. But surely ongoing health problems of a practitioner would be a factor in any review of any individual's performance. Inability to perform one's duties for health reasons is not limited to those over 65.

What is evident then, is that the system for "special application" does not really allow the practitioner any leeway beyond showing that something "unique" may be offered to the Hospital. In my view, the violation of the rights thus cannot be justified by the appellants. The requirement of showing extra competence or other special qualities is too great. This higher standard is applied solely because the individual has reached 65. This Court has already admonished the use of convenience in administrative procedures as a possible justification for the breach of rights: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 218-19, *per* Wilson J. It seems self-evident that the retirement Regulation and policy set an arbitrary and easy mark for the end of a career—one's 65th birthday. The combination of these factors leads me to the conclusion that the mark is set too high for the practitioners affected: the rights have not been impaired "as little as possible", in my view.

There are acceptable alternatives to the procedures developed by the Board of Trustees, to encourage retirement. A recommended age for retirement could be established, and could be made at the point where it becomes clear that physical difficulties are prevalent, with exceptions made in the appropriate case. Reviews of competence could be semi-annual for those over, for example, 70 years of age. These measures among others can be implemented discretely and using a process upholding the dignity of the individual.

I would only add that the number of persons wishing to work beyond 70 or 75 will not be staggering. But there are people who can (and do) make significant contributions well beyond their

ration physique ni qu'elle a nécessairement des répercussions sur la compétence du médecin. La santé du médecin peut être un facteur à considérer dans l'examen de ses aptitudes. Mais assurément, les problèmes de santé permanents d'un médecin seraient un facteur pertinent à tout examen de rendement de tout individu. L'incapacité d'exécuter ses fonctions pour des raisons de santé n'est pas limitée aux personnes de plus de 65 ans.

Ce qui ressort clairement c'est que le système de la «demande spéciale» n'accorde pas vraiment de marge de manœuvre au médecin sinon celle d'établir qu'il a quelque chose d'«unique» à offrir à l'hôpital. À mon avis, les appelants ne peuvent donc justifier la violation des droits en cause. L'obligation d'établir une compétence supérieure ou d'autres qualités spéciales est trop exigeante. Cette norme supérieure n'est appliquée que parce que l'individu a atteint 65 ans. Notre Cour a déjà condamné l'utilisation de motifs de commodité administrative comme justification possible de la violation des droits: *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, aux pp. 218 et 219 (le juge Wilson). Il semble évident que le règlement et la politique de retraite obligatoire établissent un seuil arbitraire et facile pour mettre fin à la carrière d'une personne—son 65e anniversaire de naissance. La combinaison de ces facteurs m'amène à conclure que ce seuil est trop sévère pour les médecins visés: j'estime qu'on n'a pas porté atteinte «le moins possible» à leurs droits.

Il existe d'autres solutions de rechange acceptables aux règles formulées par le conseil d'administration pour favoriser la retraite. On pourrait recommander un âge de retraite et le fixer lorsqu'il devient clair que les problèmes physiques sont prédominants, sous réserve d'exceptions dans les cas appropriés. Par exemple, des examens de rendement pourraient être tenus deux fois par année pour les médecins âgés de plus de 70 ans. Ces mesures parmi d'autres pourraient être mises en œuvre discrètement et d'une façon qui ne porte pas atteinte à la dignité de la personne.

Je tiens seulement à ajouter que le nombre de personnes désirant travailler au-delà de 70 ou 75 ans ne sera pas considérable. Mais il existe des gens qui peuvent apporter (et qui apportent) une

65th birthday, whether it be in conducting an orchestra, running a private business or leading a country. These people should be afforded the opportunity to continue in their chosen fields. They should not suddenly be presumed to be no longer fit to perform. Finally, persons reaching these ages are usually well aware of their decreased physical capacities if they exist. Handled in a mature and respectful fashion, the retirement process can be a smooth and dignified transition both for the individual and for the institution in question.

I recognize the able submissions of counsel for the Hospital and the Board of Trustees, to the effect that there is an increasing number of practitioners and that the admitting privileges available to the hospital are not unlimited. The Hospital must be efficient and cohesive. But I cannot accept that this can justify the imposition of the measures in question. The bottom line is competence. I doubt anyone would argue that experienced practitioners have expertise which cannot be found in a textbook. And any practitioner who has not kept up with recent developments should and will be screened out in annual reviews. Younger practitioners have greater physical stamina in some cases, but the health of all practitioners is relevant to their ongoing competence. We are left with the bare imposition of a different and higher standard on those over 65. This method of impairing rights is too severe. In this case, the means used should have been more carefully tailored to impair the rights in a more appropriate manner.

I conclude then that Regulation 5.04 and the policy attached to it cannot be saved by s. 1 of the *Charter* and therefore is unconstitutional. Accordingly, I would dismiss the appeal with costs, and answer the constitutional questions as follows:

1. Do the provisions of the *Canadian Charter of Rights and Freedoms* apply to the actions of the Vancouver

contribution importante bien au-delà de leur 65e anniversaire de naissance, qu'il s'agisse de diriger un orchestre, d'exploiter une entreprise privée ou de diriger un pays. Ces personnes devraient se voir donner l'opportunité de pouvoir continuer à exercer dans le domaine de leur choix. On ne devrait pas subitement présumer qu'elles ne sont plus en mesure de le faire. Enfin, les personnes qui atteignent cet âge sont habituellement bien conscientes de la diminution de leurs capacités physiques, le cas échéant. Abordée d'une manière responsable et respectueuse, la retraite peut être un processus de transition paisible et digne tant pour l'individu que pour l'institution en question.

Je reconnais les arguments valables des procureurs de l'hôpital et du conseil d'administration, soit qu'il y a un nombre croissant de médecins et que les privilèges d'admission à l'hôpital ne sont pas illimités. L'hôpital doit être efficace et cohérent. Mais je ne peux accepter que cela justifie l'imposition des mesures en question. À la limite, c'est une question de compétence. Je pense que personne ne contesterait que les médecins chevronnés ont une expertise qui ne se trouve pas dans un manuel de médecine. Et tout médecin qui ne s'est pas tenu au courant des récents développements devrait être et sera repéré lors des examens annuels. Les médecins plus jeunes ont une plus grande vigueur physique dans certains cas, mais la santé de tous les médecins est pertinente à leur compétence permanente. Nous nous retrouvons donc avec l'imposition flagrante d'une norme différente et plus sévère pour les personnes de plus de 65 ans. Cette façon de porter atteinte aux droits est trop drastique. En l'espèce, les mesures utilisées auraient dû être adaptées de façon plus circonscrite et d'une manière plus appropriée lorsqu'il s'agit de porter atteinte aux droits d'un individu.

Je conclus donc que le règlement 5.04 et la politique qui s'y rattache ne sauraient être justifiés en vertu de l'article premier de la *Charte* et sont donc inconstitutionnels. Par conséquent, je suis d'avis de rejeter le pourvoi avec dépens et de répondre aux questions constitutionnelles de la façon suivante:

1. Les dispositions de la *Charte canadienne des droits et libertés* s'appliquent-elles aux actions du Vancouver

General Hospital in establishing and administering Regulation 5.04 of the Medical Staff Regulations?

Yes.

2. If the answer to question 1 is yes, is Regulation 5.04 of the Medical Staff Regulations contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

3. If the answer to question 1 is yes, was the administration of Regulation 5.04 of the Medical Staff Regulations by the Vancouver General Hospital contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

4. If the answer to either questions 2 or 3 is yes, is Regulation 5.04 of the Medical Staff Regulations or the manner of its administration by the Vancouver General Hospital nevertheless justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

The following are the reasons delivered by

SOPINKA J.—For the reasons which I gave in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, I agree with the conclusions and reasons of Justice La Forest in respect of all issues except whether Regulation 5.04 is law within the meaning of s. 15(1) of the *Canadian Charter of Rights and Freedoms* which I would prefer not to decide on the basis of an assumption that the Hospital is part of government.

The following are the reasons delivered by

CORY J. (dissenting)—On this appeal I am in agreement with the reasons of Justice Wilson and her proposed disposition of the case. However, I must briefly explain the basis for my conclusion that s. 1 of the *Charter* could not save the Hospital's mandatory retirement regulations while it could quite properly be employed to maintain the universities' compulsory retirement regulations.

I agree with Justice La Forest that, for the reasons he expressed, the balancing exercise which

General Hospital relativement à la rédaction et à la mise en œuvre du règlement 5.04 des Medical Staff Regulations?

Oui.

2. Si la réponse à la question 1 est affirmative, le règlement 5.04 des Medical Staff Regulations est-il contraire au par. 15(1) de la *Charte canadienne des droits et libertés*?

Oui.

3. Si la réponse à la question 1 est affirmative, l'application du règlement 5.04 des Medical Staff Regulations par le Vancouver General Hospital est-elle contraire au par. 15(1) de la *Charte canadienne des droits et libertés*?

Oui.

4. Si la réponse aux questions 2 ou 3 est affirmative, le règlement 5.04 des Medical Staff Regulations ou la façon dont il est appliqué par le Vancouver General Hospital sont-ils néanmoins justifiés en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

Non.

Version française des motifs rendus par

LE JUGE SOPINKA—Pour les motifs que j'ai exposés dans l'arrêt *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, je partage les conclusions et les motifs du juge La Forest relativement à toutes les questions en litige à l'exception de celle de savoir si le règlement 5.04 est une loi au sens du par. 15(1) de la *Charte canadienne des droits et libertés*, que je préfère ne pas trancher sur le fondement de l'hypothèse que l'hôpital fait partie du gouvernement.

Version française des motifs rendus par

LE JUGE CORY (dissident)—Dans ce pourvoi, je me range aux motifs du juge Wilson et à la façon dont elle statuerait en l'espèce. Cependant, je dois expliquer brièvement le fondement de ma conclusion que l'article premier de la *Charte* ne peut être invoqué pour justifier les règlements de l'hôpital sur la retraite obligatoire alors qu'il pouvait fort bien l'être pour justifier les règlements des universités sur la retraite obligatoire.

Je suis d'accord avec le juge La Forest, pour les motifs qu'il a exposés, quand il dit que la juste

the Court must undertake in a consideration of the application of s. 1 to the universities' regulations should be sensitive and not mechanistic.

Certainly there are substantial differences between universities and hospitals. The universities justified their policies of mandatory retirement on the basis that they were intended to enhance their capacity to seek and maintain excellence by permitting flexibility in resource allocation and faculty renewal and to preserve academic freedom and the collegial form of association by minimizing distinctive modes of performance evaluation.

The importance of these objects was recognized by La Forest J. in this way, at pp. 286-87 [*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229]:

> Academic freedom and excellence is essential to our continuance as a lively democracy. Faculty renewal is required if universities are to stay on the cutting edge of research and knowledge. Far from being wholly detrimental to the group affected, mandatory retirement contributes significantly to an enriched working life for its members. It ensures that faculty members have a large measure of academic freedom with a minimum of supervision and performance review throughout their period at university. They need not be unduly concerned with a "bad year" or a few bad years, or that their productive capacity may decline with the passing years. Security of employment is well protected for a substantial number of years and they are spared demeaning tests that would otherwise have to be employed. That is not to say, and there can be no doubt, that mandatory retirement can be a source of considerable anguish for those who do not wish to retire. But the "bargain" involved in taking a tenured position has clear compensatory features even for the individual affected, and it is noteworthy that it is the bargain sought by faculty associations and indeed by labour unions in many other sectors of our society.

Against the detriment to those affected must be weighed the benefit of the universities' policies to society generally and the individuals who compose it. It must be remembered as well that, in a closed system with limited resources like universities, there is a significant correlation between those who retire and those who may be

appréciation à laquelle doit se livrer la Cour dans l'examen de l'application de l'article premier aux règlements des universités doit être adaptée aux circonstances et non mécanique.

Il y a évidemment des différences importantes entre les universités et les hôpitaux. Les universités justifient leurs politiques de retraite obligatoire en affirmant qu'elles visent à favoriser leur aptitude à promouvoir l'excellence en faisant preuve de souplesse dans la répartition des ressources et le renouvellement du personnel, et à préserver la liberté académique et la collégialité en restreignant les modes distincts d'évaluation du rendement.

Le juge La Forest a reconnu l'importance de ces objectifs lorsqu'il a affirmé aux pp. 286 et 287 [*McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229]:

> La liberté académique et l'excellence sont essentielles à la vitalité de notre démocratie. Le renouvellement du corps professoral est nécessaire si les universités veulent rester à la fine pointe de la recherche et du savoir. Loin d'être tout à fait préjudiciable au groupe visé, la retraite obligatoire contribue considérablement à l'enrichissement du milieu de travail des membres du corps professoral. Elle assure aux professeurs une large mesure de liberté académique avec un minimum de surveillance et d'évaluation du rendement pendant toute leur carrière à l'université. Ils n'ont pas à trop se préoccuper d'une [TRADUCTION] «mauvaise année» ou de quelques mauvaises années, ou du fait que leur productivité puisse diminuer avec le passage des années. La sécurité d'emploi est bien protégée pendant un nombre considérable d'années et ils échappent à des critères avilissants qui devraient autrement être appliqués. Cela ne veut pas dire que la retraite obligatoire ne peut être une source d'angoisse considérable pour ceux qui ne veulent pas prendre leur retraite, et il ne fait pas de doute qu'elle l'est d'ailleurs. Mais le [TRADUCTION] «marché» que comporte l'acceptation d'un poste permanent a clairement des aspects compensatoires même pour la personne visée et il convient de souligner que c'est ce marché que recherchent les associations de professeurs et même les syndicats dans plusieurs autres secteurs de notre société.

Au préjudice que subissent les personnes visées, il faut opposer le bénéfice des politiques universitaires que tirent la société en général et les individus qui la composent. Il faut également se rappeler que dans un système fermé ayant des ressources limitées comme les universités, il existe une corrélation significative entre ceux qui

hired. Thus the young must be deprived of the opportunities to contribute to society through work in the universities as part of the cost of retaining those currently employed on an indefinite basis.

These factors were in large part responsible for determining that the compulsory retirement regulations of the universities met all the requirements of s. 1 of the *Charter*. They do not have the same significance in the case of hospitals. Doctors with admitting or operating privileges have no security of tenure. It follows that tenure can hardly be said to be the essential part or indeed any part of the bargain struck between the doctor and the hospital. It is not without significance that in the university setting the Faculty Association supported the mandatory retirement policy, whereas there was no such support by the Medical Association for the Hospital's policy.

At the Hospital the doctor's level of skill is tested at least annually. There was a system in place for testing doctors before the mandatory retirement policy came into effect. There is still a testing procedure in effect whereby doctors are reviewed or tested once a year. That review system is sufficient in itself to demonstrate that the s. 1 requirements cannot be met by the Hospital. A continuous testing of the skills of doctors throughout their years of association with a hospital is essential for the successful operation of the Hospital. The testing takes place without regard to age. In the hospital setting the essential testing of doctors cannot adversely affect any collegiality that may exist. Indeed, collegiality does not appear to be an essential factor in the operation of a hospital as it is for a university. Nor can the testing be said to impair in any way security of tenure at the hospital. Clearly, tenure must be dependent upon the doctor's demonstrating a satisfactory level of skill in order to continue to work at the Hospital.

It can thus be seen that the factors which operated to bring the university retirement policy

prennent leur retraite et ceux qui peuvent être embauchés. Il faut donc notamment priver les jeunes de la chance de contribuer à la société par leur travail dans les universités, pour garder indéfiniment ceux qui s'y trouvent actuellement.

Ces facteurs ont en grande partie servi à déterminer que les règlements des universités sur la retraite obligatoire satisfaisaient aux exigences de l'article premier de la *Charte*. Ils n'ont pas la même importance dans le cas des hôpitaux. Les médecins qui détiennent des privilèges d'admission ou de chirurgie n'ont aucune sécurité d'emploi. Il s'ensuit qu'on peut difficilement affirmer que la permanence est une partie essentielle ou même une partie du marché conclu entre le médecin et l'hôpital. Il est important de signaler que, dans le milieu universitaire, l'association des professeurs était en faveur de la politique de retraite obligatoire alors que dans le milieu hospitalier, l'association des médecins ne l'était pas.

Dans le milieu hospitalier, le niveau de compétence des médecins est évalué au moins une fois par année. Il y avait un système d'évaluation des médecins avant que la politique de retraite obligatoire entre en vigueur. Il existe toujours une procédure d'évaluation en vertu de laquelle la compétence des médecins est appréciée une fois par année. Ce système d'évaluation est en soi suffisant pour démontrer que les hôpitaux ne peuvent satisfaire aux exigences de l'article premier. Un examen permanent des compétences des médecins au cours des années où ils sont associés à un hôpital est essentiel pour le fonctionnement efficace de celui-ci. L'appréciation a lieu sans égard à l'âge. Dans le milieu hospitalier, l'appréciation essentielle des compétences des médecins ne peut avoir un effet préjudiciable sur la collégialité qui peut exister. D'ailleurs, la collégialité ne semble pas être un facteur essentiel dans le fonctionnement d'un hôpital comme elle l'est dans une université. On ne peut non plus affirmer que l'appréciation porte atteinte à la sécurité d'emploi à l'hôpital. Il est clair que cette sécurité doit dépendre de la preuve faite par le médecin d'un niveau satisfaisant de compétences.

On peut donc constater que les facteurs qui ont contribué à justifier la politique de retraite dans

within the scope of s. 1 of the *Charter* are not applicable to the Hospital. There would seem to be no valid reason why continued testing could not serve to ensure that the doctors over 65 years of age possessed a satisfactory degree of skill.

Appeal allowed and the plaintiffs' action dismissed with costs, WILSON, L'HEUREUX-DUBÉ *and* CORY JJ. *dissenting.*

Solicitors for the appellants: Davis & Company, Vancouver.

Solicitors for the respondents: Jordan & Gall, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

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

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

les universités selon l'article premier de la Charte ne s'appliquent pas aux hôpitaux. Il semble donc n'y avoir aucune raison valable pour que l'évaluation permanente ne puisse servir à établir que les médecins de plus de 65 ans possèdent un niveau de compétence satisfaisant.

Pourvoi accueilli et action des demandeurs rejetée avec dépens, les juges WILSON, L'HEUREUX-DUBÉ *et* CORY *sont dissidents.*

Procureurs des appelants: Davis & Company, Vancouver.

Procureurs des intimés: Jordan & Gall, Vancouver.

Procureur de l'intervenant le procureur général du Canada: Le procureur général du Canada, Ottawa.

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

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le ministère du procureur général, Victoria.

K.R.J. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

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

Indexed as: R. *v.* K.R.J.

2016 SCC 31

File No.: 36200.

2015: December 2; 2016: July 21.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

K.R.J. *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

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

Répertorié : R. *c.* K.R.J.

2016 CSC 31

N° du greffe : 36200.

2015 : 2 décembre; 2016 : 21 juillet.

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

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

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

Section 11(*i*) of the *Charter* provides that, if the punishment for an offence is varied after a person commits the offence, but before sentencing, the person is entitled to "the benefit of the lesser punishment". When offenders are convicted of certain sexual offences against a person under the age of 16 years, s. 161(1) of the *Criminal Code* gives sentencing judges the discretion to prohibit them from engaging in a variety of everyday conduct upon their release into the community, subject to any conditions or exemptions the judge considers appropriate. In 2012, Parliament expanded the scope of s. 161(1), empowering sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age (s. 161(1)(c)) or from using the Internet or other digital network (s. 161(1)(d)). In doing so, Parliament intended to give sentencing judges the discretion to impose the expanded prohibition measures on all offenders, even those who offended before the amendments came into force. In March 2013, the accused pleaded guilty to incest and the creation of child pornography. The offences were committed between 2008 and 2011. By virtue of the convictions and the age of the victim, the sentencing judge was required to consider whether to impose a prohibition under s. 161(1). The question arose as to whether the 2012 amendments could operate retrospectively such that they could be imposed on the accused.

The sentencing judge concluded that an order under the new s. 161(1)(c) and (d) constitutes punishment within the meaning of s. 11(*i*) of the *Charter*, such that the provisions cannot be applied retrospectively. He therefore imposed a prohibition order under s. 161, but limited the prohibited activities to those described in the version of s. 161(1) that existed when the accused committed the offences. On the Crown appeal, the majority of the Court of Appeal concluded that the 2012 amendments were enacted to protect the public, rather than to punish offenders, and therefore, they do not qualify as punishment within the meaning of s. 11(*i*). The majority allowed the appeal and imposed the conditions in s. 161(1)(c) and (d) retrospectively on the accused.

Held (Abella and Brown JJ. dissenting in part): The appeal should be allowed in part. The amendments to s. 161(1)(c) and (d) of the *Criminal Code* qualify as punishment such that their retrospective operation limits the right protected by s. 11(*i*) of the *Charter*. Under s. 1 of

L'alinéa 11*i*) de la *Charte* prévoit, lorsque la peine qui sanctionne une infraction est modifiée après la perpétration de celle-ci, mais avant la détermination de la peine, que le contrevenant a le droit « de bénéficier de la peine la moins sévère ». Lorsqu'une personne est déclarée coupable d'une infraction sexuelle énumérée à l'égard d'une personne âgée de moins de 16 ans, le par. 161(1) du *Code criminel* confère au juge qui détermine la peine un pouvoir discrétionnaire lui permettant d'interdire au délinquant de se livrer à différentes activités quotidiennes après sa libération et une fois de retour dans la collectivité, sous réserve de certaines conditions ou exemptions. En 2012, le législateur a étendu la portée du par. 161(1) en conférant au juge le pouvoir d'interdire au délinquant sexuel d'avoir des contacts avec une personne âgée de moins de 16 ans (al. 161(1)c)) ou d'utiliser Internet ou tout autre réseau numérique (al. 161(1)d)). Le législateur entendait ainsi investir le juge qui détermine la peine d'un pouvoir discrétionnaire qui lui permette de soumettre aux nouvelles interdictions tout contrevenant, y compris celui qui a commis l'acte criminel avant l'entrée en vigueur des modifications. En mars 2013, l'accusé a plaidé coupable à des accusations d'inceste et de production de pornographie juvénile. Les infractions avaient été commises entre 2008 et 2011. Étant donné les déclarations de culpabilité et l'âge de la victime, le juge était tenu de se demander s'il y avait lieu de prononcer une interdiction fondée sur le par. 161(1). La question s'est alors posée de savoir si les dispositions issues des modifications de 2012 pouvaient s'appliquer rétrospectivement de sorte que l'accusé y soit assujetti.

Le juge chargé de la détermination de la peine a conclu qu'une ordonnance fondée sur les nouveaux al. 161(1)c) et d) constitue une peine au sens de l'al. 11*i*) de la *Charte*, de sorte que les dispositions ne peuvent s'appliquer rétrospectivement. Il a donc interdit sur le fondement de l'art. 161 les seules activités mentionnées dans la version du par. 161(1) qui était en vigueur lorsque l'accusé avait commis les infractions. Dans le cadre de l'appel du ministère public, les juges majoritaires de la Cour d'appel ont conclu que les nouvelles interdictions issues des modifications de 2012 visaient à protéger le public, non à punir les contrevenants, de sorte qu'elles ne pouvaient être considérées comme une peine au sens de l'al. 11*i*). Ils ont accueilli l'appel et soumis l'accusé aux interdictions prévues aux al. 161(1)c) et d), appliquant ceux-ci rétrospectivement.

Arrêt (les juges Abella et Brown sont dissidents en partie) : Le pourvoi est accueilli en partie. Les dispositions issues des modifications apportées aux al. 161(1)c) et d) du *Code criminel* sont assimilées à une peine, de sorte que leur application rétrospective restreint le droit

the *Charter*, while the retrospective operation of the no contact provision in s. 161(1)(c) is not a reasonable limit on the s. 11(*i*) right, the retrospective operation of the Internet prohibition in s. 161(1)(d) is a reasonable limit. Accordingly, the appeal should be allowed with respect to s. 161(1)(c), but dismissed with respect to s. 161(1)(d).

Per McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.: Section 11(*i*) of the *Charter* constitutionally enshrines the fundamental notion that criminal laws should generally not operate retrospectively. This constitutional aversion for retrospective criminal laws is primarily motivated by the desire to protect the fairness of criminal proceedings and safeguard the rule of law. Rules pertaining to criminal punishment should be clear and certain. To attract the protection of s. 11(*i*), the new prohibition measures must qualify as "punishment". In *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, this Court developed a two-part test for determining whether a consequence amounts to punishment under s. 11(*i*): (1) the measure must be a consequence of a conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence; and (2) it must be imposed in furtherance of the purpose and principles of sentencing.

This test requires two clarifications. First, while not all measures imposed to protect the public constitute punishment, public protection is at the core of the purpose and principles of sentencing and is therefore an insufficient litmus test for defining punishment. Thus, sanctions intended to advance public safety do not constitute a broad exception to the protection s. 11(*i*) affords and may qualify as punishment. Second, the s. 11(*i*) test for punishment must embody a clearer, more meaningful consideration of the impact a sanction can have on an offender. Doing so enhances fairness and predictability in punishment and is consistent with this Court's jurisprudence.

Accordingly, the s. 11(*i*) test for punishment should be restated as follows: a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it

garanti par l'al. 11*i*) de la *Charte*. À la lumière de l'article premier de la *Charte*, l'application rétrospective de l'al. 161(1)c), qui permet d'interdire tout contact, ne constitue pas une restriction raisonnable du droit garanti par l'al. 11*i*), mais celle de l'al. 161(1)d), qui permet d'interdire l'utilisation d'Internet, constitue une restriction raisonnable. Par conséquent, le pourvoi est accueilli quant à l'al. 161(1)c), mais rejeté quant à l'al. 161(1)d).

La juge en chef McLachlin et les juges Cromwell, Moldaver, Karakatsanis, Wagner, Gascon et Côté : L'alinéa 11*i*) de la *Charte* constitutionnalise la notion fondamentale voulant que, en matière pénale, une disposition ne doive généralement pas s'appliquer rétrospectivement. Cette aversion de la Constitution pour les dispositions pénales d'application rétrospective tient principalement à la volonté de protéger l'équité des procédures criminelles et de garantir la primauté du droit. Les règles applicables aux sanctions criminelles doivent être claires et certaines. Pour faire jouer la protection de l'al. 11*i*), les nouvelles interdictions doivent constituer une « peine ». Dans *R. c. Rodgers*, 2006 CSC 15, [2006] 1 R.C.S. 554, la Cour a dégagé un critère à deux volets qui permet de décider si une conséquence équivaut ou non à une peine au sens de l'al. 11*i*) : (1) la mesure doit être une conséquence de la déclaration de culpabilité et faire partie des sanctions dont est passible un accusé pour une infraction donnée et (2) elle doit être conforme à l'objectif et aux principes de la détermination de la peine.

Deux précisions s'imposent relativement à ce critère. Premièrement, même si toute mesure imposée pour protéger le public ne constitue pas une peine, la protection du public est au cœur de l'objectif et des principes de la détermination de la peine et elle n'est donc pas une considération suffisante pour décider qu'une sanction constitue ou non une peine. Par conséquent, la sanction qui vise à promouvoir la sécurité du public ne bénéficie pas d'une exception générale à la protection qu'offre l'al. 11*i*) et elle peut être considérée comme une peine. Deuxièmement, le critère qui permet d'assimiler une mesure à une peine pour les besoins de l'al. 11*i*) de la *Charte* doit englober une prise en compte plus claire et plus soutenue de l'incidence de la sanction sur le contrevenant. Une telle prise en compte permet d'accroître le caractère équitable de la peine et la prévisibilité de son infliction et elle est compatible avec la jurisprudence de la Cour.

Ainsi, il convient de reformuler comme suit le critère permettant d'assimiler une mesure à une peine pour les besoins de l'al. 11*i*) : une mesure constitue une peine si (1) elle est une conséquence d'une déclaration de culpabilité qui fait partie des sanctions dont est passible un

is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests. To satisfy the third branch of this test, a consequence of conviction must significantly constrain a person's ability to engage in otherwise lawful conduct or impose significant burdens not imposed on other members of the public.

Applying this reformulated test, the 2012 amendments to s. 161(1) constitute punishment. The prohibitions found in these amendments are a consequence of conviction, imposed in furtherance of the purpose and principles of sentencing, and they can have a significant impact on the liberty and security of offenders. Clearly, the 2012 amendments constitute greater punishment than the previous prohibitions. Accordingly, the retrospective operation of these provisions limits the s. 11(*i*) right as it deprives the accused of the benefit of the less restrictive community supervision measures captured in the previous version of s. 161 — that is, the lesser punishment.

To be justified under s. 1 of the *Charter*, a law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society. The legislative history, judicial interpretation, and design of s. 161 all confirm that the overarching goal of the section is to protect children from sexual violence perpetrated by recidivists. It follows naturally that the objective of the retrospective operation of the 2012 amendments — the infringing measure — is to better protect children from the risks posed by offenders like the accused who committed their offences before, but were sentenced after, the amendments came into force. This latter objective anchors the s. 1 analysis and is of sufficient importance to warrant further scrutiny.

There is clearly a rational connection between this objective and retrospectively giving sentencing judges the discretionary power to limit those offenders who pose a continuing risk to children in contacting children in person or online, and in engaging with online child pornography (the means chosen). Reason and logic suffice to establish that Parliament proceeded rationally in opting to give s. 161(1)(c) and (d) retrospective effect. Further, given

accusé pour une infraction donnée et (2) soit elle est conforme à l'objectif et aux principes de la détermination de la peine, (3) soit elle a une grande incidence sur le droit du contrevenant à la liberté ou à la sécurité. Pour satisfaire au troisième volet du critère, la conséquence de la déclaration de culpabilité doit restreindre sensiblement la faculté qu'a une personne de se livrer à une activité par ailleurs licite ou soumettre une personne à des contraintes substantielles auxquelles les autres citoyens ne sont pas soumis.

Au vu du critère ainsi reformulé, les nouvelles interdictions issues des modifications apportées au par. 161(1) en 2012 constituent une peine. Elles sont une conséquence de la déclaration de culpabilité, elles sont conformes à l'objectif et aux principes de la détermination de la peine et elles peuvent avoir une grande incidence sur le droit à la liberté et à la sécurité du contrevenant. De toute évidence, elles emportent l'infliction d'une peine plus importante que les interdictions antérieures. Par conséquent, l'application rétrospective des dispositions qui les prévoient restreint le droit garanti par l'al. 11*i*) puisqu'elle empêche l'accusé de faire l'objet des mesures de surveillance dans la collectivité moins restrictives qui figuraient dans la version antérieure de l'art. 161, c'est-à-dire de la peine la moins sévère.

Pour être justifiée au regard de l'article premier de la *Charte*, la règle de droit qui restreint un droit constitutionnel doit le faire conformément à un objectif suffisamment important qui se concilie avec les valeurs d'une société libre et démocratique. L'historique législatif de l'art. 161, son interprétation judiciaire et la manière dont il est conçu confirment que l'objectif prépondérant de l'article est de protéger les enfants contre la violence sexuelle aux mains de récidivistes. Il s'ensuit naturellement que l'objectif de l'application rétrospective des modifications de 2012 — la mesure attentatoire — est de mieux protéger les enfants contre le risque que présente un contrevenant qui, comme l'accusé, a commis l'acte criminel avant l'entrée en vigueur des modifications, mais a été condamné après celle-ci. C'est en fonction de cet objectif que s'effectue l'analyse au regard de l'article premier et il s'agit d'un objectif suffisamment important pour justifier la poursuite de l'examen.

Il existe manifestement un lien rationnel entre cet objectif et l'octroi rétrospectif au tribunal qui détermine la peine d'un pouvoir discrétionnaire lui permettant de soumettre à des contraintes le contrevenant qui représente toujours un risque pour les enfants du fait qu'il peut communiquer en personne ou en ligne avec eux et accéder à de la pornographie juvénile en ligne (le moyen choisi). La raison et la logique suffisent pour établir que

the discretionary and tailored nature of s. 161 and the fact that a purely prospective application of the amendments would have compromised Parliament's full objective, the retrospective operation of s. 161(1)(c) and (d) impairs the s. 11(*i*) rights as little as reasonably possible.

Finally, the deleterious and salutary effects of the law must be assessed. This final stage of the proportionality inquiry is important because it allows courts to transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society in direct and explicit terms. Although this examination entails difficult value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision. While the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this final step permits courts to address the essence of the proportionality enquiry at the heart of s. 1.

The deleterious effects flowing from the retrospective operation of s. 161(1)(c) are substantial. The new s. 161(1)(c) goes much further and prohibits any contact — including communicating by any means — with a person who is under the age of 16 years in a public or private space. By impacting people like the accused with a punishment of which they had no notice, the retrospective operation of s. 161(1)(c) undermines fairness in criminal proceedings and compromises the rule of law. Unfortunately, sexual offences against children have persisted for centuries. The Crown has failed to lead much, if any, evidence to establish the degree of enhanced protection s. 161(1)(c) provides in comparison to the previous version of the prohibition. The benefits society stands to gain are marginal and speculative. The Crown has provided no temporal justification for the retrospective limitation, yet, at its root, s. 11(*i*) is about the timing of changes to penal laws. The retrospective operation of s. 161(1)(c) therefore cannot be justified under s. 1. As a result, s. 161(1)(c) should apply only prospectively — that is, only to offenders who committed their offences after the 2012 amendments came into force.

le législateur a agi de manière rationnelle en conférant aux al. 161(1)c) et d) un effet rétrospectif. En outre, puisque l'art. 161 confère un pouvoir discrétionnaire et qu'il est adapté à son objectif, et comme l'application strictement prospective aurait compromis la réalisation intégrale de l'objectif du législateur, l'application rétrospective des al. 161(1)c) et d) porte atteinte au droit protégé par l'al. 11*i*) aussi peu qu'il est raisonnablement possible de le faire.

Enfin, il faut apprécier les effets préjudiciables et les effets bénéfiques de la règle de droit. Cette dernière étape de l'examen de la proportionnalité est importante car le tribunal peut alors transcender l'objectif de la règle de droit et se livrer à un examen rigoureux de l'incidence de la règle de droit sur la société libre et démocratique canadienne d'une manière directe et explicite. Même si l'examen suppose des jugements de valeur difficiles, il vaut mieux faire en sorte que ces jugements soient explicites, de manière à accroître la transparence et l'intelligibilité de la décision ultime. Bien que, de nos jours, au Canada, l'atteinte minimale occupe la place la plus grande dans le discours relatif à l'article premier, le tribunal peut, à cette dernière étape, se pencher sur l'essence de l'examen de la proportionnalité qui est au cœur de l'application de l'article premier.

Les effets préjudiciables de l'application rétrospective de l'al. 161(1)c) sont importants. Le nouvel al. 161(1)c) permet au tribunal d'aller beaucoup plus loin et d'interdire d'avoir des contacts — notamment communiquer par quelque moyen que ce soit — avec une personne âgée de moins de 16 ans dans un lieu public ou privé. En condamnant un contrevenant comme l'accusé à une peine dont il ne se savait pas passible, l'application rétrospective de l'al. 161(1)c) compromet l'équité des procédures criminelles et la primauté du droit. Les enfants sont malheureusement victimes d'infractions sexuelles depuis des siècles. Le ministère public n'a présenté que peu d'éléments ou n'en a pas présenté du tout pour établir le degré de protection accrue offert par le nouvel al. 161(1)c) comparativement au libellé antérieur de l'interdiction. Les effets bénéfiques éventuels pour la société sont négligeables et hypothétiques. Le ministère public n'a pas fait valoir l'existence d'une justification d'ordre temporel de la restriction rétrospective du droit et, pourtant, l'al. 11*i*) s'intéresse foncièrement au moment où intervient la modification d'une disposition à caractère punitif. L'application rétrospective de l'al. 161(1)c) ne saurait donc pas se justifier au regard de l'article premier. Dès lors, l'alinéa ne devrait s'appliquer que prospectivement, c'est-à-dire seulement au contrevenant dont l'acte criminel est postérieur à l'entrée en vigueur des nouvelles dispositions en 2012.

The deleterious effects resulting from the retrospective operation of s. 161(1)(d) are also significant. A complete ban on using the Internet or other digital network is more intrusive than the previous ban on using a computer system for the purpose of communicating with young people. As with the retrospective operation of s. 161(1)(c), the imposition of punishment without notice translates into broader societal harms, including compromising the fairness of criminal proceedings and challenging the rule of law. However, s. 161(1)(d) is directed at grave, emerging harms precipitated by a rapidly evolving social and technological context. This evolving context has changed both the degree and nature of the risk of sexual violence facing young persons. As a result, the previous iteration of s. 161 became insufficient to respond to the modern risks children face. By closing this legislative gap and mitigating these new risks, the benefits of the retrospective operation of s. 161(1)(d) are significant and fairly concrete. The previous prohibition was insufficient to address the evolving risks. On balance, Parliament was justified in giving s. 161(1)(d) retrospective effect in the unique context within which it was legislating. The harms at stake are particularly powerful. The statutory regime is highly tailored and discretionary. An Internet prohibition, while invasive, is not among the most onerous punishments, such as increased incarceration. The benefits of the law outweigh its deleterious effects.

In summary, the 2012 amendments to s. 161(1)(c) and (d) qualify as punishment based on both the objective and impact of the prohibitions. The retrospective imposition of these prohibitions therefore limits the right protected by s. 11(*i*) of the *Charter*. While the retrospective operation of the no contact provision in s. 161(1)(c) is not a reasonable limit on the s. 11(*i*) right, the retrospective operation of the Internet prohibition in s. 161(1)(d) is a reasonable limit.

Per Abella J. (dissenting in part): The *Charter* breach of s. 161(1)(d) cannot be justified. The wording of s. 11(*i*) is unequivocal. The absolutist language used by the drafters of the *Charter* in s. 11 must colour the s. 1 analysis by demanding the most stringent of justifications.

The Crown has the highest possible evidentiary burden, namely, to demonstrate through compelling evidence

Les effets préjudiciables de l'application rétrospective de l'al. 161(1)d) sont eux aussi importants. L'interdiction totale d'utiliser Internet ou tout autre réseau numérique constitue un plus grand empiétement que l'interdiction antérieure d'utiliser un ordinateur dans le but de communiquer avec de jeunes personnes. Comme pour l'application rétrospective de l'al. 161(1)c), l'infliction d'une peine dont le contrevenant ne pouvait se savoir passible cause un préjudice général à la société, notamment en compromettant l'équité des procédures criminelles et en remettant en question la primauté du droit. Toutefois, l'al. 161(1)d) s'attaque aux nouveaux préjudices graves dont l'infliction est précipitée par l'évolution rapide du contexte sociotechnologique. Ce contexte en constante évolution a modifié tant le degré que la nature du risque de violence sexuelle auquel sont exposées les jeunes personnes. Par conséquent, la version antérieure de l'art. 161 ne permettait plus de contrer le risque que courent les enfants de nos jours. Du fait qu'elle comble cette lacune législative et réduit les risques nouveaux, l'application rétrospective de l'al. 161(1)d) comporte des effets bénéfiques importants assez concrets. L'interdiction antérieure n'était plus adaptée à l'évolution du risque. Tout bien considéré, le législateur était justifié, vu le contexte unique dans lequel il intervenait, de conférer à l'al. 161(1)d) un effet rétrospectif. Les préjudices en jeu sont particulièrement convaincants. Le régime législatif a une portée très bien circonscrite et confère un pouvoir discrétionnaire. L'interdiction d'utiliser Internet, même si elle est attentatoire, ne fait pas partie des sanctions les plus lourdes, telle la peine d'emprisonnement accrue. Les effets bénéfiques de la règle de droit l'emportent sur ses effets préjudiciables.

Bref, les interdictions prévues aux al. 161(1)c) et d) depuis les modifications apportées en 2012 peuvent être assimilées à une peine en raison tant de leur objectif que de leurs répercussions. L'application rétrospective de ces interdictions restreint donc le droit garanti par l'al. 11*i*) de la *Charte*. L'application rétrospective de l'al. 161(1)c), qui permet d'interdire tout contact, ne constitue pas une restriction raisonnable du droit garanti par l'al. 11*i*), mais celle de l'al. 161(1)d), qui permet d'interdire l'utilisation d'Internet, constitue une restriction raisonnable.

La juge Abella (dissidente en partie) : L'atteinte de l'al. 161(1)d) à la *Charte* ne saurait se justifier. Le libellé de l'al. 11*i*) est sans équivoque. La formulation absolue employée à l'art. 11 par les rédacteurs de la *Charte* doit influer sur l'analyse que commande l'article premier par l'exigence de la justification la plus stricte.

Le ministère public a le fardeau de preuve le plus strict qui soit, de sorte qu'il doit convaincre le tribunal

that the previous provisions so significantly undermined the government's objectives, that the retrospective application of the greater punishment was justified. The Crown's evidentiary record here was insufficient to justify the retrospective application of the impugned provisions. Far from offering compelling evidence, the Crown offered no evidence in the context of s. 161(1)(d), to show that the former provisions so significantly undermined its objectives, that the retroactive application of greater restrictions was justified. If all that is needed to justify a breach of s. 11(*i*) is the suggestion of a possible reduction in recidivism rates, whether based on changes in technology or otherwise, the state could, in theory, justify the retrospective application of more stringent punishments so routinely that s. 11(*i*) is written out of the *Charter*. In this case, there was no evidence about how the retrospective application of s. 161(1)(d) was expected to, or would, reduce recidivism rates any more than those under the former restrictions. As a result, while there is agreement with the majority that both s. 161(1)(c) and (d) of the *Criminal Code* violate s. 11(*i*) of the *Charter* and that s. 161(1)(c) cannot be justified under s. 1, neither can s. 161(1)(d) be justified.

Per Brown J. (dissenting in part): There is agreement with the majority that the conditions which a sentencing judge may impose under s. 161(1)(c) and (d) of the *Criminal Code* constitute punishment within the meaning of s. 11(*i*) of the *Charter* and that their retrospective application infringes s. 11(*i*). There is also agreement that the Crown has met its burden of justifying the infringement of s. 11(*i*) in respect of the conditions relating to Internet use contained in s. 161(1)(d). However, the Crown has also done so in respect of the conditions imposable under s. 161(1)(c) relating to contact with children. The retrospective application of both conditions should therefore be upheld under s. 1 of the *Charter*.

The harm addressed by s. 11(*i*) is not the punishment itself, but rather the means by which it is imposed. This means-based quality of the s. 11(*i*) protection affects the analysis to be applied under s. 1, since the *Oakes* analysis considers the proportionality between a legislative objective and the *Charter*-infringing effects resulting from its pursuit, not the choice of means that, by itself, constitutes a *Charter* infringement. The *Oakes* test is not, and should not be treated as, a technical inquiry. The majority's rigid and acontextual application of *Oakes* causes it to lose sight of the broader context and overall goals

que l'application des dispositions antérieures aurait si considérablement compromis les objectifs de l'État que l'application rétrospective d'une peine plus sévère était justifiée. Le dossier de preuve du ministère public en l'espèce est insuffisant pour justifier l'application rétrospective des dispositions contestées. Loin d'offrir une preuve de nature à convaincre, le ministère public n'a produit à l'appui de l'al. 161(1)d) aucun élément selon lequel les dispositions antérieures compromettaient si considérablement les objectifs de l'État que l'application rétrospective d'interdictions de plus grande portée était justifiée. Si, pour justifier la restriction du droit garanti à l'al. 11*i*), il suffit d'invoquer la réduction possible des taux de récidive, de pair avec l'évolution technologique ou toute autre considération, l'État pourrait en théorie justifier dans tous les cas l'application rétrospective de peines accrues, au point de réduire à néant l'al. 11*i*) de la *Charte*. En l'espèce, nul élément de la preuve n'indique comment l'application rétrospective de l'al. 161(1)d) devait réduire ou aurait réduit les taux de récidive davantage que ne le permettaient les anciennes interdictions. Par conséquent, il y accord avec les juges majoritaires que les al. 161(1)c) et d) du *Code criminel* contreviennent tous deux à l'al. 11*i*) de la *Charte* et que l'al. 161(1)c) ne peut être justifié au regard de l'article premier. L'alinéa 161(1)d) ne peut cependant pas être justifié non plus.

Le juge Brown (dissident en partie) : Comme le concluent les juges majoritaires, chacune des interdictions que le juge qui détermine la peine peut prononcer en vertu des al. 161(1)c) et d) du *Code criminel* constitue une peine au sens de l'al. 11*i*) de la *Charte* et l'application rétrospective des dispositions qui les prévoient contrevient à l'al. 11*i*). Le ministère public s'est certes acquitté de son obligation de justifier l'atteinte au droit garanti par l'al. 11*i*) en ce qui concerne l'interdiction d'utiliser Internet prévue à l'al. 161(1)d). Toutefois, il s'en est également acquitté quant à l'interdiction prévue à l'al. 161(1)c), à savoir celle d'avoir des contacts avec des enfants. L'application rétrospective des deux interdictions devrait donc être jugée conforme à l'article premier de la *Charte*.

Le préjudice que vise à contrer l'al. 11*i*) n'est donc pas la peine comme telle, mais plutôt le moyen par lequel elle est infligée. Cette caractéristique de la protection de l'al. 11*i*) fondée sur le moyen entre en jeu dans l'analyse que commande l'article premier, étant donné que, dans l'arrêt *Oakes*, la Cour se penche sur la proportionnalité de l'objectif législatif et des effets attentatoires à la *Charte* qui découlent des mesures prises pour l'atteindre, et non sur le choix du moyen qui équivaut en soi à une atteinte constitutionnelle. L'application du critère de l'arrêt *Oakes* ne se veut pas formaliste, et elle ne devrait pas

sought by Parliament. It holds Parliament to an exacting standard of proof, thereby denying Parliament the room necessary to perform its legislative policy-development role when addressing a chronic social problem. And it also insists on direct evidence of anticipated benefits which, given that chronic nature of the harm, is likely impossible to obtain.

A broad examination of Parliament's purpose is necessary in order to anchor a useful proportionality analysis because of the unique means-based quality of s. 11(*i*)'s protection. The measure that gave rise to the *Charter* infringement, and which should anchor the proportionality analysis, comprises the amendments to s. 161 as a whole. And, as to that measure, the majority's characterization of the objective should be accepted: the objective is to enhance the protection s. 161 affords to children against the risk of harm posed by sexual offenders. The retrospective application of these amendments is rationally connected to that protective purpose, since the risk an offender poses to reoffend sexually against children is not affected by whether the offence occurred before or after the measure's enactment. And, given Parliament's objective of enhancing the protections that s. 161 affords to children, there are no less-impairing alternate measure that would allow for s. 161(1)'s protections to be realized in respect of an offender who committed his or her offence before the amendments came into force and who poses a risk to reoffend.

The final stage of the proportionality analysis is tied to the practical impacts and benefits of the law, but what is ultimately being weighed is much more abstract and philosophical: the detriment to *Charter*-protected rights against the public benefit sought. Insisting upon too strict an evidentiary burden must be carefully avoided. However, the majority does precisely that by demanding empiricism where none can exist. Given the complex social context in which Parliament develops policy, it will sometimes be difficult, if not impossible, for the state to provide reliable and direct evidence of the benefits its measure will achieve.

The majority errs by overstating the deleterious effects of s. 161(1)(c)'s retrospective operation while understating its salutary effects. Section 161(1)(c) prohibits

être tenue pour telle. En appliquant l'arrêt *Oakes* avec rigidité et sans tenir compte du contexte, les juges majoritaires perdent de vue le tableau général et l'objectif global du législateur. Ils soumettent le législateur à une norme de preuve très stricte et lui refusent ainsi la marge de manœuvre dont il a besoin pour s'acquitter de sa fonction de mise en œuvre de politiques en matière législative lorsqu'il s'agit de s'attaquer à un problème social chronique. Ils exigent en outre une preuve directe des effets bénéfiques escomptés, mais étant donné la nature chronique du problème, il est impossible de produire une telle preuve.

Pour se prononcer utilement sur la proportionnalité, il faut donc rechercher plus largement l'intention du législateur en raison de la caractéristique propre à l'al. 11*i*), soit la protection fondée sur le moyen. La mesure attentatoire qui doit être soumise à l'examen consiste dans la totalité des modifications apportées à l'art. 161. La caractérisation par les juges majoritaires de l'objectif de cette mesure, à savoir accroître la protection qu'offre aux enfants l'art. 161 contre le risque de préjudice que représentent les personnes déclarées coupables d'infractions sexuelles, doit être retenue. L'application rétrospective des dispositions issues des modifications a un lien rationnel avec cette vocation protectrice, car le risque que le contrevenant s'en prenne à nouveau sexuellement à des enfants n'a rien à voir avec le fait que l'acte criminel a été commis avant ou après l'adoption de la mesure. Et vu l'objectif du législateur d'accroître la protection qu'offre aux enfants l'art. 161, aucune autre mesure moins attentatoire ne ferait jouer la protection offerte par le par. 161(1) dans le cas du contrevenant qui a commis l'acte criminel avant l'entrée en vigueur des modifications et qui présente un risque de récidive.

La dernière étape de l'examen de la proportionnalité se rattache à l'incidence réelle et aux effets bénéfiques de la règle de droit, mais l'objet de la mise en balance est somme toute de nature beaucoup plus abstraite et philosophique : l'effet préjudiciable sur le droit garanti par la *Charte* comparé à l'effet bénéfique recherché pour la société. Il faut bien se garder d'imposer un fardeau de preuve trop strict. Or, c'est précisément ce que font les juges majoritaires en exigeant une preuve empirique alors qu'il n'en existe aucune. Compte tenu du contexte social complexe dans lequel les politiques du législateur voient souvent le jour, il sera parfois difficile, voire impossible, pour l'État d'avancer une preuve fiable et directe des effets bénéfiques d'une mesure.

Les juges majoritaires font erreur en exagérant les effets préjudiciables de l'application rétrospective de l'al. 161(1)c) tout en sous-estimant ses effets bénéfiques.

only unsupervised contact with children, and is subject to any other exemptions that the sentencing judge sees fit to impose. The majority's interpretation of the restriction on liberty worked by s. 161(1)(c) is over-expansive and is at odds with the well-established principle that the criminal law's prohibitions on conduct should be construed strictly. Further, the majority's insistence on a compelling temporal justification for the retrospective operation of s. 161(1)(c) when assessing the deleterious impact of its retrospective operation on the rule of law is inappropriate. The majority is, in substance questioning whether Parliament's objective in enacting a retrospective increase in punishment was truly pressing and substantial. Temporal considerations are not relevant when assessing the deleterious effect of a retrospective punishment on the rule of law because all retrospective changes to the law derogate from the rule of law, irrespective of Parliament's reasons for enacting them.

As to the salutary effects, the risk posed to children by offenders like the accused simply cannot be mitigated by the original version of s. 161(1). The evidence before Parliament showed that a majority of sexual offences against children were committed by family members or acquaintances. The previous version of s. 161(1) could not be used to restrict an offender's ability to interact with children in private, even if that is where the offender poses the greatest risk to reoffend sexually against children. The salutary effects of s. 161(1)(c)'s retrospective operation seem manifest.

All the reasons identified by the majority in support of the conclusion that the limit imposed on the s. 11(*i*) right by the retrospective application of s. 161(1)(d) is justified are equally applicable to the retrospective application of s. 161(1)(c). The condition in s. 161(1)(c) is also highly tailored and discretionary, since it is imposed only where the sentencing judge deems it necessary, and also since it is subject to such exemptions as the sentencing judge sees fit to allow. If the retrospective operation of s. 161(1)(d) is a proportional and justified limit on an offender's s. 11(*i*) right, the retrospective operation of s. 161(1)(c) must be as well.

Cette disposition n'interdit que les contacts non supervisés avec des enfants, et l'ordonnance rendue sur son fondement peut être assortie de toute exemption que le juge chargé de déterminer la peine estime indiquée. L'interprétation par les juges majoritaires de la restriction du droit à la liberté opérée par l'al. 161(1)c) est indûment libérale et va directement à l'encontre du principe bien établi en droit criminel voulant que l'interdiction d'une conduite doive être interprétée restrictivement. En outre, l'accent mis par les juges majoritaires sur l'existence d'une justification d'ordre temporel convaincante de l'application rétrospective de l'al. 161(1)c) dans leur appréciation de l'effet préjudiciable de l'application rétrospective n'est pas opportun. Ils remettent essentiellement en cause l'objectif poursuivi par le législateur par l'augmentation rétrospective de la peine lorsqu'ils se demandent s'il était véritablement urgent et réel. Les considérations d'ordre temporel ne sont pas pertinentes pour apprécier l'effet préjudiciable d'une peine d'application rétrospective sur la primauté du droit, car toute modification apportée rétrospectivement à une règle de droit porte atteinte à la primauté du droit, quelle que soit la motivation du législateur.

En ce qui a trait aux effets bénéfiques, le risque que fait courir aux enfants un contrevenant comme l'accusé ne peut tout simplement pas être réduit en appliquant la version antérieure du par. 161(1). Selon la preuve dont disposait le législateur, la plupart des infractions sexuelles perpétrées contre des enfants le sont par des membres de la famille ou par des connaissances. La version antérieure du par. 161(1) ne pouvait empêcher le délinquant d'interagir avec des enfants dans un lieu privé, alors que c'est précisément le contexte dans lequel le délinquant présente le risque le plus grand de récidive sexuelle contre des enfants. Les effets bénéfiques de l'application rétrospective de l'al. 161(1)c) paraissent manifestes.

Les raisons invoquées par les juges majoritaires à l'appui de leur conclusion selon laquelle est justifiée la restriction du droit garanti par l'al. 11*i*), du fait de l'application rétrospective de l'al. 161(1)d), valent également toutes pour l'application rétrospective de l'al. 161(1)c). L'interdiction que prévoit l'al. 161(1)c) est elle aussi très bien circonscrite et relève du pouvoir discrétionnaire puisqu'elle n'est prononcée que lorsque le juge qui détermine la peine conclut qu'elle est nécessaire et, en outre, qu'elle fait l'objet de toute exemption que le juge indique. Si l'application rétrospective de l'al. 161(1)d) constitue une restriction proportionnée et justifiée du droit que l'al. 11*i*) garantit au contrevenant, il doit en aller de même pour l'application rétrospective de l'al. 161(1)c).

Balancing the salutary and deleterious effects of a *Charter*-infringing law is not an objective calculation because it requires the court to weigh incommensurables — in this case, to weigh the deleterious impact on the sexual offender and the rule of law against the possible benefit of protecting children from sexual offenders. However, despite the impossibility of weighing incommensurables objectively, a reviewing court must nevertheless come to a reasoned conclusion. The salutary effects pursued in this case are worth the cost in rights limitation: the harms sought to be addressed are grave, persistent, and worthy of Parliament's efforts in the criminal law realm. The provisions are sufficiently tailored so that no offender's s. 11(*i*) rights will be unduly limited. Neither of the impugned provisions works a drastic increase in the punishment imposed. On balance, the potential salutary effect of the retrospective operation of s. 161(1)(c) and (d) of better protecting children from all sexual offenders who pose a risk to reoffend sexually against them, regardless of when the offender committed a designated offence, outweighs the modest impact on fairness and the rule of law.

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By Karakatsanis J.

Discussed: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; **referred to:** *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591; *R. v. Kelly*, [1992] 2 S.C.R. 170; *R. v. Murrins*, 2002 NSCA 12, 201 N.S.R. (2d) 288; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81; *R. v. Cross*, 2006 NSCA 30, 138 C.R.R. (2d) 163; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *R. v. Heywood* (1992), 20 B.C.A.C. 166, aff'd [1994] 3 S.C.R. 761; *R. v. A. (R.K.)*, 2006 ABCA 82, 208 C.C.C. (3d) 74; *R. v. Perron*, 2009 ONCA 498, 244 C.C.C. (3d) 369; *R. v. R.R.B.*, 2013 BCCA 224, 338 B.C.A.C. 106; *R. v. Levin*, 2015 ONCJ 290; *R. v. Schledermann*, 2014 ONSC 674; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Sharpe*, 2001 SCC 2,

La mise en balance des effets préjudiciables et des effets bénéfiques d'une règle de droit attentatoire ne constitue pas un calcul utilitaire objectif, car le tribunal doit soupeser des choses non mesurables, en l'occurrence l'effet préjudiciable sur le délinquant sexuel et sur la primauté du droit par rapport à l'effet bénéfique possible de la protection des enfants contre les délinquants sexuels. Cependant, malgré l'impossibilité de soupeser objectivement des choses non mesurables, le tribunal de révision doit néanmoins arriver à une conclusion raisonnée. Les effets bénéfiques escomptés en l'espèce justifient la restriction des droits : les préjudices que l'on cherche à contrer sont graves et persistants et justifient la prise de mesures législatives relevant du droit criminel. La portée des dispositions est suffisamment circonscrite pour que les droits du contrevenant garantis par l'al. 11*i*) ne soient pas indûment restreints. Ni l'al. 161(1)c) ni l'al. 161(1)d) n'emportent un accroissement draconien de la peine infligée. Tout bien considéré, l'effet bénéfique potentiel de l'application rétrospective des alinéas en cause qui réside dans la protection accrue des enfants contre tous les délinquants sexuels susceptibles de récidiver et de s'en prendre à nouveau à eux, peu importe le moment où le contrevenant a commis une infraction énumérée, prime l'effet modéré qui en résulte sur l'équité des procédures criminelles et sur la primauté du droit.

Jurisprudence

Citée par la juge Karakatsanis

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[2001] 1 S.C.R. 45; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485; *R. v. Budreo* (2000), 46 O.R. (3d) 481; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

By Abella J. (dissenting in part)

Canada (Attorney General) v. Whaling, 2014 SCC 20, [2014] 1 S.C.R. 392; *Liang v. Canada (Attorney General)*, 2014 BCCA 190, 311 C.C.C. (3d) 159.

By Brown J. (dissenting in part)

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Citée par le juge Brown (dissident en partie)

R. c. Oakes, [1986] 1 R.C.S. 103; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567; *Public School Boards' Assn. of Alberta c. Alberta (Procureur général)*, 2000 CSC 2, [2000] 1 R.C.S. 44; *M. c. H.*, [1999] 2 R.C.S. 3; *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3; *Harper c. Canada (Procureur général)*, 2004 CSC 33, [2004] 1 R.C.S. 827; *R. c. Butler*, [1992] 1 R.C.S. 452; *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877; *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45; *R. c. Bryan*, 2007 CSC 12, [2007] 1 R.C.S. 527; *R. c. McIntosh*, [1995] 1 R.C.S. 686; *R. c. Orbanski*, 2005 CSC 37, [2005] 2 R.C.S. 3; *R. c. St-Onge Lamoureux*, 2012 CSC 57, [2012] 3 R.C.S. 187; *New Jersey c. T.L.O.*, 469 U.S. 325 (1985).

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Eric Purtzki and *Garth Barriere*, for the appellant.

Lesley A. Ruzicka, for the respondent.

Richard Kramer and *Marc Ribeiro*, for the intervener the Attorney General of Canada.

Stacey D. Young and *Jennifer A. Crawford*, for the intervener the Attorney General of Ontario.

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Eric Purtzki et *Garth Barriere*, pour l'appelant.

Lesley A. Ruzicka, pour l'intimée.

Richard Kramer et *Marc Ribeiro*, pour l'intervenant le procureur général du Canada.

Stacey D. Young et *Jennifer A. Crawford*, pour l'intervenant le procureur général de l'Ontario.

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

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

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

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

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

Karakatsanis J. —

I. Introduction

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

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

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

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

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

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

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

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

La juge Karakatsanis —

I. Introduction

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

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

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

the scope of s. 161(1), empowering sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age (s. 161(1)(c)) or from using the Internet or other digital network (s. 161(1)(d)).

[4] In doing so, Parliament intended to give sentencing judges the discretion to impose the expanded prohibition measures on all offenders, even those who offended *before* the amendments came into force. In other words, Parliament intended the 2012 amendments to operate retrospectively.

[5] The issue in this appeal is whether the *retrospective* operation of the 2012 amendments to s. 161(1)(c) and (d) of the *Criminal Code* is constitutional. This issue engages two subsidiary questions. First, do the prohibition measures contained in s. 161(1)(c) and (d) constitute "punishment" such that their retrospective operation limits s. 11(*i*) of the *Charter*? Second, if so, is the limit a reasonable one as can be demonstrably justified under s. 1 of the *Charter*? The application of these expanded prohibition measures to offenders who committed their offences *after* the amendments came into force is not at issue.

[6] I conclude that the 2012 amendments to s. 161(1)(c) and (d) qualify as punishment based on both the objective and impact of the prohibitions. The retrospective imposition of these prohibitions therefore limits s. 11(*i*) of the *Charter*.

[7] Turning to s. 1 of the *Charter*, I reach opposite conclusions with respect to s. 161(1)(c) and (d): while the retrospective operation of the no contact provision in s. 161(1)(c) is *not* a reasonable limit on the s. 11(*i*) right, the retrospective operation of the Internet prohibition in s. 161(1)(d) *is* a reasonable limit. My conclusion with respect to s. 161(1)(d) is chiefly due to the fact that Parliament enacted

sous réserve des conditions ou exemptions qu'il indique. En 2012, le législateur a étendu la portée du par. 161(1) en conférant au juge le pouvoir d'interdire au délinquant sexuel d'avoir des contacts avec une personne âgée de moins de 16 ans (al. 161(1)c)) ou d'utiliser Internet ou tout autre réseau numérique (al. 161(1)d)).

[4] Le législateur entendait ainsi investir le juge qui détermine la peine d'un pouvoir discrétionnaire lui permettant de soumettre aux nouvelles interdictions tout contrevenant, y compris celui qui a commis l'infraction *avant* l'entrée en vigueur des modifications. Autrement dit, l'intention du législateur était que les modifications de 2012 s'appliquent de manière rétrospective.

[5] Nous devons décider si l'application *rétrospective* des dispositions issues des modifications de 2012 (les nouveaux al. 161(1)c) et d) du *Code criminel*) est constitutionnelle. Deux questions subsidiaires se posent alors. Premièrement, les interdictions prévues aux al. 161(1)c) et d) constituent-elles une « peine », de sorte que leur application rétrospective restreigne le droit garanti par l'al. 11*i*) de la *Charte*? Deuxièmement, dans l'affirmative, s'agit-il d'une restriction raisonnable dont la justification peut se démontrer au regard de l'article premier de la *Charte*? L'application des nouvelles interdictions au contrevenant dont les actes criminels sont *ultérieurs* à l'entrée en vigueur des modifications n'est pas en cause.

[6] Je conclus que les interdictions prévues aux al. 161(1)c) et d) depuis les modifications apportées en 2012 peuvent être assimilées à une peine en raison tant de leur objectif que de leurs répercussions. L'application rétrospective de ces interdictions restreint donc le droit garanti par l'al. 11*i*) de la *Charte*.

[7] En ce qui concerne l'article premier de la *Charte*, je tire des conclusions opposées à l'égard des al. 161(1)c) et d). L'application rétrospective de l'al. 161(1)c), qui permet d'interdire tout contact, *ne* constitue *pas* une restriction raisonnable du droit garanti par l'al. 11*i*), mais celle de l'al. 161(1)d), qui permet d'interdire l'utilisation d'Internet, *constitue* une restriction raisonnable. Ma conclusion relative à

the provision within a rapidly evolving social and technological context, which changed both the degree and nature of the risk of sexual violence facing young persons. Accordingly, I would allow the appeal in part.

II. Facts and Legislative History

[8] On March 6, 2013, the appellant pleaded guilty to incest and the creation of child pornography. The offences were committed between 2008 and 2011, and involved the appellant's preschool-aged daughter.

[9] When the appellant committed the offences, s. 161(1) of the *Criminal Code* read as follows:

> **161.** (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from
>
> (*a*) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a day-care centre, schoolground, playground or community centre;
>
> (*b*) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; or
>
> (*c*) using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years.

[10] After the appellant committed the offences, but before he was sentenced, s. 161(1) was amended

l'al. 161(1)d) s'appuie principalement sur le fait que le législateur a adopté la disposition dans un contexte sociotechnologique en constante évolution, un contexte qui a modifié à la fois le degré et la nature du risque de violence sexuelle auquel sont exposées les jeunes personnes. Par conséquent, je suis d'avis d'accueillir le pourvoi en partie.

II. Faits et historique législatif

[8] Le 6 mars 2013, l'appelant a plaidé coupable à des accusations d'inceste et de production de pornographie juvénile. Les infractions ont été commises entre 2008 et 2011, et la victime est la fillette de l'appelant.

[9] Lors de la perpétration des infractions, le par. 161(1) du *Code criminel* était libellé comme suit :

> **161.** (1) Dans le cas où un contrevenant est déclaré coupable, ou absous en vertu de l'article 730 aux conditions prévues dans une ordonnance de probation, d'une infraction mentionnée au paragraphe (1.1) à l'égard d'une personne âgée de moins de seize ans, le tribunal qui lui inflige une peine ou ordonne son absolution, en plus de toute autre peine ou de toute autre condition de l'ordonnance d'absolution applicables en l'espèce, sous réserve des conditions ou exemptions qu'il indique, peut interdire au contrevenant :
>
> *a*) de se trouver dans un parc public ou une zone publique où l'on peut se baigner s'il y a des personnes âgées de moins de seize ans ou s'il est raisonnable de s'attendre à ce qu'il y en ait, une garderie, un terrain d'école, un terrain de jeu ou un centre communautaire;
>
> *b*) de chercher, d'accepter ou de garder un emploi — rémunéré ou non — ou un travail bénévole qui le placerait en relation de confiance ou d'autorité vis-à-vis de personnes âgées de moins de seize ans;
>
> *c*) d'utiliser un ordinateur au sens du paragraphe 342.1(2) dans le but de communiquer avec une personne âgée de moins de seize ans.

[10] Après que l'appelant eut commis les infractions, mais avant la détermination de sa peine,

by the *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 16(1), which came into force on August 9, 2012. Section 161(1)(a) and (b) remained unchanged. But the Act modified s. 161(1)(c) to include prohibiting all contact with young persons, no matter the means, and introduced a new Internet prohibition through s. 161(1)(d). These amendments had the effect of expanding the scope of the community supervision measures a sentencing judge can impose on sexual offenders. Section 161(1)(c) and (d) now provide that a sentencing judge can prohibit an offender from:

> **(c)** having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or
>
> **(d)** using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

[11] After the 2012 amendments came into force, the appellant was sentenced to nine years' imprisonment. By virtue of the appellant's convictions and the age of the victim, the sentencing judge was required to consider whether to impose a prohibition order under s. 161(1). The question arose as to whether the 2012 amendments could operate retrospectively such that they could be imposed on the appellant.

III. Decisions Below

A. *British Columbia Provincial Court — Klinger Prov. Ct. J.*

[12] The sentencing judge found that an order under s. 161 would be appropriate because "there is a serious risk to the safety of children under the age of 16 after [the appellant] is released". However, on the basis of the test for punishment set out by this Court in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 63, he concluded that an order under the new s. 161(1)(c) and (d) constitutes punishment within the meaning of s. 11(*i*) of the *Charter*, such that the provisions cannot be applied

le par. 161(1) a été modifié par la *Loi sur la sécurité des rues et des communautés*, L.C. 2012, c. 1, par. 16(1), entrée en vigueur le 9 août 2012. Les alinéas 161(1)a) et b) sont demeurés inchangés. Par contre, l'al. 161(1)c) interdisait désormais tout contact avec de jeunes personnes, peu importe le moyen, et un nouvel alinéa — 161(1)d) — interdisait l'utilisation d'Internet. Ces modifications ont eu pour effet d'accroître la portée des mesures de surveillance dans la collectivité auxquelles le juge qui détermine la peine pouvait soumettre un délinquant sexuel. Les alinéas 161(1)c) et d) prévoient aujourd'hui que ce juge peut interdire au contrevenant :

> **c)** d'avoir des contacts — notamment communiquer par quelque moyen que ce soit — avec une personne âgée de moins de seize ans, à moins de le faire sous la supervision d'une personne que le tribunal estime convenir en l'occurrence;
>
> **d)** d'utiliser Internet ou tout autre réseau numérique, à moins de le faire en conformité avec les conditions imposées par le tribunal.

[11] Après l'entrée en vigueur des modifications de 2012, l'appelant a été condamné à neuf ans d'emprisonnement. Étant donné les déclarations de culpabilité et l'âge de la victime, le juge était tenu de se demander s'il y avait lieu de prononcer une interdiction fondée sur le par. 161(1). La question s'est alors posée de savoir si les dispositions issues des modifications de 2012 pouvaient s'appliquer rétrospectivement de sorte que l'appelant y soit assujetti.

III. Décisions des juridictions inférieures

A. *Cour provinciale de la Colombie-Britannique (le juge Klinger)*

[12] Le juge qui détermine la peine conclut qu'une ordonnance fondée sur l'art. 161 est indiquée, car [TRADUCTION] « la sécurité des enfants âgés de moins de seize ans sera exposée à un risque sérieux une fois [l'appelant] libéré ». Compte tenu du critère établi par la Cour en la matière dans *R. c. Rodgers*, 2006 CSC 15, [2006] 1 R.C.S. 554, par. 63, il estime toutefois qu'une ordonnance fondée sur les nouveaux al. 161(1)c) et d) constitue une peine au sens de l'al. 11*i*) de la *Charte*, de sorte que les

retrospectively. Since no formal constitutional challenge was brought and the sentencing judge merely used s. 11(*i*) as a tool of statutory interpretation, no consideration was given to s. 1 of the *Charter*.

[13] In the result, the sentencing judge imposed a prohibition order under s. 161 for a period of seven years, but limited the prohibited activities to those described in the version of s. 161(1) that existed when the appellant committed the offences.

B. *British Columbia Court of Appeal — 2014 BCCA 382, 316 C.C.C. (3d) 540*

[14] On the Crown appeal, the appellant filed a formal constitutional challenge to the retrospective operation of the 2012 amendments. The Court of Appeal split over whether a violation of s. 11(*i*) had been established. Writing for the majority, Newbury J.A. concluded that the 2012 amendments were enacted to protect the public, rather than to punish offenders; therefore, they do not qualify as punishment within the meaning of s. 11(*i*). Newbury J.A. allowed the appeal and imposed the conditions in s. 161(1)(c) and (d) retrospectively on the appellant for a period of seven years.

[15] Groberman J.A., dissenting in part, concluded that the retrospective application of the 2012 amendments infringes s. 11(*i*). Applying *Rodgers*, Groberman J.A. concluded that s. 161 orders are consequences of conviction, imposed in furtherance of the purpose and principles of sentencing, and thus qualify as "punishment".

[16] Because the majority found that s. 11(*i*) was not engaged, the parties and the Court of Appeal did not address s. 1 of the *Charter*.

dispositions ne peuvent s'appliquer rétrospectivement. Vu l'absence de contestation constitutionnelle formelle et le fait qu'il ne recourt à l'al. 11*i*) qu'aux fins d'interprétation législative, le juge omet de considérer l'application de l'article premier de la *Charte*.

[13] Le juge interdit donc sur le fondement de l'art. 161, pour une période de sept ans, les seules activités mentionnées dans la version du par. 161(1) qui était en vigueur lorsque l'appelant a commis les infractions.

B. *Cour d'appel de la Colombie-Britannique — 2014 BCCA 382, 316 C.C.C. (3d) 540*

[14] Dans le cadre de l'appel du ministère public, l'appelant a contesté formellement la constitutionnalité de l'application rétrospective des dispositions issues des modifications de 2012. La Cour d'appel est partagée quant à savoir si l'atteinte au droit garanti par l'al. 11*i*) est établie ou non. Au nom des juges majoritaires, la juge Newbury conclut que les nouvelles interdictions issues des modifications de 2012 visent à protéger le public, non à punir les contrevenants, de sorte qu'elles ne peuvent être considérées comme une peine au sens de l'al. 11*i*). Elle accueille l'appel et soumet l'appelant aux interdictions prévues aux al. 161(1)c) et d), rétrospectivement, pour une période de sept ans.

[15] Dissident en partie, le juge Groberman opine que l'application rétrospective des dispositions issues des modifications de 2012 contrevient à l'al. 11*i*). Il s'appuie sur l'arrêt *Rodgers* pour conclure que les ordonnances fondées sur l'art. 161 sont une conséquence de la déclaration de culpabilité, que les interdictions qu'elles prévoient sont conformes à l'objectif et aux principes de la détermination de la peine et qu'il s'agit donc d'une « peine ».

[16] Vu la conclusion des juges majoritaires selon laquelle le droit garanti par l'al. 11*i*) n'est pas en jeu, ni les parties ni la Cour d'appel ne se sont exprimées sur l'application de l'article premier de la *Charte*.

IV. Issues

[17] This case raises two constitutional questions:

(1) Does the retrospective operation of s. 161(c) and (d) of the *Criminal Code* limit s. 11(*i*) of the *Charter*?

(2) If so, is the limitation a reasonable one prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

V. Analysis

[18] As a preliminary matter, I observe that although there is a presumption against the retrospective application of legislation that affects substantive rights (*R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 10), the parties do not dispute the Court of Appeal's finding that the presumption has been rebutted in this case because Parliament intended the 2012 amendments to operate retrospectively. I agree.

[19] This appeal thus turns on whether such retrospective application complies with constitutional standards.

A. *Do the 2012 Amendments Constitute Punishment Such That Their Retrospective Operation Limits Section 11(i) of the Charter?*

(1) The Purpose of Section 11(*i*) of the *Charter* and the Interests It Protects

[20] Section 11 of the *Charter* protects the legal rights of accused persons when they are charged with an offence. Section 11 encompasses "crucial fundamental rights" (*R. v. Wigglesworth*, [1987] 2 S.C.R. 541, per Wilson J., at p. 558), including the right to be tried within a reasonable time (s. 11(*b*)); the right to be presumed innocent (s. 11(*d*)); and the right against double jeopardy or punishment (s. 11(*h*)).

IV. Questions en litige

[17] Le dossier soulève deux questions constitutionnelles :

(1) L'application rétrospective des al. 161(1)c) et d) du *Code criminel* restreint-elle le droit garanti par l'al. 11*i*) de la *Charte*?

(2) Dans l'affirmative, s'agit-il d'une restriction apportée par une règle de droit dans des limites raisonnables et dont la justification peut se démontrer dans une société libre et démocratique au regard de l'article premier de la *Charte*?

V. Analyse

[18] Je remarque au préalable que, bien qu'il existe une présomption à l'encontre de l'application rétrospective d'une disposition législative qui porte atteinte à un droit substantiel (*R. c. Dineley*, 2012 CSC 58, [2012] 3 R.C.S. 272, par. 10), les parties ne contestent pas la conclusion de la Cour d'appel selon laquelle la présomption est réfutée en l'espèce, le législateur ayant voulu que les dispositions issues des modifications de 2012 s'appliquent de manière rétrospective. Je suis d'accord.

[19] L'issue du pourvoi tient donc à ce que cette application rétrospective est conforme ou non aux normes constitutionnelles.

A. *Les dispositions issues des modifications de 2012 infligent-elles une peine, de sorte que leur application rétrospective restreigne le droit garanti par l'al. 11i) de la Charte?*

(1) L'objet de l'al. 11*i*) de la *Charte* et les droits que celui-ci garantit

[20] L'article 11 de la *Charte* protège les droits de la personne inculpée, des « droits fondamentaux très importants » (*R. c. Wigglesworth*, [1987] 2 R.C.S. 541, la juge Wilson, p. 558), dont celui d'être jugé dans un délai raisonnable (al. 11*b*)), celui d'être présumé innocent (al. 11*d*)) et celui à la protection contre le double péril ou la double peine (al. 11*h*)).

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

> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[22] Along with s. 11(*g*) — which protects an accused's right "not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence" — s. 11(*i*) constitutionally enshrines the fundamental notion that criminal laws should generally not operate retrospectively.

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

> According to the ideal of the rule of law, the law must be such that those subject to it can reliably be guided by it, either to avoid violating it or to build the legal consequences of having violated it into their thinking about what future actions may be open to them. People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans.
>
> (J. Gardner, "Introduction", in H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed. 2008), xiii, at p. xxxvi)

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

> **11.** Tout inculpé a le droit :
>
> . . .
>
> *i*) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[22] De pair avec l'al. 11*g*) — qui protège le droit de l'accusé « de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction » —, l'al. 11*i*) constitutionnalise la notion fondamentale voulant que, en matière pénale, une disposition ne doive généralement pas s'appliquer rétrospectivement.

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

> [TRADUCTION] L'idéal de la primauté du droit veut que la loi permette à celui qui y est assujetti de s'y fier afin de pouvoir éviter d'y contrevenir ou de pouvoir se représenter les conséquences juridiques d'une contravention au moment d'envisager quelque action. Les gens doivent pouvoir connaître la teneur de la loi et en tenir effectivement compte dans leur réflexion. La loi doit éviter de prendre les gens au dépourvu, de leur tendre un piège, de les mettre en opposition avec ses exigences de manière à tromper leurs attentes et à contrecarrer leurs plans.
>
> (J. Gardner, « Introduction », dans H. L. A. Hart, *Punishment and Responsibility : Essays in the Philosophy of Law* (2e éd. 2008), xiii, p. xxxvi)

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

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

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

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

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

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

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

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

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

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

of law and ensuring fairness in criminal proceedings.

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

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

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

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

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

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

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

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

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

role does the impact a sanction can have on an offender play in the analysis? I address each question in turn.

(a) *Do Laws Primarily Aimed at Public Protection Necessarily Fail to Satisfy the Second Branch of the Rodgers Test?*

[31] In this case, the Court of Appeal interpreted *Rodgers* as indicating that sanctions principally aimed at public protection necessarily fall outside the ambit of punishment. The Crown echoes this position before this Court. As I will explain, this position overreaches: while not all measures imposed to protect the public constitute punishment, public protection is at the core of the purpose and principles of sentencing. Public protection is therefore an insufficient litmus test for defining punishment.

[32] The purpose and principles of sentencing have been the subject of extensive jurisprudence and are reflected, at least in part, in ss. 718 et seq. of the *Criminal Code*: see *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 1; see also *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 35. Section 718 provides that the "fundamental purpose of sentencing is to protect society" and to contribute "to respect for the law and the maintenance of a just, peaceful and safe society". This overarching purpose is accomplished by "imposing just sanctions" (s. 718) that reflect one or more of the traditional sentencing objectives: denunciation, deterrence, separation of offenders from society, rehabilitation, reparation, and promoting a sense of responsibility in offenders. Sections 718.1 and 718.2 go on to list a number of sentencing principles, including the fundamental principle of proportionality, that guide sentencing judges in crafting a fit sentence.

principalement la protection du public omet-elle nécessairement de satisfaire au second volet du critère de l'arrêt *Rodgers*? Deuxièmement, quel rôle joue dans l'analyse l'incidence de la sanction sur le contrevenant? J'examine successivement ces questions ci-après.

a) *La disposition qui vise principalement la protection du public omet-elle nécessairement de satisfaire au second volet du critère de l'arrêt Rodgers?*

[31] En l'espèce, la Cour d'appel conclut de *Rodgers* que la sanction dont la vocation principale est de protéger le public n'est forcément pas une peine. Le ministère public en convient devant notre Cour. Comme je l'expliquerai, c'est aller trop loin. Même si toute mesure imposée pour protéger le public ne constitue pas une peine, la protection du public est au cœur de l'objectif et des principes de la détermination de la peine. La protection du public n'est donc pas une considération suffisante pour décider qu'une sanction constitue ou non une peine.

[32] L'objectif et les principes de la détermination de la peine font l'objet d'une jurisprudence abondante et se retrouvent, du moins en partie, aux art. 718 et suiv. du *Code criminel* (voir *R. c. Lacasse*, 2015 CSC 64, [2015] 3 R.C.S. 1089, par. 1; voir également *R. c. Ipeelee*, 2012 CSC 13, [2012] 1 R.C.S. 433, par. 35). L'article 718 dispose que le « prononcé des peines a pour objectif essentiel de protéger la société et de contribuer [. . .] au respect de la loi et au maintien d'une société juste, paisible et sûre ». Cet objectif général est atteint par « l'infliction de sanctions justes » (art. 718) qui tiennent compte d'un ou de plusieurs des objectifs traditionnels de la détermination de la peine, à savoir la dénonciation, la dissuasion, l'isolement des délinquants du reste de la société, la réinsertion sociale, la réparation et le fait de susciter la conscience de leurs responsabilités chez les délinquants. Les articles 718.1 et 718.2 énoncent en outre un certain nombre de principes de la détermination de la peine, y compris le principe fondamental de la proportionnalité, lequel guide le tribunal dans la détermination d'une peine juste.

[33] It is clear from the plain language of s. 718 that public protection is part of the very essence of the purpose and principles governing the sentencing process, a point emphasized by this Court in *R. v. Lyons*, [1987] 2 S.C.R. 309, per La Forest J., at p. 329: ". . . the fundamental purpose of the criminal law generally, and of sentencing in particular, [is] the protection of society". It is therefore difficult to distinguish between sanctions intended to protect the public and sanctions intended to punish offenders. Doherty J.A. highlighted this difficulty in the recent case of *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81. Although his comments were made in the context of defining the common law presumption against retrospectivity, they are apposite here:

> The distinction between sanctions intended to protect the public and those intended to punish offenders is difficult to make in the context of sentencing for criminal offences. Many criminal sanctions are designed to both protect the public and punish the accused. In fact, some sanctions protect the public by punishing the accused. The objectives of public protection and punishment often cannot realistically be separated and treated as individual and competing purposes in the sentencing context. [para. 42]

For these reasons, sanctions intended to advance public safety do not constitute a broad exception to the protection s. 11(*i*) affords and may qualify as punishment.

[34] To be clear, while measures imposed at sentencing for the purpose of protecting the public may constitute punishment under s. 11(*i*), a public-protection purpose is not, on its own, determinative. To satisfy the second branch of the *Rodgers* test, a consequence of conviction must be imposed in furtherance of the purpose and principles of sentencing. As discussed, the purpose of sentencing is to "protect society" or advance "respect for the law and the maintenance of a just, peaceful and safe society" (s. 718 of the *Criminal Code*) by fulfilling one or more of the traditional sentencing objectives (s. 718(a) through (f)) in accordance with the

[33] Suivant le sens ordinaire des termes employés à l'art. 718, la protection du public relève nettement de l'essence même de l'objectif et des principes qui régissent le processus de détermination de la peine, ce que souligne la Cour dans *R. c. Lyons*, [1987] 2 R.C.S. 309, le juge La Forest, p. 329 : « . . . l'objet fondamental du droit criminel en général et de l'imposition des peines en particulier [est] la protection de la société ». Il est par conséquent difficile de distinguer la sanction qui vise à protéger le public de celle dont le but est de punir le contrevenant. Le juge Doherty signale la difficulté dans le récent arrêt *R. c. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81. Ses remarques sont formulées dans le contexte de la définition de la présomption de non-rétrospectivité en common law, mais elles demeurent pertinentes en l'espèce :

> [TRADUCTION] Il est difficile de distinguer entre la sanction qui vise à protéger le public et celle dont le but est de punir le contrevenant lorsqu'il s'agit de déterminer la peine à infliger à l'auteur d'une infraction criminelle. De nombreuses sanctions criminelles sont conçues à la fois pour protéger le public et pour punir l'accusé. En fait, certaines protègent le public en punissant l'accusé. Souvent, on ne peut pas vraiment dissocier l'objectif de protéger le public et celui de punir, ni les considérer comme des objectifs individuels et concurrents dans le contexte de la détermination de la peine. [par. 42]

C'est pourquoi la sanction qui vise à promouvoir la sécurité du public ne bénéficie pas d'une exception générale à la protection qu'offre l'al. 11*i*) et elle peut être considérée comme une peine.

[34] Précisons que, lors de la détermination de la peine, une mesure prise pour protéger le public peut constituer une peine au sens de l'al. 11*i*), mais que l'objectif de la protection du public n'est pas décisif en soi. Pour satisfaire au second volet du critère de l'arrêt *Rodgers*, la conséquence de la déclaration de culpabilité doit être conforme à l'objectif et aux principes de la détermination de la peine. Rappelons que la détermination de la peine vise à « protéger la société » ou à promouvoir le « respect de la loi et [le] maintien d'une société juste, paisible et sûre » (art. 718 du *Code criminel*) grâce à la réalisation de l'un ou de plusieurs des objectifs traditionnels

principles of sentencing reflected in ss. 718.1 and 718.2.

(b) *What Role Does the Impact of a Sanction Play in the Analysis?*

[35] Citing *R. v. Cross*, 2006 NSCA 30, 138 C.R.R. (2d) 163, at paras. 45-46, the Crown submits that the impact of a sanction on an offender is only relevant if it is out of proportion to the sanction's legislative purpose. That is, "if the impact of the sanction aligns with its legislative purpose and is not of such magnitude that it reveals, instead, a punitive intent, it is not 'punishment'" (*Cross*, at para. 45).

[36] As I shall explain, I conclude that the impact of a sanction has broader significance. While a sanction's impact was to some extent implicit in the *Rodgers* analysis, in my view, the s. 11(*i*) test for punishment must embody a clearer, more meaningful consideration of the impact a sanction can have on an offender. This is important for a variety of reasons.

[37] First, it accords with "the liberal and purposive approach" that must be taken in interpreting *Charter* rights, including s. 11(*i*) (*Rodgers*, at para. 61). The purposes of s. 11(*i*), which are centred on the rule of law and fairness in criminal proceedings, are compromised if the right is incapable of protecting offenders from the retrospective imposition of sanctions that have a significant impact on their liberty or security — regardless of the sanction's objective. As the interveners the David Asper Centre for Constitutional Rights, the Criminal Lawyers' Association (Ontario), the British Columbia Civil Liberties Association, and the Association des avocats de la défense de Montréal all submit, fairness and predictability in punishment are enhanced when there is a pragmatic consideration of the impact of an impugned sanction.

énumérés aux al. 718a) à f), et ce, conformément aux principes de détermination de la peine qui se retrouvent aux art. 718.1 et 718.2.

b) *Quel rôle joue dans l'analyse l'incidence de la sanction sur le contrevenant?*

[35] Prenant appui sur l'arrêt *R. c. Cross*, 2006 NSCA 30, 138 C.R.R. (2d) 163, par. 45-46, le ministère public fait valoir que l'incidence de la sanction sur le contrevenant n'est à considérer que lorsqu'elle est sans commune mesure avec l'objectif législatif qui sous-tend la sanction. Autrement dit, [TRADUCTION] « lorsque l'incidence de la sanction est dans le droit fil de l'objectif législatif et n'est pas considérable au point de révéler plutôt l'intention de punir, il ne s'agit pas d'une "peine" » (*Cross*, par. 45).

[36] Comme je l'explique plus loin, j'estime que l'incidence de la sanction revêt une importance plus grande. Elle est jusqu'à un certain point prise tacitement en compte dans l'arrêt *Rodgers* et dans l'analyse que la Cour y effectue mais, à mon sens, le critère qui permet d'assimiler une mesure à une peine pour les besoins de l'al. 11*i*) de la *Charte* doit englober une prise en compte plus claire et plus soutenue de l'incidence de la sanction sur le contrevenant. Cela importe pour diverses raisons.

[37] Premièrement, une telle démarche est compatible avec « l'interprétation libérale et téléologique » qui s'impose à l'égard des droits garantis par la *Charte*, y compris à l'al. 11*i*) (*Rodgers*, par. 61). Les objectifs de l'al. 11*i*), qui sont axés sur la primauté du droit et l'équité dans les procédures criminelles, sont compromis si le droit garanti ne peut protéger le contrevenant contre l'application rétrospective d'une sanction ayant une grande incidence sur sa liberté et sa sécurité, indépendamment de l'objectif de la sanction. Comme le soutiennent les intervenants David Asper Centre for Constitutional Rights, Criminal Lawyers' Association (Ontario), Association des libertés civiles de la Colombie-Britannique et Association des avocats de la défense de Montréal, le caractère équitable de la peine et la prévisibilité de son infliction s'accroissent lorsque l'incidence de la sanction en cause est prise en compte avec pragmatisme.

[38] A "liberal and purposive approach" to punishment is appropriate because s. 11(*i*) is engaged only within a narrow sphere. As mentioned, in *Wigglesworth*, this Court held that s. 11 of the *Charter* applies only to proceedings that are criminal or *quasi*-criminal, or, regardless of the nature of the proceeding, if a "true penal consequence" such as imprisonment is at stake (p. 559). The Court in *Wigglesworth* gave s. 11 a narrow ambit so that "[t]he content of [the s. 11] rights [does not] suffer from a lack of predictability or a lack of clarity because of a universal application of the section" (p. 558). Although 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.

[39] Second, a consideration of the impact of a sanction is consistent with this Court's jurisprudence. Since the early days of the *Charter*, this Court has always looked to both purposes and effects when considering the constitutionality of laws: see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 331. And in the recent decision of *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, this Court adopted "a functional rather than a formalistic perspective" (para. 52), observing that, "[i]t is the retrospective frustration of an expectation of liberty that constitutes punishment" (para. 60). The Court went on to conclude that the elimination of accelerated parole review violated s. 11(*h*) as it had a sufficiently significant impact on "an offender's settled expectation of liberty" (para. 60). In doing so, the Court focused on the impact the retrospective law had on the offender, rather than the purpose animating the law: see H. Stewart, "Punitive in Effect: Reflections on *Canada v. Whaling*" (2015), 71 *S.C.L.R.* (2d) 263, at p. 269. Although *Whaling* was concerned with the definition of punishment in the context of s. 11(*h*) of the *Charter*,

[38] Une « interprétation libérale et téléologique » est indiquée à l'égard de la peine car l'al. 11*i*) ne s'applique que dans un contexte bien délimité. Rappelons que, dans *Wigglesworth*, la Cour statue que l'art. 11 de la *Charte* s'applique seulement dans le cadre de procédures criminelles ou quasi criminelles, ou bien, quelle que soit la nature de l'instance, lorsqu'une « véritable conséquence pénale » est en jeu (p. 559). Elle ajoute que l'art. 11 a une portée étroite, de sorte que « [l]e contenu [des droits qu'il confère] ne devrait pas connaître un manque de prévisibilité ou de clarté en raison d'une application universelle de l'article » (p. 558). Même si le critère de la « véritable conséquence pénale » établit un seuil indéniablement élevé, il a été conçu pour permettre au tribunal de décider si une personne est un « inculpé » même si elle fait l'objet d'une procédure *autre* que criminelle. En matière criminelle, ce qui justifie une interprétation étroite de la « conséquence pénale » ou de la « peine » disparaît pour l'essentiel.

[39] Deuxièmement, la prise en compte de l'incidence de la sanction est compatible avec la jurisprudence de la Cour. Depuis les premiers jours de l'application de la *Charte*, la Cour s'est toujours penchée tant sur les objectifs que sur les effets d'une règle de droit pour se prononcer sur sa constitutionnalité (voir *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 331). Et, dans le récent arrêt *Canada (Procureur général) c. Whaling*, 2014 CSC 20, [2014] 1 R.C.S. 392, la Cour adopte « [un] plan, sinon formel, du moins fonctionnel » (par. 52) et fait alors observer que « [l]a peine se cristallise par l'effet rétrospectif de l'atteinte aux attentes légitimes de liberté » (par. 60). Elle conclut que la suppression de la procédure d'examen expéditif (en matière de libération conditionnelle) contrevient à l'al. 11*h*) puisqu'elle a une incidence suffisamment importante sur « l'attente légitime en matière de liberté » du contrevenant (par. 60). La Cour s'attache alors principalement à l'incidence de la loi d'application rétrospective sur le contrevenant, plutôt qu'à son objectif sous-jacent (voir H. Stewart, « Punitive in Effect : Reflections on *Canada v. Whaling* »

harmony between s. 11(*i*) and (*h*) is desirable as fairness in punishment underlies both provisions.

[40] Third, an approach that accounts for a sanction's impact will assist in identifying the "lesser punishment" to which an accused is entitled. The punishment with the less severe impact on the liberty or security of an offender will be deemed to be the "lesser punishment" for the purposes of s. 11(*i*). A definition of punishment that focuses heavily on the objective of the sanction obscures this inquiry.

[41] Thus, I would restate the test for punishment as follows in order to carve out a clearer and more meaningful role for the consideration of the impact of a sanction: a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests.[1]

[42] As this Court wrote in *Cunningham v. Canada*, [1993] 2 S.C.R. 143: "The *Charter* does not protect against insignificant or 'trivial' limitations of rights . . . . The [state action] must be significant enough to warrant constitutional protection" (p. 151). That is why, if a consequence of conviction is not imposed in furtherance of the purpose and principles of sentencing, it must have a *significant* impact on an offender's constitutionally protected *liberty* or *security* interests before it will qualify as punishment for the purposes of s. 11(*i*). To satisfy this requirement, a consequence of conviction must significantly constrain a person's ability to engage

[1] In articulating this test, I do not decide whether s. 11(*i*) would be infringed in circumstances akin to those in *Whaling*, in which accelerated parole review was retrospectively eliminated, thereby impacting the length of incarceration that was imposed as a sanction consequent to conviction.

(2015), 71 *S.C.L.R.* (2d) 263, p. 269). Bien que *Whaling* porte sur la définition de la peine pour les besoins de l'al. 11*h*) de la *Charte*, il convient d'harmoniser l'application des al. 11*i*) et *h*) puisque le caractère équitable de la peine sous-tend les deux dispositions.

[40] Troisièmement, une approche qui tient compte de l'incidence de la sanction est utile pour déterminer la « peine la moins sévère » susceptible d'être infligée à l'accusé. La peine dont l'incidence est la moins grande sur la liberté ou la sécurité du contrevenant devient la « peine la moins sévère » pour l'application de l'al. 11*i*). Définir la peine en s'attachant lourdement à l'objectif de la sanction nuit à la démarche.

[41] C'est pourquoi j'incline à reformuler comme suit le critère qui permet d'assimiler une mesure à une peine afin de conférer un rôle plus clair et plus important à la prise en compte de l'incidence de la sanction : une mesure constitue une peine si (1) elle est une conséquence d'une déclaration de culpabilité qui fait partie des sanctions dont est passible un accusé pour une infraction donnée et (2) soit elle est conforme à l'objectif et aux principes de la détermination de la peine, (3) soit elle a une grande incidence sur le droit du contrevenant à la liberté ou à la sécurité[1].

[42] Dans l'arrêt *Cunningham c. Canada*, [1993] 2 R.C.S. 143, la Cour affirme que « [l]a *Charte* n'assure pas une protection contre les restrictions insignifiantes ou "négligeables" [. . .] La [mesure de l'État] doit être suffisamment importante pour justifier une protection constitutionnelle » (p. 151). C'est pourquoi lorsqu'une conséquence de la déclaration de culpabilité n'est pas conforme à l'objectif et aux principes de la détermination de la peine, elle doit avoir une *grande* incidence sur le droit constitutionnel du contrevenant *à la liberté* ou *à la sécurité* pour constituer une peine au sens de l'al. 11*i*). Pour satisfaire à cette exigence, la conséquence de la

[1] En proposant ce critère, je ne me prononce pas quant à savoir s'il y aurait atteinte au droit garanti par l'al. 11*i*) dans des circonstances semblables à celles de l'affaire *Whaling*, dans laquelle la procédure d'examen expéditif avait été supprimée rétrospectivement, ce qui avait eu une incidence sur la durée de la peine d'emprisonnement infligée comme sanction consécutive à la déclaration de culpabilité.

in otherwise lawful conduct or impose significant burdens not imposed on other members of the public. Again, Doherty J.A.'s comments in *Hooyer* are helpful: ". . . a prohibition that significantly limits the lawful activities in which an accused can engage, where an accused can go, or with whom an accused can communicate or associate, would sufficiently impair the liberty and security of the accused to warrant characterizing the prohibition as punishment" (para. 45).

[43] Having reformulated the s. 11(*i*) test for punishment, I now turn to the sanctions at issue in this appeal. I first discuss s. 161 of the *Criminal Code* in more detail before applying the test for punishment to the 2012 amendments.

(3) History and Operation of Section 161 of the *Criminal Code*

[44] The legislative history, judicial interpretation, and design of s. 161 all confirm that the section has an overarching protective function: to shield children from sexual violence.

[45] Section 161 was enacted in 1993 in response to the decision in *R. v. Heywood* (1992), 20 B.C.A.C. 166, in which the British Columbia Court of Appeal struck down under s. 7 of the *Charter* the offence of loitering: see *An Act to amend the Criminal Code and the Young Offenders Act*, S.C. 1993, c. 45, s. 1. After 1993, s. 161 continued to evolve and, in 2012, the impugned amendments were introduced through the *Safe Streets and Communities Act*. The protective function of s. 161 generally, and the 2012 amendments specifically, was repeatedly emphasized throughout the legislative debates. For example, at the Bill's third reading, the Minister of Justice stated that the proposed amendments are "an important step forward in the protection of children in this country" (*House of Commons Debates*, vol. 145, No. 144, 3rd Sess., 40th Parl., March 11, 2011, at p. 8967).

déclaration de culpabilité doit restreindre sensiblement la faculté qu'a une personne de se livrer à une activité par ailleurs licite ou soumettre une personne à des contraintes substantielles auxquelles les autres citoyens ne sont pas soumis. Les propos du juge Doherty dans *Hooyer* valent encore une fois d'être cités : [TRADUCTION] « . . . l'interdiction qui restreint sensiblement l'activité licite à laquelle peut se livrer l'accusé, ses allées et venues, les personnes avec lesquelles il peut communiquer ou qu'il peut fréquenter, porte suffisamment atteinte à la liberté et la sécurité de l'accusé pour que l'on puisse l'assimiler à une peine » (par. 45).

[43] Après la reformulation du critère qui permet d'assimiler une mesure à une peine pour les besoins de l'al. 11*i*), je passe aux sanctions visées par le pourvoi. J'examine d'abord plus en détail l'art. 161 du *Code criminel*, puis j'applique le critère aux dispositions issues des modifications de 2012.

(3) Historique et application de l'art. 161 du *Code criminel*

[44] Son historique législatif et son interprétation judiciaire, ainsi que la manière dont il est conçu, confirment que l'art. 161 a une fonction protectrice prépondérante, à savoir protéger les enfants contre la violence sexuelle.

[45] L'article 161 a vu le jour en 1993 pour donner suite à l'arrêt *R. c. Heywood* (1992), 20 B.C.A.C. 166, dans lequel la Cour d'appel de la Colombie-Britannique avait invalidé l'infraction de flânerie par application de l'art. 7 de la *Charte* (voir la *Loi modifiant le Code criminel et la Loi sur les jeunes contrevenants*, L.C. 1993, c. 45, art. 1). La disposition a par la suite évolué et, en 2012, les modifications visées en l'espèce ont été apportées par la *Loi sur la sécurité des rues et des communautés*. Tout au long des débats législatifs, on a maintes fois souligné la fonction protectrice de l'art. 161 en général et des dispositions issues des modifications de 2012 en particulier. Par exemple, lors de la troisième lecture du projet de loi, le ministre de la Justice a déclaré que les modifications proposées « fai[saient] beaucoup pour protéger nos enfants » (*Débats de la Chambre des communes*, vol. 145, nº 144, 3e sess., 40e lég., 11 mars 2011, p. 8967).

[46] The jurisprudence interpreting and applying s. 161 confirms the provision's protective purpose: see, e.g., *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 803; *R. v. A. (R.K.)*, 2006 ABCA 82, 208 C.C.C. (3d) 74, at para. 20; *R. v. Perron*, 2009 ONCA 498, 244 C.C.C. (3d) 369, at para. 13.

[47] As well, the design of s. 161 is consistent with its purpose of protecting children from sexual violence. Section 161 orders are discretionary and "subject to the conditions or exemptions that the court directs" (s. 161(1)). They can therefore be carefully tailored to the circumstances of a particular offender. The discretionary and flexible nature of s. 161 demonstrates that it was designed to empower courts to craft tailored orders to address the nature and degree of risk that a sexual offender poses to children once released into the community. Failure to comply with the order can lead to a term of imprisonment of up to four years (s. 161(4)).

[48] Further, I agree with the line of cases holding that s. 161 orders can be imposed only when there is an evidentiary basis upon which to conclude that the particular offender poses a risk to children and the judge is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk: see *A. (R.K.)*, at para. 32; see also *R. v. R.R.B.*, 2013 BCCA 224, 338 B.C.A.C. 106, at paras. 32-34. These orders are not available as a matter of course. In addition, the content of the order must carefully respond to an offender's specific circumstances.[2]

[46] Les décisions dans lesquelles les tribunaux ont interprété et appliqué l'art. 161 confirment la vocation protectrice de la disposition (voir p. ex. *R. c. Heywood*, [1994] 3 R.C.S. 761, p. 803; *R. c. A. (R.K.)*, 2006 ABCA 82, 208 C.C.C. (3d) 74, par. 20; *R. c. Perron*, 2009 ONCA 498, 244 C.C.C. (3d) 369, par. 13).

[47] De même, la manière dont est conçu l'art. 161 se concilie avec son objectif de protéger les enfants contre la violence sexuelle. L'ordonnance est rendue sur le fondement d'un pouvoir discrétionnaire et elle s'applique « sous réserve des conditions ou exemptions [que le tribunal] indique » (par. 161(1)). Elle peut être soigneusement adaptée à la situation du contrevenant. Le caractère discrétionnaire et souple du pouvoir conféré à l'art. 161 montre que le législateur a voulu permettre au tribunal de concevoir une ordonnance adaptée qui tient compte de la nature et de l'importance du risque que représente pour les enfants le délinquant sexuel libéré et rendu à la collectivité. L'inobservation de l'ordonnance peut entraîner un emprisonnement maximal de quatre ans (par. 161(4)).

[48] En outre, je m'inscris dans le courant jurisprudentiel selon lequel l'ordonnance fondée sur l'art. 161 ne peut être rendue que lorsque la preuve permet de conclure que le contrevenant représente un risque pour les enfants et que le juge est convaincu que les conditions dont elle est assortie visent raisonnablement à réduire ce risque (voir *A. (R.K.)*, par. 32; voir également *R. c. R.R.B.*, 2013 BCCA 224, 338 B.C.A.C. 106, par. 32-34). Il ne s'agit pas d'une ordonnance rendue automatiquement. De plus, elle doit être soigneusement adaptée à la situation particulière du contrevenant[2].

[2] For example, the order imposed by McArthur J. in *R. v. Levin*, 2015 ONCJ 290, at para. 113 (CanLII), illustrates how the Internet prohibition in s. 161(1)(d) can be crafted to fulfill the protective goals of the legislation while enhancing the offender's rehabilitation process. See also the order imposed in *R. v. Schledermann*, 2014 ONSC 674, at para. 13 (CanLII).

[2] Par exemple, l'ordonnance de la juge McArthur dans *R. c. Levin*, 2015 ONCJ 290, par. 113 (CanLII), montre comment l'interdiction d'utiliser Internet prévue à l'al. 161(1)d) peut être rédigée pour atteindre les objectifs de protection de la loi tout en favorisant la réadaptation du contrevenant. Voir également l'ordonnance en cause dans *R. c. Schledermann*, 2014 ONSC 674, par. 13 (CanLII).

(4) Application of the Test for Punishment to the 2012 Amendments to Section 161 of the *Criminal Code*

[49] Applying the reformulated test, I conclude that the 2012 amendments constitute punishment.

[50] First, the 2012 amendments form part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence. Section 161(1) directs sentencing judges to consider whether to exercise their discretion to impose the community supervision measures once an offender is convicted of an enumerated sexual offence involving a person under the age of 16. Section 161 orders are therefore a consequence of conviction, a fact that the Crown does not dispute.

[51] Second, the sanctions contained in the 2012 amendments are imposed in furtherance of the purpose and principles of sentencing and can have a significant impact on an offender's *Charter*-protected interests — although, to be clear, both are not required to satisfy the test.

[52] As to the objective, the 2012 amendments are intended to protect children by separating offenders from society, assisting in rehabilitation, and deterring sexual violence, sentencing goals that all find expression in s. 718 of the *Criminal Code*. In addition, the discretionary and flexible process through which s. 161 orders are imposed aligns with the principles of sentencing articulated in ss. 718.1 and 718.2. As noted above, the fact that such orders are imposed to protect children, on its own, is not determinative.

[53] These prohibitions are to be distinguished from DNA orders, which have been found not to constitute punishment under s. 11(*i*): see *Rodgers*, at para. 65. As discussed, the objective of DNA orders

(4) Application du critère qui permet d'assimiler une mesure à une peine aux dispositions qui sont issues des modifications apportées en 2012 à l'art. 161 du *Code criminel*

[49] Au vu du critère reformulé, je conclus que les nouvelles interdictions issues des modifications de 2012 constituent une peine.

[50] Premièrement, elles font partie des sanctions dont est passible un accusé pour une infraction donnée. Le paragraphe 161(1) exige du juge qui détermine la peine qu'il se demande s'il convient ou non d'exercer le pouvoir discrétionnaire qui lui permet de soumettre à des mesures de surveillance dans la collectivité le contrevenant qui est déclaré coupable d'une infraction sexuelle énumérée à l'égard d'une personne âgée de moins de 16 ans. L'ordonnance fondée sur l'art. 161 est donc une conséquence de la déclaration de culpabilité, et le ministère public ne le conteste pas.

[51] Deuxièmement, les sanctions prévues par les dispositions issues des modifications de 2012 sont conformes à l'objectif et aux principes de la détermination de la peine et peuvent avoir une grande incidence sur les droits constitutionnels du contrevenant, même si, je le précise, les deux ne sont pas nécessaires pour satisfaire au critère.

[52] En ce qui a trait à l'objectif, les dispositions issues des modifications de 2012 sont censées protéger les enfants en isolant le contrevenant du reste de la société, en favorisant la réinsertion sociale et en décourageant la violence sexuelle, des objectifs de la détermination de la peine qui figurent tous à l'art. 718 du *Code criminel*. De plus, le processus discrétionnaire et souple à l'issue duquel est rendue l'ordonnance prévue à l'art. 161 respecte les principes de détermination de la peine énoncés aux art. 718.1 et 718.2. Je le répète, le fait qu'une telle ordonnance est rendue pour protéger les enfants n'est pas décisif en soi.

[53] Il y a lieu de distinguer l'ordonnance portant interdiction de celle qui autorise le prélèvement d'un échantillon d'ADN, cette dernière n'étant pas assimilée à une peine au sens de l'al. 11*i*) (voir

is primarily to facilitate the *investigation* of future crimes, rather than to achieve deterrence, denunciation, separation, or rehabilitation in connection with a past offence: see *Rodgers*, at para. 64.

[54] Turning to the impact of the amendments, both s. 161(1)(c) and (d) can have a significant impact on the liberty and security of offenders — potentially for the rest of their lives. This Court has recognized that living in the community under restrictions can attract a considerable degree of stigma (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 105). Further, a prohibition under s. 161(1)(c) on having any contact with persons under the age of 16 could potentially curtail the types of employment an offender can pursue, and an offender's ability to interact with people (including adults in the company of children) in public and private spaces. And depriving an offender under s. 161(1)(d) of access to the Internet is tantamount to severing that person from an increasingly indispensable component of everyday life:

> The Internet has become a hub for every kind of human activity, from education to recreation to commerce. It is no longer merely a window to the world. For a growing number of people, the Internet *is* their world — a place where one can do nearly everything one needs or wants to do. The Web provides virtual opportunities for people to shop, meet new people, converse with friends and family, transact business, network and find jobs, bank, read the newspaper, watch movies, and attend classes. [Emphasis in original; footnotes omitted.]
>
> (B. A. Areheart and M. A. Stein, "Integrating the Internet" (2015), 83 *Geo. Wash. L. Rev.* 449, at p. 456)

For many Canadians, membership in online communities is an integral component of citizenship and personhood. In my view, retrospectively excluding offenders from these virtual communal

Rodgers, par. 65). Rappelons que l'objectif de l'ordonnance qui autorise le prélèvement d'un échantillon d'ADN est principalement de faciliter l'*enquête* relative à de futurs crimes, plutôt que de dissuader, de dénoncer, d'isoler ou de réinsérer socialement en lien avec une infraction antérieure (voir *Rodgers*, par. 64).

[54] En ce qui concerne l'incidence des modifications, les al. 161(1)c) et d) peuvent tous deux avoir une grande incidence sur la liberté et la sécurité du contrevenant, peut-être même pour le reste de ses jours. La Cour reconnaît que le fait de vivre dans la collectivité en étant soumis à des conditions strictes peut engendrer une stigmatisation non négligeable (*R. c. Proulx*, 2000 CSC 5, [2000] 1 R.C.S. 61, par. 105). En outre, l'interdiction fondée sur l'al. 161(1)c) d'avoir des contacts avec une personne âgée de moins de 16 ans est susceptible de réduire les domaines d'emploi qui s'offrent au contrevenant et la possibilité qu'il a d'interagir avec autrui (y compris les adultes accompagnés d'enfants) dans les lieux publics et privés. Empêcher le contrevenant d'avoir accès à Internet sur le fondement de l'al. 161(1)d) équivaut à le tenir à l'écart d'un élément de plus en plus essentiel à la vie quotidienne :

> [TRADUCTION] Internet est désormais au centre de l'activité humaine dans tous les domaines, qu'il s'agisse de l'éducation ou du commerce, voire des loisirs. Ce n'est plus une simple fenêtre sur le monde. Pour un nombre croissant de personnes, Internet *est* leur monde, un endroit où l'on peut faire presque tout ce que l'on a besoin de faire ou que l'on souhaite faire. La toile offre la possibilité virtuelle de magasiner, de faire des rencontres, d'échanger avec les amis et la famille, de mener ses activités, de réseauter et de trouver un emploi, d'effectuer des opérations bancaires, de lire le journal, de regarder des films et de suivre des cours. [En italique dans l'original; notes en bas de page omises.]
>
> (B. A. Areheart et M. A. Stein, « Integrating the Internet » (2015), 83 *Geo. Wash. L. Rev.* 449, p. 456)

Pour de nombreux Canadiens, l'appartenance à des communautés en ligne fait partie intégrante de la citoyenneté et de l'identité individuelle. À mon avis, l'exclusion d'un contrevenant de tels espaces

spaces is a substantial consequence that implicates the fairness and rule of law concerns underlying the s. 11(*i*) right.

[55] The significant impact the 2012 amendments can have on the liberty and security of offenders is another way in which these sanctions are distinguishable from DNA orders. I agree with Doherty J.A. that "a sentencing provision requiring an accused to provide a DNA sample upon conviction . . . does not meaningfully impair the accused's liberty or security of the person and would not be regarded as punishment" (*Hooyer*, at para. 45).

[56] I also note that the text of s. 161(1) ("in addition to any other punishment" or "*en plus de toute autre peine*"), while certainly not determinative, is nonetheless informative. As Groberman J.A. observed in dissent at the Court of Appeal, "Parliament itself appears to have considered that the sanctions set out in s. 161(1) come within the ordinary meaning of the word 'punishment'" (para. 78) or "*peine*".[3]

[57] In sum, the prohibitions found in the 2012 amendments to s. 161(1) constitute punishment for the purposes of s. 11(*i*) of the *Charter*. They are a consequence of conviction, imposed in furtherance of the purpose and principles of sentencing, and they can have a significant impact on the liberty and security of offenders. Clearly, the 2012 amendments constitute greater punishment than the previous prohibitions: under the new s. 161(1)(c), a judge can prohibit all contact with children, no matter the means (not just contact involving a computer system); and under the new s. 161(1)(d), a judge can prohibit an offender from using the Internet or

communs virtuels par l'application rétrospective de la nouvelle disposition constitue une conséquence importante qui met en cause l'équité des procédures criminelles et la primauté du droit, deux notions qui sous-tendent l'al. 11*i*).

[55] La grande incidence des modifications de 2012 sur le droit à la liberté et à la sécurité du contrevenant offre un autre moyen de distinguer les nouvelles sanctions de l'autorisation de prélever un échantillon d'ADN. Je conviens avec le juge Doherty que [TRADUCTION] « la disposition sur la peine qui exige de l'accusé qu'il fournisse un échantillon d'ADN une fois déclaré coupable [. . .] ne porte pas sensiblement atteinte au droit à la liberté ou à la sécurité de la personne et [qu']on ne saurait voir dans son application l'infliction d'une peine » (*Hooyer*, par. 45).

[56] Je remarque aussi que le libellé du par. 161(1) (« en plus de toute autre peine » ou, en anglais, « *in addition to any other punishment* ») est instructif même s'il n'est assurément pas décisif. Comme le fait observer le juge dissident Groberman de la Cour d'appel, [TRADUCTION] « le législateur semble lui-même considérer que chacune des sanctions énoncées au par. 161(1) constitue une "peine" (ou, en anglais, "*punishment*") au sens ordinaire du mot » (par. 78)[3].

[57] En résumé, les interdictions issues des modifications apportées au par. 161(1) en 2012 constituent une peine pour l'application de l'al. 11*i*) de la *Charte*. Elles sont une conséquence de la déclaration de culpabilité, elles sont conformes à l'objectif et aux principes de la détermination de la peine et elles peuvent avoir une grande incidence sur le droit à la liberté et à la sécurité du contrevenant. De toute évidence, elles emportent l'infliction d'une peine plus importante que les interdictions antérieures : le nouvel al. 161(1)c) permet au juge d'interdire tout contact avec un enfant, quel que soit le moyen utilisé (pas seulement l'ordinateur),

[3] The French text of s. 11(i) reads as follows: "*Tout inculpé a le droit . . . i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.*"

[3] Voici le libellé anglais de l'al. 11*i*) : « *Any person charged with an offence has the right [. . .] i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.* »

other digital network for any purpose (not just for the purpose of contacting children). Accordingly, the retrospective operation of these provisions limits the s. 11(*i*) right as it deprives the appellant of the benefit of the less restrictive community supervision measures captured in the previous version of s. 161 — that is, the "lesser punishment".

et le nouvel al. 161(1)d) confère au juge le pouvoir d'interdire au contrevenant d'utiliser Internet ou tout autre réseau numérique à quelque fin (pas seulement pour entrer en contact avec des enfants). Par conséquent, l'application rétrospective des dispositions qui prévoient ces interdictions restreint le droit garanti par l'al. 11*i*) puisqu'elle empêche l'appelant de faire l'objet des mesures de surveillance dans la collectivité moins restrictives qui figuraient dans la version antérieure de l'art. 161, c'est-à-dire de la « peine la moins sévère ».

B. *Is the Limitation of Section 11(i) Justified Under Section 1 of the Charter?*

B. *La restriction du droit garanti par l'al. 11i) se justifie-t-elle au regard de l'article premier de la Charte?*

[58] Section 1 of the *Charter* provides as follows:

[58] L'article premier de la *Charte* est libellé comme suit :

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

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

To establish that the limitation on the appellant's s. 11(*i*) right is reasonable and demonstrably justified, the government must show that the 2012 amendments have a sufficiently important objective "and that the means chosen are proportional to that object[ive]" (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 94). A law is proportionate if (1) there is a rational connection between the means adopted and the objective; (2) it is minimally impairing in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and (3) there is proportionality between the deleterious and salutary effects of the law (*R. v. Oakes*, [1986] 1 S.C.R. 103; *Carter*, at para. 94). The proportionality inquiry is a normative and contextual one, which requires courts to examine the broader picture by "balanc[ing] the interests of society with those of individuals and groups" (*Oakes*, at p. 139).

Pour établir que la restriction du droit de l'appelant garanti par l'al. 11*i*) est raisonnable et que sa justification peut se démontrer, l'État doit montrer que les modifications de 2012 ont un objectif suffisamment important « et que les moyens choisis sont proportionnels à cet obje[ctif] » (*Carter c. Canada (Procureur général)*, 2015 CSC 5, [2015] 1 R.C.S. 331, par. 94). Une règle de droit est proportionnée à son objectif lorsque (1) le moyen retenu est rationnellement lié à cet objectif, (2) qu'elle est minimalement attentatoire en ce qu'il n'existe aucun autre moyen d'atteindre le même objectif en restreignant moins le droit en cause et (3) qu'il y a proportionnalité entre ses effets préjudiciables et ses effets bénéfiques (*R. c. Oakes*, [1986] 1 R.C.S. 103; *Carter*, par. 94). L'examen de la proportionnalité se veut à la fois normatif et contextuel et exige du tribunal qu'il considère le tableau tout entier en « soupes[ant] les intérêts de la société et ceux de particuliers et de groupes » (*Oakes*, p. 139).

[59] Unfortunately, s. 1 was not dealt with in the courts below. This means we do not have the benefit of a full record, including expert testimony. But the parties urged us to consider s. 1 on the record before us. This Court therefore deals with this issue, on consent, as a court of first instance.

[60] The Crown adduced fresh evidence attached to two affidavits, consisting of statistics and social science articles relating to the issue of the recidivism of sexual offenders. The appellant did not oppose the admission of this evidence and I am satisfied it would be appropriate to receive it. Accordingly, in assessing whether the Crown has discharged its justificatory burden, I will consider the Crown's fresh evidence as "supplemented by common sense and inferential reasoning", in addition to the jurisprudence and legislative debates proffered by the parties (*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 78).

(1) Do the 2012 Amendments Have a Sufficiently Important Objective?

[61] A law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society. This examination is a threshold requirement that is undertaken without considering the scope of the right infringement, the means employed, or the relationship between the positive and negative effects of the law.

[62] The appellant correctly submits that the relevant objective is that of the infringing measure: see *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 20. Here, the infringing measure is the *retrospective operation* of the impugned law. However, the more general purpose behind the enactment of the 2012 amendments informs the specific rationale for applying the amendments retrospectively.

[59] Malheureusement, les juridictions inférieures ne se penchent pas en l'espèce sur l'application de l'article premier. Nous ne disposons donc pas d'un dossier complet constitué notamment de témoignages d'experts. Les parties nous exhortent néanmoins à nous prononcer sur l'application de l'article premier à partir du dossier existant. La Cour le fait donc sur consentement, comme le ferait un tribunal de première instance.

[60] Le ministère public a produit une preuve nouvelle jointe en annexe à deux affidavits. Il s'agit de statistiques et d'articles relevant des sciences sociales et portant sur la récidive en matière d'infractions sexuelles. L'appelant ne s'est pas opposé à l'admission de ces éléments de preuve, et je suis convaincue qu'il convient de les recevoir. Par conséquent, pour décider si le ministère public s'est acquitté de son obligation de justification, j'examinerai la preuve nouvelle de l'intimée en la « complét[ant] par le bon sens et le raisonnement par déduction », ce à quoi s'ajouteront la jurisprudence et le compte rendu des débats législatifs soumis par les parties (*R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, par. 78).

(1) Les dispositions issues des modifications de 2012 ont-elles un objectif suffisamment important?

[61] La règle de droit qui restreint un droit constitutionnel doit le faire conformément à un objectif suffisamment important qui se concilie avec les valeurs d'une société libre et démocratique. L'examen du respect de cette condition s'effectue sans tenir compte de la portée de l'atteinte au droit, du moyen retenu ou du lien entre les répercussions positives et négatives de la règle de droit.

[62] L'appelant soutient à bon droit que l'objectif à considérer est celui de la mesure attentatoire (voir *Toronto Star Newspapers Ltd. c. Canada*, 2010 CSC 21, [2010] 1 R.C.S. 721, par. 20). En l'espèce, la mesure attentatoire réside dans l'*application rétrospective* de la règle de droit en cause. Toutefois, l'objectif général des dispositions issues des modifications de 2012 joue dans la raison d'être particulière de leur application rétrospective.

[63] The appellant argues that the objective of the retrospective operation of the 2012 amendments is to increase the punishment imposed on offenders who committed their offences prior to 2012 so as to more effectively further the purpose and principles of sentencing. In my view, this articulation of the law's purpose is not sufficiently precise and is essentially a description of the means the legislature has chosen to achieve its purpose: see *Carter*, at para. 76; see also *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 28.

[64] As discussed above, the legislative history, judicial interpretation, and design of s. 161 all confirm that the overarching goal of the section is to protect children from sexual violence perpetrated by recidivists. And there is ample evidence in the legislative record surrounding the enactment of the new s. 161(1)(c) and (d) to show that enhancing child protection motivated the impugned amendments as well. To highlight but one example, at the debate accompanying the second reading of the Bill, the Parliamentary Secretary to the Minister of Justice said the amendments "see[k] to prevent . . . child sex offenders from having the opportunity to facilitate their offending. Finding access to a child or the opportunity to be alone with a child is a key for many child sex offenders" (*House of Commons Debates*, vol. 145, No. 110, 3rd Sess., 40th Parl., December 3, 2010, at p. 6787).

[65] Accordingly, the overarching objective of the prospective operation of the 2012 amendments is to enhance the protection s. 161 affords to children against the risk of harm posed by convicted sexual offenders. It follows naturally that the objective of the retrospective operation of these amendments — the infringing measure — is to better protect children from the risks posed by offenders like the appellant who committed their offences before, but were sentenced after, the amendments came into force. This latter objective anchors the s. 1 analysis.

[63] L'appelant fait valoir que l'objectif de l'application rétrospective des nouvelles dispositions est d'accroître la peine infligée au contrevenant dont les actes criminels sont antérieurs à 2012, et ce, afin de favoriser davantage la réalisation de l'objectif de la détermination de la peine et l'application des principes de celle-ci. À mon avis, cette formulation n'est pas suffisamment précise et revient essentiellement à décrire le moyen que le législateur a choisi pour parvenir à ses fins (voir *Carter*, par. 76; voir également *R. c. Moriarity*, 2015 CSC 55, [2015] 3 R.C.S. 485, par. 28).

[64] Rappelons-le, l'historique législatif de l'art. 161, son interprétation judiciaire et la manière dont il est conçu confirment que l'objectif prépondérant de l'article est de protéger les enfants contre la violence sexuelle aux mains de récidivistes. Le dossier législatif des nouveaux al. 161(1)c) et d) renferme maints indices selon lesquels l'accroissement de la protection des enfants motivait tout autant les modifications en cause. Un seul exemple suffit à le montrer. Lors du débat en deuxième lecture, le secrétaire parlementaire du ministre de la Justice a dit que les modifications « vis[aient] [. . .] à ce que les personnes susceptibles de commettre une infraction sexuelle [. . .] ne puissent pas faciliter la perpétration de l'infraction. L'occasion d'être seul avec un enfant ou l'accès à un enfant est déterminant pour bon nombre de personnes qui commettent des infractions d'ordre sexuel contre un enfant » (*Débats de la Chambre des communes*, vol. 145, nº 110, 3e sess., 40e lég., 3 décembre 2010, p. 6787).

[65] Par conséquent, l'objectif prépondérant de l'application prospective des dispositions issues des modifications de 2012 est d'accroître la protection qu'offre aux enfants l'art. 161 contre le risque de préjudice que représentent les personnes déclarées coupables d'infractions sexuelles. Il s'ensuit naturellement que l'objectif de l'application rétrospective — la mesure attentatoire — est de mieux protéger les enfants contre le risque que présente un contrevenant qui, comme l'appelant, a commis l'acte criminel avant l'entrée en vigueur des modifications, mais a été condamné après celle-ci. C'est en fonction de cet objectif que s'effectue l'analyse au regard de l'article premier.

[66] Obviously, this objective is sufficiently important to warrant further scrutiny. As Laskin J.A. wrote in *R. v. Budreo* (2000), 46 O.R. (3d) 481 (C.A.), "Children are among the most vulnerable groups in our society. The sexual abuse of young children is a serious societal problem, a statement that needs no elaboration" (para. 37). Providing enhanced protection to children from becoming victims of sexual offences is vital in a free and democratic society.

(2) Are the Means Adopted Proportional to the Law's Objective?

[67] In assessing the proportionality of a law, a degree of deference is required. As this Court recently wrote in *Carter*:

> At this stage of the analysis, the courts must accord the legislature a measure of deference. Proportionality does not require perfection: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 78. Section 1 only requires that the limits be "reasonable". [para. 97]

(a) *Rational Connection*

[68] At this first step of the proportionality inquiry, the government must demonstrate that the means used by the limiting law are rationally connected to the purpose the law was designed to achieve. "To establish a rational connection, the government need only show that there is a causal connection between the infringement and the benefit sought 'on the basis of reason or logic'" (*Carter*, at para. 99, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153).

[69] As the appellant concedes, there is clearly a rational connection between providing enhanced protection to children from the risks of sexual violence presented by offenders who committed their offences before the 2012 amendments came into force (the objective) and retrospectively giving

[66] De toute évidence, cet objectif est suffisamment important pour justifier la poursuite de l'examen. Comme l'écrit le juge Laskin dans *R. c. Budreo* (2000), 46 O.R. (3d) 481 (C.A.), [TRADUCTION] « [l]es enfants font partie des groupes les plus vulnérables de notre société. La violence sexuelle dont sont victimes de jeunes enfants constitue un sérieux problème social, point n'est besoin de le démontrer » (par. 37). Offrir aux enfants une protection accrue afin qu'ils ne soient pas victimes d'infractions sexuelles est vital dans une société libre et démocratique.

(2) Le moyen retenu par le législateur est-il proportionné à l'objectif de la règle de droit?

[67] Une certaine déférence s'impose lorsqu'il s'agit d'apprécier la proportionnalité d'une règle de droit. Comme l'écrit la Cour dans le récent arrêt *Carter* :

> À ce stade de l'analyse, les tribunaux doivent faire preuve d'une certaine déférence à l'endroit du législateur. La proportionnalité ne nécessite pas la perfection : *Saskatchewan (Human Rights Commission) c. Whatcott*, 2013 CSC 11, [2013] 1 R.C.S. 467, par. 78. L'article premier exige seulement que les limites soient « raisonnables ». [par. 97]

a) *Lien rationnel*

[68] À cette première étape de l'examen de la proportionnalité, l'État doit démontrer que le législateur restreint le droit d'une manière qui a un lien rationnel avec l'objectif de la règle de droit. « Pour prouver l'existence d'un lien rationnel, le gouvernement n'a qu'à démontrer l'existence d'un lien causal, "fondé sur la raison ou la logique", entre la violation et l'avantage recherché » (*Carter*, par. 99, citant *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 153).

[69] Comme le concède l'appelant, il existe manifestement un lien rationnel entre la protection accrue des enfants contre le risque de violence sexuelle que représente le délinquant dont les actes criminels sont antérieurs à l'entrée en vigueur des dispositions issues des modifications de 2012

sentencing judges the discretionary power to limit those offenders who pose a continuing risk to children in contacting children in person or online, and in engaging with online child pornography (the means chosen). Although the Crown's fresh evidence, which I discuss below, assists in solidifying this causal link, at this stage, I am satisfied that reason and logic suffice to establish that Parliament proceeded rationally in opting to give s. 161(1)(c) and (d) retrospective effect in order to better protect children from recidivism risks posed by offenders who committed their offences before the 2012 amendments came into force.

(b) *Minimal Impairment*

[70] The question at this second stage is whether the 2012 amendments are minimally impairing, in the sense that "the limit on the right is reasonably tailored to the objective" (*Carter*, at para. 102). It is only when there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner" that a law should fail the minimal impairment test (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55).

[71] I am satisfied that the retrospective operation of the prohibitions contained in the 2012 amendments is minimally impairing of s. 11(*i*).

[72] The amendments were enacted within the context of a highly discretionary provision that is tailored to its objective. Prohibitions listed in s. 161(1) are to be imposed only when a judge is satisfied that the specific offender poses a continued risk to children upon his release into the community *and* that the specific terms of the order are a reasonable attempt to minimize the risk. The law is therefore not "drafted in a way that unnecessarily catches

(l'objectif) et l'octroi rétrospectif au tribunal qui détermine la peine d'un pouvoir discrétionnaire lui permettant de soumettre à des contraintes le contrevenant qui représente toujours un risque pour les enfants du fait qu'il peut communiquer en personne ou en ligne avec eux et accéder à de la pornographie juvénile en ligne (le moyen choisi). Bien que la preuve nouvelle du ministère public — sur laquelle je reviens plus loin — étoffe ce lien causal, je suis convaincue à ce stade que la raison et la logique suffisent pour établir que le législateur a agi de manière rationnelle en conférant aux al. 161(1)c) et d) un effet rétrospectif afin de mieux protéger les enfants contre le risque de récidive chez le délinquant sexuel dont les actes criminels sont antérieurs à l'entrée en vigueur des nouvelles dispositions en 2012.

b) *Atteinte minimale*

[70] La question à trancher à cette deuxième étape est celle de savoir si les nouvelles dispositions portent atteinte le moins possible au droit constitutionnel, c'est-à-dire si « la restriction du droit est raisonnablement adaptée à l'objectif » (*Carter*, par. 102). Ce n'est que lorsqu'il existe d'autres moyens moins préjudiciables de réaliser l'objectif de l'État « de façon réelle et substantielle » qu'une loi ne satisfait pas à l'exigence de l'atteinte minimale (*Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 55).

[71] Je suis convaincue que l'application rétrospective des interdictions issues des modifications de 2012 porte atteinte le moins possible à l'al. 11*i*).

[72] Les modifications ont été apportées à une disposition qui confère un pouvoir hautement discrétionnaire et qui est adaptée à son objectif. Les interdictions du par. 161(1) ne doivent être prononcées que si le tribunal est convaincu que le contrevenant exposera toujours les enfants à un risque une fois libéré et rendu à la collectivité *et* que les conditions dont est assortie l'ordonnance visent raisonnablement à réduire le risque. La disposition

[conduct] that has little or nothing to do with the prevention of harm to children" (*Sharpe*, at para. 95). In other words, the retrospective use of s. 161(1)(c) and (d) is *available only* when a judge is satisfied that the prohibitions will advance the enhanced child-protection goal of the amendments. No risk, no retrospective order.

[73] Further, s. 161(1) permits a sentencing judge to impose any conditions or exemptions that correspond to the circumstances of a particular offender. Section 161(1)(c) provides that offenders may have contact with persons under the age of 16 if "the offender does so under the supervision of a person whom the court considers appropriate". Similarly, s. 161(1)(d) permits offenders to use the Internet if "the offender does so in accordance with conditions set by the court". Finally, the prohibition order can be limited in duration (s. 161(2)) and reviewed periodically to ensure it continues to correspond to an offender's circumstances (s. 161(3)).

[74] Despite the highly discretionary and tailored nature of s. 161, the appellant argues that the impugned amendments are not minimally impairing because the Crown has failed to demonstrate that a purely prospective application of the amendments would undermine its objective.[4] Although I will discuss the potential gaps in the evidentiary record more fully below when I weigh the deleterious and salutary effects of the law, I would not give effect to this submission at the minimal impairment stage, for a few reasons.

n'est donc pas « rédigée de manière à englober inutilement [une conduite] qui n'a que peu ou [qui n'a] rien à voir avec la prévention du préjudice causé aux enfants » (*Sharpe*, par. 95). En d'autres mots, le recours rétrospectif aux nouveaux al. 161(1)c) et d) peut *seulement intervenir* lorsque le tribunal est convaincu que les interdictions favoriseront l'objectif des modifications, à savoir la protection accrue des enfants. Pas de risque, pas d'application rétrospective.

[73] En outre, le par. 161(1) permet au tribunal qui détermine la peine de prévoir toute condition ou exemption que commande la situation du contrevenant. L'alinéa 161(1)c) dispose que le contrevenant peut communiquer avec une personne âgée de moins de 16 ans s'il le fait « sous la supervision d'une personne que le tribunal estime convenir en l'occurrence ». Dans la même veine, l'al. 161(1)d) permet au contrevenant d'utiliser Internet s'il le fait « en conformité avec les conditions imposées par le tribunal ». Enfin, l'interdiction peut avoir une durée limitée (par. 161(2)) et être révisée périodiquement pour s'assurer qu'elle est toujours adaptée à la situation du contrevenant (par. 161(3)).

[74] L'appelant fait valoir que même si l'art. 161 confère un pouvoir hautement discrétionnaire et est adapté à son objectif, les dispositions en cause ne portent pas atteinte le moins possible au droit garanti, car le ministère public n'a pas démontré que si elles ne s'appliquaient que prospectivement la réalisation de leur objectif serait compromise[4]. Je reviendrai plus en détail sur les lacunes possibles du dossier de preuve lorsque je soupèserai les effets préjudiciables et les effets bénéfiques de la règle de droit, mais je ne retiens pas l'argument au regard du volet de l'atteinte minimale, et ce, pour plusieurs raisons.

[4] It was not argued that other prohibition regimes in the *Criminal Code* (such as those found in ss. 810, 810.1, or 810.2) could have achieved the government's objective in a real and substantial manner.

[4] Nul n'a fait valoir que d'autres régimes d'interdiction du *Code criminel* (dont ceux correspondant aux art. 810, 810.1 et 810.2) auraient pu permettre à l'État d'atteindre son objectif de façon réelle et substantielle.

[75] It is widely accepted (and the record confirms) that a non-trivial percentage of sex offenders will reoffend. If the amendments operated only prospectively, a sentencing judge would be unable to impose the prohibitions in s. 161(1)(c) and (d) on offenders who committed their crimes before 2012 *even if* the judge were satisfied that the prohibitions were required to minimize the risk to a child that a sex offender will recidivate. I therefore accept that a purely prospective application of the amendments would have prevented Parliament from fully realizing its objective of enhancing the protection s. 161 affords to children from offenders who committed their offences before the coming into force of the 2012 amendments. Further, accepting the appellant's argument would fail to accord sufficient deference, at this stage of the analysis, to the government's choice of legislative means. And questions pertaining to the extent of the efficacy of the retrospective operation of the 2012 amendments are best left to the next step of the analysis: proportionality of effects.

[76] In sum, given the discretionary and tailored nature of s. 161 and the fact that a purely prospective operation of the amendments would have compromised Parliament's full objective, I conclude that the retrospective operation of s. 161(1)(c) and (d) impairs the s. 11(*i*) right as little as reasonably possible.[5] The more difficult issue is whether the benefits achieved from imposing the 2012 amendments retrospectively outweigh the deleterious effects.

[75] On reconnaît généralement (et le dossier confirme) qu'un pourcentage non négligeable de délinquants sexuels récidive. Si les nouvelles dispositions ne s'appliquaient que prospectivement, le tribunal qui détermine la peine ne pourrait soumettre aux interdictions prévues par les nouveaux al. 161(1)c) et d) le contrevenant dont les actes criminels sont antérieurs à 2012 *même s'*il était convaincu qu'elles sont nécessaires à la réduction du risque qu'un enfant soit victime de la récidive d'un délinquant sexuel. Par conséquent, je conviens qu'une application strictement prospective n'aurait pas permis au législateur de réaliser pleinement son objectif d'accroître la protection que l'art. 161 offre aux enfants contre un délinquant dont les actes criminels sont antérieurs à l'entrée en vigueur des nouvelles dispositions en 2012. En outre, faire droit à la prétention de l'appelant reviendrait à déférer insuffisamment, à ce stade de l'analyse, à la décision de l'État d'opter pour une mesure législative plutôt qu'une autre. Il vaut mieux reporter l'examen des questions liées au degré d'efficacité de l'application rétrospective à l'étape suivante de l'analyse, celle de la proportionnalité des effets.

[76] En résumé, puisque l'art. 161 confère un pouvoir discrétionnaire et qu'il est adapté à son objectif, et comme l'application strictement prospective aurait compromis la réalisation intégrale de l'objectif du législateur, je conclus que l'application rétrospective des al. 161(1)c) et d) porte atteinte au droit protégé par l'al. 11*i*) aussi peu qu'il est raisonnablement possible de le faire[5]. Il est plus difficile de savoir si les effets bénéfiques de leur application rétrospective l'emportent sur ses effets préjudiciables.

[5] It should be obvious from the above analysis that, had Parliament adopted a less tailored and discretionary regime, the 2012 amendments may very well have failed the minimal impairment test. It is accordingly unclear how my articulation of the purpose of the impugned amendments has rendered the minimal impairment analysis "redundant", as my colleague Brown J. alleges (para. 138). On the contrary, the minimal impairment test remains an important part of assessing whether Parliament has discharged its burden under s. 1.

[5] Il devrait apparaître clairement de l'analyse qui précède que si le législateur avait opté pour un régime moins adapté et de nature moins discrétionnaire, les dispositions issues des modifications de 2012 auraient fort bien pu ne pas satisfaire au critère de l'atteinte minimale. Je m'explique donc mal comment ma formulation de l'objectif des modifications en cause a pu rendre « superfl[u] » l'examen de l'atteinte minimale comme le prétend mon collègue le juge Brown (par. 138). Au contraire, ce critère demeure un rouage important de la démarche qui consiste à se demander si le législateur s'est acquitté de son obligation pour les besoins de l'article premier.

(c) *Proportionality of Effects*

[77] At this final stage of the proportionality analysis, the Court must "weig[h] the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good" (*Carter*, at para. 122).[6] This final stage is an important one because it performs a fundamentally distinct role. As a majority of this Court observed in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877:

> The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. . . . The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [para. 125]

[78] It is for this reason that Aharon Barak, former President of the Supreme Court of Israel, has described this final step as "the very heart of proportionality" ("Proportional Effect: The Israeli Experience" (2007), 57 *U.T.L.J.* 369, at p. 380). And in *Hutterian Brethren*, Abella J. wrote: ". . . most of the heavy conceptual lifting and balancing ought to be done at the final step — proportionality. Proportionality is, after all, what s. 1 is about" (para. 149).

[79] I agree. While the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this final step permits courts to address the essence of the proportionality enquiry at the

[6] In *Oakes*, this final stage of the proportionality analysis was initially conceived as a comparison between the deleterious effects of the limiting measure and the law's objective. However, in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, Lamer C.J. reformulated the test to account for the "proportionality between the deleterious and the salutary effects of the measur[e]" because characterizing the final step "as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality" (p. 889 (emphasis deleted)).

c) *Proportionnalité des effets*

[77] À cette dernière étape de l'examen de la proportionnalité, la Cour doit « mettre en balance l'incidence de la loi sur les droits protégés et l'effet bénéfique de la loi au plan de l'intérêt supérieur du public » (*Carter*, par. 122)[6]. Il s'agit d'une étape importante, car son rôle est fondamentalement distinct. Comme le font observer les juges majoritaires de la Cour dans *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877 :

> Les première et deuxième étapes de l'analyse de la proportionnalité ne portent pas sur le rapport entre les mesures et le droit en question garanti par la *Charte*, mais plutôt sur le rapport entre les objectifs de la loi et les moyens employés. [. . .] La troisième étape de l'analyse de la proportionnalité donne l'occasion d'apprécier, à la lumière des détails d'ordre pratique et contextuel qui ont été dégagés aux première et deuxième étapes, si les avantages découlant de la limitation sont proportionnels aux effets préjudiciables, mesurés au regard des valeurs consacrées par la *Charte*. [par. 125]

[78] C'est la raison pour laquelle l'ancien président de la Cour suprême d'Israël, Aharon Barak, voit dans cette dernière étape [TRADUCTION] « le cœur même de la proportionnalité » (« Proportional Effect : The Israeli Experience » (2007), 57 *U.T.L.J.* 369, p. 380). Et, dans l'arrêt *Hutterian Brethren*, la juge Abella écrit que « la majeure partie de l'analyse conceptuelle doit être faite à l'étape finale — celle de la proportionnalité. Après tout, c'est de la proportionnalité dont il est censé être question à l'article premier » (par. 149).

[79] Je suis d'accord. Bien que, de nos jours, au Canada, l'atteinte minimale occupe la place la plus grande dans le discours sur l'article premier, le tribunal peut, à cette dernière étape, se pencher sur

[6] Initialement, dans l'arrêt *Oakes*, cette dernière étape visait à comparer les effets préjudiciables de la mesure restrictive et l'objectif de la loi. Toutefois, dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, le juge en chef Lamer a reformulé le critère afin de tenir compte de la « proportionnalité entre les effets préjudiciables des mesures et leurs effets bénéfiques » parce que la qualification de la dernière étape « comme concernant uniquement l'équilibre entre l'objectif et les effets préjudiciables d'une mesure repose sur une conception trop étroite de la proportionnalité » (p. 889 (soulignement omis)).

heart of s. 1.[7] It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society "in direct and explicit terms" (J. Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 *Osgoode Hall L.J.* 1, at p. 66). In other words, this final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society. Although this examination entails difficult value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision. Further, as mentioned, proceeding to this final stage permits appropriate deference to Parliament's choice of means, as well as its full legislative objective.

[80] In this case, there are important differences between the effects of the two impugned amendments. I will therefore consider the two provisions separately.

(i) Balancing the Deleterious and Salutary Effects of the Retrospective Operation of Section 161(1)(c) of the *Criminal Code*

[81] The deleterious effects flowing from the retrospective operation of s. 161(1)(c) are substantial. At the individual level, in depriving offenders of the benefit of the lesser punishment, s. 161(1)(c) prevents the appellant and other offenders from freely participating in society following their release into the community. Before the new s. 161(1)(c) was introduced, outside the digital realm, judges could prohibit offenders only from attending public parks, public swimming pools, daycare centres,

[7] See D. Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007), 57 *U.T.L.J.* 383, at pp. 393-97; M. Zion, "Effecting Balance: *Oakes* Analysis Restaged" (2012-2013), 43 *Ottawa L. Rev.* 431; Barak, at pp. 380-82; F. Schauer, "Proportionality and the Question of Weight", in G. Huscroft, B. W. Miller and G. Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014), 173, at pp. 181-85.

l'essence de l'examen de la proportionnalité qui est au cœur de l'application de l'article premier[7]. Ce n'est qu'à la dernière étape que le tribunal peut transcender l'objectif de la règle de droit et se livrer à un examen rigoureux de l'incidence de la règle de droit sur la société libre et démocratique canadienne [TRADUCTION] « d'une manière directe et explicite » (J. Cameron, « The Past, Present, and Future of Expressive Freedom Under the *Charter* » (1997), 35 *Osgoode Hall L.J.* 1, p. 66). Autrement dit, cette dernière étape permet au tribunal de prendre du recul pour décider, sous l'angle normatif, si l'atteinte au droit est justifiée dans une société libre et démocratique. Même si l'examen suppose des jugements de valeur difficiles, il vaut mieux faire en sorte que ces jugements soient explicites de manière à accroître la transparence et l'intelligibilité de la décision ultime. En outre, je le rappelle, cette dernière étape donne au tribunal l'occasion de faire preuve de la déférence qui s'impose envers le législateur quant au moyen retenu et à l'objectif global poursuivi.

[80] En l'espèce, il existe des différences importantes entre les effets des deux dispositions issues des modifications. Je les examine donc séparément.

(i) Mise en balance des effets préjudiciables et des effets bénéfiques de l'application rétrospective de l'al. 161(1)c) du *Code criminel*

[81] Les effets préjudiciables de l'application rétrospective de l'al. 161(1)c) sont importants. À l'échelle individuelle, en privant l'appelant de son droit de bénéficier de la peine la moins sévère, l'alinéa l'empêche — ainsi que d'autres contrevenants — de participer librement à la société une fois libéré et rendu à la collectivité. Avant l'adoption du nouvel al. 161(1)c), le tribunal pouvait seulement, à l'extérieur du domaine numérique, interdire au contrevenant de fréquenter un parc public, une piscine, une

[7] Voir D. Grimm, « Proportionality in Canadian and German Constitutional Jurisprudence » (2007), 57 *U.T.L.J.* 383, p. 393-397; M. Zion, « Effecting Balance : *Oakes* Analysis Restaged » (2012-2013), 43 *R.O. Ottawa* 431; Barak, p. 380-382; F. Schauer, « Proportionality and the Question of Weight », dans G. Huscroft, B. W. Miller et G. Webber, dir., *Proportionality and the Rule of Law : Rights, Justification, Reasoning* (2014), 173, p. 181-185.

schoolgrounds, playgrounds, and community centres, or from seeking employment or volunteer opportunities involving children. The new s. 161(1)(c) potentially goes much further and prohibits "any contact — including communicating by any means — with a person who is under the age of 16 years" in a public or private space. For example, offenders might be prohibited from conversing with younger members of their family, or from freely moving about certain private and public spaces where children are present. This expanded prohibition, relative to the more limited prohibitions that existed previously, constitutes a substantial intrusion on the liberty and security of certain offenders.

garderie, le terrain d'une école, un terrain de jeu ou un centre communautaire, ou de rechercher un emploi ou d'offrir ses services comme bénévole dans un domaine lié aux enfants. Le nouvel al. 161(1)c) pourrait permettre au tribunal d'aller beaucoup plus loin et de lui interdire d'avoir « des contacts — notamment communiquer par quelque moyen que ce soit — avec une personne âgée de moins de seize ans » dans un lieu public ou privé. Par exemple, le tribunal pourrait interdire au contrevenant de parler avec les jeunes membres de sa famille ou de se trouver dans un endroit privé ou public où il y a des enfants. Par rapport aux interdictions de portée plus restreinte qui existaient auparavant, il s'agit d'un empiétement substantiel sur le droit à la liberté et à la sécurité de certains contrevenants.

[82] The deleterious effects experienced by specific offenders translate into broader societal harms. By impacting people like the appellant with a punishment of which they had no notice, the retrospective operation of s. 161(1)(c) undermines fairness in criminal proceedings and compromises the rule of law. These are core tenets of our justice system.

[82] Les effets préjudiciables subis par les contrevenants individuels se traduisent par un préjudice plus large infligé à la société. En condamnant un contrevenant comme l'appelant à une peine dont il ne se savait pas passible, l'application rétrospective de l'al. 161(1)c) compromet l'équité des procédures criminelles et la primauté du droit, deux préceptes fondamentaux de notre système de justice.

[83] The adverse impact the retrospective operation of s. 161(1)(c) has on fairness and the rule of law is particularly acute because, in broadening the scope of prohibited conduct, Parliament does not appear to have been responding to an emerging threat, or an evolving social context. Unfortunately, sexual offences against children have persisted for centuries. Setting aside for the moment the use of technology to contact young people, which is captured by s. 161(1)(d), why was additional protection required in 2012? In terms of sexual offences resulting from physical proximity, on this record, there appears to have been little change in the nature and degree of risk facing children since the last time s. 161(1) was amended. The dearth of a compelling temporal justification for imposing s. 161(1)(c) retrospectively enhances the damage the provision does to fairness and the rule of law, and thus

[83] L'incidence préjudiciable de l'application rétrospective de l'al. 161(1)c) sur l'équité des procédures criminelles et la primauté du droit est particulièrement grave, car en élargissant la portée de l'interdiction, le législateur ne paraît pas donner ainsi suite à une menace nouvelle ou à quelque évolution du contexte social. Les enfants sont malheureusement victimes d'infractions sexuelles depuis des siècles. On peut se demander, en faisant momentanément abstraction de l'utilisation de la technologie pour entrer en contact avec de jeunes personnes, laquelle fait l'objet de l'al. 161(1)d), pour quelle raison une protection supplémentaire s'imposait en 2012. En ce qui concerne les infractions sexuelles résultant d'une proximité physique, au vu du dossier, la nature et le degré du risque auquel sont exposés les enfants semblaient avoir peu changé depuis la modification précédente du

undermines public confidence in the criminal justice system.

[84] The Crown submits that the benefit of retrospectively applying s. 161(1)(c) is that more children will be protected from sexual violence. In advancing this claim, the Crown chiefly relies on social science articles and statistics relating to recidivism of sexual offenders in order to clarify the risk children face when sexual offenders are released into the community.

[85] The Crown's social science articles endeavour to quantify rates of recidivism of sexual offenders. One article pegged the recidivism rates for "child molesters" at 13% 5 years following the commission of the offence, 18% after 10 years, and 23% after 15 years.[8] The authors found that the recidivism rate for sexual offenders who victimize extra familial young boys (35% after 15 years) is significantly higher than the average recidivism rate for all sexual offenders (24% after 15 years) (p. 8). These recidivism rates were confirmed by another article adduced by the Crown, which asserts that "[s]exual interest in children was a significant predictor of sexual recidivism".[9] That is, "[t]hose individuals with identifiable interests in deviant sexual activities were among those most likely to continue sexual offending. The evidence was strongest for sexual interest in children" (p. 15). The authors further observed that these figures "should be considered to underestimate the real recidivism rates"

par. 161(1). L'inexistence d'une justification d'ordre temporel convaincante de l'application rétrospective de l'al. 161(1)c) accroît l'atteinte à l'équité des procédures criminelles et à la primauté du droit et mine par conséquent la confiance du public dans le système de justice criminelle.

[84] Le ministère public soutient que l'application rétrospective de l'al. 161(1)c) permet de protéger plus d'enfants contre la violence sexuelle. Il invoque principalement à l'appui de sa prétention des articles et des statistiques relevant des sciences sociales et portant sur la récidive sexuelle afin de préciser le risque que courent les enfants lorsqu'un délinquant sexuel est libéré et rendu à la collectivité.

[85] Les auteurs des articles en question tentent de déterminer le taux de récidive en matière d'infractions sexuelles. Dans le cas des « agresseurs d'enfants », l'un d'eux fixe ce taux à 13 p. 100 cinq ans après la perpétration de l'infraction, à 18 p. 100 dix ans après et à 23 p. 100 quinze ans après[8]. Les auteurs concluent que le taux de récidive des délinquants sexuels qui s'en prennent à de jeunes garçons qui ne font pas partie de leur famille (35 p. 100 quinze ans après l'infraction) est de beaucoup supérieur à la moyenne pour l'ensemble des délinquants sexuels (24 p. 100 quinze ans après) (p. 10). Un autre article confirme ces données, et son auteur ajoute que « [l'existence chez ces délinquants d']intérêts sexuels à l'égard des enfants constitu[e] un prédicateur significatif de la récidive sexuelle »[9]. Autrement dit, « [l]es délinquants qui manifest[ent] des intérêts identifiables à l'égard d'activités sexuelles déviantes [sont] parmi les plus susceptibles de continuer à commettre des

[8] Public Safety and Emergency Preparedness Canada, "Sex Offender Recidivism: A Simple Question", by A. J. R. Harris and R. K. Hanson, March 2004 (online), at p. 7. This study used data from 10 follow-up studies of adult male sexual offenders with a combined sample of 4,724 offenders.

[9] Public Safety and Emergency Preparedness Canada, "Predictors of Sexual Recidivism: An Updated Meta-Analysis", by R. K. Hanson and K. Morton-Bourgon, February 2004 (online), at p. 9. This article examined the research evidence of 95 different studies, involving more than 31,000 sexual offenders.

[8] Sécurité publique et Protection civile Canada, « La récidive sexuelle : d'une simplicité trompeuse », par A. J. R. Harris et R. K. Hanson, mars 2004 (en ligne), p. 9. Cette étude s'appuie sur les données de 10 études de suivi visant des délinquants sexuels adultes de sexe masculin et comportant un échantillon combiné de 4 724 contrevenants.

[9] Sécurité publique et Protection civile Canada, « Les prédicteurs de la récidive sexuelle : une méta-analyse à jour », par R. K. Hanson et K. Morton Bourgon, février 2004 (en ligne), p. 11. L'article examine les éléments de preuve issus de 95 études visant plus de 31 000 délinquants sexuels.

because sexual crimes are significantly underreported (p. 8).

[86] These recidivism rates are significant. I accept that a non-trivial number of sexual offenders commit further sexual crimes after being released into the community. And the odds of this occurring appear to increase in the context of sexual offences against children. This is the harm the 2012 amendments are aimed at mitigating.

[87] The Crown also seeks to demonstrate the beneficial effects of making these enhanced prohibitions available retrospectively through statistics relating to the number of offenders potentially impacted by the 2012 amendments. Since the amendments came into force and as of May 14, 2015, 157 s. 161 orders have been imposed in British Columbia on offenders who committed their offences prior to August 9, 2012. And as of that same date there were 239 accused persons in British Columbia charged with offences captured by s. 161 that were committed prior to the coming into force of the 2012 amendments. On a national scale, these numbers would clearly be much higher. These statistics suggest that if the 2012 amendments cannot operate retrospectively, sentencing judges will be unable to consider imposing the enhanced prohibitions found in s. 161(1)(c) and (d) on many hundreds of sex offenders across the nation.

[88] I accept that the Crown's fresh evidence assists in identifying recidivism rates and the number of offenders who stand to be impacted by the retrospective operation of the 2012 amendments. Real risks to children are certainly present. And I accept that a provision prohibiting contact between sexual offenders and children will, to some extent, assist in mitigating these risks.

infractions sexuelles. La preuve [est] particulièrement solide pour l'intérêt sexuel à l'égard des enfants » (p. 18). Les auteurs font aussi observer que ces chiffres « doivent être considérés comme une sous-estimation des taux de récidive réels », étant donné que les crimes sexuels sont nettement sous-signalés (p. 10).

[86] Ces taux de récidive sont élevés. Je conviens qu'un nombre non négligeable de délinquants sexuels commettent d'autres crimes sexuels après leur libération et leur retour dans la collectivité. Et le risque de récidive sexuelle semble augmenter lorsque leurs victimes sont des enfants. Tel est le préjudice que les modifications de 2012 visaient à réduire.

[87] Le ministère public cherche aussi à démontrer les effets bénéfiques de l'application rétrospective des interdictions de portée accrue au moyen de statistiques sur le nombre de contrevenants susceptibles d'être touchés par les modifications de 2012. Entre l'entrée en vigueur des nouvelles dispositions et le 14 mai 2015, 157 ordonnances ont été rendues en Colombie-Britannique sur le fondement de l'art. 161 à l'endroit de contrevenants dont les actes criminels étaient antérieurs au 9 août 2012. En date du 14 mai 2015 et dans la même province, 239 personnes avaient été accusées d'infractions visées à l'art. 161 et commises avant l'entrée en vigueur des nouvelles dispositions. À l'échelle nationale, les chiffres sont assurément beaucoup plus élevés. Ces statistiques donnent à penser que si les nouvelles dispositions ne peuvent être appliquées rétrospectivement, les juges qui déterminent la peine ne pourront envisager de soumettre des centaines de délinquants sexuels partout au pays aux nouvelles interdictions prévues aux al. 161(1)c) et d).

[88] Je conviens que la preuve nouvelle du ministère public contribue à l'établissement des taux de récidive ainsi que du nombre de contrevenants susceptibles d'être touchés par l'application rétrospective des dispositions issues des modifications de 2012. Il existe assurément un risque réel pour les enfants. Je reconnais également qu'une disposition interdisant au délinquant sexuel d'avoir des contacts avec des enfants contribuera jusqu'à un certain point à réduire ce risque.

[89] However, the appellant correctly points out that the Crown has failed to lead much, if any, evidence to establish the *degree* of *enhanced* protection s. 161(1)(c) provides in comparison to the previous version of the prohibition. It is therefore unclear what effect the *retrospective* operation of s. 161(1)(c) would have on the recidivism rates identified by the Crown. And there is no evidence demonstrating that the risks s. 161(1)(c) are directed at have changed quantitatively or qualitatively, such that the fundamental fairness and rule of law concerns would be mitigated. Even in the passages of the legislative record that the Crown put before this Court, it is striking that there was almost no discussion of why the amendments to s. 161(1)(c) were required to better protect children.

[90] Put simply, the precise benefits of the *retrospective* operation of s. 161(1)(c) remain unclear. It can be difficult to prove a negative, which is why reason and logic are important complements to tangible evidence. And, to some extent, these evidentiary difficulties may be unavoidable. After all:

> Public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Justice La Forest offered an observation in *McKinney* which rings true: "[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society".
>
> (S. Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), 34 *S.C.L.R.* (2d) 501, at p. 524, quoting *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 304.)

[89] Or, l'appelant souligne à juste titre que le ministère public n'a présenté que peu d'éléments ou n'en a pas présenté du tout pour établir le *degré* de protection *accrue* offert par le nouvel al. 161(1)c) comparativement au libellé antérieur de l'interdiction. L'effet de l'application *rétrospective* de l'al. 161(1)c) sur les taux de récidive avancés par le ministère public demeure donc indéterminé. Et aucune preuve ne démontre que le risque auquel cet alinéa est censé s'attaquer a changé sur les plans quantitatif ou qualitatif de manière à atténuer les craintes liées à l'équité fondamentale et à la primauté du droit. Même les extraits du dossier législatif déposés devant la Cour par le ministère public montrent de manière frappante que l'opportunité de modifier l'al. 161(1)c) afin de mieux protéger les enfants n'a pratiquement fait l'objet d'aucun débat.

[90] Dit simplement, les effets bénéfiques précis de l'application *rétrospective* de l'al. 161(1)c) demeurent indéterminés. Il peut se révéler difficile de prouver l'inexistence de quelque chose. C'est pourquoi la raison et la logique constituent des compléments importants à la preuve matérielle. Et jusqu'à un certain point, ces difficultés de preuve peuvent être inéluctables. Après tout :

> [TRADUCTION] Les politiques gouvernementales sont souvent élaborées à partir d'approximations et d'extrapolations découlant de la preuve disponible, d'inférences tirées de données comparatives et même, à l'occasion, d'hypothèses émises en connaissance de cause. En l'absence de recherches politiques de grande envergure, cette preuve est vraisemblablement la seule dont on peut disposer. Dans *McKinney*, le juge La Forest a fait une observation très juste : « [d]ans ces domaines, les décisions découlent inévitablement de la combinaison d'hypothèses, de connaissances fragmentaires, de l'expérience générale et de la connaissance des besoins, des aspirations et des ressources de la société ».
>
> (S. Choudhry, « So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1 » (2006), 34 *S.C.L.R.* (2d) 501, p. 524, citant *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, p. 304-305.)

[91] Nonetheless, s. 1 mandates that the limitation on the right be *demonstrably* justified. As Dickson C.J. wrote in *Oakes*, this is a "stringent standard of justification" (p. 136). The retrospective operation of the impugned measure adversely impacts the liberty and security of offenders (relative to the previous version of s. 161), and, importantly, the fairness of criminal proceedings and the rule of law. Although this adverse impact will be experienced only when a judge concludes it is necessary to alleviate the risk the offender poses to children, it remains the case that the deleterious effects of the impugned measure are significant and tangible.

[92] In comparison, the benefits society stands to gain are marginal and speculative. While the Crown's evidence regarding recidivism of sexual offenders begins to paint the picture (particularly since it shows that sex offenders who victimize children are more likely to reoffend), the rendering remains largely incomplete. In particular, the Crown has provided no temporal justification for the retrospective limitation, nor much evidence to establish the degree of enhanced protection s. 161(1)(c) provides. For example, the record suggests that many sexual assaults committed against children are perpetrated by family members or acquaintances. But surely this reality did not just recently come to Parliament's attention. In the context of a s. 11(*i*) infringement, one expects the Crown to better explain why *retrospective* penal laws were required.

[93] Temporal considerations are relevant in this content because, at its root, s. 11(*i*) is about the *timing* of changes to penal laws. In this case, it is not Parliament's decision to increase the punishment for sexual offenders that has, by itself, triggered *Charter* scrutiny — rather, it is Parliament's decision to reach back in time to impose these enhanced

[91] Néanmoins, l'article premier exige que la justification de la restriction du droit *puisse se démontrer*. Comme le dit le juge en chef Dickson dans *Oakes*, il s'agit d'une « norme sévère en matière de justification » (p. 136). L'application rétrospective de la mesure en cause a une incidence préjudiciable sur le droit à la liberté et à la sécurité du contrevenant (comparativement au libellé antérieur de l'art. 161) et, fait important, sur l'équité des procédures criminelles et la primauté du droit. Certes, cette incidence préjudiciable n'existe que lorsqu'un juge conclut à la nécessité d'atténuer le risque que le contrevenant représente pour les enfants, mais il demeure que les effets préjudiciables de la mesure en cause sont importants et tangibles.

[92] En comparaison, les effets bénéfiques éventuels pour la société sont négligeables et hypothétiques. Bien que la preuve du ministère public concernant la récidive chez les délinquants sexuels esquisse le tableau de la situation (surtout en montrant que les délinquants sexuels qui s'en prennent à des enfants sont plus susceptibles de récidiver que les autres délinquants sexuels), le tableau demeure largement incomplet. En particulier, le ministère public n'a pas fait valoir l'existence d'une justification d'ordre temporel de la restriction rétrospective du droit et a avancé bien peu d'éléments pour établir le degré de protection accrue offert par l'al. 161(1)c). À titre d'exemple, le dossier indique que de nombreuses agressions sexuelles d'enfants sont perpétrées par des membres de la famille ou par des connaissances. Or, le législateur ne vient assurément pas tout juste de l'apprendre. Face à une allégation d'atteinte au droit que garantit l'al. 11*i*), on s'attendrait à ce que le ministère public en fasse davantage pour convaincre le tribunal de la nécessité qu'une disposition pénale s'applique *rétrospectivement*.

[93] Les considérations d'ordre temporel importent dans ce contexte, car l'al. 11*i*) s'intéresse foncièrement au *moment où intervient* la modification d'une disposition à caractère punitif. Dans la présente affaire, ce qui porte atteinte au droit garanti par l'al. 11*i*), ce n'est pas le choix du législateur d'accroître la peine infligée au délinquant sexuel

prohibitions on offenders who had no notice of them that offends s. 11(*i*). Thus, temporal factors that may help explain Parliament's rationale for circumventing a basic tenet of our criminal law are relevant to the s. 11(*i*) inquiry. When it comes to s. 11(*i*), timing can be everything.

et qui est à l'origine de l'examen au regard de la *Charte*, mais plutôt sa décision de remonter dans le temps pour rendre le contrevenant passible, sans que ce dernier ne l'ait su au moment de perpétrer l'infraction, de nouvelles interdictions dont la portée est accrue. Dès lors, les considérations d'ordre temporel qui sont susceptibles d'expliquer la décision du législateur de contourner un précepte fondamental du droit criminel sont pertinentes dans le cadre de l'examen que commande l'al. 11*i*). S'agissant de cette disposition de la *Charte*, la situation dans le temps peut primer toute autre considération.

[94] Evidence related to the risks of recidivism is generally insufficient, on its own, to discharge the Crown's justificatory burden. To hold otherwise would be to potentially eviscerate the s. 11(*i*) right for the simple reason that retrospectively increasing punishment in order to curtail the risk of recidivism is a rationale that could apply to a broad range of crimes.

[94] La preuve liée au risque de récidive est généralement insuffisante à elle seule pour permettre au ministère public de s'acquitter de son obligation de justification. Conclure le contraire pourrait vider de sa substance le droit garanti par l'al. 11*i*) pour la simple raison que l'accroissement rétrospectif de la peine dans le but de réduire le risque de récidive relève d'une logique susceptible de s'appliquer à une grande variété de crimes.

[95] It may be tempting to conclude that mitigating the risk of sexual violence to even one child is worth the costs. However, there can be no broad exception to the protection of s. 11(*i*) whenever the victim is a child. Such an approach ascribes almost no value to the right. Section 11(*i*) protects fundamental interests that can be overridden only in demonstrably compelling circumstances. In my view, the Crown has failed to show that the largely speculative salutary effects of the retrospective operation of s. 161(1)(c) outweigh its tangible and substantial drawbacks.

[95] On pourrait être tenté de conclure que la réduction du risque qu'un seul enfant soit victime de violence sexuelle en vaut le coût. Toutefois, il ne saurait y avoir d'exception générale à la protection de l'al. 11*i*) chaque fois que la victime est un enfant, sinon le droit protégé serait presque dénué de toute valeur. L'alinéa 11*i*) protège des droits fondamentaux qu'on ne peut écarter que dans des circonstances dont le caractère impérieux peut être démontré. À mon avis, le ministère public n'a pas établi que les effets bénéfiques largement conjecturaux de l'application rétrospective de l'al. 161(1)c) l'emportent sur ses inconvénients tangibles et substantiels.

[96] The retrospective operation of s. 161(1)(c) therefore cannot be justified under s. 1. As a result, s. 161(1)(c) applies only prospectively — that is, only to offenders who committed their offences after the 2012 amendments came into force (s. 52(1), *Constitution Act, 1982*).

[96] L'application rétrospective de l'al. 161(1)c) ne saurait donc pas se justifier au regard de l'article premier. En conséquence, l'alinéa ne s'applique que prospectivement, c'est-à-dire seulement au contrevenant qui a commis l'infraction après l'entrée en vigueur des nouvelles dispositions en 2012 (par. 52(1) de la *Loi constitutionnelle de 1982*).

[97] I note that there are other prohibition orders under the *Criminal Code* that may assist the Crown

[97] Je constate que le *Code criminel* — notamment aux art. 810, 810.1 et 810.2 — prévoit d'autres

to some extent in filling the gap left by the lack of any retrospective application of s. 161(1)(c), such as those that can be imposed pursuant to ss. 810, 810.1, and 810.2. However, I make no further comment on those provisions since they were not meaningfully raised or argued by any of the parties before us.

(ii) Balancing the Deleterious and Salutary Effects of the Retrospective Operation of Section 161(1)(d) of the *Criminal Code*

[98] The deleterious effects resulting from the retrospective operation of s. 161(1)(d) are also significant. A complete ban on "using the Internet or other digital network" — an indispensable tool of modern life and an avenue of democratic participation — is more intrusive than the previous ban on "using a computer system . . . for the purpose of communicating" with young people. This constitutes a significant deprivation of liberty. Therefore, the retrospective operation of s. 161(1)(d) can erect massive barriers to an offender's full participation in society, which may result in substantial consequences both socially and economically.

[99] As with the retrospective operation of s. 161(1)(c), the imposition of punishment without notice translates into broader societal harms, including compromising the fairness of criminal proceedings and challenging the rule of law. Clarity and predictability are central to the proper functioning of the criminal justice system, and are at the core of s. 11(*i*)'s purpose. Respect for the law and public confidence in the administration of justice are threatened when laws are changed retrospectively, without notice.

[100] Turning to the salutary effects, the Crown's evidence relating to the risk of harm from recidivism of sexual offenders, discussed above, applies equally here; however, when it comes to s. 161(1)(d),

ordonnances portant interdiction grâce auxquelles le ministère public pourrait, dans une certaine mesure, combler le vide occasionné par l'application non rétrospective de l'al. 161(1)c). Je m'abstiens cependant de toute remarque supplémentaire sur ces dispositions puisque leur application n'a pas été soulevée ou plaidée devant nous par l'une ou l'autre des parties.

(ii) Mise en balance des effets préjudiciables et des effets bénéfiques de l'application rétrospective de l'al. 161(1)d) du *Code criminel*

[98] Les effets préjudiciables de l'application rétrospective de l'al. 161(1)d) sont eux aussi importants. L'interdiction totale « d'utiliser Internet ou tout autre réseau numérique » — un outil indispensable de la vie moderne, de même qu'une voie de participation à la démocratie — constitue un plus grand empiétement que l'interdiction antérieure « d'utiliser un ordinateur [. . .] dans le but de communiquer » avec de jeunes personnes. Il en résulte une atteinte importante au droit à la liberté. Dès lors, l'application rétrospective de l'al. 161(1)d) peut faire considérablement obstacle à la pleine participation du contrevenant à la société, ce qui est susceptible d'avoir de grandes conséquences socio-économiques.

[99] Comme pour l'application rétrospective de l'al. 161(1)c), l'infliction d'une peine dont le contrevenant ne pouvait se savoir passible cause un préjudice général à la société, notamment en compromettant l'équité des procédures criminelles et en remettant en question la primauté du droit. La clarté et la prévisibilité sont essentielles au bon fonctionnement du système de justice criminelle et elles sont au cœur de la raison d'être de l'al. 11*i*). Le respect de la loi et la confiance du public dans l'administration de la justice sont mis en péril lorsqu'une règle de droit est modifiée rétrospectivement sans que l'intéressé n'ait pu connaître la nouvelle version au moment de commettre l'acte criminel.

[100] En ce qui concerne les effets bénéfiques, la preuve susmentionnée offerte par le ministère public sur le risque de préjudice lié à la récidive propre aux délinquants sexuels vaut également pour

this evidence is buttressed by other important considerations.

[101] As I shall explain, in brief, the record before this Court demonstrates that s. 161(1)(d) is directed at grave, emerging harms precipitated by a rapidly evolving social and technological context. This evolving context has changed both the *degree* and *nature* of the risk of sexual violence facing young persons. As a result, the previous iteration of s. 161 became insufficient to respond to the modern risks children face. By closing this legislative gap and mitigating these new risks, the benefits of the retrospective operation of s. 161(1)(d) are significant and fairly concrete.

[102] The rate of technological change over the past decade has fundamentally altered the social context in which sexual crimes can occur. Social media websites (like Facebook and Twitter), dating applications (like Tinder), and photo-sharing services (like Instagram and Snapchat) were all founded *after* 2002, the last time prior to the 2012 amendments that substantial revisions to s. 161(1) were made. These new online services have given young people — who are often early adopters of new technologies — unprecedented access to digital communities. At the same time, sexual offenders have been given unprecedented access to potential victims and avenues to facilitate sexual offending.

[103] The legislative record before this Court speaks to this rapid evolution and shows that, in enacting s. 161(1)(d) and giving it retrospective effect, Parliament was attempting to keep pace with technological changes that have substantially altered the degree and nature of the risks facing children. For example, at the second reading of the Bill, the Parliamentary Secretary to the Minister of Justice said, "An increasing number of child sex offenders also use the Internet and other new technologies to facilitate the grooming of victims or to commit other child sex offences" (p. 6787). At a Committee debate, the Acting

l'al. 161(1)d), mais d'autres considérations d'importance viennent l'étayer.

[101] En bref, comme je l'explique plus loin, il appert du dossier de la Cour que l'al. 161(1)d) s'attaque aux nouveaux préjudices graves dont l'infliction est précipitée par l'évolution rapide du contexte sociotechnologique. Ce contexte en constante évolution a modifié tant le *degré* que la *nature* du risque de violence sexuelle auquel sont exposées les jeunes personnes. Par conséquent, la version antérieure de l'art. 161 ne permettait plus de contrer le risque que courent les enfants de nos jours. Du fait qu'elle comble cette lacune législative et réduit les risques nouveaux, l'application rétrospective de l'al. 161(1)d) comporte des effets bénéfiques importants assez concrets.

[102] La vitesse à laquelle la technologie a évolué au cours de la dernière décennie a fondamentalement modifié le contexte social dans lequel peuvent survenir les crimes sexuels. Les médias sociaux (comme Facebook et Twitter), les applications de rencontres (comme Tinder), de même que les services de partage de photos (comme Instagram et Snapchat) ont tous vu le jour *après* 2002, soit l'année où le par. 161(1) avait été modifié la fois précédente. Ces nouveaux services en ligne ont donné aux jeunes — qui sont souvent les premiers à adopter les nouvelles technologies — un accès sans précédent aux communautés numériques. Parallèlement, les délinquants sexuels ont obtenu un accès inédit à des victimes potentielles et à des moyens qui facilitent la commission d'infractions sexuelles.

[103] Le dossier législatif dont dispose la Cour fait état de cette évolution rapide et montre que, par l'édiction de l'al. 161(1)d) et son application rétrospective, le législateur entendait se mettre au diapason de la technologie dont l'évolution avait substantiellement modifié le degré et la nature du risque auquel étaient exposés les enfants. Par exemple, lors de la deuxième lecture du projet de loi, le secrétaire parlementaire du ministre de la Justice a dit : « De plus en plus de délinquants sexuels dont les victimes sont des enfants utilisent aussi Internet et les nouvelles technologies pour

General Counsel, Criminal Law Policy Section, Department of Justice testified:

> . . . what Bill C-54 recognizes is that offenders use the Internet computer systems for all sorts of reasons. Yes, they use it to communicate directly with a young person, and we catch that already, but they use it also to offend, in their offending pattern, whether it's to access child pornography, for example . . . .
>
> So the idea with Bill C-54 is to require a court to turn its mind to this each time it is sentencing a person who is convicted of one of these child sex offences and to consider whether in that instance, with the offender before them, given the nature of the offending pattern and the conduct before the court, there should be a restriction on that individual's access to the Internet or other technology that would otherwise facilitate his or her reoffending.

(Standing Committee on Justice and Human Rights, *Evidence*, No. 50, 3rd Sess., 40th Parl., February 28, 2011, at p. 4)

[104] As well, a Statistics Canada Director (who was testifying before the Committee) said, "What we can say based on those data is that the number of charges of child luring via the Internet is increasing" (*Evidence*, No. 49, 3rd Sess., 40th Parl., February 16, 2011, at p. 7). The legislative record contains other similar passages.

[105] In addition to this testimony concerning the evolving risks children face, others testified that controlling an offender's access to the Internet is an effective means of curbing these risks. For example, during other Committee debates, the Executive Director of BOOST Child Abuse Prevention and Intervention testified that "[t]he emerging research connecting online offences to hands-on sexual offences emphasizes the importance of the court's ability . . . to permit the offender use of the Internet

faciliter la "préparation" des victimes ou pour commettre d'autres infractions de nature sexuelle à l'endroit d'un enfant » (p. 6787). Lors du débat en comité, l'avocate générale intérimaire, Section de la politique en matière de droit pénal du ministère de la Justice, a témoigné :

> . . . ce que le projet de loi C-54 reconnaît, c'est que les délinquants peuvent utiliser des ordinateurs reliés à Internet à toutes sortes de fins. Oui, ils les utilisent pour communiquer directement avec une jeune personne — et la loi couvre déjà cet aspect —, mais aussi pour commettre d'autres délits, selon leur comportement délinquant, qu'il s'agisse par exemple d'accéder à de la pornographie infantile . . .
>
> Donc, l'idée, avec ce projet de loi C-54, est d'obliger un tribunal à en tenir compte chaque fois qu'il impose une peine à une personne reconnue coupable d'une de ces infractions de nature sexuelle à l'égard d'enfants, et à examiner si, en l'espèce, compte tenu du délinquant qu'il a devant lui, de la nature de son comportement criminel ou de sa conduite devant le tribunal, il y a lieu de restreindre l'accès de cette personne à Internet ou à d'autres technologies qui pourraient autrement faciliter une récidive de sa part.

(Comité permanent de la justice et des droits de la personne, *Témoignages*, nº 50, 3e sess., 40e lég., 28 février 2011, p. 4)

[104] Par ailleurs, une directrice de Statistique Canada appelée à témoigner devant le comité a déclaré : « Ce que nous pouvons dire, sur la base de ces données, est que le nombre d'accusations de leurre d'enfants par Internet est en hausse » (*Témoignages*, nº 49, 3e sess., 40e lég., 16 février 2011, p. 7). D'autres passages du dossier législatif vont dans le même sens.

[105] Outre ces témoignages sur l'évolution du risque auquel sont exposés les enfants, d'autres ont porté sur le fait que contrôler l'accès d'un contrevenant à Internet constitue un moyen efficace de réduire ce risque. Par exemple, à une autre séance du comité, la directrice générale de BOOST Child Abuse Prevention and Intervention a déclaré que « [l]es nouvelles recherches qui établissent un lien entre les cyberprédateurs et les infractions réelles font état de l'importance que les tribunaux interdisent à un

only when supervised" (*Evidence*, No. 46, 3rd Sess., 40th Parl., February 7, 2011, at p. 6).[10]

[106] The Crown's social science literature also addresses the unique role the Internet plays in facilitating sexual crimes against children. For example:

The number of detected online sex offenders has drastically increased since the early 2000s . . . .

. . .

. . . Indeed, the rates of online sexual crimes, and child pornography offences in particular, have increased substantially with the increasing use of the internet . . . .

. . .

. . . Specifically, the ease of access to online child pornography may contribute to a new group of offenders who succumb to temptations that they would have otherwise controlled.

(K. M. Babchishin, R. K. Hanson and H. VanZuylen, "Online Child Pornography Offenders are Different: A Meta-analysis of the Characteristics of Online and Offline Sex Offenders Against Children" (2015), 44 *Arch. Sex. Behav.* 45, at p. 46)

délinquant [. . .] d'utiliser Internet à moins d'être supervisé » (*Témoignages*, nº 46, 3e sess., 40e lég., 7 février 2011, p. 6)[10].

[106] La documentation de sciences sociales produite par l'intimée fait également état du rôle unique d'Internet dans la facilitation de la commission d'infractions sexuelles contre des enfants. Par exemple :

[TRADUCTION] La détection de délinquants sexuels en ligne a radicalement augmenté depuis le début des années 2000 . . .

. . .

. . . En fait, le taux de criminalité sexuelle en ligne, la pornographie juvénile en particulier, a substantiellement augmenté du fait du recours accru à Internet . . .

. . .

. . . Plus particulièrement, la facilité d'accès à la pornographie juvénile en ligne peut contribuer à l'émergence d'un nouveau type de contrevenant qui succombe à une tentation à laquelle il aurait résisté autrement.

(K. M. Babchishin, R. K. Hanson et H. VanZuylen, « Online Child Pornography Offenders are Different : A Meta-analysis of the Characteristics of Online and Offline Sex Offenders Against Children » (2015), 44 *Arch. Sex. Behav.* 45, p. 46)

[10] Another individual, who had been involved with police training, testified as follows:

> In 2010, I completed a pan-Canadian research project that examined the exponential increase of crimes of exploitation committed on or facilitated by the Internet against children in Canada and globally. Accessing images of child abuse — somewhat understated by the use of the term "child pornography" — child luring, trafficking, and travelling for the purpose of sexual offending are crimes increasingly facilitated by modern, ubiquitous technologies, especially the Internet, around the globe. . . .
>
> . . .
>
> . . . To prevent the ever-increasing numbers of crime, offenders must be disconnected from social networking sites through which they lurk and stalk.

(*Evidence*, No. 44, 3rd Sess., 40th Parl., January 31, 2011, at pp. 5-6)

[10] Une autre personne qui avait participé à la formation de policiers a offert le témoignage suivant :

> En 2010, j'ai mené un projet de recherche pancanadien qui consistait à examiner la hausse exponentielle des crimes d'exploitation commis sur Internet, ou grâce à Internet, contre des enfants au Canada et ailleurs. Accéder à des images d'enfants exploités sexuellement — sous-évaluées en quelque sorte par l'utilisation du terme « pornographie juvénile » — leurrer des enfants, faire la traite des enfants et voyager dans le but de les agresser sexuellement sont des crimes de plus en plus faciles à commettre en raison des technologies modernes et omniprésentes partout sur la planète, surtout Internet. . .
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> . . .
>
> . . . Pour empêcher l'augmentation constante du nombre de crimes, on doit débrancher les agresseurs qui rôdent sur Internet et qui suivent des enfants.

(*Témoignages*, nº 44, 3e sess., 40e lég., 31 janvier 2011, p. 5-6)

[107] New and qualitatively different opportunities to harm young people exist. The Internet is a portal to accessing and distributing child pornography, a crime that itself victimizes children. As this Court observed in *Sharpe*:

> . . . possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences. [para. 28]

Further, the Internet can be used to contact other adults for the purposes of planning and facilitating criminal behaviour — pursuits not captured by the previous version of s. 161.[11]

[108] What emerges from the Crown's materials is that the proliferation of new technologies has altered the nature and degree of risk facing children, which, in turn, created a legislative gap in s. 161. The previous iteration of s. 161 — which allowed sentencing judges to prohibit offenders only from using computer systems to contact children directly — was incapable of precluding sexual offenders from participating in other kinds of harmful behaviour. And, as the record and common sense suggest, monitoring an offender's use of the Internet can limit an offender's opportunities to offend and prevent this harmful behaviour.

[109] This unique social and technological context leads me to the conclusion that the benefits occasioned by retrospectively imposing the Internet

[107] De nouvelles avenues intrinsèquement différentes s'offrent pour s'en prendre aux jeunes. Internet est un portail qui permet d'accéder à la pornographie juvénile et d'en faire la distribution, un crime dont sont en soi victimes les enfants. Comme le fait observer la Cour dans l'arrêt *Sharpe* :

> . . . la possession de pornographie juvénile contribue au marché de cette forme de pornographie, lequel marché stimule à son tour la production qui implique l'exploitation d'enfants. La possession de pornographie juvénile peut faciliter la séduction et l'initiation des victimes, vaincre leurs inhibitions et inciter à la perpétration éventuelle d'infractions. [par. 28]

En outre, Internet peut permettre à un adulte de communiquer avec un autre pour planifier et faciliter un comportement criminel, ce que n'envisageait pas la version antérieure de l'art. 161[11].

[108] Il appert donc des documents déposés par le ministère public que la prolifération des technologies nouvelles a modifié la nature et le degré du risque auquel sont exposés les enfants, d'où la lacune législative de l'art. 161. La précédente mouture de cet article qui permettait au juge appelé à déterminer la peine d'interdire seulement au contrevenant d'utiliser un système informatique pour communiquer directement avec un enfant n'était pas de nature à empêcher un délinquant sexuel de se livrer à d'autres activités préjudiciables. Et, comme le donnent à penser le dossier et le sens commun, surveiller l'utilisation d'Internet par un contrevenant peut restreindre les possibilités qui s'offrent à ce dernier de commettre une infraction et peut prévenir un tel comportement préjudiciable.

[109] Ce contexte sociotechnologique unique m'amène à conclure que les effets bénéfiques de l'application rétrospective de l'interdiction d'utiliser

[11] In one disturbing case summarized by an expert witness who testified before the parliamentary committee studying the Bill, two adults were chatting with each other in an online forum to set up an 'exchange' of children (*Evidence*, No. 46, at p. 5, testimony of Lianna McDonald).

[11] Dans une affaire troublante résumée par un témoin expert devant le comité parlementaire étudiant le projet de loi, deux adultes clavardaient l'un avec l'autre dans un forum en ligne pour organiser un « échange » d'enfants (*Témoignages*, nº 46, p. 5, Lianna McDonald).

prohibition contained in s. 161(1)(d) are greater and more certain than those stemming from s. 161(1)(c).

[110] The fact that Parliament enacted s. 161(1)(d) as a means of closing a legislative gap created by rapid social and technological change does not just enhance the salutary effects of the law: it mitigates the provision's deleterious effects, too. From the perspective of public confidence in the criminal justice system, the retrospective operation of a law that was enacted to respond to a swiftly changing social context and emerging threats seems less unfair and less inconsistent with the rule of law than the retrospective operation of a law that was not enacted for a compelling temporal reason. As Professor C. Sampford writes in his book, *Retrospectivity and the Rule of Law* (2006), "Retrospective laws which close 'loopholes' and 'unexpected interpretations and consequences' reinforce the guidance of primary laws" and can therefore advance the fairness of the legal system as a whole (p. 81).

[111] Thus, while fairness and the rule of law are compromised by laws that retrospectively undermine a citizen's liberty and security, these broader societal harms are mitigated by Parliament's compelling temporal justification for giving s. 161(1)(d) retrospective effect.

[112] I now must balance the deleterious and salutary effects of the law. As discussed, s. 161(1)(d) constitutes a significant impact on an offender's liberty and security. The impugned measure also has negative ramifications for society as a whole. Fairness and the rule of law are compromised by laws that retrospectively undermine a citizen's liberty and security, although these broader societal harms are less acute given the context in which the government legislated. In addition, the adverse impact the provision has on offenders will be experienced

Internet prévue à l'al. 161(1)d) sont plus grands et plus certains que ceux de l'application rétrospective de la nouvelle interdiction prévue à l'al. 161(1)c).

[110] Le fait que le législateur a édicté l'al. 161(1)d) afin de combler la lacune législative résultant de l'évolution rapide de la société et de la technologie ne fait pas qu'accroître les effets bénéfiques de la règle de droit, mais atténue également ses effets préjudiciables. En ce qui concerne la confiance du public dans le système de justice criminelle, l'application rétrospective d'une règle de droit visant à adapter la loi à un contexte social qui évolue rapidement et à des menaces nouvelles paraît moins contraire à l'équité des procédures criminelles et à la primauté du droit que l'application rétrospective d'une règle de droit qui n'a pas été édictée pour une raison d'ordre temporel convaincante. Comme l'écrit le Professeur C. Sampford dans son ouvrage intitulé *Retrospectivity and the Rule of Law* (2006), [TRADUCTION] « la disposition d'application rétrospective qui comble une "lacune" et remédie à "une interprétation ou une conséquence inattendues" renforce le message de la loi principale » et peut donc favoriser l'équité du système juridique dans son ensemble (p. 81).

[111] Par conséquent, bien que l'équité des procédures criminelles et la primauté du droit soient compromises par une disposition qui porte rétrospectivement atteinte au droit à la liberté et à la sécurité d'un citoyen, ce préjudice général causé à la société est atténué par l'existence de la justification d'ordre temporel convaincante invoquée par le législateur pour donner un effet rétrospectif à l'al. 161(1)d).

[112] Je dois maintenant soupeser les effets préjudiciables de la règle de droit et ses effets bénéfiques. Je le répète, l'al. 161(1)d) a une grande incidence sur le droit à la liberté et à la sécurité du contrevenant. La mesure considérée a aussi des répercussions défavorables sur l'ensemble de la société. L'équité des procédures criminelles et la primauté du droit sont compromises par une disposition qui porte atteinte rétrospectivement au droit à la liberté et à la sécurité d'un citoyen, même si ce préjudice social général est moins grave en raison

only when there is good reason: in circumstances where a judge finds that doing so will mitigate the risk an offender poses to children.

[113] As for the salutary effects, the record demonstrates that the Internet is increasingly being used to sexually offend against young people and that sex offenders who target children are more likely to reoffend. This is not simply about changing technology or general risks associated with recidivism, broad factors that can relate to many offences. Rather, the *nature and degree* of the risks facing some of the most vulnerable members of our society have changed drastically since 2002, the last time s. 161(1) was substantially amended. Technology and the proliferation of social media cyber communities have increased the degree of risk facing young persons. This has created new triggers, and new avenues for offenders to pursue in committing further offences. The previous prohibition was insufficient to address these evolving risks. But the enhanced prohibition in s. 161(1)(d) can restrict the viability of these routes. While it remains difficult to quantify the precise benefits the retrospective operation of s. 161(1)(d) may create, it seems to me that the salutary effects associated with s. 161(1)(d) are quite tangible and compelling.

[114] On balance, in my view, Parliament was justified in giving s. 161(1)(d) retrospective effect in the unique context within which it was legislating. A variety of factors support this conclusion. The harms at stake (sexual offending against young people) are particularly powerful. The statutory regime is highly tailored and discretionary. An Internet prohibition, while invasive, is not among the most onerous punishments, such as increased incarceration. And, significantly, the rapidly evolving technological and social context surrounding the enactment of s. 161(1)(d) has created new and emerging risks that make the law's salutary effects more concrete

du contexte dans lequel le gouvernement légifère. De plus, l'effet préjudiciable de la disposition sur le contrevenant ne se manifeste que lorsque son application est fondée, soit dans le cas où le juge conclut que, s'il applique la disposition, le risque auquel le contrevenant expose les enfants sera atténué.

[113] En ce qui concerne les effets bénéfiques, le dossier indique qu'Internet est de plus en plus utilisé pour commettre des infractions sexuelles contre des jeunes et que les délinquants sexuels qui s'en prennent à des enfants sont plus susceptibles de récidiver que les autres délinquants sexuels. L'évolution de la technologie ou les risques généraux liés à la récidive — des facteurs au large spectre susceptibles d'être associés à de nombreuses infractions — ne sont pas seuls en cause. En fait, *la nature et le degré* du risque auquel s'exposent certains des membres les plus vulnérables de notre société ont radicalement changé depuis 2002, l'année de la modification précédente du par. 161(1). La technologie et la prolifération des cybercollectivités de médias sociaux ont accru le degré du risque auquel sont exposés les jeunes personnes, de sorte que de nouvelles incitations et de nouvelles avenues amènent le contrevenant à persister dans son comportement criminel. L'interdiction antérieure n'était plus adaptée à l'évolution du risque, alors que la nouvelle — correspondant à l'al. 161(1)d) et dont la portée est accrue — peut réduire la viabilité de ces avenues. Bien qu'il demeure difficile de quantifier les effets bénéfiques précis de l'application rétrospective de l'al. 161(1)d), ses effets bénéfiques me paraissent tout à fait tangibles et convaincants.

[114] Tout bien considéré, j'estime que le législateur était justifié, vu le contexte unique dans lequel il intervenait, de conférer à l'al. 161(1)d) un effet rétrospectif. Diverses considérations appuient ma conclusion. Les préjudices en jeu (les infractions sexuelles commises à l'endroit de jeunes personnes) sont particulièrement convaincants. Le régime législatif a une portée très bien circonscrite et confère un pouvoir discrétionnaire. L'interdiction d'utiliser Internet, même si elle est attentatoire, ne fait pas partie des sanctions les plus lourdes, telle la peine d'emprisonnement accrue. Et surtout, l'évolution rapide de la technologie et le contexte

— while mitigating the adverse impact the law has on fairness and the rule of law. Although any one of these factors may have been insufficient in isolation, taken together, they create a compelling case. The benefits of the law outweigh its deleterious effects.

VI. Disposition

[115] I find that the retrospective operation of s. 161(1)(c) of the *Criminal Code* limits the right protected by s. 11(*i*) of the *Charter* and that this limit is *not* justified under s. 1. Accordingly, I would allow the appeal with respect to s. 161(1)(c). As a result, the provision does not apply retrospectively to offenders who committed their offences prior to the coming into force of the 2012 amendments.

[116] I also find that the retrospective operation of s. 161(1)(d) of the *Criminal Code* limits the s. 11(*i*) right. However, I conclude that this *is* a reasonable constitutional compromise under s. 1. I would therefore dismiss the appeal with respect to s. 161(1)(d).

The following are the reasons delivered by

[117] Abella J. (dissenting in part) — I agree with Justice Karakatsanis that both ss. 161(1)(c) and 161(1)(d) of the *Criminal Code*, R.S.C. 1985, c. C-46, violate s. 11(*i*) of the *Canadian Charter of Rights and Freedoms* and that s. 161(1)(c) cannot be justified under s. 1. With great respect, however, I do not share the view that s. 161(1)(d) is justified.

[118] From 2008 to 2011, when K.R.J. committed the offences for which he was eventually convicted, s. 161(1) of the *Criminal Code* stated:

social de l'adoption de l'al. 161(1)d) ont fait naître des risques nouveaux qui rendent plus tangibles les effets bénéfiques de la règle de droit tout en atténuant son incidence préjudiciable sur l'équité des procédures criminelles et la primauté du droit. Aucune de ces considérations prise isolément n'est suffisante mais, ensemble, elles justifient la mesure contestée. Les effets bénéfiques de la règle de droit l'emportent sur ses effets préjudiciables.

VI. Dispositif

[115] Je conclus que l'application rétrospective de l'al. 161(1)c) du *Code criminel* restreint le droit protégé par l'al. 11*i*) de la *Charte* et que cette restriction *ne* se justifie *pas* par application de l'article premier. Par conséquent, je suis d'avis d'accueillir le pourvoi en ce qui a trait à l'al. 161(1)c). La disposition ne s'applique donc pas rétrospectivement au contrevenant dont les actes criminels sont antérieurs à l'entrée en vigueur des nouvelles dispositions en 2012.

[116] Je conclus également que l'application rétrospective de l'al. 161(1)d) du *Code criminel* restreint le droit protégé par l'al. 11*i*). Toutefois, cette restriction *constitue* une atteinte constitutionnelle raisonnable au regard de l'article premier. Je suis donc d'avis de rejeter le pourvoi en ce qui a trait à l'al. 161(1)d).

Version française des motifs rendus par

[117] La juge Abella (dissidente en partie) — Je conviens avec la juge Karakatsanis que les al. 161(1)c) et d) du *Code criminel*, L.R.C. 1985, c. C-46, contreviennent tous deux à l'al. 11*i*) de la *Charte canadienne des droits et libertés*, et que l'al. 161(1)c) ne peut être justifié au regard de l'article premier. Soit dit en tout respect, je ne partage toutefois pas son point de vue selon lequel l'al. 161(1)d) est justifié.

[118] De 2008 à 2011, période pendant laquelle K.R.J. a commis les infractions dont il a par la suite été reconnu coupable, le par. 161(1) du *Code criminel* était libellé comme suit :

161. (1) When an offender is convicted . . . of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender . . . in addition to any other punishment that may be imposed for that offence . . . shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from

(*a*) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a day-care centre, schoolground, playground or community centre;

(*b*) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; or

(*c*) using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years.

[119] Under this scheme, K.R.J. could be subjected to geographic, work-related, and "virtual" restrictions. He could be prohibited from attending a wide variety of venues such as pools and schools, and from using a computer for the purpose of communicating with anyone *under 16 years of age*. He would still, however, have been entitled to engage in online activities with adults.

[120] By the time K.R.J. was sentenced, Parliament amended the provision. While s. 161(1)(a) and (b) were left unchanged, s. 161(1)(c) was amended and s. 161(1)(d) was added, giving sentencing judges authority to prohibit offenders from:

(c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or

(d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

161. (1) Dans le cas où un contrevenant est déclaré coupable [. . .] d'une infraction mentionnée au paragraphe (1.1) à l'égard d'une personne âgée de moins de seize ans, le tribunal qui lui inflige une peine [. . .], en plus de toute autre peine [. . .] applicabl[e] en l'espèce, sous réserve des conditions ou exemptions qu'il indique, peut interdire au contrevenant :

a) de se trouver dans un parc public ou une zone publique où l'on peut se baigner s'il y a des personnes âgées de moins de seize ans ou s'il est raisonnable de s'attendre à ce qu'il y en ait, une garderie, un terrain d'école, un terrain de jeu ou un centre communautaire;

b) de chercher, d'accepter ou de garder un emploi — rémunéré ou non — ou un travail bénévole qui le placerait en relation de confiance ou d'autorité vis-à-vis de personnes âgées de moins de seize ans;

c) d'utiliser un ordinateur au sens du paragraphe 342.1(2) dans le but de communiquer avec une personne âgée de moins de seize ans.

[119] Suivant ce régime, K.R.J. pouvait être soumis à des restrictions d'ordre géographique, professionnel et « virtuel ». Il pouvait lui être interdit de se trouver dans une multitude de lieux, telle une piscine ou une école, et d'utiliser un ordinateur dans le but de communiquer avec une personne *âgée de moins de 16 ans*, auquel cas il lui demeurait toutefois possible de participer à des activités en ligne avec des adultes.

[120] Avant la détermination de la peine de K.R.J., le législateur a modifié la disposition en cause. Les alinéas 161(1)a) et b) sont demeurés inchangés, mais l'al. 161(1)c) a été modifié et l'al. 161(1)d) s'est ajouté, de sorte que le juge appelé à déterminer la peine pouvait désormais interdire au contrevenant :

c) d'avoir des contacts — notamment communiquer par quelque moyen que ce soit — avec une personne âgée de moins de seize ans, à moins de le faire sous la supervision d'une personne que le tribunal estime convenir en l'occurrence;

d) d'utiliser Internet ou tout autre réseau numérique, à moins de le faire en conformité avec les conditions imposées par le tribunal.

[121] The amendments expanded the restrictions K.R.J. could be placed under. Rather than being banned from certain venues, s. 161(1)(c) could be used to prohibit him from attending *any* place where children are present. And rather than being prohibited from using the internet *for the purpose of communicating with children*, s. 161(1)(d) could be used to prohibit him from using the internet for *any* purpose.

[122] I agree with the majority that these potential restrictions would significantly affect K.R.J.'s liberty and security interests, and would, as a result, constitute punishment under s. 11(*i*) of the *Charter*, which states:

> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[123] The wording in this provision is unequivocal. As noted by Prof. Don Stuart, the intention behind this text is "crystal clear": *Charter Justice in Canadian Criminal Law* (6th ed. 2014), at p. 523.

[124] In my view, the absolutist language used by the drafters of the *Charter* in s. 11 must colour the s. 1 analysis by demanding the most stringent of justifications. That was the approach taken by this Court in *Canada (Attorney General) v. Whaling*, [2014] 1 S.C.R. 392. The issue was the retrospective repeal of the accelerated parole review under s. 11(*h*) of the *Charter*, which protects individuals from being punished twice for the same offence. Because the Crown had failed to adduce "compelling evidence" demonstrating that its objectives would be "significantly undermined" unless the repeal was applied on a retrospective as well as prospective basis, this Court concluded that the infringement was not justified under s. 1.

[121] Les modifications ont élargi les restrictions auxquelles pouvait être assujetti K.R.J. L'alinéa 161(1)c) permettait de lui interdire de se trouver, non plus dans certains lieux, mais à *tout* endroit où il y a des enfants et l'al. 161(1)d), d'utiliser Internet, non pas *dans le but de communiquer avec des enfants*, mais à *quelque fin que ce soit*.

[122] Je conviens avec les juges majoritaires que ces interdictions potentielles restreindraient sensiblement le droit de K.R.J. à la liberté et à la sécurité et constituent donc une peine au sens de l'al. 11*i*) de la *Charte*, dont voici le libellé :

> **11.** Tout inculpé a le droit :
>
> . . .
>
> *i*) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[123] Le libellé de la disposition est sans équivoque. Comme le fait observer le professeur Don Stuart, l'intention sous-jacente est [TRADUCTION] « claire comme du cristal » (*Charter Justice in Canadian Criminal Law* (6e éd. 2014), p. 523).

[124] À mon avis, la formulation absolue employée à l'art. 11 par les rédacteurs de la *Charte* doit influer sur l'analyse que commande l'article premier par l'exigence de la justification la plus stricte. Telle est l'approche de la Cour dans *Canada (Procureur général) c. Whaling*, [2014] 1 R.C.S. 392. Dans cette affaire, la suppression rétrospective d'une procédure d'examen expéditif (en matière de libération conditionnelle) était contestée sur le fondement de l'al. 11*h*) de la *Charte*, lequel garantit qu'une personne ne sera pas punie deux fois pour la même infraction. Le ministère public ne l'ayant pas « convaincu[e] » que ses objectifs seraient « considérablement compromis » si la suppression n'était pas appliquée de manières rétrospective et prospective, la Cour conclut que l'atteinte n'est pas justifiée au regard de l'article premier.

[125] The repeal of the accelerated parole review was subsequently also found to be unconstitutional by the British Columbia Court of Appeal, but from the perspective of s. 11(*i*), the provision at issue in this appeal. In *Liang v. Canada (Attorney General)* (2014), 311 C.C.C. (3d) 159, the British Columbia Court of Appeal concluded that the Crown's concern that it could take years to phase out the program if it could not be applied retrospectively, did not justify overriding the right:

. . . the *Charter* specifically requires that if punishment has changed between offence commission and sentencing, the offender is entitled to the lesser punishment. . . . *[T]he fact the offender will receive a lesser punishment, and perhaps one that does not meet the objectives of the present sentencing regime, is exactly what s. 11(i) contemplates. . . .*

. . .

. . . to meet the burden under s. 1 in this case, something more must be asserted than that the objective of the increased punishment is important, and therefore those who are constitutionally entitled to the lesser punishment must forego their rights. [Emphasis added; paras. 59 and 61.]

[126] Both *Whaling* and *Liang* are clear that s. 11 imposes a singularly onerous evidentiary burden on the Crown to justify a violation under s. 1. To apply a lesser burden transforms s. 11(*i*) from being practically an air-tight right into a porous one. In this case, that means that the Crown has the highest possible evidentiary burden, namely, to demonstrate through "compelling evidence" that the previous provisions so "significantly undermined" the government's objectives, that the retrospective application of greater punishment was justified.

[127] As the majority notes, the Crown's evidentiary record consisted largely of statistics about s. 161(1) orders in British Columbia, and studies on recidivism rates pertaining to sexual offenders in

[125] La suppression de la procédure d'examen expéditif a par la suite été jugée inconstitutionnelle par la Cour d'appel de la Colombie-Britannique, mais en fonction de l'al. 11*i*), soit la disposition en cause dans le présent pourvoi. Dans *Liang c. Canada (Attorney General)* (2014), 311 C.C.C. (3d) 159, cette même cour conclut que la crainte du ministère public qu'il puisse falloir des années pour mettre fin progressivement au programme si sa suppression ne pouvait s'appliquer rétrospectivement ne justifiait pas que l'on bafoue le droit en question :

[TRADUCTION] . . . la *Charte* exige expressément, lorsque la peine est modifiée entre la perpétration de l'infraction et la sentence, que le contrevenant bénéficie de la peine la moins sévère. [. . .] *[Q]ue le contrevenant bénéficie de la peine la moins sévère et, peut-être, d'une peine non conforme aux objectifs du régime actuel de détermination de la peine, telle est précisément la raison d'être de l'al. 11i). . .*

. . .

. . . satisfaire au fardeau de preuve qu'impose en l'espèce l'article premier exige davantage que l'affirmation selon laquelle l'objectif de l'accroissement de la peine est important, de sorte que les personnes auxquelles la Constitution garantit le droit à la peine la moins sévère doivent y renoncer. [Je souligne; par. 59 et 61.]

[126] Les arrêts *Whaling* et *Liang* indiquent tous deux clairement que l'art. 11 impose au ministère public un fardeau de preuve particulièrement strict pour justifier l'atteinte au regard de l'article premier. S'il en allait autrement, la protection du droit garanti à l'al. 11*i*) ne serait plus pour ainsi dire étanche, mais deviendrait poreuse. Dès lors, en l'espèce, le ministère public a le fardeau de preuve le plus strict qui soit, de sorte qu'il doit « convainc[re] » le tribunal que l'application des dispositions antérieures aurait si « considérablement compromis » les objectifs de l'État que l'application rétrospective d'une peine plus sévère était justifiée.

[127] Comme le signalent les juges majoritaires, le dossier de preuve du ministère public est constitué en grande partie de statistiques sur les ordonnances rendues en Colombie-Britannique en application du

general, including two that suggested a link between recidivism and online activities. The Crown also argued that the language shift from "computer system" to "Internet and digital network" in s. 161(1)(d) was designed to reflect advancements in technology. I agree with the majority that this evidence is insufficient to justify s. 161(1)(c) because "the Crown has failed to lead much, if any, evidence to establish the *degree* of *enhanced* protection . . . in comparison to the previous version of the prohibition" such that "the precise benefits of the *retrospective* operation of s. 161(1)(c) remain unclear": paras. 89-90 (emphasis in original).

[128] But unlike my colleagues, I find that this same reasoning is fatal to s. 161(1)(d). Far from offering compelling evidence, the Crown offered no evidence in the context of s. 161(1)(d) to show that the former provisions so significantly undermined its objectives, that the retroactive application of greater restrictions was justified. If all that is needed to justify a breach of s. 11(*i*) is the suggestion of a possible reduction in recidivism rates, whether based on changes in technology or otherwise, the state could, in theory, justify the retrospective application of more stringent punishments so routinely that s. 11(*i*) is written out of the *Charter*.

[129] In fact, there was no evidence about how the retrospective application of s. 161(1)(d) was expected to, or would, reduce recidivism rates any more than those under the former s. 161(1)(c) "computer" restrictions. I see no reason to bridge the significant empirical gaps in the evidence with inferences, particularly in the context of s. 11.

[130] I would therefore allow the appeal in connection with both ss. 161(1)(c) *and* 161(1)(d).

par. 161(1) et d'études sur les taux de récidive chez les délinquants sexuels en général, dont deux indiquent un lien entre la récidive et l'activité en ligne. Le ministère public fait également valoir que le renvoi, à l'al. 161d), non plus à un « ordinateur » mais à « Internet [et au] réseau numérique » vise à emboîter le pas aux progrès technologiques. Je conviens avec les juges majoritaires que cette preuve est insuffisante pour justifier l'al. 161(1)c), car « le ministère public n'a présenté que peu d'éléments ou n'en a pas présenté du tout pour établir le *degré* de protection *accrue* offert [. . .] comparativement au libellé antérieur de l'interdiction », de telle sorte que « les effets bénéfiques précis de l'application *rétrospective* de l'al. 161(1)c) demeurent indéterminés » (par. 89-90 (en italique dans l'original)).

[128] Mais, contrairement à mes collègues, j'estime que le même raisonnement porte un coup fatal à l'al. 161(1)d). Loin d'offrir une preuve de nature à convaincre, l'État n'a produit à l'appui de l'al. 161(1)d) aucun élément selon lequel les dispositions antérieures compromettaient si considérablement ses objectifs que l'application rétrospective d'interdictions de plus grande portée était justifiée. Si, pour justifier la restriction du droit garanti à l'al. 11*i*), il suffit d'invoquer la réduction possible des taux de récidive, de pair avec l'évolution technologique ou toute autre considération, l'État pourrait en théorie justifier dans tous les cas l'application rétrospective de peines accrues, au point de réduire à néant l'al. 11*i*) de la *Charte*.

[129] En fait, nul élément de la preuve n'indique comment l'application rétrospective de l'al. 161(1)d) devait réduire ou aurait réduit les taux de récidive davantage que ne le permettait l'interdiction d'utiliser un « ordinateur » que prévoyait l'ancien al. 161(1)c). Je ne vois aucune raison de combler par des inférences les lacunes empiriques importantes de la preuve, en particulier pour l'application l'art. 11.

[130] Je serais donc d'avis d'accueillir le pourvoi en ce qui concerne les al. 161(1)c) *et* d).

The following are the reasons delivered by

BROWN J. (dissenting in part) —

I. Introduction

[131] As my colleague Karakatsanis J. aptly notes for the majority, sexual offences against children have "persisted for centuries" (para. 83). Their legacy is toxic. They are notorious for their devastating impact, often ruining the lives of their victims, and of those whose lives intersect with those victims as they move into adulthood. Trauma from childhood sexual abuse may reverberate for generations, creating pernicious cycles of abuse.

[132] My colleague recounts how, in response to this persistent grave misconduct and its consequent social harms, Parliament amended s. 161(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, in 2012, augmenting the conditions which a sentencing judge may, in his or her discretion, impose upon an offender convicted of designated sexual offences, where the sentencing judge considers such conditions appropriate to prevent the offender from committing sexual offences against children in the future. Specifically, the sentencing judge's discretion was expanded from prohibiting offenders from "using a computer system . . . for the purpose of communicating with a person under the age of 16 years" to the following:

161 (1) . . .

. . .

(c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or

Version française des motifs rendus par

LE JUGE BROWN (dissident en partie) —

I. Introduction

[131] Comme le fait remarquer à juste titre ma collègue la juge Karakatsanis au nom des juges majoritaires, les enfants sont victimes d'infractions sexuelles « depuis des siècles » (par. 83). Il s'agit d'un héritage toxique. Nul ne conteste les effets dévastateurs de ces actes qui ruinent souvent la vie des victimes et celle des personnes qui côtoient les victimes une fois qu'elles sont devenues adultes. Le traumatisme de la violence sexuelle subie pendant l'enfance peut se répercuter sur plusieurs générations et enclencher des cycles de violence pernicieux.

[132] Ma collègue fait état de la manière dont le législateur, pour contrer ces actes graves et persistants et les problèmes sociaux qui en découlent, a modifié en 2012 le par. 161(1) du *Code criminel*, L.R.C. 1985, c. C-46, en accroissant la portée des interdictions que le juge qui détermine la peine peut, dans l'exercice de son pouvoir discrétionnaire, prononcer à l'endroit de la personne déclarée coupable d'une infraction sexuelle énumérée lorsqu'il estime que l'une ou l'autre de ces interdictions s'impose pour empêcher le contrevenant de récidiver et de s'en prendre à nouveau sexuellement à des enfants. Plus particulièrement, le pouvoir discrétionnaire qui permettait au juge d'interdire au contrevenant « d'utiliser un ordinateur [. . .] dans le but de communiquer avec une personne âgée de moins de seize ans » s'est accru de manière à lui permettre d'interdire ce qui suit au contrevenant :

161 (1) . . .

. . .

c) d'avoir des contacts — notamment communiquer par quelque moyen que ce soit — avec une personne âgée de moins de seize ans, à moins de le faire sous la supervision d'une personne que le tribunal estime convenir en l'occurrence;

(d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

Significantly, these amendments apply to all offenders being sentenced for a designated offence, irrespective of when the offender committed that offence.

[133] I agree with Karakatsanis J. that these conditions constitute "punishment" within the meaning of s. 11(*i*) of the *Canadian Charter of Rights and Freedoms*, and I endorse the test by which she makes that determination. I also agree that their retrospective application infringes s. 11(*i*). My point of departure is at the s. 1 stage of the analysis. Whereas my colleague concludes that the Crown has met its burden of justifying its infringement of s. 11(*i*) only in respect of the conditions relating to Internet use contained in s. 161(1)(d), in my view the Crown has also done so in respect of the conditions imposable under s. 161(1)(c) relating to contact with children. I would therefore uphold both conditions, dismiss the appeal, and affirm the s. 161 order made by the Court of Appeal.

II. Section 1

[134] It is worth bearing in mind that s. 11(*i*) of the *Charter* deals with the retrospective application of laws which are punitive in nature. At issue under s. 11(*i*), then, is not the punishment itself, but rather the means by which it is imposed. In my view, this means-based quality of the s. 11(*i*) protection affects the analysis to be applied under s. 1, since the *Oakes* analysis considers the proportionality between a legislative objective and the *Charter*-infringing *effects* resulting from its pursuit, not the choice of means that, by itself, constitutes a *Charter* infringement. The s. 1 analysis should be sensitive to this, in keeping with Dickson C.J.'s direction in *Oakes*: ". . . the nature of the proportionality test will vary depending on the circumstances" (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 139). The *Oakes*

d) d'utiliser Internet ou tout autre réseau numérique, à moins de le faire en conformité avec les conditions imposées par le tribunal.

Il importe de signaler que ces nouvelles dispositions s'appliquent à toute personne qui se voit infliger une peine pour avoir commis, peu importe le moment, une infraction énumérée.

[133] Je conviens avec la juge Karakatsanis que chacune de ces interdictions constitue une « peine » au sens de l'al. 11*i*) de la *Charte canadienne des droits et libertés*, et je fais mien le critère qu'elle applique pour arriver à cette conclusion. Je conviens également que l'application rétrospective des dispositions qui les prévoient contrevient à l'al. 11*i*). C'est à l'étape de l'analyse au regard de l'article premier que je diffère d'opinion. Alors que ma collègue conclut que le ministère public s'est acquitté de son obligation de justifier l'atteinte au droit garanti par l'al. 11*i*) seulement en ce qui concerne l'interdiction d'utiliser Internet prévue à l'al. 161(1)d), j'estime qu'il s'en est également acquitté quant à l'interdiction prévue à l'al. 161(1)c), à savoir celle d'avoir des contacts avec des enfants. En conséquence, je serais d'avis de confirmer la validité des deux interdictions, de rejeter le pourvoi et de confirmer l'ordonnance de la Cour d'appel fondée sur l'art. 161.

II. Article premier

[134] Il faut se rappeler que l'al. 11*i*) de la *Charte* vise l'application rétrospective d'une disposition à caractère punitif. Ce n'est donc pas la peine comme telle qui est en cause pour les besoins de son application, mais plutôt le moyen par lequel elle est infligée. J'estime que cette caractéristique de la protection de l'al. 11*i*) fondée sur le moyen entre en jeu dans l'analyse que commande l'article premier, étant donné que, dans l'arrêt *Oakes*, la Cour se penche sur la proportionnalité de l'objectif législatif et des *effets* attentatoires à la *Charte* qui découlent des mesures prises pour l'atteindre, et non sur le choix du moyen qui équivaut en soi à une atteinte constitutionnelle. L'analyse au regard de l'article premier doit en tenir compte pour se conformer aux directives du juge en chef Dickson dans ce même arrêt : « . . . la nature

test is not, and should not be treated as, a technical inquiry, as it is "dangerously misleading to conceive of s. 1 as a rigid and technical provision": *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 735, per Dickson C.J. As La Forest J. (dissenting, but not on this point) stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199:

> In *Oakes*, this Court established a set of principles, or guidelines, intended to serve as a framework for making this determination. However, these guidelines should not be interpreted as a substitute for s. 1 itself. It is implicit in the wording of s. 1 that the courts must, in every application of that provision, strike a delicate balance between individual rights and community needs. Such a balance cannot be achieved in the abstract, with reference solely to a formalistic "test" uniformly applicable in all circumstances. The s. 1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement. [Emphasis added; para. 62.]

[135] In other words, a technical and inflexible application of the *Oakes* test risks reducing what ought to be a rich, contextual inquiry under s. 1 into a form of "mechanical jurisprudence", where "[c]onceptions are fixed", "[t]he premises are no longer to be examined", and "[p]rinciples cease to have importance": R. Pound, "Mechanical Jurisprudence" (1908), 8 *Colum. L. Rev.* 605, at p. 612. The moral nuances inherent in the question of justifiable limits on fundamental rights cannot be reduced to "technical questions of weight and balance": G. C. N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (2009), at p. 104. Yet, and despite its statements to the contrary, the majority in this case has in my respectful view done precisely that. Its rigid and acontextual application of *Oakes* and its subsequent jurisprudence causes it to lose sight of the broader context and overall goal sought by Parliament. It reads the purpose of

du critère de proportionnalité pourra varier selon les circonstances » (*R. c. Oakes*, [1986] 1 R.C.S. 103, p. 139). L'application du critère de l'arrêt *Oakes* ne se veut pas formaliste, et elle ne devrait pas être tenue pour telle, puisqu'« on s'induit dangereusement en erreur si l'on voit dans l'article premier une disposition rigide et empreinte de formalisme » (*R. c. Keegstra*, [1990] 3 R.C.S. 697, p. 735 (le juge en chef Dickson)). Voici ce que dit le juge La Forest (dissident, mais non sur ce point) dans l'arrêt *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199 :

> Dans l'arrêt *Oakes*, notre Cour a établi une série de principes ou directives destinés à servir de cadre analytique à cette fin. Toutefois, ces directives ne devraient pas être interprétées comme si elles remplaçaient l'article premier. Le libellé de l'article premier indique implicitement que les tribunaux doivent, chaque fois qu'ils l'appliquent, établir un équilibre délicat entre les droits individuels et les besoins de la collectivité. Un tel équilibre ne peut être établi dans l'abstrait, à partir seulement d'un « critère » formaliste qui s'appliquerait de façon uniforme dans toutes les circonstances. L'examen fondé sur l'article premier est un examen inévitablement normatif qui exige des tribunaux qu'ils tiennent compte de la nature du droit violé ainsi que des valeurs et des principes spécifiques à partir desquels le ministère public tente de justifier la violation. [Je souligne; par. 62.]

[135] En d'autres termes, l'application formaliste et rigide du critère de l'arrêt *Oakes* risque de réduire ce qui devrait constituer un examen contextuel étoffé au regard de l'article premier à une sorte de [TRADUCTION] « processus décisionnel mécanique » où les « notions sont figées », où « l'examen des postulats n'est plus nécessaire » et où « les principes n'ont plus d'importance » (R. Pound, « Mechanical Jurisprudence » (1908), 8 *Colum. L. Rev.* 605, p. 612). On ne saurait ramener les nuances morales inhérentes au caractère justifiable de la restriction d'un droit fondamental à une [TRADUCTION] « entreprise formaliste de pondération et de mise en balance » (G. C. N. Webber, *The Negotiable Constitution : On the Limitation of Rights* (2009), p. 104). Or, soit dit en tout respect, c'est précisément ce que font selon moi les juges majoritaires en l'espèce, même s'ils affirment le contraire. En appliquant l'arrêt *Oakes* et les décisions rendues dans sa foulée avec rigidité

the legislation in an excessively narrow fashion, which results in an application of the *Oakes* test in a way that is ill-suited to deal with punitive laws which apply retrospectively. It holds Parliament to an exacting standard of proof, thereby denying Parliament the room necessary to perform its legislative policy-development role when addressing a chronic social problem. And it also insists on direct evidence of anticipated benefits which, given that chronic nature of the harm, is likely impossible to obtain.

et sans tenir compte du contexte, ils perdent de vue le tableau général et l'objectif global du législateur. Ils interprètent trop étroitement l'objet de la disposition législative, de sorte qu'ils appliquent le critère de l'arrêt *Oakes* d'une manière qui ne convient pas dans le cas d'une disposition à caractère punitif qui s'applique rétrospectivement. Ils soumettent le législateur à une norme de preuve très stricte et lui refusent ainsi la marge de manœuvre dont il a besoin pour s'acquitter de sa fonction de mise en œuvre de politiques en matière législative lorsqu'il s'agit de s'attaquer à un problème social chronique. Ils exigent en outre une preuve directe des effets bénéfiques escomptés, mais étant donné la nature chronique du problème, il est impossible de produire une telle preuve.

[136] The insight of Dickson C.J. and La Forest J. in our jurisprudence is that the s. 1 analysis must account for the broader picture. The issue is not, as La Forest J. put it, whether a particular "formalistic 'test'" has been satisfied. The "unavoidably normative inquiry" must remain focussed on the broader picture: has the state demonstrated that the impugned law prescribes a reasonable limit, demonstrably justified in a free and democratic society? To be clear, I do not suggest that *Oakes* is incorrect. Rather, I echo Dickson C.J.'s and La Forest J.'s warnings about its rigid, acontextual application. We should not lose the proportionality forest for the *Oakes* trees.

[136] Les nuances apportées par le juge en chef Dickson et le juge La Forest veulent que l'analyse au regard de l'article premier tienne compte du tableau général. Comme l'indique le juge La Forest, il ne s'agit pas de savoir si le « "critère" formaliste » précis est rempli. L'« examen inévitablement normatif » doit s'attacher au tableau général : l'État a-t-il établi que la règle de droit contestée emporte une restriction raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique? Bien évidemment, je ne laisse pas entendre que la Cour a fait erreur dans l'arrêt *Oakes*. Je rappelle plutôt la mise en garde du juge en chef Dickson et du juge La Forest contre l'application rigide et non contextuelle. Il ne faut pas perdre de vue la forêt de la proportionnalité derrière l'arbre d'*Oakes*.

A. *Objective of the Measure*

A. *Objectif de la mesure*

[137] The means-based quality of s. 11(*i*)'s protection should therefore inform the characterization of the objective anchoring the s. 1 proportionality analysis. The majority says that the relevant objective for the purpose of a proportionality analysis is that of the *Charter*-infringing measure — which, in this case, is the retrospective operation of the amendments to s. 161(1). I agree, but only to a point. The relevant objective for this purpose is indeed the objective of the measure. However, as I will explain, the measure to be considered here

[137] La caractéristique de la protection de l'al. 11*i*) fondée sur le moyen devrait donc jouer dans la détermination de l'objectif en fonction duquel il convient d'effectuer l'examen de la proportionnalité dans le cadre de l'analyse au regard de l'article premier. Les juges majoritaires affirment que l'objectif à considérer est celui de la mesure attentatoire, soit, en l'occurrence, l'application rétrospective des dispositions issues des modifications apportées au par. 161(1). J'en conviens, mais seulement jusqu'à un certain point. L'objectif à considérer est

comprises the amendments as a whole, and not merely their retrospectivity.

[138] Considering retrospectivity in isolation from the broader provision of which it forms a part skews the *Oakes* analysis by making several of its elements largely redundant. If, as the majority says, Parliament's objective was to "better protect children from the risks posed by offenders like the appellant" (para. 65) — i.e., offenders who committed a designated offence before, but were sentenced after, the amendments came into force and who pose a risk to reoffend sexually against children — then the application of such orders to offenders like the appellant is obviously rationally connected to this objective. And, there would be no possible less-impairing means of achieving this objective: simply put, the only way Parliament can apply the protective aspect of s. 161(1) orders to such offenders retrospectively is to apply s. 161(1) orders to such offenders retrospectively. Indeed, under the majority's approach, the minimal impairment inquiry becomes otiose. Of course, were such orders to be applied retrospectively as to offenders *unlike* the appellant (i.e., those who do not pose a risk to reoffend sexually against children), the rational connection and minimal impairment steps would then have some work to do under the *Oakes* analysis. By narrowly construing Parliament's purpose as the majority has, however, considerations of the rational connection and minimal impairment elements of the proportionality analysis are limited to determining whether the *Charter*-infringing measure captures the individuals which it targets, not whether the measure is rationally connected to the objective and minimally impairing of the *Charter* rights of those who legitimately fall within its ambit.

effectivement celui de la mesure, mais comme je l'explique plus loin, la mesure à examiner en l'espèce s'entend des modifications dans leur totalité, et non seulement de l'application rétrospective des dispositions qui en sont issues.

[138] L'examen de la rétrospectivité sans égard à la disposition dans laquelle elle s'inscrit fausse l'analyse préconisée dans l'arrêt *Oakes* en rendant en grande partie superflus plusieurs des éléments de celle-ci. Si, comme le soutiennent les juges majoritaires, le législateur a voulu « mieux protéger les enfants contre le risque que présente un contrevenant [. . .] comme l'appelant » (par. 65), c'est-à-dire un contrevenant qui a commis une infraction énumérée avant l'entrée en vigueur des modifications, mais qui a été condamné après celle-ci, et qui présente le risque de s'en prendre à nouveau sexuellement à des enfants, l'application d'une ordonnance fondée sur l'art. 161 à un contrevenant comme l'appelant a manifestement un lien rationnel avec cet objectif. Qui plus est, aucun autre moyen moins attentatoire ne permettrait d'atteindre cet objectif : en somme, le législateur ne peut faire en sorte que la vocation protectrice d'une telle ordonnance s'applique rétrospectivement à un tel contrevenant autrement qu'en prévoyant l'application rétrospective de l'ordonnance à un tel contrevenant. Suivant l'approche restrictive des juges majoritaires, l'examen du caractère minimal de l'atteinte devient en effet inutile. Évidemment, si une telle ordonnance s'appliquait à un contrevenant *différent* de l'appelant (c.-à-d. qui ne présenterait pas le risque de s'en prendre à nouveau sexuellement à des enfants), les volets du lien rationnel et de l'atteinte minimale joueraient leur rôle jusqu'à un certain point dans l'analyse établie par l'arrêt *Oakes*. L'interprétation étroite de l'intention du législateur à laquelle se livrent les juges majoritaires fait en sorte que l'examen du lien rationnel et de l'atteinte minimale que comporte l'analyse de la proportionnalité se limite à se demander si la mesure attentatoire atteint les personnes qu'elle vise, à l'exclusion de la question de savoir si la mesure a un lien rationnel avec l'objectif et si l'atteinte aux droits que la *Charte* garantit aux personnes auxquelles la mesure s'applique légitimement est minimale.

[139] A broader examination of Parliament's purpose is therefore necessary in order to anchor a useful proportionality analysis. The measure that gave rise to the *Charter* infringement, and which should anchor the proportionality analysis, comprises the amendments to s. 161 as a whole. And, as to that measure, I agree with the majority's characterization of its objective as being to "enhance the protection s. 161 affords to children against the risk of harm posed by convicted sexual offenders" (para. 65). The retrospective application of these amendments is rationally connected to that protective purpose, since the risk an offender poses to reoffend sexually against children is not affected by whether the offence occurred before or after the measure's enactment. And, given Parliament's objective of enhancing the protections that s. 161 affords to children, there is no less-impairing alternate measure that would allow for s. 161(1)'s protections to be realized in respect of an offender who committed his or her offence before the amendments came into force and who poses a risk to reoffend.

B. *Balancing Salutary and Deleterious Effects*

[140] I agree with the majority that the final stage of the s. 1 analysis allows courts to "transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society" (para. 79). But a robust examination of this impact takes us only so far because, after all, the impact of a provision on a free and democratic society is hardly a measurable thing. The question we are trying to answer is whether "the deleterious effects are out of proportion to the public good achieved by the infringing measure": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 78. Neither criterion is amenable to demonstrative proof. The final proportionality analysis is tied to the practical impacts and benefits of the law, but what is ultimately being weighed is much more abstract and philosophical: the detriment to *Charter*-protected rights against the public benefit sought. We must therefore

[139] Pour se prononcer utilement sur la proportionnalité, il faut donc rechercher plus largement l'intention du législateur. La mesure attentatoire qui doit être soumise à l'examen consiste dans la totalité des modifications apportées à l'art. 161. Je conviens avec les juges majoritaires que l'objectif de cette mesure est « d'accroître la protection qu'offre aux enfants l'art. 161 contre le risque de préjudice que représentent les personnes déclarées coupables d'infractions sexuelles » (par. 65). L'application rétrospective des dispositions issues des modifications a un lien rationnel avec cette vocation protectrice, car le risque que le contrevenant s'en prenne à nouveau sexuellement à des enfants n'a rien à voir avec le fait que l'infraction a été commise avant ou après l'adoption de la mesure. Et vu l'objectif du législateur d'accroître la protection qu'offre aux enfants l'art. 161, aucune autre mesure moins attentatoire ne ferait jouer la protection offerte par l'art. 161 dans le cas du contrevenant qui a commis l'acte criminel avant l'entrée en vigueur des modifications et qui présente un risque de récidive.

B. *Mise en balance des effets bénéfiques et des effets préjudiciables*

[140] Je conviens avec les juges majoritaires que la dernière étape de l'analyse au regard de l'article premier permet au tribunal de « transcender l'objectif de la règle de droit et [de] se livrer à un examen rigoureux de l'incidence de la règle de droit sur la société libre et démocratique canadienne » (par. 79). Cet examen rigoureux est toutefois limité puisque, après tout, on peut difficilement mesurer l'incidence d'une règle de droit sur une société libre et démocratique. La question à laquelle nous tentons de répondre est celle de savoir si « [l]es effets préjudiciables sont disproportionnés [. . .] aux avantages que l'ensemble de la population en tirera » (*Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 78). Le respect de l'un ou l'autre de ces critères ne peut être concrètement démontré. La dernière étape de l'examen de la proportionnalité se rattache à l'incidence réelle et aux effets bénéfiques de la règle de droit, mais l'objet de

be careful to avoid insisting upon too strict an evidentiary burden.

[141] With these general comments in mind, I turn to the majority's proportionality analysis. It suffers, in my respectful view, from several flaws. First, it imposes an evidentiary burden on the state that is impossible to satisfy, especially in the murky area of recidivism risks and criminal law policy. Second, it overstates the deleterious effects of s. 161(1)(c) while understating its salutary effects. Further, the majority's reasons for upholding the retrospective application of s. 161(1)(d) are, in principle, equally applicable to the retrospective application of s. 161(1)(c). In other words, if the majority's reasoning on s. 161(1)(d) is accepted, then the retrospective application of s. 161(1)(c) must also be a proportionate limit on the appellant's s. 11(*i*) right.

(1) The Evidentiary Burden

[142] The majority stresses — almost to a determinative extent — shortcomings it sees in the Crown's social science evidence, concluding that while it sufficiently demonstrates that the sought-after "degree of enhanced protection" for children will be achieved by the retrospective operation of s. 161(1)(d), "the rendering remains largely incomplete" in respect of s. 161(1)(c) (para. 92).

[143] This reasoning is troubling in several respects. First, it departs significantly from this Court's approach to social science evidence and the evidentiary burden borne by the state under s. 1. Social science evidence used to establish legislative facts should ordinarily be adduced through expert witnesses in order to allow its truth to be tested: *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1

la mise en balance est somme toute de nature beaucoup plus abstraite et philosophique : l'effet préjudiciable sur le droit garanti par la *Charte* comparé à l'effet bénéfique recherché pour la société. Nous devons donc nous garder d'imposer un fardeau de preuve trop strict.

[141] Au vu de ces remarques générales, je passe à l'examen de la proportionnalité par les juges majoritaires, lequel, à mon humble avis, comporte plusieurs lacunes. Premièrement, les juges majoritaires imposent à l'État un fardeau de preuve dont il ne pourra jamais s'acquitter, en particulier pour ce qui concerne le monde nébuleux des risques de récidive et des politiques en matière de droit criminel. Deuxièmement, ils exagèrent les effets préjudiciables de l'al. 161(1)c) tout en sous-estimant ses effets bénéfiques. En outre, les raisons qu'ils invoquent pour valider l'application rétrospective de l'al. 161(1)d) valent en principe tout autant pour l'application rétrospective de l'al. 161(1)c). En d'autres mots, si on fait droit à leur raisonnement concernant l'al. 161(1)d), l'application rétrospective de l'al. 161(1)c) doit équivaloir elle aussi à une restriction proportionnée du droit que l'al. 11*i*) garantit à l'appelant.

(1) Le fardeau de preuve

[142] Les juges majoritaires signalent — et ce, de manière presque déterminante dans leurs motifs — les faiblesses de la preuve relevant des sciences sociales produite par le ministère public et concluent que même si cette preuve suffit à démontrer que l'application rétrospective de l'al. 161(1)d) permet d'atteindre le « degré de protection accrue » à offrir aux enfants, « le tableau demeure largement incomplet » pour ce qui est de l'al. 161(1)c) (par. 92).

[143] Ce raisonnement est déroutant sous plusieurs rapports. Premièrement, il rompt sensiblement avec l'approche de la Cour à l'égard de la preuve relevant des sciences sociales et du fardeau de preuve que l'article premier impose à l'État. La preuve relevant des sciences sociales censée établir un fait législatif doit normalement être présentée par un témoin expert de façon à permettre la contestation de sa véracité (*Public School Boards' Assn. of*

S.C.R. 44, at paras. 4-5, per Binnie J. This social science evidence, however, was adduced through a "Brandeis brief", and is untested by the ordinary truth-seeking processes of a trial. Considerable care should therefore be taken in examining this evidence and drawing inferences — whether favourable or adverse from the state's standpoint — from it: *M. v. H.*, [1999] 2 S.C.R. 3, at para. 296, per Bastarache J., writing separate but concurring reasons.

[144] Further, given the complex social context in which Parliament often develops policy — of which the prevention of recidivism in cases of sexual offences against children is clearly an instance — it will sometimes be difficult, if not impossible, for the state to provide reliable and direct evidence of the benefit its measures will achieve. Recidivism rates are derived from statistical extrapolation, psychology, and other elements of social science, which will not always translate easily into proof to the standard of demonstrable justification. As this Court has recognized, "social claims are not always amenable to proof by empirical evidence": *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 144. As a result, "public policy is often made on the basis of incomplete knowledge": S. Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), 34 *S.C.L.R.* (2d) 501, at p. 524. The proportionality analysis should therefore be sensitive to policy-makers' need for a measure of latitude to consider and try previously untried alternatives, particularly when confronting persistent and complex public policy concerns.

[145] This is not to say that these evidentiary difficulties compel acceptance of the Crown's claims. This Court has held that a rigorous s. 1 analysis may also be accomplished by employing "logic [and] reason" in assessing justifiable limits on *Charter*

Alberta c. Alberta (Procureur général), 2000 CSC 2, [2000] 1 R.C.S. 44, par. 4-5, le juge Binnie). Or, dans la présente affaire, la preuve relevant des sciences sociales a été présentée au moyen d'un « mémoire de Brandeis » et sa véracité n'a pas été contestée dans le cadre du processus habituel de recherche de la vérité qu'est le procès. Une grande prudence est donc de mise lorsqu'il s'agit de considérer une telle preuve et d'en tirer des inférences, qu'elles soient favorables ou non à la thèse de l'État (*M. c. H.*, [1999] 2 R.C.S. 3, par. 296 (le juge Bastarache, motifs concordants)).

[144] Par ailleurs, compte tenu du contexte social complexe dans lequel les politiques du législateur voient souvent le jour — et dont un exemple manifeste est la prévention de la récidive en matière d'infractions sexuelles contre des enfants —, il sera parfois difficile, voire impossible, pour l'État d'avancer une preuve fiable et directe des effets bénéfiques d'une mesure. Les taux de récidive sont établis à partir d'extrapolations statistiques, de données psychologiques et d'autres éléments relevant des sciences sociales qui ne pourront pas toujours se transformer d'emblée en éléments de preuve susceptibles de satisfaire à la norme de la justification démontrable. La Cour reconnaît que « [l]es revendications de nature [. . .] sociale ne se prêtent pas toujours à une preuve empirique » (*Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3, par. 144). Il s'ensuit que [TRADUCTION] « les politiques publiques voient souvent le jour à partir de données incomplètes » (S. Choudhry, « So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1 » (2006), 34 *S.C.L.R.* (2d) 501, p. 524). L'examen de la proportionnalité devrait donc tenir compte de la nécessité qu'un décideur jouisse d'une certaine latitude pour envisager une solution inédite et la mettre à l'essai, surtout lorsqu'il s'attaque à un problème d'intérêt public à la fois persistant et complexe.

[145] Pour autant, de telles difficultés au chapitre de la preuve n'obligent pas le tribunal à faire droit aux prétentions du ministère public. La Cour a statué qu'on pouvait aussi se livrer à une analyse rigoureuse au regard de l'article premier en recourant

rights: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 78; see also *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 503-4, per Sopinka J.; *Keegstra*, at p. 776, per Dickson C.J.; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 107, per Bastarache J.; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 85-94, per McLachlin C.J.; *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, at para. 20, per Bastarache J., and paras. 100-103, per Abella J., dissenting. By applying this approach here (instead of demanding empiricism where none can exist), the salutary effects of s. 161(1)(c) become clear, as does the true scope of its deleterious effects.

« à la logique [et] à la raison » pour décider si la restriction d'un droit garanti par la *Charte* est justifiable ou non (*Harper c. Canada (Procureur général)*, 2004 CSC 33, [2004] 1 R.C.S. 827, par. 78; voir également *R. c. Butler*, [1992] 1 R.C.S. 452, p. 503-504 (le juge Sopinka); *Keegstra*, p. 776 (le juge en chef Dickson); *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877, par. 107 (le juge Bastarache); *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, par. 85-94 (la juge en chef McLachlin); *R. c. Bryan*, 2007 CSC 12, [2007] 1 R.C.S. 527, par. 20 (le juge Bastarache) et par. 100-103 (la juge Abella, dissidente)). Si la Cour appliquait cette démarche en l'espèce (au lieu d'exiger une preuve empirique alors qu'il n'en existe aucune), les effets bénéfiques de l'al. 161(1)c) apparaîtraient clairement, et l'étendue véritable de ses effets préjudiciables aussi.

(2) Salutary and Deleterious Effects of Section 161(1)(c)

(2) Les effets bénéfiques de l'al. 161(1)c) et ses effets préjudiciables

[146] The majority says that the retrospective operation of s. 161(1)(c) creates serious deleterious effects at an individual and societal level. At an individual level, it views s. 161(1)(c) as going much further in its potential restrictions of an offender's liberty than did its predecessor, since it "prohibits any contact — including communicating by any means — with a person who is under the age of 16 years" (para. 81 (emphasis in original)). It warns that this provision could have the effect of prohibiting offenders from conversing with younger members of his or her family, or that it could prohibit offenders from "freely moving about certain private and public spaces where children are present" (para. 81). At a societal level, the majority says that the retrospective operation of a punitive law "undermines fairness in criminal proceedings and compromises the rule of law" (para. 82) (although this can, of course, be said of any measure which infringes s. 11(*i*)).

[146] Les juges majoritaires estiment que l'application rétrospective de l'al. 161(1)c) a de sérieux effets préjudiciables sur les plans individuel et social. Sur le plan individuel, ils sont d'avis que l'al. 161(1)c) va beaucoup plus loin que la disposition qu'il remplace dans la restriction éventuelle du droit du contrevenant à la liberté en ce qu'il « interdi[t] d'avoir des contacts — notamment communiquer par quelque moyen que ce soit — avec une personne âgée de moins de seize ans » dans un lieu public ou privé (par. 81 (souligné dans l'original)). Ils préviennent que la disposition pourrait interdire au contrevenant de parler avec les jeunes membres de sa famille ou « de se trouver dans un endroit privé ou public où il y a des enfants » (par. 81). Sur le plan social, ils font valoir que l'application rétrospective d'une disposition à caractère punitif « compromet l'équité des procédures criminelles et la primauté du droit » (par. 82) (bien que l'on puisse évidemment dire la même chose de toute mesure qui contrevient à l'al. 11*i*)).

[147] The general restriction on liberty or security of the person which results from retrospectively applied punishment is not, however, relevant to the inquiry under s. 11(*i*) of the *Charter*. What is

[147] La restriction générale du droit à la liberté ou à la sécurité de la personne qui découle d'une peine appliquée rétrospectivement n'a cependant pas à être considérée dans l'analyse que commande

relevant when assessing the deleterious impact upon the offender of a retrospectively applied punitive law is *the degree by which it increases punishment* relative to the original law. For example, a retrospective increase in a mandatory minimum term of incarceration from one year to 14 years would have a greater deleterious impact on offenders and on the rule of law than would a retrospective increase in a fine from $100 to $101. But, again, this is because of the relative differences in the degree of increased punishment wrought by such measures, and not because of the general restrictions on liberty or security of the person that they impose. Again, s. 11(*i*) is not concerned with the nature of the punishment, but with its retrospective increase.

[148] Further, the majority's conclusion regarding the deleterious impact upon the offender's liberty interests is, in my view, overstated.

[149] It is useful to return to the text of s. 161(1)(c):

161 (1) . . . the court that sentences the offender . . . shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from

. . .

(c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate . . . .

[150] Section 161(1)(c) contains two crucial qualifications which circumscribe its deleterious impact upon an offender's liberty interest. First, the matter is left to the sentencing judge's discretion, both as to whether to impose conditions ("shall consider making and may make"), and as to the tailoring of the conditions themselves ("subject to the conditions or exemptions that the court directs"). Second, a s. 161(1)(c) order — even when imposed without

l'al. 11*i*) de la *Charte*. Ce qui doit être pris en compte pour apprécier l'effet préjudiciable sur le contrevenant d'une disposition à caractère punitif appliquée rétrospectivement c'est *le degré d'accroissement de la peine* par rapport à la disposition antérieure. À titre d'exemple, l'accroissement rétrospectif qui ferait passer une peine d'emprisonnement minimale obligatoire d'un an à 14 ans aurait un effet préjudiciable plus grand sur le contrevenant et sur la primauté du droit que l'accroissement rétrospectif qui ferait passer une amende de 100 $ à 101 $. Or, je le répète, il en est ainsi en raison des différents degrés d'accroissement de la peine qui correspondent à ces mesures, et non de la restriction générale du droit à la liberté ou à la sécurité de la personne qui découle de celles-ci. Rappelons que l'analyse au regard de l'al. 11*i*) ne s'intéresse pas à la nature de la peine, mais bien à son accroissement rétrospectif.

[148] Par ailleurs, la conclusion des juges majoritaires concernant l'effet préjudiciable sur le droit à la liberté du contrevenant est à mon sens exagérée.

[149] Considérons à nouveau le texte de l'al. 161(1)c) :

161 (1) . . . le tribunal qui [. . .] inflige une peine [au contrevenant] [. . .], sous réserve des conditions ou exemptions qu'il indique, peut interdire au contrevenant

. . .

c) d'avoir des contacts — notamment communiquer par quelque moyen que ce soit — avec une personne âgée de moins de seize ans, à moins de le faire sous la supervision d'une personne que le tribunal estime convenir en l'occurrence.

[150] L'alinéa 161(1)c) renferme deux éléments cruciaux qui circonscrivent son effet préjudiciable sur le droit à la liberté du contrevenant. D'abord, le juge se voit conférer un pouvoir discrétionnaire lui permettant à la fois de prononcer une interdiction (« peut interdire au contrevenant ») et d'adapter celle-ci (« sous réserve des conditions ou exemptions qu'il indique »). Ensuite, l'interdiction prononcée sur le fondement de l'al. 161(1)c) —

other conditions or exemptions — still contains the internal qualification that the prohibition of contact with a person under the age of 16 years only applies to such contact which occurs without the "supervision of a person whom the court considers appropriate".

[151] In other words, an offender who seeks to interact with, for example, younger members of his or her family, may do so either by seeking an exemption or under the supervision of a person the court considers appropriate. Similarly — and assuming that, as the majority suggests, freely moving about in a public space where children are present is sufficient to constitute "contact" or to risk "contact" (a suggestion to which I return below) — were an offender to provide a legitimate reason for being in a public space where children are present, that offender may obtain an exemption for that particular place, or may be in that place under the supervision of a person the court considers appropriate. In determining whether such exemptions are appropriate, the sentencing court must of course consider the danger the offender poses to re-offend sexually against children. But the point is that s. 161(1)(c) gives a sentencing judge the tools to ensure that the offender's liberty is not restricted more than is necessary to mitigate that offender's risk.

[152] As to the meaning of "contact", the majority's assessment of the deleterious effects of s. 161(1)(c)'s retrospective application largely rests on an overly expansive interpretation of the meaning of "contact" in s. 161(1)(c). More to the point, the majority's suggestion that merely "moving about" in a public space where children are present constitutes or risks "contact" represents a strained interpretation of the scope of the restriction on contact, and is directly at odds with the well-established principle that the criminal law's prohibitions on conduct should be construed strictly: *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paras. 38-39, per Lamer C.J. To the extent, therefore, that the meaning of "contact" is ambiguous, it "must be interpreted in

assortie ou non de conditions ou d'exemptions — renferme toujours un élément intrinsèque qui fait en sorte que l'interdiction d'avoir des contacts avec une personne âgée de moins de 16 ans ne vaut que pour les contacts qui ont lieu sans la « supervision d'une personne que le tribunal estime convenir en l'occurrence ».

[151] Autrement dit, le contrevenant qui souhaite interagir avec, par exemple, un jeune membre de sa famille peut le faire moyennant une exemption ou sous la supervision d'une personne que le tribunal estime convenir en l'occurrence. De même — et à supposer, comme le laissent entendre les juges majoritaires, que le fait de se trouver dans un lieu privé ou public où il y des enfants suffise pour qu'il y ait « contacts » ou risque de « contacts » (ce sur quoi je reviendrai) —, le contrevenant qui avancerait un motif légitime de se trouver dans un lieu public où il y a des enfants pourrait obtenir une exemption pour ce lieu en particulier ou pourrait s'y trouver sous la supervision d'une personne que le tribunal estime convenir en l'occurrence. Pour décider de l'opportunité d'une telle exemption, le juge qui détermine la peine doit bien sûr tenir compte du risque que le contrevenant récidive et s'en prenne à nouveau sexuellement à des enfants. L'alinéa 161(1)c) lui offre donc des avenues pour faire en sorte que le droit à la liberté du contrevenant ne soit pas restreint plus qu'il ne le faut pour atténuer le risque qu'il représente.

[152] En ce qui a trait au sens du mot « contacts » employé à l'al. 161(1)c), l'appréciation par les juges majoritaires des effets préjudiciables de l'application rétrospective de l'alinéa repose en grande partie sur une interprétation indûment libérale de ce mot. Plus précisément, leur affirmation selon laquelle le simple fait de « se trouver » dans un lieu public où il y a des enfants équivaut à « avoir des contacts » ou présente un risque d'« avoir des contacts » revient à forcer l'interprétation de la portée de l'interdiction des contacts et va directement à l'encontre du principe bien établi en droit criminel voulant que l'interdiction d'une conduite doive être interprétée restrictivement (*R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 38-39, le juge en chef Lamer).

the manner most favourable to accused persons": *McIntosh*, at para. 39.

[153] While overstating the deleterious effects of s. 161(1)(c)'s retrospective operation, the majority also understates its salutary effects. The risk that some offenders pose to reoffend sexually against children simply cannot be mitigated by the original version of s. 161(1). The appellant presents an example of this. Having committed several designated offences against his infant daughter, he was found by the sentencing judge to pose a "substantial" risk to reoffend sexually against children. While s. 161(1)(a) would have allowed the sentencing judge to restrict the offender's presence in specified public places such as public parks and public swimming areas in which children are present or could reasonably be expected to be present, the sentencing judge could not tailor a s. 161(1) order to restrict the appellant's ability to interact with children in private. But this is, of course, precisely where the appellant and other similar offenders pose the greatest risk to children. The evidence before Parliament showed that (1) of the children of the age of five years and less who were the victims of sexual offences in 2009, approximately 60% of boys and 70% of girls were victimized by family members; and (2) most victims under the age of 16 were victimized by family members or acquaintances. Far from "speculative" (para. 95), then, the salutary effects of s. 161(1)(c)'s retrospective operation seem manifest. It restricts an offender whose offences predate the amendments to s. 161(1)(c) from having unsupervised access to children, both in private and in public, where the sentencing judge determines that such a condition is necessary to address a risk that the offender will commit further sexual offences against children.

Dès lors, dans la mesure où le mot « contacts» n'a pas un sens clair, il « faut [l']interpréter [. . .] de la façon qui favorisera le plus l'accusé » (*McIntosh*, par. 39).

[153] S'ils exagèrent les effets préjudiciables de l'application rétrospective de l'al. 161(1)c), les juges majoritaires sous-estiment ses effets bénéfiques. Le risque que certains contrevenants récidivent et s'en prennent à nouveau sexuellement à des enfants ne peut tout simplement pas être réduit en appliquant la version antérieure du par. 161(1). L'appelant en est un bon exemple. Comme il avait perpétré plusieurs infractions énumérées à l'encontre de sa propre fillette, le juge a estimé qu'il existait un risque [TRADUCTION] « important » qu'il récidive et s'en prenne à nouveau sexuellement à des enfants. L'alinéa 161(1)a) aurait certes permis au juge de lui interdire de se rendre dans certains lieux publics, tel un parc ou un lieu de baignade fréquenté par des enfants ou dont on peut raisonnablement s'attendre à ce qu'il soit fréquenté par des enfants, mais il n'aurait pu adapter l'interdiction fondée sur le par. 161(1) de manière à l'empêcher d'interagir avec des enfants dans un lieu privé. Or, c'est précisément là où l'appelant et d'autres délinquants du même acabit présentent le risque le plus grand pour les enfants. Selon la preuve dont disposait le législateur, (1) parmi les enfants de cinq ans et moins qui ont été victimes d'infractions sexuelles en 2009, environ 60 p. 100 des garçons et 70 p. 100 des filles l'ont été aux mains de membres de leur famille et (2) la plupart des victimes de moins de 16 ans ont subi leur triste sort aux mains de membres de leur famille ou de connaissances. Ainsi, loin d'être « conjecturaux » (par. 95), les effets bénéfiques de l'application rétrospective de l'al. 161(1)c) paraissent manifestes. Cette dernière empêche le contrevenant dont les actes criminels sont antérieurs à la modification de l'al. 161(1)c) d'avoir accès sans supervision à des enfants, que ce soit dans un lieu privé ou public, lorsque le juge qui détermine la peine estime qu'une interdiction en ce sens est nécessaire pour contrer le risque que le contrevenant commette à nouveau des infractions sexuelles contre des enfants.

[154] The majority's consideration of the deleterious effects of the retrospective operation of this provision also views as significant the "dearth of a compelling temporal justification" for s. 161(1)(c)'s retrospective operation, in the sense that "there appears to have been little change in the nature and degree of risk facing children since the last time s. 161(1) was amended" (para. 83). But with respect, and even assuming this concern could fairly be characterized as "temporal" in nature, this is not the sort of temporal concern that s. 11(*i*) engages, being the retrospective application of punishment. The majority, is, in substance, questioning whether Parliament's objective — which the majority has already found to have met the "pressing and substantial" objective requirement of *Oakes* — was pressing and substantial. Further, even if this "temporal justification" were an appropriate consideration at this stage of the analysis, it should not be virtually determinative when assessing the deleterious impact of a retrospective punishment. Bearing in mind that the record indicates that Parliament was responding to what it believed to be a grave social harm — which harm the majority acknowledges as persistent — it is worth recalling this Court's statement in *Keegstra* (at p. 776, per Dickson C.J.) that it is "well accepted that Parliament can use the criminal law to prevent the risk of serious harms". It does not matter whether that risk has remained constant or increased, or whether it is longstanding or emerging. This Court has never, for example, required the Crown to advance a compelling "temporal" justification to uphold *Charter*-infringing impaired driving legislation by showing that the persistent social harm of impaired driving has taken a turn for the worse: see, e.g., *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3; *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187 (upholding the presumption of identity in s. 258(1)(d.1) of the *Criminal Code*). Parliament should be entitled, within constitutional limits, to innovate in finding a solution to chronic harms, irrespective of whether the incidence of such harms has remained stable, increased, or even declined.

[154] Dans leur examen des effets préjudiciables, les juges majoritaires tiennent également pour importante « [l]'inexistence d'une justification d'ordre temporel convaincante » de l'application rétrospective de l'al. 161(1)c) en ce sens que « la nature et le degré du risque auquel sont exposés les enfants semblaient avoir peu changé depuis la modification précédente du par. 161(1) » (par. 83). Mais, soit dit en tout respect, à supposer même que cette préoccupation puisse être « d'ordre temporel », il ne s'agit pas du genre de préoccupation « d'ordre temporel » qui intéresse l'al. 11*i*), à savoir l'application rétrospective d'une peine. Les juges majoritaires remettent essentiellement en cause l'objectif du législateur, dont ils estiment pourtant qu'il est « urgent et réel » suivant le critère de l'arrêt *Oakes*. En outre, même s'il convenait à ce stade de l'analyse de se pencher sur l'existence d'une « justification d'ordre temporel », cette considération ne devrait pas être déterminante, pour ainsi dire, dans l'appréciation de l'effet préjudiciable d'une peine d'application rétrospective. Gardant présent à l'esprit que, selon le dossier, le législateur s'attaquait à ce qui constituait selon lui un grave préjudice social — un préjudice que les juges majoritaires tiennent pour persistant —, il vaut la peine de rappeler les propos de la Cour dans l'arrêt *Keegstra* (p. 776, le juge en chef Dickson) selon lesquels il est « généralement reconnu que le Parlement peut se servir du droit criminel pour prévenir le risque de préjudices graves ». Peu importe que le risque soit demeuré constant ou se soit accru, ou qu'il existe de longue date ou depuis peu. Par exemple, la Cour n'a jamais exigé, pour valider une disposition sur la conduite en état d'ébriété qui contrevenait à la *Charte*, que le ministère public établisse l'existence d'une justification « d'ordre temporel » convaincante et démontre l'aggravation du préjudice persistant causé par la conduite en état d'ébriété (voir p. ex. *R. c. Orbanski*, 2005 CSC 37, [2005] 2 R.C.S. 3; *R. c. St-Onge Lamoureux*, 2012 CSC 57, [2012] 3 R.C.S. 187 (confirmant la présomption d'identité prévue à l'al. 258(1)d.1) du *Code criminel*). Le législateur devrait pouvoir, à l'intérieur des limites fixées par la Constitution, faire preuve d'innovation dans la recherche d'une solution à un préjudice chronique, peu importe que l'incidence de ce préjudice soit demeurée stable, ait augmenté ou ait même diminué.

[155] To be clear, nobody doubts that s. 11(*i*) deals with temporal considerations, because, as the majority says, it is "about the *timing* of changes to penal laws" (para. 93 (emphasis in original)). But the "temporal" concern identified by the majority speaks more (if not exclusively) to the pressing and substantial nature of Parliament's objective than it does to the deleterious effects of retrospective punishment on the rule of law (e.g. para. 93: ". . . temporal factors that may help explain Parliament's rationale . . ."). *All* retrospective changes to the law derogate from the rule of law, irrespective of Parliament's reasons for enacting them. *All* retrospective punishment is imposed without fair warning, denying a person "the opportunity to know what is expected of her and to decide what to do in light of that knowledge": D. Lyons, *Ethics and the rule of law* (1984), at p. 75. In every such case, and even where the majority's concern about whether there has been "change in the nature and degree of risk" (para. 83) is assuaged, the rule of law is harmed: see L. L. Fuller, *The Morality of Law* (rev. ed. 1969), at pp. 53-54; C. Sampford, *Retrospectivity and the Rule of Law* (2006), at p. 81. The relevance of this concern driving the majority's assessment of the deleterious impacts on the rule of law in this case is therefore far from evident.

[155] Précisons que nul ne doute que les considérations d'ordre temporel importent pour les besoins de l'al. 11*i*) puisque, comme le disent les juges majoritaires, celui-ci « s'intéresse [. . .] au *moment où intervient* la modification d'une disposition à caractère punitif » (par. 93 (en italique dans l'original)). Or, cette préoccupation que relèvent mes collègues a plus (sinon seulement) à voir avec la nature urgente et réelle de l'objectif du législateur qu'avec les effets préjudiciables d'une peine d'application rétrospective sur la primauté du droit (p. ex. au par. 93 : « . . . les considérations d'ordre temporel qui sont susceptibles d'expliquer la décision du législateur . . . »). *Toute* modification apportée rétrospectivement à une règle de droit porte atteinte à la primauté du droit, quelle que soit la motivation du législateur. *Toute* peine d'application rétrospective est infligée sans que le contrevenant n'ait pu vraiment savoir qu'il en était passible et a privé ce dernier de [TRADUCTION] « la possibilité de savoir ce qu'on attendait de lui et d'agir en conséquence » (D. Lyons, *Ethics and the rule of law* (1984), p. 75). Chaque fois alors, même lorsque les juges majoritaires se soucient moins de savoir si « la nature et le degré du risque [ont] changé » (par. 83), la primauté du droit est compromise (voir L. L. Fuller, *The Morality of Law* (éd. rév. 1969), p. 53-54; C. Sampford, *Retrospectivity and the Rule of Law* (2006), p. 81). La pertinence de cette préoccupation qui sous-tend l'appréciation, par les juges majoritaires, des effets préjudiciables de la mesure sur la primauté du droit en l'espèce est donc loin d'aller de soi.

(3) Inconsistent Treatment of Paragraphs (c) and (d)

(3) Analyse différente des al. c) et d)

[156] I also observe that, apart from the matter of "temporal" justifications which I have just addressed, all the reasons identified by the majority in support of its conclusion that the limit imposed on the appellant's s. 11(*i*) right by the retrospective application of s. 161(1)(d) is justified are equally applicable to the retrospective application of s. 161(1)(c).

[156] Outre la question de l'existence d'une justification « d'ordre temporel », examinée précédemment, je remarque aussi que toutes les raisons invoquées par les juges majoritaires à l'appui de leur conclusion selon laquelle est justifiée la restriction du droit que l'al. 11*i*) garantit à l'appelant, du fait de l'application rétrospective de l'al. 161(1)d), valent également pour l'application rétrospective de l'al. 161(1)c).

[157] In this regard, the majority observes in respect of s. 161(1)(d) that the harms at stake are

[157] Les juges majoritaires signalent que, pour ce qui concerne l'al. 161(1)d), les préjudices en jeu

"particularly powerful"; that the statutory regime "is highly tailored and discretionary"; and that the Internet prohibition is "not among the most onerous punishments, such as increased incarceration" (para. 114). But each of these reasons support the conclusion that the retrospective operation of s. 161(1)(c) is justified as well. Section 161(1)(c) addresses precisely the same "particularly powerful" concern as does s. 161(1)(d), being sexual offences against children. The condition in s. 161(1)(c), as I have explained, is also "highly tailored and discretionary", since it is imposed only where the sentencing judge deems it necessary, and also since it is subject to such exemptions as the sentencing judge sees fit to allow. And the punishment imposed by s. 161(1)(c) is "not among the most onerous punishments, such as increased incarceration", since it prohibits an offender only from having unsupervised contact with a child. It therefore follows that, if the retrospective operation of s. 161(1)(d) is a proportional and justified limit on an offender's s. 11(*i*) right, the retrospective operation of s. 161(1)(c) must be as well.

(4) The Proper Balancing

[158] I accept that the retrospective operation of the amendments to s. 161(1) works a relative increase in punishment that is not trivial. Section 161(1)(c)'s conditions on unsupervised contact with children regardless of location is more restrictive than the conditions imposable under the original provision. And s. 161(1)(d)'s restriction on Internet access goes much further in restricting an offender's use of computers than did the original provision. I also accept that, like any other s. 11(*i*) infringement, the retrospective operation of each has a deleterious impact on the rule of law and fairness in the criminal justice system, as each signifies an increase in possible punishment without notice to the individual.

sont « particulièrement convaincants », le régime législatif « a une portée très bien circonscrite et confère un pouvoir discrétionnaire » et l'interdiction d'utiliser Internet « ne fait pas partie des sanctions les plus lourdes, telle la peine d'emprisonnement accrue » (par. 114). Pourtant, chacune de ces raisons appuie la conclusion selon laquelle l'application rétrospective de l'al. 161(1)c) est elle aussi justifiée. L'alinéa 161(1)c) s'attaque précisément au même préjudice « particulièrement convaincant » que l'al. 161(1)d), à savoir les infractions sexuelles contre les enfants. Comme je l'explique précédemment, l'interdiction que prévoit l'al. 161(1)c) est elle aussi « très bien circonscrite et [relève du] pouvoir discrétionnaire », puisqu'elle n'est prononcée que lorsque le juge qui détermine la peine conclut qu'elle est nécessaire et, également, qu'elle fait l'objet de toute exemption que le juge indique. Et la peine infligée par l'al. 161(1)c) « ne fait pas partie des sanctions les plus lourdes, telle la peine d'emprisonnement accrue », car elle interdit seulement au contrevenant d'avoir des contacts non supervisés avec un enfant. Dès lors, si l'application rétrospective de l'al. 161(1)d) constitue une restriction proportionnée et justifiée du droit que l'al. 11*i*) garantit au contrevenant, il doit en aller de même pour l'application rétrospective de l'al. 161(1)c).

(4) La mise en balance qui s'impose

[158] Je reconnais que l'application rétrospective des dispositions issues des modifications apportées au par. 161(1) entraîne un accroissement relatif de la peine qui n'est pas négligeable. L'interdiction que l'al. 161(1)c) fait au contrevenant d'avoir des contacts non supervisés avec un enfant, peu importe le lieu, est plus restrictive que celle qui pouvait résulter de l'application de la disposition antérieure. Et l'interdiction d'utiliser Internet prévue à l'al. 161(1)d) a une bien plus grande portée que celle d'utiliser un ordinateur que prévoyait la disposition antérieure. Je reconnais également que, comme n'importe quelle atteinte au droit garanti par l'al. 11*i*), l'application rétrospective de chacune des dispositions a un effet préjudiciable sur la primauté du droit et sur l'équité du système de justice criminelle, chacune d'elle emportant l'infliction éventuelle d'une peine accrue dont l'intéressé ne se savait pas passible.

[159] As for salutary effects, the evidence before Parliament and before this Court shows that a significant number of offenders convicted of designated sexual offences pose a risk to reoffend sexually against children. It also shows that most child victims are known to sexual offenders — they are not strangers taken from a public place, the victims of random chance. And it shows that Internet-based offending is rapidly increasing, which could realistically result in contact-based offences being committed against a child. Finally, it shows that the previous version of s. 161(1) could not address either of these issues — unsupervised contact with a child whether the child is known to the offender or not, and unsupervised access to the Internet for offenders who are likely to use the Internet to facilitate sexual offending.

[159] Quant aux effets bénéfiques, il appert de la preuve dont disposait le législateur et qui figure au dossier de la Cour qu'un nombre élevé d'auteurs d'infractions sexuelles énumérées sont susceptibles de récidiver et de s'en prendre à nouveau sexuellement à des enfants. Elle montre par ailleurs que la plupart des jeunes victimes sont connues des délinquants sexuels, qu'elles ne sont pas choisies au hasard dans un lieu public. Elle nous apprend en outre que la criminalité liée à Internet s'accroît rapidement, ce qui pourrait effectivement mener à la perpétration d'infractions liées aux contacts. Enfin, selon la preuve, la version antérieure du par. 161(1) ne pouvait réprimer aucun de ces actes, soit les contacts non supervisés avec des enfants, connus ou non du contrevenant, et l'accès non supervisé à Internet par un contrevenant susceptible d'utiliser la toile pour faciliter la commission d'une infraction sexuelle.

[160] Balancing these deleterious and salutary effects at the proportionality stage of the s. 1 analysis entails, as the majority recognizes, "difficult value judgments" (para. 79). This is never a "neutral utilitarian calculus": *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), at p. 369, per Brennan J., dissenting in part. Despite claims to the contrary (see D. M. Beatty, *The Ultimate Rule of Law* (2004), at pp. 166-69; A. Barak, "Proportionality and Principled Balancing" (2010), 4 *L. & Ethics Hum. Rts.* 1 (abstract)), undertaking a proportionality analysis does not entail making a truly objective calculation, because it requires the court to weigh incommensurables — in this case, to weigh the deleterious impact on the sexual offender and on the rule of law against the possible benefit of protecting children from sexual offenders.

[160] La mise en balance de ces effets préjudiciables et de ces effets bénéfiques à l'étape de l'examen de la proportionnalité que comporte l'analyse au regard de l'article premier suppose, comme le reconnaissent les juges majoritaires, « des jugements de valeur difficiles » (par. 79). Il ne s'agit jamais d'un [TRADUCTION] « calcul utilitaire objectif » (*New Jersey c. T.L.O.*, 469 U.S. 325 (1985), p. 369, le juge Brennan, dissident en partie). Malgré les prétentions qui vont dans le sens contraire (voir D. M. Beatty, *The Ultimate Rule of Law* (2004), p. 166-169; A. Barak, « Proportionality and Principled Balancing » (2010), 4 *L. & Ethics Hum. Rts.* 1 (résumé)), l'examen de la proportionnalité ne comporte pas de véritable calcul objectif, car le tribunal doit soupeser des choses non mesurables, en l'occurrence l'effet préjudiciable sur le délinquant sexuel et sur la primauté du droit par rapport à l'effet bénéfique possible de la protection des enfants contre les délinquants sexuels.

[161] Despite the impossibility of weighing incommensurables objectively, a reviewing court must nevertheless come to a reasoned conclusion. In my view, the salutary effects pursued are worth the cost in rights limitation: the harms sought to be addressed are grave, persistent, and worthy of Parliament's efforts in the criminal law realm. The

[161] Malgré l'impossibilité de soupeser objectivement des choses non mesurables, le tribunal de révision doit néanmoins arriver à une conclusion raisonnée. Selon moi, les effets bénéfiques escomptés justifient la restriction du droit: les préjudices que l'on cherche à contrer sont graves et persistants et justifient la prise de mesures législatives

provisions are sufficiently tailored so that no offenders' s. 11(*i*) rights will be unduly limited — it is only those offenders who pose a risk to reoffend against children who will be subject to a s. 161(1) order, and it is only those offenders who pose a risk to reoffend either through unsupervised access to children or unsupervised use of the Internet who will be retrospectively subject to the impugned provisions. Neither of the impugned provisions works a drastic increase in the punishment imposed. On balance, the potential salutary effect of the retrospective operation of s. 161(1)(c) and s. 161(1)(d) of better protecting children from all sexual offenders who pose a risk to reoffend sexually against them, regardless of when the offender committed a designated offence, outweighs the modest impact on fairness and the rule of law.

III. Conclusion

[162] In my view, the retrospective operation of s. 161(1)(c) is a justified infringement on the appellant's s. 11(*i*) right. I would therefore dismiss the appeal and affirm the s. 161(1) order imposed by the majority of the Court of Appeal.

Appeal allowed in part, ABELLA *and* BROWN JJ. *dissenting in part.*

Solicitors for the appellant: Eric Purtzki, Vancouver; Garth Barriere, Vancouver.

Solicitor for the respondent: Attorney General of British Columbia, Victoria.

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

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

relevant du droit criminel. La portée des dispositions est suffisamment circonscrite pour que les droits du contrevenant garantis par l'al. 11*i*) ne soient pas indûment restreints. Ce ne sont en effet que les contrevenants susceptibles de récidiver et de s'en prendre à nouveau à des enfants qui font l'objet d'une interdiction fondée sur le par. 161(1) et ce ne sont que les contrevenants susceptibles de récidiver soit par l'accès non supervisé à des enfants, soit par l'utilisation non supervisée d'Internet qui feront l'objet de l'application rétrospective des dispositions en cause. Ni l'une ni l'autre de ces dernières n'emportent un accroissement draconien de la peine infligée. Tout bien considéré, l'effet bénéfique potentiel de l'application rétrospective des al. 161(1)c) et d) qui réside dans la protection accrue des enfants contre tous les délinquants sexuels susceptibles de récidiver et de s'en prendre à nouveau à eux, peu importe le moment où le contrevenant a commis l'acte criminel, prime l'effet modéré qui en résulte sur l'équité des procédures criminelles et sur la primauté du droit.

III. Conclusion

[162] À mon sens, l'application rétrospective de l'al. 161(1)c) constitue une atteinte justifiée au droit que l'al. 11*i*) garantit à l'appelant. Je serais donc d'avis de rejeter le pourvoi et de confirmer l'ordonnance des juges majoritaires de la Cour d'appel fondée sur le par. 161(1).

Pourvoi accueilli en partie, les juges ABELLA *et* BROWN *sont dissidents en partie.*

Procureurs de l'appelant : Eric Purtzki, Vancouver; Garth Barriere, Vancouver.

Procureur de l'intimée : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

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

Solicitors for the intervener Association des avocats de la défense de Montréal: Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: John Norris, Toronto; University of Toronto Faculty of Law, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Henein Hutchison, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Vancouver.

Procureurs de l'intervenante l'Association des avocats de la défense de Montréal : Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Procureurs de l'intervenant David Asper Centre for Constitutional Rights : John Norris, Toronto; University of Toronto Faculty of Law, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Henein Hutchison, Toronto.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : McCarthy Tétrault, Vancouver.

Thomson Newspapers Company Limited, doing business as *The Globe and Mail, The Evening Telegram, Winnipeg Free Press* and *Times-Colonist,* and Southam Inc. *Appellants*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of British Columbia and the Canadian Civil Liberties Association *Interveners*

INDEXED AS: THOMSON NEWSPAPERS CO. *v.* CANADA (ATTORNEY GENERAL)

File No.: 25593.

1997: October 9; 1998: May 29.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka,* Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Opinion surveys — Elections — Federal elections legislation prohibiting publication, dissemination or broadcasting of opinion survey results on last weekend of election campaign and on polling day — Whether legislation infringes freedom of expression — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Canada Elections Act, R.S.C., 1985, c. E-2, s. 322.1.

Constitutional law — Charter of Rights — Right to vote — Access to information during election — Restrictions on opinion survey results — Canadian Charter of Rights and Freedoms, s. 3 — Canada Elections Act, R.S.C., 1985, c. E-2, s. 322.1.

The appellants brought an application for a declaration that s. 322.1 of the *Canada Elections Act* violates freedom of expression and the right to vote guaranteed

*Sopinka J. took no part in the judgment.

Thomson Newspapers Company Limited, faisant affaire sous les dénominations *The Globe and Mail, The Evening Telegram, Winnipeg Free Press* et *Times-Colonist,* et Southam Inc. *Appelantes*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général de la Colombie-Britannique et l'Association canadienne des libertés civiles *Intervenants*

RÉPERTORIÉ: THOMSON NEWSPAPERS CO. *c.* CANADA (PROCUREUR GÉNÉRAL)

N° du greffe: 25593.

1997: 9 octobre; 1998: 29 mai.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Sopinka*, Gonthier, Cory, McLachlin, Iacobucci, Major et Bastarache.

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

Droit constitutionnel — Charte des droits — Liberté d'expression — Sondages d'opinion — Élections — Loi électorale fédérale interdisant de publier, de diffuser ou d'annoncer les résultats de sondages d'opinion au cours de la dernière fin de semaine d'une campagne électorale et le jour du scrutin — Cette loi porte-t-elle atteinte à la liberté d'expression? — Dans l'affirmative, cette atteinte est-elle justifiable? — Charte canadienne des droits et libertés, art. 1, 2b) — Loi électorale du Canada, L.R.C. (1985), ch. E-2, art. 322.1.

Droit constitutionnel — Charte des droits — Droit de vote — Accès à l'information durant une élection — Restrictions visant les résultats de sondages d'opinion — Charte canadienne des droits et libertés, art. 3 — Loi électorale du Canada, L.R.C. (1985), ch. E-2, art. 322.1.

Les appelantes ont présenté une requête sollicitant une déclaration portant que l'art. 322.1 de la *Loi électorale du Canada* viole la liberté d'expression et le droit

*Le juge Sopinka n'a pas pris part au jugement.

by ss. 2(*b*) and 3 of the *Canadian Charter of Rights and Freedoms*. The impugned section prohibits the broadcasting, publication or dissemination of opinion survey results during the final three days of a federal election campaign. The Ontario Court (General Division) denied the appellants' application, holding that s. 322.1 did not violate a citizen's right to vote and that, although the section infringed freedom of expression, it was justified under s. 1 of the *Charter*. The Court of Appeal affirmed the judgment.

Held (Lamer C.J. and L'Heureux-Dubé and Gonthier JJ. dissenting): The appeal should be allowed.

Per Cory, McLachlin, Iacobucci, Major and Bastarache JJ.: Section 322.1 of the *Canada Elections Act*, which applies only to "new" poll results, infringes s. 2(*b*) of the *Charter*. The publication of opinion survey results is an activity that conveys meaning and therefore falls within the ambit of s. 2(*b*). By prohibiting the broadcasting, publication or dissemination of opinion survey results during the final three days of an election campaign, s. 322.1 restricts freedom of expression.

Section 322.1 is not justified under s. 1 of the *Charter*. All the steps of a s. 1 analysis must be undertaken with a close attention to context. Characterizing the context of the impugned provision is important in order to determine the type of proof which a court can demand of the legislator to justify its measures under s. 1. In the course of a contextual approach under s. 1, the vulnerability of the group which the legislator seeks to protect, that group's own subjective fears or apprehension of harm, the inability to measure scientifically a particular harm, and the efficaciousness of a remedy, are all factors which the court must take into account in assessing whether a limit has been demonstrably justified according to the civil standard of proof. Another factor to be considered is the nature of the activity which is infringed. The degree of constitutional protection may vary depending on the nature of the expression at issue. Here, the speech infringed is political information. Opinion surveys regarding political candidates or electoral issues are part of the political process and, thus, at the core of expression guaranteed by the *Charter*. The

de vote garantis respectivement par l'al. 2*b*) et l'art. 3 de la *Charte canadienne des droits et libertés*. L'article contesté interdit d'annoncer, de publier ou de diffuser les résultats de sondages sur les intentions de vote durant les trois derniers jours des campagnes électorales. La Cour de l'Ontario (Division générale) a refusé la requête des appelantes et statué que l'art. 322.1 ne violait pas le droit de vote des citoyens et que, même si cette disposition portait atteinte à la liberté d'expression, elle était justifiée au sens de l'article premier de la *Charte*. La Cour d'appel a confirmé cette décision.

Arrêt (le juge en chef Lamer et les juges L'Heureux-Dubé et Gonthier sont dissidents): Le pourvoi est accueilli.

Les juges Cory, McLachlin, Iacobucci, Major et Bastarache: L'article 322.1 de la *Loi électorale du Canada*, qui s'applique uniquement aux résultats de «nouveaux» sondages, porte atteinte à l'al. 2*b*) de la *Charte*. La publication des résultats de sondages est une activité qui transmet un message et qui, par conséquent, entre dans le champ d'application de l'al. 2*b*). En interdisant d'annoncer, de publier ou de diffuser les résultats de sondages sur les intentions de vote au cours des trois derniers jours des campagnes électorales, l'art. 322.1 limite la liberté d'expression.

L'article 322.1 n'est pas justifié au sens de l'article premier de la *Charte*. Toutes les étapes de l'analyse fondée sur l'article premier doivent être réalisées en accordant une grande attention au contexte. Il importe de qualifier le contexte de la disposition contestée pour déterminer le type de preuve que le tribunal peut demander au législateur d'apporter pour justifier ses mesures au regard de l'article premier. Dans l'application de l'approche contextuelle à l'article premier, la vulnérabilité du groupe que le législateur cherche à protéger, les craintes subjectives ou la crainte de préjudice entretenue par ce groupe, ainsi que l'incapacité de mesurer scientifiquement le préjudice particulier en cause ou l'efficacité d'une réparation sont autant de facteurs que le tribunal doit prendre en considération lorsqu'il décide si une restriction est justifiée suivant la norme de preuve applicable en matière civile. Un autre facteur qui doit être pris en considération est la nature de l'activité à laquelle il est porté atteinte. Le degré de protection constitutionnelle peut varier selon la nature de la forme d'expression en cause. Dans le présent cas, le discours visé par l'atteinte est l'information politique. Les sondages concernant les candidats ou les enjeux électoraux font partie du processus politique et sont, de ce fait, au cœur de la liberté d'expression garantie par la *Charte*. La nature de la forme d'expression en litige tend à indiquer

nature of the expression at issue suggests that a deferential approach is inappropriate in this case.

While the objective of providing a period of rest and reflection for voters prior to going to the polls is not a pressing and substantial objective, the objective of guarding against the possible influence of inaccurate polls late in the election campaign by allowing for a period of criticism and scrutiny immediately prior to election day is of sufficient importance to meet the first step of the s. 1 analysis. The purpose of this particular limitation on expression is to ensure that information which the evidence indicates has an important influence on the choice of at least some voters is presented according to the standards of accuracy which polls are normally expected to attain. To the extent that the votes of some might be distorted as a result of polls being presented in a misleading fashion, such a distortion is clearly a matter which the government may legitimately be concerned to remedy.

The three-day blackout period on the publication of polls will serve, to some degree, the purpose of preventing the use of inaccurate polls by voters by giving critics the opportunity to assess the methodological information made available by the pollster and to question the validity of the poll on that basis. To that extent, the ban is rationally connected to the purpose of the legislation. However, since s. 322.1 does not require the publication of methodological information, the most that could be achieved by the blackout period, if an opinion survey is released without such information, is that the validity of a poll could be undermined by pointing out the failure of the pollster to publish the methodology of the poll.

Section 322.1 does not minimally impair freedom of expression. The section is a very crude instrument in serving the government's purpose. The social science evidence did not establish that Canadian voters are a vulnerable group relative to pollsters and the media who publish polls. The presumption should be that the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information. While some voters clearly do consider polls to be of some value in making their electoral decision, no evidence has been adduced that voters have suffered from any misapprehensions regarding the accuracy of any single poll. Voters are constantly exposed to opinion poll results throughout the election and a single inaccurate poll result is likely to be spotted and discounted appro-

qu'une approche empreinte de retenue est inappropriée en l'espèce.

Alors que l'objectif qui consiste à donner aux électeurs une période de répit et de réflexion avant le scrutin n'est pas urgent et réel, l'objectif qui consiste à prévenir contre l'influence possible de sondages inexacts publiés tard dans les campagnes électorales par l'instauration d'une période de critique et d'examen immédiatement avant le jour du scrutin est suffisamment important pour satisfaire à la première étape de l'analyse fondée sur l'article premier. L'objectif de cette restriction de la liberté d'expression est de faire en sorte que des données qui, selon la preuve, ont une influence importante sur la décision d'au moins certains électeurs soient présentées avec le niveau d'exactitude qu'on attend normalement des sondages. Dans la mesure où la décision de certains électeurs pourrait être faussée par suite de résultats de sondages présentés d'une manière trompeuse, il est alors manifestement légitime pour le gouvernement d'être préoccupé par cette situation et de vouloir y remédier.

L'embargo de trois jours sur les sondages permet, dans une certaine mesure, de réaliser l'objectif qui consiste à empêcher l'utilisation de sondages inexacts par les électeurs, en donnant aux critiques la possibilité d'évaluer l'information fournie par le sondeur sur la méthodologie qu'il a utilisée et de mettre en doute la validité du sondage sur ce plan. Dans cette mesure, l'interdiction a un lien rationnel avec l'objet de la loi. Toutefois, comme l'art. 322.1 n'exige pas la publication de renseignements méthodologiques, l'embargo permettrait tout au plus d'attaquer la validité d'un sondage en signalant l'omission du sondeur de publier des renseignements sur la méthodologie utilisée pour effectuer le sondage.

L'article 322.1 ne porte pas atteinte le moins possible à la liberté d'expression. Cette disposition est un instrument très grossier pour réaliser l'objectif du gouvernement. La preuve fondée sur les sciences sociales n'a pas établi que les électeurs canadiens forment un groupe vulnérable par rapport aux sondeurs et aux médias qui publient les sondages. On doit présumer que l'électeur canadien est un être rationnel, capable de tirer des leçons de son expérience et de juger de façon indépendante de la valeur de certaines sources d'information électorale. Bien que certains électeurs estiment que les sondages peuvent éclairer leur décision, il n'a été présenté aucun élément de preuve établissant que les électeurs ont été victimes de méprise quant à l'exactitude d'un sondage. Les électeurs sont constamment bombardés de sondages pendant toute la campagne, et il est

priately. This is not an appropriate case for the government to respond to the paucity of evidence by relying on the "reasoned apprehension of harm" test. First, the claims of widespread or significant harm based on a logical inference derived from surrounding factors are not compelling in the context of factors which, as in this case, refute such logical inferences. Second, the government is not dealing with a vulnerable group which is in danger of manipulation or abuse by the pollsters or the media because of an essential opposition of interests, or because of the nature of the speech itself. Nor is there a shared understanding amongst Canadians that a single inaccurate poll will mislead them to any undue extent.

Where the contextual factors indicate that the government has not established that the harm which it is seeking to prevent is widespread or significant, a deferential approach to the particular means chosen by the legislature to implement the legislative purpose is not warranted. In this case, s. 322.1 is not narrowly tailored to its objective. The ban is overbroad because it prohibits in the final three days of an election campaign the publication and use by voters of all those polls which would meet the usual standards of accuracy. The ban is also underbroad because it may not adequately disabuse voters of an erroneous impression left by a poll which did not disclose its methodology to critics or the public. The obvious alternative was a mandatory disclosure of methodological information without a publication ban. Although such a provision would still leave the door open to inaccurate poll results published immediately prior to the election having some impact, that possibility would be significantly reduced both by virtue of the reader's initial access to those methodological data, and by the opportunity for rapid response by parties whose interests are prejudiced by the inaccurate poll. The failure to address or explain the reason for not adopting a significantly less intrusive measure which appears as effective as that actually adopted weighs heavily against the justifiability of s. 322.1. Finally, the experience of the international community is inconclusive.

The doubtful benefits of the ban are outweighed by its deleterious effects. The impact of s. 322.1 on freedom of

probable qu'un sondage aux résultats inexacts sera repéré et écarté comme il se doit. Il ne s'agit pas d'un cas où le gouvernement peut obvier au manque de preuve en invoquant le critère de «l'appréhension raisonnée de préjudice». Premièrement, les prétentions relatives à l'existence d'un préjudice répandu ou important, qui sont fondées sur des inférences logiques tirées de facteurs contextuels, ne sont pas convaincantes en présence de facteurs réfutant ces inférences, comme c'est le cas en l'espèce. Deuxièmement, le gouvernement n'est pas concerné par un groupe vulnérable, qui risque d'être victime de manipulation ou d'abus de la part des sondeurs ou des médias en raison d'un choc fondamental d'intérêts ou de la nature du discours en cause. Il n'existe pas non plus, au sein de la population canadienne, une perception commune voulant qu'un seul sondage inexact puisse tromper les Canadiens dans une mesure indue.

Lorsque les facteurs contextuels indiquent que le gouvernement n'a pas établi que le préjudice qu'il cherche à prévenir est répandu ou important, une approche empreinte de retenue vis-à-vis des moyens particuliers choisis par le législateur pour réaliser un objectif législatif n'est pas justifiée. En l'espèce, l'art. 322.1 n'a pas été conçu strictement en vue de la réalisation de son objectif. L'interdiction est trop générale en ce qu'elle a pour effet d'interdire, durant les trois derniers jours des campagnes électorales, la publication et l'utilisation par les électeurs de tous les sondages qui respectent les normes habituelles d'exactitude. Par ailleurs, l'interdiction est trop limitée parce qu'il est possible qu'elle ne dissipe pas suffisamment chez les électeurs l'impression erronée laissée par un sondage dont la méthodologie n'a pas été communiquée aux critiques ou au public. La solution de rechange évidente était la communication obligatoire des données méthodologiques sans interdiction de publication. Bien qu'une telle disposition laisse encore subsister la possibilité que la publication des résultats d'un sondage inexact immédiatement avant le jour du scrutin ait quelque influence, cette possibilité serait considérablement amoindrie du fait que les électeurs auraient accès à ces données méthodologiques et que les partis auxquels ce sondage serait préjudiciable auraient la possibilité de répliquer rapidement. L'omission d'exposer ou d'expliquer la raison pour laquelle on a écarté une mesure beaucoup moins attentatoire, qui semble aussi efficace que celle effectivement prise, milite fortement contre la reconnaissance du caractère justifiable de l'art. 322.1. Finalement, l'expérience au niveau international n'est pas concluante.

Les effets préjudiciables de l'interdiction l'emportent sur ses avantages douteux. L'effet de l'art. 322.1 sur la

expression is profound. The section imposes a complete ban on political information at a crucial time in the electoral process. The ban interferes with the rights of voters who want access to the most timely polling information available, and with the rights of the media and pollsters who want to provide it. Although it is conceivable that some indeterminate number of voters might be unable to spot an inaccurate poll result and might rely to a significant degree on the error, thus perverting their electoral choice, the government cannot take the most uninformed and naive voter as the standard by which constitutionality is assessed. A measure which decides that information which is desired and can be rationally and properly assessed by the vast majority of the voting electorate should be withheld because of a concern that a very few voters might be so confounded that they would cast their vote for a candidate whom they would not have otherwise preferred cannot be accepted. Given the state of the evidence adduced on this issue, the postulated harm will seldom occur. The benefits of the ban are, therefore, marginal. The deleterious effects, however, are substantial. The ban sends the general message that the media can be constrained by government not to publish factual information. As well, the ban interferes with the media's reporting function with respect to the election. Further, by denying access to electoral information which some voters may consider useful, the ban interferes not only with their freedom of expression, but also with their perception of the freeness and validity of their vote. In sum, the very serious invasion of the freedom of expression of all Canadians is not outweighed by the speculative and marginal benefits postulated by the government.

liberté d'expression est profond. La disposition impose une interdiction complète visant de l'information politique à un moment crucial du processus électoral. Cette interdiction porte atteinte, d'une part, aux droits des électeurs qui veulent avoir accès à l'information la plus à-propos disponible en matière de sondage, et, d'autre part, aux droits des médias et des sondeurs qui désirent fournir cette information. Même s'il est concevable qu'un nombre indéterminé d'électeurs pourraient être incapables de déceler des résultats de sondage inexacts et pourraient, dans une mesure importante, s'appuyer sur l'erreur, ce qui fausserait leur choix électoral, le gouvernement ne peut pas faire de l'électeur le moins informé et le plus naïf la norme au regard de laquelle la constitutionnalité est appréciée. On ne peut accepter une mesure disposant que des renseignements qui sont désirés et qui peuvent être évalués rationnellement et adéquatement par la vaste majorité des électeurs ne peuvent être communiqués parce qu'on craint qu'un très petit nombre d'entre eux pourraient être à ce point décontenancés par ces renseignements qu'ils voteraient pour un candidat qu'ils n'auraient pas appuyé autrement. Compte tenu de la preuve présentée sur cette question, le préjudice qui a été posé en postulat ne se produit que rarement. Les avantages de l'interdiction sont par conséquent minimes. Les effets préjudiciables sont toutefois considérables. L'interdiction transmet le message général que les médias peuvent être empêchés par le gouvernement de publier de l'information factuelle. De plus, elle entrave le rôle de communicateurs de l'information des médias en période électorale. En outre, en niant l'accès à une information électorale que certains électeurs peuvent considérer utile, l'interdiction porte non seulement atteinte à leur liberté d'expression, mais également à leur perception que leur vote est libre et valide. En résumé, l'atteinte très grave à la liberté d'expression de tous les Canadiens n'est pas écartée par les avantages hypothétiques minimes avancés par le gouvernement.

In light of the conclusion that s. 322.1 of the *Canada Elections Act* is an unjustified limit on free expression, it is unnecessary to determine whether the section constitutes an infringement of the right to vote protected by s. 3 of the *Charter*.

Compte tenu de la conclusion selon laquelle l'art. 322.1 de la *Loi électorale du Canada* constitue une limite injustifiée de la liberté d'expression, il est inutile de décider si cette disposition entraîne une violation du droit de vote garanti par l'art. 3 de la *Charte*.

Per Lamer C.J. and L'Heureux-Dubé and Gonthier JJ. (dissenting): Section 322.1 of the *Canada Elections Act* does not infringe s. 3 of the *Charter*. A restriction on information would constitute an infringement of the right to vote under s. 3 only if it undermines the guarantee of effective representation. In the instant case, the

Le juge en chef Lamer et les juges L'Heureux-Dubé et Gonthier (dissidents): L'article 322.1 de la *Loi électorale du Canada* ne viole pas l'art. 3 de la *Charte*. Pour qu'il y ait violation du droit de vote prévu à l'art. 3, la limitation de l'information doit compromettre la garantie d'une représentation effective. En l'espèce, la courte

short blackout period has no such effect. On the contrary, such a period assists effective representation.

While s. 322.1 limits freedom of expression within the meaning of s. 2(*b*) of the *Charter*, it constitutes a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*. The objective of preventing the potentially distorting effect of public opinion survey results that are released late in an election campaign when there is no longer a sufficient opportunity to respond is a sufficiently important objective which meets the first step of the s. 1 analysis. Opinion polls on election issues influence voters' decisions and it is important that the information the polls convey not be misleading or inaccurate. By providing for timely publication of poll results to allow scrutiny and criticism, s. 322.1 improves information to the public during election campaigns, enhances the electoral process and strikes a balance between the right to vote and freedom of expression. The social science studies which composed much of the evidence show that there exists a long-standing concern about the publication of opinion survey results during election campaigns in Canada, including the problems associated with the undue influence, late publication and accuracy of polls. In enacting s. 322.1, Parliament has responded to that concern. The *Charter* should not become an impediment to social and democratic progress and be made to serve substantial commercial interests in publishing opinion poll results, by defeating a reasonable attempt by Parliament to allay potential distortion of voter choice. Several studies and reports in the last 30 years on the publication of opinion survey results during election campaigns in Canada, as well as bills in the House of Commons, and legislation in other democratic countries, support Parliament's reasonable finding that the concern at bar was serious.

The second step of the s. 1 analysis — the proportionality test — is also met. First, the rational connection in this case is self-evident. Opinion polls significantly influence voter choice and electoral campaigns. It follows that the publication of inaccurate, though authoritative, opinion survey results that go uncorrected may well lead to voters making misinformed decisions. Logically, there is a reasoned apprehension that voters will

période d'interdiction en litige n'a pas cet effet. Au contraire, une telle interdiction favorise la représentation effective.

Bien que l'art. 322.1 restreigne la liberté d'expression garantie à l'al. 2*b*) de la *Charte*, il constitue une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte*. L'objectif qui consiste à prévenir l'effet déformant susceptible de découler de la publication de résultats de sondages tard dans les campagnes électorales, lorsqu'il ne reste plus assez de temps pour y répondre, constitue un objectif suffisamment important pour satisfaire au premier volet de l'analyse selon l'article premier. Les sondages sur des enjeux électoraux influencent les décisions des électeurs et il est important que l'information qu'ils communiquent ne soit pas erronée ou trompeuse. En pourvoyant à la publication de leurs résultats en temps utile, pour que l'on en fasse l'examen et la critique, l'art. 322.1 améliore la qualité de l'information dont dispose le public pendant les campagnes électorales, renforce le processus électoral et concilie le droit de vote et la liberté d'expression. Il ressort de la preuve présentée, composée en grande partie d'études réalisées dans le domaine des sciences sociales, que la publication des sondages d'opinion pendant les campagnes électorales constitue une préoccupation de longue date au Canada, notamment en ce qui concerne les problèmes liés à l'influence indue des sondages, à leur publication tard dans les campagnes électorales et à leur exactitude. En adoptant l'art. 322.1, le Parlement a réagi à cette préoccupation. La *Charte* ne doit pas devenir un obstacle au progrès social et démocratique et être mise au service de puissants intérêts commerciaux désireux de publier des résultats de sondages, en faisant échouer une tentative raisonnable du Parlement de prévenir la dénaturation potentielle du choix exprimé par les électeurs. Plusieurs rapports et études sur la publication de résultats de sondages d'opinion pendant les campagnes électorales au Canada réalisés au cours des 30 dernières années, ainsi que les projets de loi déposés devant la Chambre des communes et les mesures législatives en vigueur dans d'autres pays démocratiques appuient la conclusion raisonnable du Parlement qu'il y avait là motif sérieux d'inquiétude.

La deuxième étape de l'analyse fondée sur l'article premier — le critère de la proportionnalité — est également respecté. Premièrement, en l'espèce, le lien rationnel est évident. Les sondages d'opinion influencent de façon importante le choix des électeurs et les campagnes électorales. Il s'ensuit que la publication de résultats de sondages qui, quoiqu'ils fassent autorité, sont inexacts et ne sont pas rectifiés, peut fort bien amener les élec-

be deprived of the full exercise of their franchise. Its importance is measured by the significant influence of polls on voters and the prevalence of misleading polls. Ensuring that polls that cannot be adequately, publicly and independently evaluated as to their correctness because of insufficient time are not published clearly addresses this problem.

Second, s. 322.1 passes the minimal impairment analysis. Section 322.1 constitutes a genuine mediation between the rights of voters to receive information in a timely fashion, and the right of pollsters and publishers freely to provide the information they want. Not only does the legislation protect the rights of voters but it does so by serving one of the very purposes of freedom of expression — informing while allowing for political debate and discussion — and by striking a balance between two basic aspects of voters' right to information — the availability of accessible, unrestricted information and the timely availability of factual information that may be misleading so as to allow for scrutiny and criticism. In matching means to ends and asking whether rights are impaired as little as possible, a legislature mediating between the claims of competing groups is forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. This Court should not second-guess the wisdom of a legislature in its endeavour to draw the line between competing credible evidence, once it has been established, on the civil standard of proof, that Parliament's objective was pressing and substantial. At this stage, the question is whether there is a reasonable basis, on the evidence tendered, for concluding that a blackout on all opinion polls during the last weekend of an election campaign and during election day impairs freedom of expression as little as possible given the government's pressing and substantial objective. Parliament is not bound to find the least intrusive nor the best means. This would be too high a standard for our elected representatives to meet. Here, although one can conceive of alternatives to the impugned measure, there is simply no equally effective alternative to the current short-term blackout for achieving the legislative objective. Based upon the current legislation and the reports and studies available, Parliament reasonably determined that a 72-hour period was necessary to allow meaningful scrutiny of poll results during an election campaign. The 72-hour blackout period is very shortlived and only affects one mode of expression which is not a primary source of information concerning relevant political facts. It

teurs à prendre des décisions mal éclairées. Logiquement, il existe une appréhension raisonnée que certains électeurs soient privés de la possibilité d'exercer pleinement leur droit de vote. L'importance de cette appréhension se mesure à l'influence des sondages sur les électeurs et à la fréquence des sondages trompeurs. Le fait d'interdire la publication de sondages dont l'exactitude ne peut, par manque de temps, être évaluée de manière adéquate, publique et indépendante, vise clairement à résoudre ce problème.

Deuxièmement, l'art. 322.1 est jugé acceptable au terme de l'analyse de l'atteinte minimale. L'article 322.1 constitue un véritable compromis entre le droit des électeurs d'obtenir de l'information en temps utile et celui des sondeurs et des diffuseurs de fournir librement l'information de leur choix. Non seulement cette mesure législative protège-t-elle les droits des électeurs, mais elle le fait en servant l'un des objectifs mêmes de la liberté d'expression — celui d'informer le public tout en permettant la discussion et les débats politiques — et en établissant un équilibre entre deux aspects fondamentaux du droit des électeurs à l'information — la disponibilité d'une information accessible et abondante, et l'accès en temps utile à l'information factuelle qui est susceptible d'être trompeuse, de manière à en permettre l'examen minutieux et la critique. En comparant la fin et les moyens et en se demandant s'il a été porté atteinte le moins possible aux droits en cause, le législateur qui est appelé à arbitrer les revendications de groupes concurrents est obligé de trouver le point d'équilibre sans certitude absolue quant à la réponse optimale. Notre Cour ne devrait pas mettre en doute la sagesse du législateur dans ses efforts pour faire la part des choses à même les éléments de preuve contradictoires mais par ailleurs crédibles, une fois qu'il a été établi, suivant la norme de preuve applicable en matière civile, que l'objectif du législateur est urgent et réel. À ce stade, la question est de savoir s'il existe, à la lumière de la preuve présentée, un fondement raisonnable permettant de conclure que l'imposition d'un embargo visant tous les sondages d'opinion durant la fin de semaine précédant le jour du scrutin et le jour du scrutin lui-même porte atteinte le moins possible à la liberté d'expression compte tenu de l'objectif urgent et réel poursuivi par le gouvernement. Le législateur n'est pas tenu de trouver le moyen le moins attentatoire ni encore le meilleur moyen. Il s'agirait d'une norme trop élevée pour nos élus. En l'espèce, bien qu'on puisse concevoir des solutions autres que la disposition contestée, il n'existe tout simplement pas de solution de rechange aussi efficace que le court embargo en vigueur actuellement pour réaliser l'objectif visé par la loi. Se fondant sur la législation qui existait ainsi que

mainly constitutes information as to the effect of relevant political information on potential voters. The scope of s. 322.1 prohibits polls of all kinds regardless of their scientific nature or quality because there is no clear cut line between reliable poll results and misleading poll results. Section 322.1 does not apply, however, to the discussion of previously released poll results. The legislation prohibits broadcasting, publication and dissemination and these expressions refer only to the initial release of poll results. Finally, both the motions judge and the Court of Appeal held that inaccurate polls at the end of an election campaign constitute a reasonable concern. Everyone is vulnerable to misinformation which cannot be verified. Our democracy, and its electoral process, finds its strength in the vote of each and every citizen. Each citizen, no matter how politically knowledgeable one may be, has his or her own reasons to vote for a particular candidate and the value of any of these reasons should not be undermined by misinformation. When Parliament identifies one matter of concern, it has no absolute duty to identify and regulate each and every factor. The government does not have to show that this concern is more serious or is causing more harm to the electoral process or to individual voters than any other potentially misleading information. There is no such standard under the *Charter*.

Third, the salutary effects of s. 322.1 concerning both the right to vote and freedom of expression outweigh its deleterious effects. The salutary effect of s. 322.1 is to promote the right of voters not to be misled in the exercise of their right to vote. Section 322.1, however, deprives some voters, who rely on polls to make their decision, of late campaign opinion poll results. This deleterious effect is quite limited when one considers the delay between conducting the poll and ultimately publishing its results. As to the effects of the measure on freedom of expression, s. 322.1 has a positive impact, promoting debate and truth in political discussion since it gives voters the opportunity to be informed about the existence of misleading factual information. Although s. 322.1 precludes the media from publishing polls on

sur les rapports et études disponibles, le Parlement a décidé qu'une période de 72 heures était nécessaire pour permettre un examen utile de l'ensemble des résultats de sondages dévoilés durant une campagne électorale. L'embargo de 72 heures est très court et ne touche qu'un seul mode d'expression qui n'est pas une source primaire d'information sur les faits politiques pertinents. Il constitue principalement une source d'information sur l'effet de renseignements politiques pertinents sur les électeurs. La portée de l'art. 322.1 interdit la publication de tous les types de sondages, indépendamment de leur nature ou qualité scientifiques parce qu'il n'existe pas de ligne de démarcation nette entre les résultats de sondages fiables et les résultats trompeurs. L'article 322.1 n'interdit cependant pas l'analyse des résultats de sondages déjà publiés. La disposition en cause interdit l'annonce, la publication et la diffusion des résultats de sondages et ces expressions ne visent que la communication initiale des résultats de sondages. Enfin, tant le juge des requêtes que la Cour d'appel ont décidé que la publication de sondages inexacts en fin de campagne électorale constituait une préoccupation raisonnable. Chacun est vulnérable à une mauvaise information qui ne peut être vérifiée. Notre démocratie — et son processus électoral — tire sa force du vote de chacun des citoyens. Chaque citoyen, quel que soit son degré de connaissance de la politique, a ses raisons bien à lui de voter pour un candidat donné, et la valeur de ces raisons ne doit pas être amoindrie par une mauvaise information. Lorsqu'il décèle un sujet de préoccupation, le Parlement n'a pas l'obligation absolue de relever et de réglementer chacun des facteurs en cause. Le gouvernement n'a pas à établir que cette préoccupation est plus sérieuse ou cause davantage préjudice au processus électoral ou aux électeurs que toute autre information susceptible d'induire en erreur. Il n'existe aucune norme de la sorte dans l'application de la *Charte*.

Troisièmement, les effets bénéfiques qu'a l'art. 322.1 à la fois sur le droit de vote et sur la liberté d'expression l'emportent sur ses effets préjudiciables. L'effet bénéfique de l'art. 322.1 est qu'il favorise le droit des électeurs de ne pas être induits en erreur lorsqu'ils exercent leur droit de vote. L'article 322.1 prive toutefois des électeurs qui se fondent sur les sondages pour prendre leur décision des résultats de certains sondages d'opinion effectués tard dans les campagnes électorales. Cet effet préjudiciable est très limité, si l'on tient compte du délai entre la réalisation du sondage et la publication de ses résultats. Pour ce qui est des effets de la mesure sur la liberté d'expression, l'art. 322.1 a un effet positif. Il favorise l'échange des idées et l'émergence de la vérité dans les discussions politiques puisqu'il permet aux

the last weekend of the election campaign and on polling day, this ban causes only minimal impairment to freedom of expression because of its very short duration and because of the lack of satisfactory alternatives available to tailor the measure to the legislative objective.

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By Bastarache J.

Distinguished: *R. v. Butler*, [1992] 1 S.C.R. 452; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Keegstra*, [1990] 3 S.C.R. 697; **referred to:** *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438; *Haig v. Canada*, [1993] 2 S.C.R. 995; Eur. Court H.R., *Mathieu-Mohin and Clerfayt* case, judgment of 2 March 1987, Series A No. 113; *Bowman v. United Kingdom* (1996), 22 E.H.R.R. C.D. 13; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *R. v. Laba*, [1994] 3 S.C.R. 965; *Butler v. Michigan*, 352 U.S. 380 (1957).

By Gonthier J. (dissenting)

Re C.F.R.B. and Attorney-General for Canada, [1973] 3 O.R. 819; *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R. v. Butler*, [1992] 1 S.C.R. 452; *Canada (Attorney General) v. Somerville*, [1996] 8 W.W.R. 199; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *R.*

électeurs d'être informés de l'existence de renseignements factuels trompeurs. Bien que l'art. 322.1 empêche les médias de publier des résultats de sondages pendant le dernier week-end de la campagne électorale ainsi que le jour du scrutin, en raison de sa très courte durée et de l'absence de solutions de rechange satisfaisantes permettant d'adapter la mesure à l'objectif de la loi, cette interdiction porte atteinte de façon minimale à la liberté d'expression.

Jurisprudence

Citée par le juge Bastarache

Distinction faite d'avec les arrêts: *R. c. Butler*, [1992] 1 R.C.S. 452; *Libman c. Québec (Procureur général)*, [1997] 3 R.C.S. 569; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *R. c. Keegstra*, [1990] 3 R.C.S. 697; **arrêts mentionnés:** *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *Renvoi relatif aux circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158; *Sauvé c. Canada (Procureur général)*, [1993] 2 R.C.S. 438; *Haig c. Canada*, [1993] 2 R.C.S. 995; Cour eur. D.H., affaire *Mathieu-Mohin et Clerfayt*, arrêt du 2 mars 1987, série A nº 113; *Bowman c. United Kingdom* (1996), 22 E.H.R.R. C.D. 13; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232; *Ross c. Conseil scolaire du district nº 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825; *Towne Cinema Theatres Ltd. c. La Reine*, [1985] 1 R.C.S. 494; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876; *R. c. Laba*, [1994] 3 R.C.S. 965; *Butler c. Michigan*, 352 U.S. 380 (1957).

Citée par le juge Gonthier (dissident)

Re C.F.R.B. and Attorney-General for Canada, [1973] 3 O.R. 819; *Renvoi relatif aux circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Libman c. Québec (Procureur général)*, [1997] 3 R.C.S. 569; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Ross c. Conseil scolaire du district nº 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825; *R. c. Zundel*, [1992] 2 R.C.S. 731; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *R. c. Butler*, [1992] 1 R.C.S. 452; *Canada (Attorney General) c. Somerville*, [1996] 8 W.W.R. 199; *Harvey c. Nouveau-Brunswick (Procureur*

v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

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général), [1996] 2 R.C.S. 876; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835.

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APPEAL from a judgment of the Ontario Court of Appeal (1996), 30 O.R. (3d) 350, 92 O.A.C. 290, 138 D.L.R. (4th) 1, 37 C.R.R. (2d) 225, [1996] O.J. No. 2829 (QL), dismissing the appellants' appeal from a judgment of the Ontario Court (General Division) (1995), 24 O.R. (3d) 109, [1995] O.J. No. 1375 (QL), dismissing an application for a declaration that s. 322.1 of the *Canada Elections Act* is unconstitutional. Appeal allowed, Lamer C.J. and L'Heureux-Dubé and Gonthier JJ. dissenting.

W. Ian C. Binnie, *Q.C.*, and *Michael J. Bryant*, for the appellants.

Roslyn J. Levine, *Q.C.*, and *Gail Sinclair*, for the respondent.

Joseph J. Arvay, *Q.C.*, for the intervener the Attorney General of British Columbia.

Sydney L. Goldenberg and *Stephen L. McCammon*, for the intervener the Canadian Civil Liberties Association.

The reasons of Lamer C.J. and L'Heureux-Dubé and Gonthier JJ. were delivered by

GONTHIER J. (dissenting) — I have had the benefit of the reasons for judgment of my colleague, Justice Bastarache. I refer to his summary of the

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (updated 1997, release 2).
Hoy, Claire. *Margin of Error: Pollsters and the Manipulation of Canadian Politics*. Toronto: Key Porter Books, 1989.
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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1996), 30 O.R. (3d) 350, 92 O.A.C. 290, 138 D.L.R. (4th) 1, 37 C.R.R. (2d) 225, [1996] O.J. No. 2829 (QL), qui a rejeté l'appel formé par les appelantes contre une décision de la Cour de l'Ontario (Division générale) (1995), 24 O.R. (3d) 109, [1995] O.J. No. 1375 (QL), qui avait rejeté une requête sollicitant une déclaration portant que l'art. 322.1 de la *Loi électorale du Canada* est inconstitutionnel. Pourvoi accueilli, le juge en chef Lamer et les juges L'Heureux-Dubé et Gonthier sont dissidents.

W. Ian C. Binnie, *c.r.*, et *Michael J. Bryant*, pour les appelantes.

Roslyn J. Levine, *c.r.*, et *Gail Sinclair*, pour l'intimé.

Joseph J. Arvay, *c.r.*, pour l'intervenant le procureur général de la Colombie-Britannique.

Sydney L. Goldenberg et *Stephen L. McCammon*, pour l'intervenante l'Association canadienne des libertés civiles.

Version française des motifs du juge en chef Lamer et des juges L'Heureux-Dubé et Gonthier rendus par

LE JUGE GONTHIER (dissident) — J'ai eu l'avantage de prendre connaissance des motifs de jugement de mon collègue le juge Bastarache. Je ren- 1

judgments below and statement of the issues. While I agree with his statutory interpretation of s. 322.1 of the *Canada Elections Act*, R.S.C., 1985, c. E-2, with his views as to the scope of s. 3 of the *Canadian Charter of Rights and Freedoms*, and with his position that there is an infringement of freedom of expression, within the meaning of s. 2(*b*) of the *Charter*, I am not in agreement with his reasons and his disposition of the appeal with respect to the justification of the infringement. In my view, the said infringement is justified under s. 1 of the *Charter*.

I. Introduction and Historical Background

2 In recent political history, polls have had a substantial impact on the strategies of candidates and the policies of governments. They have become a permanent feature of Canadian politics. It is said that polls tend to reduce the level of political discourse to the lowest common denominator: principles are sacrificed for percentage points (C. C. J. Feasby, "Public Opinion Poll Restrictions, Elections, and the *Charter*" (1997), 55(2) *U.T. Fac. L. Rev.* 241, at p. 244). They tend to preempt the discussion of issues and short-circuit the democratic process:

> *Conversation*, as theorists from Tarde to Habermas have argued, is fundamental to the construction of a democratic public sphere, and polls do not seem to generate interpersonal communication. In a way, polls make many political discussions superfluous, since they give the illusion that the public has already spoken in a definitive manner. [Emphasis in original.]
>
> (S. Herbst, *Numbered Voices: How Opinion Polling Has Shaped American Politics* (1993), at p. 166.)

To the extent that media coverage of election campaigns focuses more on polling results, it focuses less on the merits of the candidates and their positions and tends to distract voters' attention from substantive issues pertaining to the good government of the country. The reliance on polls has become so pervasive that some commentators

voie donc à son résumé des décisions dont appel et à sa formulation des questions en litige. Bien que je souscrive à son interprétation de l'art. 322.1 de la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2, ainsi qu'à son opinion sur la portée de l'art. 3 de la *Charte canadienne des droits et libertés* et à sa conclusion qu'il y a atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte*, je ne suis pas d'accord avec sa décision et ses motifs en ce qui concerne la justification de l'atteinte. À mon avis, l'atteinte est justifiée au sens de l'article premier de la *Charte*.

I. Introduction et contexte historique

Au cours de l'histoire politique récente, les sondages ont eu une incidence considérable sur les stratégies des candidats et sur les politiques gouvernementales. Ils sont devenus une caractéristique permanente de la vie politique canadienne. On affirme que les sondages tendent à réduire le discours politique au plus petit dénominateur commun: des principes sont sacrifiés en échange de quelques points de pourcentage (C. C. J. Feasby, «Public Opinion Poll Restrictions, Elections, and the *Charter*» (1997), 55(2) *U.T. Fac. L. Rev.* 241, à la p. 244). Les sondages tendent à remplacer le débat des enjeux et à court-circuiter le processus démocratique:

> [TRADUCTION] La *conversation*, ont prétendu de nombreux théoriciens, de Tarde à Habermas, est essentielle à l'édification d'un espace public démocratique. Or, les sondages ne semblent pas susciter la communication entre les individus. En un sens, les sondages rendent de nombreuses discussions politiques superflues, puisqu'ils donnent l'impression que le public s'est déjà irrévocablement prononcé de façon définitive. [En italique dans l'original.]
>
> (S. Herbst, *Numbered Voices: How Opinion Polling Has Shaped American Politics* (1993), à la p. 166.)

Dans la mesure où la couverture des campagnes électorales par les médias accorde plus d'attention aux résultats des sondages, elle s'attache moins aux mérites des candidats et à leurs positions respectives et elle a tendance à détourner l'attention des électeurs des questions de fond touchant le bon gouvernement du pays. Le recours aux sondages a

characterize election campaigns as "horse races" (S. Ansolabehere and S. Iyengar, "Of Horseshoes and Horse Races: Experimental Studies of the Impact of Poll Results on Electoral Behavior", *Political Communication*, vol. 11, No. 4, 1994, 413-430). The following quotation strikingly illustrates the developing situation:

> The 1980s is a decade in which media polling has become an epidemic; in which polling has become not just a political tool, an early-warning guidance system, but an occasional substitute for policy itself; in which democracy itself was undermined by the pervasive influence of polls and pollsters who, for all practical purposes, replaced elected representatives, including cabinet ministers, and traditional political strategists as the major determinants of political action. On the strength of their computer printouts, pollsters came to be viewed as sainted public oracles, supposedly capable not only of probing our innermost thoughts and feelings, but of predicting our future actions as well.
>
> . . .
>
> Polls have become a perplexing reality in the political process; still a legitimate, albeit imperfect, measure of public attitudes, they are afforded an unhealthy level of credence in the affairs of state by political players and the public alike.

(C. Hoy, *Margin of Error: Pollsters and the Manipulation of Canadian Politics* (1989), at pp. 39-40.)

The problem becomes more acute when some voters consciously use survey results to make decisions, despite the fact that some polls may be inaccurately conducted, misrepresented by the media or misunderstood by the public. The accuracy of opinion poll results may be deceptive and the credibility owed to them exaggerated. The closer the polling day, the less time there is to assess, scrutinize, and possibly correct polls. While the "horse race" turn that election campaigns take is unfortunate, voters have the right to choose the information that they want to rely on in deciding how to vote. If a voter wants to vote strategically, he may

pris des proportions à ce point endémiques que certains commentateurs qualifient les campagnes électorales de véritables «courses de chevaux» (S. Ansolabehere et S. Iyengar, «Of Horseshoes and Horse Races: Experimental Studies of the Impact of Poll Results on Electoral Behavior», *Political Communication*, vol. 11, nº 4, 1994, 413-430). Voici un extrait qui illustre de manière saisissante l'évolution de la situation:

> [TRADUCTION] Au cours des années 1980, la pratique du sondage d'opinion par les médias a pris des allures d'épidémie. Le sondage est devenu non seulement un outil politique, un système de guidage avancé, mais aussi, à l'occasion, un véritable succédané de politiques. La démocratie elle-même a été sapée par l'influence omniprésente des sondages et des sondeurs d'opinion qui, à toutes fins utiles, ont remplacé les représentants du peuple, y compris les ministres et les stratèges politiques habituels, en tant que principaux déterminants de l'action politique. Sur la foi de leurs imprimés d'ordinateur, on en est venu à considérer les sondeurs d'opinion comme des devins, des oracles, censément capables non seulement de découvrir nos pensées et sentiments les plus profonds, mais également de prédire nos actions.
>
> . . .
>
> Les sondages sont devenus une réalité embarrassante du processus politique. Même s'ils constituent un instrument de mesure légitime, quoiqu'imparfait, des attitudes du public, les acteurs politiques, tout comme le public d'ailleurs, leur accordent, dans les affaires de l'État, un degré malsain de crédibilité.

(C. Hoy, *Margin of Error: Pollsters and the Manipulation of Canadian Politics* (1989), aux pp. 39 et 40.)

Le problème s'aggrave lorsque des électeurs se fondent sciemment sur les résultats des sondages pour prendre leurs décisions, malgré la possibilité que certains sondages aient été effectués de façon incorrecte, mal présentés par les médias ou encore mal compris par le public. Il est possible que l'exactitude des résultats des sondages d'opinion soit illusoire et que la crédibilité qu'on leur accorde soit exagérée. Plus le jour du scrutin approche, moins on a de temps pour évaluer, examiner attentivement et possiblement rectifier les résultats des sondages. Bien que l'allure de «courses de chevaux» que prennent les campagnes élec-

rely on poll results to make his decision. However, he will not be well served by an inaccurate or misleading poll. The expression he tries to convey through his vote could be unsubstantiated or misinformed.

3 It should be noted that overall results may not reveal the actual impact of opinion polls on individual voters. For instance, the choice of a voter who wants to support the leading candidate may be cancelled out by the vote of someone who wants to support the trailing candidate, while both were misled by the same poll. Our democracy, and its electoral process, finds its strength in the vote of each and every citizen. Our *Charter* provides that each citizen has the right to vote. One should not find solace in the thought that two mistakenly cast votes may perchance cancel each other out.

4 To quote the finding of Somers J., the motions judge below, "[t]he effect of polling has been a long-standing concern amongst those involved in the study of elections and with those who actively partake in the elections themselves" ((1995), 24 O.R. (3d) 109, at p. 121). In 1966, a government-appointed Committee on Election Expenses — the Barbeau Committee — in the course of its work on the limitation of election expenses, identified opinion polls as an area of concern. In its report, at p. 51, the Committee recommended that the publication of opinion surveys be completely banned throughout election campaigns as it considered "their uncontrolled use for public purposes improper". The Government recognized that this was an issue of some concern in its *White Paper on Election Law Reform* in 1986. The White Paper pointed out that up to that time, more than 20 private members' bills had been introduced in the House of Commons with the purpose of either prohibiting the publication of opinion surveys or controlling the methodology of such surveys published during campaigns. Although none of these

torales soit déplorable, les électeurs ont néanmoins le droit de se fonder sur l'information de leur choix lorsqu'ils décident pour qui voter. L'électeur qui désire voter de façon stratégique peut s'appuyer sur les résultats des sondages pour arrêter sa décision. Cependant, il ne sera pas bien servi par un sondage inexact ou trompeur. En effet, le message qu'il désire communiquer par son vote pourrait bien être non fondé ou mal éclairé.

Il convient de souligner qu'il est possible que les résultats globaux ne révèlent pas l'influence réelle des sondages d'opinion sur chaque électeur. Par exemple, il se peut que le vote d'un électeur désireux d'appuyer le candidat en avance soit annulé par le vote d'un autre électeur voulant donner son appui au candidat en difficulté, et que ces deux personnes aient été induites en erreur par le même sondage. La force de notre démocratie — et de son processus électoral — repose sur le vote de chaque citoyen. Aux termes de notre *Charte*, tout citoyen a le droit de vote. Personne ne devrait tirer réconfort de l'idée que deux votes accordés par erreur puissent par chance s'annuler l'un l'autre.

Voici la conclusion du juge Somers, qui a statué sur la requête en première instance: [TRADUCTION] «[l]'effet des sondages est une préoccupation de longue date des personnes qui étudient les élections et de celles qui y participent activement» ((1995), 24 O.R. (3d) 109, à la p. 121). En 1966, le Comité des dépenses électorales — le Comité Barbeau — qui avait été créé par le gouvernement de l'époque a dit, dans le cadre de ses travaux sur l'imposition d'un plafond en matière de dépenses électorales, que les sondages d'opinion étaient une source de préoccupation. Dans son rapport, à la p. 54, le Comité a recommandé l'interdiction complète de la publication de sondages d'opinion durant les campagnes électorales, car il estimait qu'«il ne conv[enait] pas d'y recourir d'une façon abusive à des fins de propagande publique». En 1986, dans son *Livre blanc sur la réforme de la loi électorale*, le gouvernement a reconnu que cette question soulevait effectivement certaines inquiétudes. On soulignait, dans le Livre blanc, que plus de 20 projets de loi émanant de députés avaient été déposés à la Chambre des communes et propo-

bills were passed, they were reflective of the public concern over this issue, since the sponsors of the bills represented different regions of the country, as well as the various political parties which have been represented in the House of Commons over the past 30 years. The Government argued that certain precautions should be taken to protect the public against abuses in this area. In so doing, it recommended that methodological information be included in the publication or broadcast of opinion surveys during an election campaign.

saient soit d'interdire la publication de sondages soit de surveiller la méthodologie des sondages publiés en cours de campagne. Bien qu'aucun de ces projets de loi n'ait été adopté, ils reflétaient néanmoins les préoccupations du public à l'égard de cette question, puisque les parrains de ces propositions provenaient de différentes régions du pays et appartenaient à l'un ou l'autre des divers partis politiques qui ont été représentés à la Chambre des communes au cours des 30 dernières années. Le gouvernement a affirmé que certaines précautions devaient être prises pour protéger le public contre les abus dans ce domaine. À cette occasion, il a recommandé que la publication ou la diffusion de résultats de sondages d'opinion pendant les campagnes électorales soit accompagnée de renseignements sur la méthodologie utilisée.

By an Order in Council dated November 15, 1989, a Royal Commission on Electoral Reform and Party Financing, chaired by Mr. Pierre Lortie (the "Lortie Commission"), was appointed to inquire into and report on the appropriate principles and process that should govern the election of members of the House of Commons and the financing of political parties and of candidates' campaigns. It held hearings across Canada and considered the issue of opinion surveys in some depth. During the hearings, at least 90 briefs were submitted regarding the influence of public opinion surveys. Seventy percent of these briefs favoured government regulation of such polls during elections.

5 Le 15 novembre 1989, un décret créait la Commission royale sur la réforme électorale et le financement des partis (la «Commission Lortie»). Présidée par M. Pierre Lortie, cette commission était chargée d'enquêter et de faire rapport sur les principes et les procédures qui devraient régir l'élection des députés à la Chambre des communes et le financement des partis politiques et des campagnes électorales. Elle a tenu des audiences dans les diverses régions du Canada et fait un examen approfondi de la question des sondages. Au moins 90 mémoires traitant de l'influence des sondages ont été déposés au cour de ces audiences. Soixante-dix pour cent de ces mémoires étaient en faveur de la réglementation par le gouvernement des sondages effectués pendant les campagnes électorales.

The Commission retained Professor Guy Lachapelle, Associate Professor in the Department of Political Science at Concordia University, to research and study this issue. His research study, entitled *Polls and the Media in Canadian Elections: Taking the Pulse* ("Lachapelle Study"), was published in 1991. Somers J. found the Lachapelle Study, "because of its breadth and thoroughness to be the most credible evidence put before the court" (p. 116). Among other things, Lachapelle surveyed the briefs filed with the Commission concerning opinion polls. At para. 8 of his affidavit filed in the

6 La Commission a confié à M. Guy Lachapelle, professeur agrégé du département de Science politique de l'Université Concordia, la tâche d'étudier cette question. Son rapport de recherche, intitulé *Les sondages et les médias lors des élections au Canada: le pouls de l'opinion* («Étude Lachapelle»), a été publié en 1991. Le juge Somers a estimé que l'Étude Lachapelle était, [TRADUCTION] «en raison de son envergure et de son exhaustivité, l'élément de preuve le plus crédible présenté à la cour» (p. 116). Entre autres choses, le professeur Lachapelle a étudié les mémoires concernant les

instant case (Case on Appeal, at pp. 92 *et seq.*), Professor Lachapelle stated:

> The basic argument of most of these briefs was that polls have undue influence on elections, especially as a potential influence on voters. However, no definitive conclusion about the actual impact of public opinion surveys could be drawn from these briefs. [Emphasis added.]

Professor Lachapelle admitted that the actual impact of public opinion surveys was, and continues to be, a matter of controversy even among researchers. He went on to say:

> Therefore, the academic literature is highly divided on the impact of public opinion surveys during and outside election periods. Further, this literature cannot demonstrate that polls do, in fact, have a major impact on the outcome of elections. Even the concept of strategic voting cannot be scientifically proven. However, we cannot reject or ignore the hypothesis that an impact does exist, and has consequences for voting behaviour. [Emphasis added.]

(Lachapelle's affidavit, at para. 21.)

The foregoing debate appears centered on the effect of polls on the outcome of elections. Of greater import in the case at bar is the effect of polls on individual voters. The Lortie Commission Final Report (*Reforming Electoral Democracy* (1991), vol. 1) found, at p. 455, that "the publication of opinion polls during election campaigns is controversial". However, it reached the conclusion that "[n]otwithstanding the frequent assertion of pollsters that their data have minimal influence on voters, recent research provides strong support for the proposition that published opinion polls can significantly influence campaigns and voters" (p. 457). It also found that "[r]ecent Canadian research supports the conclusion that published campaign opinion polls create the conditions for a 'politics of expectations' that includes both strategic voting and bandwagon effects" (p. 458). "In short, the argument that published polls do not

sondages qui ont été présentés à la Commission. Au paragraphe 8 de son affidavit déposé en l'espèce (dossier, aux pp. 92 et suiv.), le professeur Lachapelle dit ceci:

> [TRADUCTION] L'argument fondamental avancé dans la plupart de ces mémoires est que les sondages exercent une influence indue sur les élections, particulièrement en tant que source potentielle d'influence sur les électeurs. Cependant, aucune conclusion définitive quant à l'incidence réelle des sondages d'opinion n'a pu être tirée de ces mémoires. [Je souligne.]

Le professeur Lachapelle admet que l'incidence réelle des sondages d'opinion fait toujours l'objet d'une controverse, même parmi les chercheurs. Il poursuit ainsi:

> [TRADUCTION] En conséquence, les auteurs sont fortement divisés sur la question de l'incidence des sondages d'opinion pendant les périodes électorales et en dehors de celles-ci. En outre, leurs travaux ne permettent pas de démontrer que les sondages exercent, dans les faits, une grande incidence sur l'issue des élections. Même l'existence du concept du vote stratégique ne peut être prouvée scientifiquement. Cependant, nous ne pouvons pas rejeter ni passer sous silence l'hypothèse voulant qu'une telle incidence existe effectivement et qu'elle a des conséquences sur le comportement des électeurs. [Je souligne.]

(Affidavit de Lachapelle, au par. 21.)

Ce débat paraît donc s'attacher à l'effet des sondages sur l'issue des élections. Or, en l'espèce, c'est l'incidence des sondages sur le comportement de chaque électeur qui importe davantage. Dans son Rapport final (*Pour une démocratie électorale renouvelée* (1991), vol. 1), la Commission Lortie conclut, à la p. 473, que «la publication de sondages en cours de campagne est un sujet controversé». Toutefois, elle arrive à la conclusion que, «[b]ien que les maisons de sondage ne cessent de répéter que leurs données affectent peu le vote, des recherches récentes tendent à prouver le contraire» (p. 475). Elle conclut également que «[d]es recherches canadiennes récentes confirment que les sondages publiés en cours de campagne créent les conditions d'un "jeu des attentes", qui englobe tant le vote stratégique que l'effet d'entraînement» (p. 476). «Bref, il est impossible de soutenir que la publication des sondages n'influence pas le choix

influence voter choice or affect the conduct of campaigns is simply untenable" (p. 458). At para. 18 of his affidavit, Professor Lachapelle mentioned that research on the 1988 federal election shows that the behaviour of some voters is guided partly, but not solely, by the published and broadcast results of public opinion surveys.

In his study, Professor Lachapelle mentioned several potential effects of opinion polls on voters at election time:

the bandwagon effect (electors rally to support the candidate leading in the polls);

the underdog effect (electors rally to support the candidate trailing in the polls);

the demotivating effect (electors abstain from voting out of certainty that their candidate will win);

the motivating effect (electors vote because the polls alert them to the fact that an election is going on);

the strategic effect (electors decide how to vote on the basis of the relative popularity of the parties according to the polls); and

the free-will effect (electors vote to prove the polls wrong).

(Lachapelle Study, *supra*, at pp. 13-14.)

The bandwagon effect is the best documented result of exposure to poll news. Studies found that, while the bandwagon effect may occur in response to any poll, elections provide the most fertile ground for the growth of poll-driven opinion. It is said that the bandwagon effect was observed in British and American elections, and in Quebec during the 1988 federal election (I. McAllister and D. T. Studlar, "Bandwagon, Underdog, or Projection? Opinion Polls and Electoral Choice in Britain, 1979-1987", *Journal of Politics*, vol. 53, No. 3, August 1991, 720-41, at p. 736; Ansolabehere and Iyengar, *supra*, at p. 427; R. Johnston et al., *Letting the People Decide: Dynamics of a Canadian Election* (1992), at p. 200).

des électeurs et électrices ou la conduite des campagnes» (p. 476). Au paragraphe 18 de son affidavit, le professeur Lachapelle mentionne qu'il ressort de l'étude de la campagne électorale fédérale de 1988 que le comportement de certains électeurs est inspiré en partie, mais pas exclusivement, par la publication et la diffusion des résultats de sondages d'opinion.

Dans son étude, le professeur Lachapelle énumère plusieurs effets potentiels des sondages d'opinion sur les électeurs le jour du scrutin: 7

le ralliement au vainqueur («bandwagon»);

le ralliement au candidat en difficulté («underdog);

l'effet démobilisateur (on s'abstient par certitude de gagner); . . .

l'effet mobilisateur (les sondages incitent à aller voter — ils informent le citoyen qu'il y a une élection);

le vote stratégique (l'électeur décide pour qui voter en fonction de la popularité des partis); et

le libre arbitre (on vote pour faire mentir les sondages).

(Étude Lachapelle, *op. cit.*, aux pp. 15 et 16.)

Le ralliement au vainqueur est l'effet le mieux documenté de la mise en contact du public avec les résultats des sondages. Des études ont permis de constater que, quoique l'effet qui précède puisse se produire par suite de n'importe quel sondage, les élections constituent le terrain le plus fertile au développement d'une opinion déterminée par les sondages. On affirme que cet effet a été observé lors de campagnes électorales en Grande-Bretagne et aux États-Unis, ainsi qu'au Québec durant la campagne électorale fédérale de 1988 (I. McAllister et D. T. Studlar, «Bandwagon, Underdog, or Projection? Opinion Polls and Electoral Choice in Britain, 1979-1987», *Journal of Politics*, vol. 53, nº 3, août 1991, 720 à 741, à la p. 736; Ansolabehere et Iyengar, *loc. cit.*, à la p. 427; R. Johnston et autres, *Letting the People Decide: Dynamics of a Canadian Election* (1992), à la p. 200).

8 In the course of his work, Lachapelle studied the brief of the Quebec Federation of Professional Journalists to the Lortie Commission. In its brief, the Federation conceded that a 48-hour blackout prohibiting all publication or broadcast of opinion polls before the vote would be an acceptable compromise and would respect every individual's right to have time to reply (Lachapelle Study, *supra*, at p. 27).

9 At the end of his study, Lachapelle concluded that "there are significant shortcomings in the media treatment of polls" (Lachapelle Study, at p. 154). He listed several factors which could seriously impact on the accuracy and reliability of opinion poll results:

1. *The Order and Wording of Questions Asked*: For instance, according to Claire Hoy's statement in 1989 (Hoy, *supra*), Angus Reid differs from the other polling organizations in that it asks which of the three leaders is the most popular before asking which of the parties the respondent supports. In addition, Reid asks the question on voting intentions at the end of the questionnaire, whereas Environics, for example, asks it at the beginning (Lachapelle Study, at pp. 90 and 95);

2. *The Different Methods of Distribution of the Undecided Voters*: In the 1988 federal election, no polling organization made a distinction between respondents who intended to refrain from voting, intended to spoil their ballot, did not know how they were going to vote, or refused to answer, although the first two instances are hardly cases of indecision; they express a clear opinion. The treatment of undecided respondents varies considerably and may actually misrepresent reality (Lachapelle Study, at pp. 95-96);

3. *Data-Collection Methods*: During the 1988 federal election campaign, the polling organization Gallup Inc. conducted its surveys both by tele-

Dans le cours de ses travaux, le professeur Lachapelle a étudié le mémoire présenté par la Fédération professionnelle des journalistes du Québec à la Commission Lortie. Dans son mémoire, la Fédération reconnaît qu'une période de restriction totale de 48 heures interdisant toute publication ou diffusion de sondages d'opinion avant la tenue du scrutin peut constituer un compromis acceptable qui respecte le droit de réplique de tout citoyen (Étude Lachapelle, *op. cit.*, à la p. 29).

À la fin de son étude, le professeur Lachapelle conclut que «des déficiences importantes [ont été] relevées dans le traitement médiatique des sondages» (Étude Lachapelle, à la p. 178). Il énumère plusieurs facteurs susceptibles d'influer sérieusement sur l'exactitude et la fiabilité des résultats de sondages d'opinion:

1. *L'ordre et le libellé des questions*: Par exemple, suivant les propos formulés par Claire Hoy en 1989 (Hoy, *op. cit.*), la maison Angus Reid diffère des autres organisations de sondage en ce qu'elle demande d'abord lequel des trois chefs est le plus populaire avant de demander lequel des partis le répondant appuie. De plus, chez Angus Reid on pose la question sur les intentions de vote à la fin du questionnaire, alors que chez Environics, par exemple, cette question est posée au début (Étude Lachapelle, à la p. 105);

2. *Les différentes méthodes de répartition des indécis*: Durant la campagne électorale fédérale de 1988, aucune organisation de sondage n'a fait de distinction entre les répondants qui disaient avoir l'intention de s'abstenir, avoir l'intention de voter ou d'annuler leur vote, ne pas savoir pour qui ils allaient voter, ou encore qui refusaient de répondre. Dans les deux premiers cas, on peut difficilement parler d'indécis, puisque ces répondants exprimaient une opinion claire. Le traitement des indécis varie considérablement et peut, dans les faits, fausser la réalité (Étude Lachapelle, aux pp. 110 et 111);

3. *Les méthodes de cueillette*: Durant la campagne électorale fédérale de 1988, la maison de sondage Gallup Inc. a mené des enquêtes télépho-

phone and in face-to-face interviews, separately or together. This poses numerous problems, especially when the results are presented together without comparing telephone results with those obtained through personal interviews (Lachapelle Study, at p. 97). It is difficult for the elector to grasp all the methodological nuances of sampling (Lachapelle Study, at p. 117). The reader requires a certain attentiveness to recognize that Gallup's methodology varied from one poll to the next, although the press reports contain the information (Lachapelle Study, at p. 116);

4. *Margin of Error*: The margin of error for a particular question may be higher than the average margin because not all the interviewees respond to all the questions. This is not expressly mentioned in the polls (Lachapelle Study, at p. 104);

5. *Timeframe for the Interviews*: For a cross-Canada survey, some organizations take up to seven days to interview their respondents, which may reduce the accuracy and reliability of the "snapshot" (Lachapelle Study, at pp. 113-15 and 116);

The last poll of the 1988 campaign, broadcast two days before election day, did not mention the dates of the interviews. As the study put it: "How could even moderately perspicacious citizens be expected to react and exercise their right of rejoinder? Given the amount of time left, this right was rendered ineffective." (Lachapelle Study, at p. 116.)

Predicting regional voting intentions from a cross-Canada survey is also subject to considerable risk, though it became widespread in recent elections. The validity of certain local polls can also be questioned when the interview periods extend over

niques et des entrevues en personne, tantôt séparément tantôt simultanément. Cette façon de faire pose de nombreuses difficultés, surtout lorsque les résultats sont présentés de manière globale dans le rapport, sans comparer les résultats téléphoniques avec ceux des entrevues menées en personne (Étude Lachapelle, aux pp. 111 et 112). Il est difficile pour les électeurs de saisir les nuances qui existent entre les méthodes d'échantillonnage (Étude Lachapelle, à la p. 133). Bien que l'information de presse contienne ces renseignements, il faut tout de même une certaine dose d'attention de la part du lecteur pour bien saisir que la méthodologie de Gallup a varié d'un sondage à l'autre (Étude Lachapelle, à la p. 133);

4. *La marge d'erreur*: La marge d'erreur à l'égard d'une question donnée peut être supérieure à la marge moyenne, étant donné que toutes les personnes interrogées ne répondent pas forcément à toutes les questions. Ce fait n'est pas expressément mentionné dans les sondages (Étude Lachapelle, aux pp. 119 et 120);

5. *La période des entrevues*: Pour ce qui est des sondages pancanadiens, certaines organisations prennent jusqu'à sept jours pour effectuer les entrevues, situation qui est susceptible de réduire l'exactitude et la fiabilité de l'«image éclair» (Étude Lachapelle, aux pp. 129 à 133);

Dans le cas du dernier sondage de la campagne de 1988, diffusé deux jours avant le jour du scrutin, aucune mention n'était faite des dates des entrevues. Comme on le dit dans l'étude: «[C]omment des citoyens auraient-ils pu réagir et exercer leur droit de réplique dans de telles conditions? Ce droit, compte tenu du temps limité mis à leur disposition, devient dès lors tout à fait caduc.» (Étude Lachapelle, aux pp. 129 et 133.)

10 La prédiction, à partir d'un sondage pancanadien, des intentions de vote à l'échelle régionale comporte également des risques considérables, bien que cela soit devenu une pratique répandue au cours des récentes élections. On peut également s'interroger sur la validité de certains sondages locaux, dans le cadre desquels les entrevues se sont

several weeks if not months (Lachapelle Study, at p. 145).

11 In spite of their serious impact on the reliability of polls, these factors, just to name a few, are often overlooked by the public when considering poll results but are carefully taken into account by analysts.

12 On the basis of his analysis of the domestic and international context, Professor Lachapelle made the following recommendations to the Lortie Commission:

(a) that the media be legally required to publish specific technical information regarding public opinion surveys;

(b) that there be a blackout on publication of public opinion surveys by all print and electronic media during the final three days of an election campaign, in order to permit candidates adequate time to respond to controversial or misleading public opinion surveys before election day; and

(c) that a polling commission be established to ensure publication of complete methodological information, confidentiality of data, and public access to high quality information.

(Lachapelle's affidavit, at para. 11.)

13 In its own Final Report, at p. 457, the Lortie Commission made this striking statement:

Although the industry in general has become highly professional since public polling was introduced in Canada in 1941, the incidence of technically deficient and poorly reported polls is still substantial. In recent elections, there have been instances of misleading polls, some because of technical errors and others because of partisan misrepresentation. There have even been allegations of fraudulent polls, where the data were said to have been fabricated to counter a poll showing the opposition in the lead. Such "bogus" polls and the more common misrepresented poll have been released to the media in many democracies. (Cantril 1991, 67; Worcester 1991, 199; Hoy 1989, 189-202) It is the willingness

échelonnées sur plusieurs semaines, voire plusieurs mois (Étude Lachapelle, à la p. 167).

Malgré l'incidence importante qu'ils ont sur la fiabilité des sondages, ces facteurs, pour ne nommer que ceux-là, sont souvent négligés par le public dans l'examen des résultats des sondages, mais en revanche ils sont soigneusement pris en compte par les analystes.

À la lumière de son analyse des contextes canadien et international, le professeur Lachapelle a recommandé à la Commission Lortie:

[TRADUCTION]

a) que les médias soient tenus par la loi de publier des renseignements techniques particuliers concernant les sondages d'opinion;

b) qu'il soit interdit à tous les médias, tant écrits qu'électroniques, de publier des sondages d'opinion pendant les trois derniers jours des campagnes électorales, afin d'accorder aux candidats suffisamment de temps pour répliquer aux sondages d'opinion controversés ou trompeurs avant le jour du scrutin;

c) que soit établie une commission des sondages chargée de veiller à ce que des renseignements méthodologiques complets soient publiés, à ce que la confidentialité des données recueillies soit respectée et à ce que le public ait accès à une information de grande qualité.

(Affidavit du professeur Lachapelle, au par. 11.)

Dans son Rapport final, à la p. 475, la Commission Lortie fait cette étonnante affirmation:

Bien que l'industrie du sondage en général ait atteint un haut niveau de professionnalisme depuis l'apparition des sondages d'opinion au Canada en 1941, le nombre d'enquêtes techniquement déficientes et mal présentées demeure important. Certains sondages publiés à l'occasion d'élections récentes étaient entachés d'erreurs techniques, et d'autres étaient présentés de façon partiale. On a même signalé des sondages carrément frauduleux, dont les données auraient été fabriquées de toutes pièces pour contrer un sondage plaçant l'adversaire en tête. Les médias de maints pays démocratiques ont publié de tels sondages «bidon» et, de façon plus courante, des sondages présentés de manière trompeuse (Cantril 1991, 67;

of the media to report such polls that makes them significant and troublesome. [Emphasis added.]

Regarding opinion poll regulation, the Lortie Commission recommended that there be, at the end of the election campaign, a 48-hour blackout period on publication of public opinion poll results. It also suggested technical information be provided as recommended by Lachapelle, but not the establishment of a polling commission.

An all-party Special Committee of the House of Commons on Electoral Reform considered the Lortie Commission's Final Report. In its third report to the House of Commons, the Special Committee recommended a 72-hour prohibition period on publication of opinion survey results prior to the closing of the polls, but made no recommendation as to methodology information. The Special Committee's recommendation of a 72-hour publication ban was incorporated into Bill C-114, *An Act to amend the Canada Elections Act*. Bill C-114 was adopted, without division, in the House of Commons on May 6, 1993: S.C. 1993, c. 19.

The Senate Standing Committee on Legal and Constitutional Affairs examined the legislation. Professor Peter Aucoin, Director of Research for the Lortie Commission, was a witness before the Senate Committee. He stressed the importance of polls during elections and submitted two arguments to support the proposed 72-hour ban:

While I support this particular proposal [the 72-hour blackout period], people must understand its purpose. The purpose is not, as has been said even in the Senate, to give voters a rest or breather from a flood of public opinion polls published just prior to election day. In fact, voters find that polls are useful information to them. They have a right to those polls. In terms of the

Worcester 1991, 199; Hoy 1989, 189-202). En fait, ces «sondages» posent un problème dans la mesure où les médias sont prêts à les diffuser. [Je souligne.]

En ce qui concerne la réglementation des sondages d'opinion, la Commission Lortie recommande l'instauration, à la fin de la campagne électorale, d'un embargo de 48 heures sur la publication des résultats de sondages d'opinion. Elle suggère également que soient communiqués des renseignements techniques, comme l'avait recommandé le professeur Lachapelle. Elle ne propose toutefois pas la création d'une commission des sondages.

14 Un Comité spécial multipartite de la Chambre des communes sur la réforme électorale a examiné le Rapport final de la Commission Lortie. Dans son troisième rapport à la Chambre des communes, le Comité spécial a recommandé qu'il soit interdit de publier les résultats de sondages d'opinion pendant une période de 72 heures avant la fermeture des bureaux du scrutin, mais n'a fait aucune recommandation sur l'information concernant la méthodologie utilisée. La recommandation du Comité spécial d'interdire la publication des résultats de sondages pendant une période de 72 heures a été incorporée au Projet de loi C-114 intitulé, *Loi modifiant la Loi électorale du Canada*. Le Projet de loi C-114 a été adopté sans opposition par la Chambre des communes le 6 mai 1993: L.C. 1993, ch. 19.

15 Le Comité sénatorial permanent des affaires juridiques et constitutionnelles a examiné la loi. Le professeur Peter Aucoin, directeur de la recherche pour la Commission Lortie, a témoigné devant ce comité. Il a souligné l'importance des sondages pendant les campagnes électorales et présenté deux arguments en faveur de l'interdiction de 72 heures proposée:

[TRADUCTION] Je suis certes en faveur de cette proposition [l'embargo de 72 heures], mais il faut que les gens comprennent bien l'objectif. Il ne s'agit pas, malgré ce qui a été dit même au Sénat, de laisser un répit aux électeurs et de leur épargner une masse d'informations tirée des sondages d'opinion publique juste avant le jour de l'élection. En réalité, les électeurs ont l'occasion de constater que les sondages leur fournissent des renseignements utiles. Ils y ont droit. Dans les campagnes

electoral contest as we know it, the more polls the better.

The issue here is twofold. Public opinion polls purport to be scientific and are reported as such by the press. There is a question of the accuracy of public opinion polls in reading public opinion. There is clearly some need for regulation, given that particular assumption.

. . .

[P]arties and candidates need access to the polls and this requires some time. In particular, it means they have to be able to respond to the poll. They cannot do that if the poll is published either on election day or the day before an election. Therefore, the ban of 72 hours is to ensure that polls cannot be published after a point in time where candidates and parties cannot respond. It has nothing to do with giving voters a breather. [Emphasis added.]

(Senate Standing Committee on Legal and Constitutional Affairs, *Proceedings*, Issue No. 41, May 6, 1993, at pp. 41:14-41:15.)

Professor Aucoin also added the following as he responded to a comment from Senator Jean-Claude Rivest:

Senator Rivest: [TRANSLATION] . . . I do not see how you can say that a poll is an important event but it must absolutely be checked in order to ensure that there are no bogus polls, no "hamburger polls", as you explained. In this regard, in the last 72 hours there is a host of other election information and other statements that are not banned during this period and that cannot be verified before voting day.

Mr. Aucoin: [Text] I think the issue here is that the polls themselves in our culture and in our practice have a claim to scientific validity, notwithstanding the fact that they do have their limitations. In that context, to the degree that one makes a difference between published polls and just any other comments made by those participating in the election campaign, candidates and parties are at a disadvantage if there is an authenticity associated with the very concept of poll. Therefore, it has that character where one must be able to verify whether the poll exists and whether it is a credible poll. It is for those practical reasons that you would limit them.

électorales telles que nous les connaissons, plus il y a de sondages, mieux c'est.

La question est double. Les sondages d'opinion publique se veulent scientifiques et la presse les présente comme tels. Il y a le problème de la fidélité de la représentation que donnent les sondages de l'opinion publique. Il est clair qu'une certaine forme de réglementation est nécessaire dans cette situation.

. . .

Il est donc nécessaire [. . .] que les partis et les candidats puissent avoir accès aux sondages, et pour cela il faut du temps. Cela signifie, en particulier, qu'ils doivent avoir la possibilité de réagir face au sondage. Ils ne peuvent pas le faire si le sondage est rendu public le jour ou la veille de l'élection. L'interdiction qui couvre une période de 72 heures vise donc à s'assurer que l'on ne publiera pas des sondages à compter du moment où les candidats et les partis ne sont plus en mesure d'y répondre. Cela n'a rien à voir avec la volonté d'accorder un répit aux électeurs. [Je souligne.]

(Comité sénatorial permanent des affaires juridiques et constitutionnelles, *Procédures*, fascicule nº 41, 6 mai 1993, aux pp. 41:14 et 41:15.)

En outre, le professeur Aucoin a ajouté ce qui suit, en réponse à une remarque du sénateur Jean-Claude Rivest:

Le sénateur Rivest: [Texte] . . . Je ne vois pas en quoi on peut dire qu'un sondage est un fait important mais doit être vérifié absolument pour qu'il n'y ait pas des sondages bidons ou des sondages «hamburger», comme vous l'avez expliqué. À ce compte-là, dans les derniers 72 heures, il y a une foule d'autres faits électoraux, d'autres déclarations qui ne sont pas interdites dans cette période et qui ne peuvent être vérifiés parce que le jour du scrutin arrive.

M. Aucoin: [TRADUCTION] Le problème ici, à mon avis, c'est que les sondages prétendent à l'exactitude scientifique dans notre culture et compte tenu de notre pratique, en dépit du fait qu'ils ont leurs limites. De ce point de vue, et dans la mesure où l'on fait la différence entre les sondages publiés et les simples commentaires faits par les participants à la compagne électorale, les candidats et les partis sont placés dans une position d'infériorité si le concept même de sondage a un air d'authenticité. La nature du phénomène fait donc que l'on doit pouvoir vérifier dans quelle mesure le sondage a bien existé et s'il est crédible. C'est pour ces raisons que je suis d'accord pour les limiter.

If all polls were only done by certain kinds of organizations using certain kinds of standards, there would not be that problem. [Emphasis added.]

(Senate Standing Committee on Legal and Constitutional Affairs, *supra*, at pp. 41:17-41:18.)

The following incident serves to illustrate the usefulness of a ban on the publication of opinion poll results in the last 72 hours of an election campaign. In the midst of the 1993 federal election, the *Globe and Mail* made an error in its publication of the results of an Angus Reid poll (*Globe and Mail*, October 8, 1993). The *Globe and Mail* does not have a Sunday edition. If the erroneous article had been published on the last day of the campaign or on the Saturday prior to voting day, it would have been practically impossible for the pollster to convey the correct information, and for the newspaper to correct its report, before polling day. There would not have been an adequate opportunity to criticize and correct the inaccurate information before election day. The error was certainly not intentional, still it could have had far-reaching consequences, had it occurred in the last hours of an election campaign (Lachapelle's affidavit, at paras. 30-34).

The appellants themselves acknowledge that opinion polls on election issues influence voters' decisions: "[i]f voters paid no attention to polls there would be no point in suppressing them" (Appellants' Factum, at para. 35). The very fact that voters pay attention to opinion surveys and rely on them as objective, non-partisan information makes it important that the information they convey not be misleading or inaccurate. The impugned provision responds to this need by requiring that election polls be published in sufficient time to allow for timely scrutiny and criticism.

I agree with my colleague that there are various activities subject to restriction during a federal

Si tous les sondages n'étaient effectués que par certains organismes ayant recours à certaines normes, le problème ne se poserait pas. [Je souligne.]

(Comité sénatorial permanent des affaires juridiques et constitutionnelles, *op. cit.*, aux pp. 41:17 et 41:18.)

16 L'incident suivant permet d'illustrer l'utilité d'interdire la publication des résultats de sondages d'opinion pendant les 72 dernières heures d'une campagne électorale. À l'occasion de la campagne électorale fédérale de 1993, le *Globe and Mail* a fait une erreur lorsqu'il a publié les résultats d'un sondage effectué par la maison Angus Reid (*Globe and Mail*, 8 octobre 1993). Le *Globe and Mail* ne paraît pas le dimanche. Si l'article erroné était paru la dernière journée de la campagne ou encore le samedi précédant le jour du scrutin, il aurait été concrètement impossible pour la maison de sondage de corriger l'information et pour le journal de rectifier son article avant le jour du scrutin. Il n'aurait pas été vraiment possible de critiquer et corriger l'information erronée avant le jour du scrutin. L'erreur n'était certes pas intentionnelle, mais elle aurait tout de même pu être lourde de conséquences si elle était survenue dans les dernières heures de la campagne (Affidavit du professeur Lachapelle, aux par. 30 à 34).

17 Les appelantes elles-mêmes ont reconnu que les sondages sur des enjeux électoraux influencent les décisions des électeurs: [TRADUCTION] «[s]i les électeurs ne prêtaient pas attention aux sondages, il ne servirait à rien de les supprimer» (mémoire des appelantes, au par. 35). Le fait même que les électeurs prêtent attention aux sondages d'opinion et s'y réfèrent en tant que source d'information objective et non partisane fait en sorte qu'il est important que l'information qu'ils communiquent ne soit pas erronée ou trompeuse. La disposition contestée tient compte de ce besoin, en exigeant que les sondages électoraux soient publiés de manière à accorder un délai suffisant pour permettre que l'on en fasse, en temps utile, l'examen et la critique.

18 Je suis d'accord avec mon collègue que diverses activités font l'objet de restrictions pendant les

election, that it is inappropriate to pronounce generally as to the scope or constitutional validity of these provisions, and that each type of restriction must be considered in its own context since each restriction is adopted to address a particular set of circumstances. However, these restrictions, including s. 322.1, stem from the same concerns. They are strong evidence that elections constitute, in our society, a unique event which calls for special treatment in order to promote voter autonomy and rational choice. Modern Canadian electoral law has sought to curb the excesses, enhance the democratic process and enable the voter to make a rational choice. Implicit to its regulations are the notions of integrity and fairness. As was aptly stated by the Ontario Court of Appeal in *Re C.F.R.B. and Attorney-General for Canada*, [1973] 3 O.R. 819, at p. 826:

> Central to the whole democratic process is the election of legislative bodies by the vote of electors who by their ballots have expressed their choice, through a process, evolved over the years, designed to remove or at least reduce the possibility of the electors' choice being unduly influenced by pressures put upon them.

Because of their claim to scientific validity, unscrutinized polls may have an influence that they do not actually deserve and may distort the electoral process.

campagnes électorales fédérales, qu'il ne convient pas de se prononcer globalement sur la portée ou la validité constitutionnelle de ces dispositions et que chaque restriction doit être examinée suivant le contexte qui lui est propre, car chacune vise une situation particulière. Cependant, ces restrictions, y compris celle prévue à l'art. 322.1, découlent des mêmes préoccupations. Elles constituent de solides indications que, dans notre société, les élections sont des événements exceptionnels qui commandent la prise de mesures spéciales, propres à favoriser l'autonomie des électeurs et la prise de décisions rationnelles. Le droit électoral en vigueur au Canada vise à réfréner les abus, à renforcer le processus démocratique et à permettre aux électeurs de faire des choix rationnels. Le régime qu'il instaure s'inspire de notions d'intégrité et d'équité. Comme l'a dit avec justesse la Cour d'appel de l'Ontario dans *Re C.F.R.B. and Attorney-General for Canada*, [1973] 3 O.R. 819, à la p. 826:

> [TRADUCTION] L'élection de corps législatifs par des électeurs, qui ont exprimé leur choix par leur bulletin de vote, est au cœur de tout le processus démocratique. Ce processus, qui a été établi au fil des ans, vise à éliminer ou, à tout le moins, à réduire la possibilité qu'on influence indûment le choix des électeurs en faisant pression sur eux.

Comme les sondages prétendent à la validité scientifique, il est possible que des sondages soustraits à la critique aient une influence dont ils ne sont pas dignes dans les faits et qu'ils faussent le processus électoral.

II. Analysis

II. L'analyse

A. *The Right to Vote (Section 3 of the Charter)*

A. *Le droit de vote (art. 3 de la Charte)*

19 I agree with my colleague that a restriction on information would constitute an infringement of the right to vote under s. 3 of the *Charter* only if it undermines the guarantee of effective representation (*Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 183, McLachlin J.). In the instant case, I believe that the short blackout period has no such effect. On the contrary, such a period assists effective representation. A strategic voter cannot cast a significant vote if the information required to exercise that vote can-

Je suis d'accord avec mon collègue que, pour qu'il y ait violation du droit de vote prévu à l'art. 3 de la *Charte*, la limitation de l'information doit compromettre la garantie d'une représentation effective (*Renvoi relatif aux circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158, à la p. 183, le juge McLachlin). En l'espèce, j'estime que la courte période d'interdiction en litige n'a pas cet effet. Au contraire, une telle interdiction favorise la représentation effective. L'exercice du vote stratégique n'est pas possible si l'information

not be discussed and scrutinized in order to assess its real value. It follows that poll results which cannot be assessed in a timely manner may actually deprive voters of the effective exercise of their franchise. Therefore, there is no infringement of the right to vote under s. 3 of the *Charter*.

requise à cette fin ne peut être discutée et examinée minutieusement pour en évaluer la valeur réelle. Il s'ensuit que des résultats de sondages qui ne peuvent être évalués en temps utile peuvent, dans les faits, empêcher les électeurs d'exercer effectivement leur droit de vote. Par conséquent, il n'y a pas violation du droit de vote prévu à l'art. 3 de la *Charte*.

B. *Freedom of Expression (Section 2(b) of the Charter)*

B. *La liberté d'expression (al. 2b) de la Charte)*

It is not in dispute, and I agree with my colleague, that s. 322.1 infringes freedom of expression within the meaning of s. 2(*b*) of the *Charter* (*R. v. Keegstra*, [1990] 3 S.C.R. 697). The issue then is whether this infringement constitutes, under s. 1 of the *Charter*, a reasonable limit demonstrably justified in a free and democratic society. I am in agreement with my colleague that this section serves a pressing and substantial objective, but must respectfully disagree with his conclusion that the section fails to minimally impair freedom of expression or is disproportionate in its effect. His conclusion rests on reasoning belied by the evidence and denies Parliament a choice of reasonable alternatives, holding it to a standard of perfection of uncertain reach. In the result, his reasons lead to the lifting of all restrictions as to the timing of the publication of opinion polls.

20 Il n'est pas contesté — et je souscris à l'opinion de mon collègue sur ce point — que l'art. 322.1 porte atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte* (*R. c. Keegstra*, [1990] 3 R.C.S. 697). La question en litige consiste donc à déterminer si cette atteinte constitue, au sens de l'article premier de la *Charte*, une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique. Je conviens avec mon collègue que cette disposition sert un objectif urgent et réel, mais je dois respectueusement exprimer mon désaccord avec sa conclusion que la disposition porte une atteinte plus que minimale à la liberté d'expression ou a un effet disproportionné. Sa conclusion repose sur un raisonnement qui ne trouve pas appui dans la preuve en plus de nier au législateur le choix de solutions de rechange raisonnables, assujettissant ce dernier à une norme de perfection dont l'atteinte est incertaine. En bout de ligne, ses motifs ont pour effet de lever toute restriction quant au moment de publication de sondages.

Justification Under Section 1 of the *Charter*

La justification conformément à l'article premier de la *Charte*

1. *Preliminary Note: Evidence and Standard of Proof*

1. *Remarques préliminaires: Preuve et norme de preuve*

In the course of the s. 1 analysis, the standard of proof to be used is proof on a balance of probabilities (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 137). As was stated in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 39, scientific evidence is not required to meet the standard. Also McLachlin J., in writing for the majority in *RJR-MacDonald Inc. v. Canada (Attorney General)*,

21 La norme de preuve applicable dans le cadre de l'analyse fondée sur l'article premier est la prépondérance des probabilités (*R. c. Oakes*, [1986] 1 R.C.S. 103, à la p. 137). Comme il a été dit dans l'arrêt *Libman c. Québec (Procureur général)*, [1997] 3 R.C.S. 569, au par. 39, il n'est pas nécessaire de faire une preuve scientifique pour satisfaire à cette norme. En outre, Madame le juge

[1995] 3 S.C.R. 199, at para. 137, expressed the unanimous view of the Court:

> Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view. . . . [Emphasis added.]

To paraphrase the Court's findings in *Libman*, *supra*, at para. 39, election campaigns, just as referendum campaigns, fall within the realm of social science, which does not lend itself to precise evidence.

2. *Legislative Objective*

22 In the material before the Court, reference is made to three suggested legislative objectives: first, to reduce the "undue influence" of all polls in general; second, to provide for a rest period so as to allow electors time to reflect before polling day; and third, to prevent the potentially distorting effect of public opinion survey results that are released late in an election campaign leaving insufficient time to assess their validity. This latter objective is the only one that the respondent advanced before this Court. Although my analysis will focus on this particular objective, the first two objectives may not be without merit. However, they need not be considered here. As I mentioned earlier, opinion polls have reshaped Canadian elections. It is now a fact that election campaigns take on an aura of "horse races", and that discussion of issues that concern Canadians tends to be preempted. Voters are of course completely free to choose the information upon which they want to make their decision. For instance, strategic voters, who may want to vote for their second-choice candidate in order to avoid the election of a leading candidate, rely on polls. Thus, while suppressing

McLachlin, écrivant pour la majorité dans *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, au par. 137, a exprimé le point de vue unanime de la Cour sur ce point:

> Pour satisfaire à la norme de preuve en matière civile, on n'a pas à faire une démonstration scientifique; la prépondérance des probabilités s'établit par l'application du bon sens à ce qui est connu, même si ce qui est connu peut comporter des lacunes du point de vue scientifique . . . [Je souligne.]

Pour paraphraser les conclusions de notre Cour dans l'arrêt *Libman*, précité, au par. 39, les campagnes électorales, tout comme les campagnes référendaires, participent du domaine des sciences sociales et ce domaine ne se prête pas à une preuve exacte.

2. *L'objectif législatif*

La preuve dont dispose notre Cour fait état de trois objectifs législatifs: premièrement, réduire l'«influence indue» de tous les sondages en général; deuxièmement, accorder une période de répit aux électeurs avant le jour du scrutin; troisièmement, prévenir l'effet déformant possible suite à la publication de résultats de sondages au terme d'une campagne électorale, alors qu'il ne reste plus assez de temps pour évaluer leur validité. Ce dernier objectif est le seul invoqué par l'intimé devant notre Cour. Le fait que mon analyse porte principalement sur cet objectif ne veut pas dire que les deux autres sont dénués de fondement. Cependant, il n'est pas nécessaire de les examiner en l'espèce. Comme je l'ai mentionné plus tôt, les sondages d'opinion ont transformé les campagnes électorales au Canada. Le fait est que les campagnes électorales ont maintenant des allures de «courses de chevaux» et que la discussion des questions qui préoccupent les Canadiens tend à être écartée. Il va de soi que les électeurs sont entièrement libres de choisir l'information sur laquelle ils désirent fonder leur décision. Par exemple, les électeurs qui peuvent, par stratégie, désirer voter pour le candidat qui constitue leur deuxième choix, afin d'éviter l'élection du candidat en avance, se fient aux sondages. Par conséquent, alors qu'on ne saurait supprimer les sondages pour la seule raison qu'ils peuvent être

polls simply because they may be used by voters is not permissible, regulating polls may be.

(a) Criteria

The Court must first assess the objective of the infringing legislative measure, as distinguished from the means chosen to implement it. The question is whether the concern which prompted the enactment of the impugned legislation is pressing and substantial and whether the purpose of the legislation is one of sufficient importance (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 987, Dickson C.J. and Lamer J. (as he then was) and Wilson J.). The distinction between "objective" and "means" is important since at this stage, the Court must ensure that the said objective is consistent with the principles integral to a free and democratic society, pressing and substantial, and directed to the realisation of collective goals of fundamental importance (*Oakes*, *supra*, at p. 138).

In *Oakes*, *supra*, at p. 136, Dickson C.J. stated that in determining whether *Charter* rights and freedoms should be limited,

> [t]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

As La Forest J. put it in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 77, ultimately, any attempt to determine whether the impugned limit is a justifiable infringement of the freedom of expression must involve a weighing of the essential principles of a

utilisés par les électeurs, il est possible que leur réglementation soit admise.

a) Les critères

La Cour doit d'abord évaluer l'objectif de la mesure législative attentatoire, par opposition aux moyens choisis pour l'appliquer. La question est de savoir si la préoccupation qui a incité à l'adoption de la loi contestée est urgente et réelle, et si l'objet de la loi est suffisamment important (*Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, à la p. 987, le juge en chef Dickson et les juges Lamer (maintenant Juge en chef) et Wilson). La distinction entre l'«objectif» et les «moyens» est importante étant donné que, à cette étape, la Cour doit s'assurer qu'il s'agit d'un objectif urgent et réel, conforme aux principes qui constituent l'essence même d'une société libre et démocratique et visant la réalisation d'objectifs collectifs d'une importance fondamentale (*Oakes*, précité, à la p. 138). 23

Dans *Oakes*, précité, à la p. 136, le juge en chef Dickson a affirmé que, pour déterminer si les droits et libertés garantis par la *Charte* doivent être restreints, 24

> [l]es tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer. [Je souligne.]

Comme l'a dit le juge La Forest dans *Ross c. Conseil scolaire du district nº 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825, au par. 77, en dernière analyse, toute tentative en vue de déterminer si la limite contestée constitue une atteinte justifiable à la liberté d'expression doit comporter une évalua-

free and democratic society. The enhancement of the electoral process, through the provision of quality, timely information, serves one of these fundamental principles, i.e., good participation and faith of individuals in the most important political institution of all — the electoral process.

(b) Purposes of Freedom of Expression: Access to Information

25 As to the purposes underlying freedom of expression, La Forest J. in *Ross*, at para. 59, and McLachlin J. in *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 752, noted that s. 2(*b*) of the *Charter* aims at permitting free expression "to the end of promoting truth, political or social participation, and self-fulfilment". Following these purposes, freedom of expression should not be considered as an end *per se*. The promotion of an informed vote over a misinformed vote meets the three purposes and truly serves the core values of the freedom of expression in a free and democratic society: by allowing timely discussion of all published poll results, s. 322.1 aims at fostering truth; by keeping open the possibility of timely debate as to the validity of poll results, it promotes active political and social participation, rather than condone passiveness as to poll results; by allowing for full scrutiny of the information carried by poll results late in the election campaign, it promotes voters' self-fulfilment by ensuring that the intention voters really want to convey in casting their vote is actually expressed.

26 The quest for better information gives more meaning to voter participation in the electoral process. The very fact that some voters base their decision on opinion survey polls may justify the means taken to promote voters' right to good information. This is consistent with the findings of this Court that one of the objectives underlying freedom of expression is the ability of voters to make informed choices (*Libman*, *supra*, at para.

tion des principes essentiels d'une société libre et démocratique. La valorisation du processus électoral grâce à une information de qualité, disponible en temps utile, sert l'un de ces principes fondamentaux, c.-à-d. la participation utile des citoyens à l'institution politique la plus importante qui soit — le processus électoral — et leur foi dans ce processus.

b) Les objectifs de la liberté d'expression: l'accès à l'information

En ce qui concerne les objectifs qui sous-tendent la liberté d'expression, le juge La Forest dans *Ross*, précité, au par. 59, et le juge McLachlin dans *R. c. Zundel*, [1992] 2 R.C.S. 731, à la p. 752, ont souligné que l'al. 2*b*) de la *Charte* vise à permettre la liberté d'expression «dans le but de promouvoir la vérité, la participation politique ou sociale et l'accomplissement de soi». Selon ces objectifs, la liberté d'expression ne devrait pas être considérée comme une fin en soi. Le fait de favoriser le vote éclairé pour éliminer le vote «à l'aveuglette» est compatible avec ces trois objectifs et sert vraiment les valeurs fondamentales de la liberté d'expression dans une société libre et démocratique: en permettant la discussion, en temps utile, de tous les résultats de sondages publiés, l'art. 322.1 vise à faire ressortir la vérité; en rendant possible la tenue, en temps utile, d'un débat sur la validité des résultats des sondages, il favorise la participation active des citoyens à la vie politique et sociale, au lieu d'encourager la passivité face aux résultats des sondages; en permettant un examen valable de l'information fournie par les résultats des sondages communiqués tard dans les campagnes électorales, il favorise l'épanouissement individuel des électeurs en faisant en sorte que leur vote soit l'expression véritable de leurs intentions.

La recherche d'une meilleure information donne davantage de sens à la participation des électeurs au processus électoral. Le fait même que certains électeurs fondent leur décision sur les sondages d'opinion peut justifier les moyens utilisés pour appuyer le droit des électeurs à une bonne information. Cela est compatible avec la conclusion de notre Cour qu'un des objectifs qui sous-tendent la liberté d'expression est la possibilité pour les élec-

54; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 767).

As a matter of fact, in 1979, the committee on polling of the Regroupement québécois des sciences sociales suggested ways to improve the use of polls by journalists and to encourage increased accessibility to poll results broadcast during referendum campaigns. Quebec academics were concerned that with so many polls being conducted the public would not be able to distinguish between "good" and "poor" polls in the heat of the moment and that certain minimum standards of polling would lose out to partisan considerations. One of the committee's recommendations was that publication and broadcast of opinion polls during the week prior to the election be prohibited. Public discussion on published surveys, however, would still be allowed (Lachapelle Study, *supra*, at pp. 40-41). The foregoing recommendations were analysed by the Commission des droits de la personne du Québec in the light of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. As Lachapelle noted at pp. 45-46:

> According to the human rights commission of Quebec, three basic corollaries affect the public's right to be fully informed, and these must be respected in the context of an election or referendum campaign:
>
> 1. the availability of accessible, unrestricted information;
> 2. access to plentiful, diversified information; and
> 3. access to accurate, high-quality information, which implicitly guarantees the freedom to criticize that information.

As to the appropriateness of a blackout period, Lachapelle mentioned that the Commission des droits de la personne du Québec expressed reservations and urged public debate on the issue, but decided against taking a position. According to Lachapelle, "[t]he reasons for the commission's indecision were that although such a prohibition would interfere with freedom of expression, it might also encourage public debate and afford voters de faire des choix éclairés (*Libman*, précité, au par. 54; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, à la p. 767).

27 De fait, en 1979, le comité des sondages du Regroupement québécois des sciences sociales a proposé des moyens en vue d'améliorer le traitement journalistique des sondages d'opinion et de favoriser une plus grande accessibilité aux résultats de sondages diffusés lors de campagnes référendaires. Les universitaires québécois craignaient que, dans l'effervescence du moment, l'avalanche des sondages ne permette pas au public de distinguer les «bons» des «mauvais» sondages, et que certaines normes minimales de production ne soient pas respectées au profit de considérations partisanes. Une des recommandations du Comité a été que la publication et la diffusion de tout sondage d'opinion soient interdites pendant la semaine précédant le jour du scrutin. La discussion publique des sondages publiés serait cependant permise (Étude Lachapelle, *op. cit.*, aux pp. 45 et 46). Ces recommandations ont été étudiées par la Commission des droits de la personne du Québec à la lumière de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12. Comme l'a souligné le professeur Lachapelle, à la p. 53:

> Selon la Commission des droits de la personne du Québec, trois corollaires fondamentaux touchant directement le droit du public à une information pleine et entière doivent être respectés dans le contexte précis d'une campagne électorale ou référendaire:
>
> 1. l'accès à une information libre et sans entrave;
> 2. l'accès à une information abondante et diversifiée;
> 3. l'accès à une information rigoureuse et de qualité, qui permet implicitement l'exercice d'une critique libre sur cette information.

Relativement à l'opportunité d'une période d'embargo, le professeur Lachapelle a mentionné que la Commission des droits de la personne du Québec avait exprimé quelques réticences, au point où elle a décidé de ne pas prendre position et de réclamer un débat public sur la question. Au dire du professeur Lachapelle, «[t]out en reconnaissant que cette interdiction allait à l'encontre de la liberté d'expression, la Commission des droits de la personne

ers a better opportunity to consider the real issues at stake. The commission also emphasized that in a system with no restrictions, it would be impossible to correct any erroneous information published or broadcast during the final hours of a campaign. In short, this proposal would restrict the right to information, as defined in the commission's first two principles [corollaries], in order to promote the third." (Lachapelle Study, at p. 46.)

du Québec a par contre admis qu'elle pouvait également favoriser la discussion publique et déclencher chez les électeurs et électrices une réflexion plus poussée sur les enjeux véritables. La commission a également souligné le fait que dans un régime sans interdits, il est impossible, à la toute fin d'une campagne électorale, d'apporter les correctifs nécessaires à la suite de la diffusion ou de la publication d'information erronée. En somme, cette proposition a pour caractéristique de restreindre le droit à l'information défini dans les deux premiers corollaires au profit de l'exercice du troisième.» (Étude Lachapelle, aux pp. 53 et 54.)

28 The position of the appellants and the intervener Canadian Civil Liberties Association regarding free expression in democracy is couched on the rationale that truth emerges through vigorous debate and more publication of polls. My colleague adopts this view, at para. 108:

La thèse des appelantes et de l'intervenante l'Association canadienne des libertés civiles en ce qui concerne la place de la liberté d'expression dans une démocratie est fondée sur le raisonnement que la vérité émerge d'un débat vigoureux des enjeux et de la publication du plus grand nombre possible de sondages. Mon collègue adopte ce point de vue, au par. 108:

> But an opinion poll does not appear in a vacuum. Rather, it is published chronologically after a series of other polls which have been measuring public opinion throughout the election. In all likelihood, other polls conducted by other polling organizations will appear in other media outlets during the three days prior to election day. . . . The more polls which appear during this period, the less likely that voters will base their decisions on the inaccurate poll.

> Mais un sondage n'est pas fait dans l'abstrait. Au contraire, il est publié chronologiquement, dans une série de sondages mesurant l'opinion publique durant une campagne électorale. Selon toute vraisemblance, d'autres sondages effectués par d'autres maisons seront diffusés par d'autres médias au cours des trois derniers jours précédant le scrutin. [. . .] Plus il y a de sondages durant cette période, moins grand est le risque que les électeurs basent leur décision sur le sondage inexact.

This philosophical underpinning was expressed by McIntyre J., speaking for the majority, in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, where he wrote at p. 583:

Ce fondement philosophique a été décrit par le juge McIntyre qui s'exprimait pour la majorité dans l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, où il écrit ceci, à la p. 583:

> The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1644), and as well John Stuart Mill, "On Liberty" in *On Liberty and considerations on Representative Government* (Oxford 1946), at p. 14:
>
> > If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

> La reconnaissance de l'importance de la liberté d'expression ne date pas d'hier: voir John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1644), et John Stuart Mill, «On Liberty» dans *On Liberty and considerations on Representative Government* (Oxford 1946), à la p. 14:
>
> > [TRADUCTION] Si tous les hommes sauf un étaient du même avis et qu'une seule personne fût d'avis contraire, il ne serait pas justifié que l'ensemble des hommes bâillonnent ce seul individu, pas plus qu'il ne serait justifié que ce dernier, s'il en avait le pouvoir, bâillonne tous les autres hommes.

And, after stating that "All silencing of discussion is an assumption of infallibility", he said, at p. 16:

> Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

According to this rationale, if there are distorting effects, these should be dealt with through corrective response of civil society (e.g., the media, political parties, private individuals, etc.), not through coercive action by the state. There is a serious problem with relying unreservedly on this rationale when it comes to elections. To say that truth most reliably emerges by means of correction through more polls is to assume an ongoing debate. In elections, the debate ends with the vote. A multiplicity of potentially inaccurate polls, none of which are in time to permit debate, fosters confusion and offers little protection to the public. Errors and misinformation may be corrected after the election, but the value of the correction is lost. Elections suggest that a special remedy may be in order: namely, a requirement that information be timely so as to avoid the harm occurring in the first place.

(c) Purpose of Section 322.1

The purpose of s. 322.1 is to improve information to the public during election campaigns. Its primary objective is positive rather than negative. Section 322.1 does not purport to suppress an evil *per se*, such as obscenity in *R. v. Butler*, [1992] 1 S.C.R. 452, or hate propaganda in *Keegstra*, *supra*.

Puis, après avoir dit que [TRADUCTION] «Tout acte ayant pour effet de supprimer la discussion suppose l'infaillibilité de son auteur», il a ajouté à la p. 16:

> [TRADUCTION] Il est toutefois évident d'une évidence qui se passe de démonstration qu'une époque n'est pas plus infaillible que des individus, car chaque époque a été caractérisée par un grand nombre d'opinions qui, à des époques subséquentes, ont été considérées non seulement comme fausses mais comme absurdes; et il est tout autant certain que beaucoup d'opinions maintenant généralement acceptées seront un jour rejetées de la même manière que le sont à présent un bon nombre d'opinions jadis courantes.

L'importance des propos de Mill n'est nullement diminuée par l'abondante documentation qui traite de ce sujet. Le principe de la liberté de parole et d'expression a été accepté sans réserve comme une caractéristique nécessaire de la démocratie moderne.

Suivant ce raisonnement, s'il y a effet déformant, il appartient aux moyens disponibles dans le milieu de la contrer (par exemple les médias, les partis politiques, de simples particuliers) et non à l'État de le faire par mesures correctives. Toutefois, l'application sans réserve de ce raisonnement aux élections soulève un problème sérieux. Affirmer que la vérité émerge de l'effet correcteur de la publication de sondages supplémentaires, c'est présumer l'existence d'un débat qui se continue. Or, dans les campagnes électorales, le débat prend fin le jour du scrutin. Une multiplicité de sondages potentiellement inexacts, dont aucun ne serait publié en temps utile pour qu'il puisse être débattu, engendre la confusion et offre peu de protection au public. Il est possible, après l'élection, de corriger des erreurs et de rectifier une mauvaise information, mais de telles mesures n'ont plus d'utilité. Dans le cas des élections, une mesure spéciale semble s'imposer, soit l'obligation de communiquer l'information en temps utile, de manière à prévenir le mal.

c) L'objet de l'art. 322.1

29 L'article 322.1 a pour objet d'améliorer la qualité de l'information dont dispose le public pendant les campagnes électorales. Son principal objectif est de nature positive plutôt que prohibitive. L'article 322.1 ne vise pas à éliminer un mal proprement dit, telle l'obscénité dans *R. c. Butler*, [1992]

It aims at balancing and enhancing *Charter* rights, namely the informed exercise of the right to vote and a fundamental purpose of freedom of expression, i.e., informed participation in the electoral process. If one wants to identify a harm in the instant case, it would be a lack of enhancement of the electoral process through timely information. Section 322.1 aims at improving the search for truth, by providing for the timeliness of the publication of poll results, so as to allow discussion, not simply proscribing polls. It in no way dictates or deals with the content of expression.

30 The *Charter* should not become an impediment to social and democratic progress. It should not be made to serve substantial commercial interests in publishing opinion poll results, by defeating a reasonable attempt by Parliament to allay potential distortion of voter choice.

31 Parliament adopted s. 322.1 without expressed opposition, following lengthy, extensive, in-depth studies and consideration over several decades, in response to a long-standing concern. Being themselves the very objects of elections, members of Parliament were in the best position to assess the effects of polls in electoral campaigns and their impact on individual voters. In the proceedings, it has not been suggested that members of Parliament had any interest other than to foster the integrity of the electoral process by avoiding voters being misled on facts through denial of an opportunity for scrutiny and discussion.

(d) Evidence

32 Social science studies composed much of the evidence submitted before the motions judge. In that respect, Somers J. rightly stated, at p. 142:

1 R.C.S. 452, ou la propagande haineuse dans *Keegstra*, précité. Il tend plutôt à concilier et à renforcer des droits garantis par la *Charte*, savoir l'exercice éclairé du droit de vote ainsi qu'un aspect fondamental de la liberté d'expression, c.-à-d. la participation éclairée au processus électoral. Si on tient à identifier un mal en l'espèce, il s'agit de l'affaiblissement du processus électoral par l'absence de communication de l'information en temps utile. L'article 322.1 n'a pas pour but l'interdiction des sondages mais il vise plutôt à favoriser la recherche de la vérité en pourvoyant à la publication de leurs résultats en temps utile, pour qu'ils puissent être discutés. En aucune façon concerne-t-il ou dicte-t-il le contenu de cette forme d'expression.

La *Charte* ne doit pas devenir un obstacle au progrès social et démocratique. Elle ne doit pas être mise au service de puissants intérêts commerciaux désireux de publier des résultats de sondages, en faisant échouer une tentative raisonnable du Parlement de prévenir la dénaturation potentielle du choix exprimé par les électeurs.

En réponse à une préoccupation de longue date, le Parlement a adopté sans opposition l'art. 322.1, au terme de dizaines d'années de réflexion et d'études longues et approfondies. Étant les principaux acteurs du processus électoral, les députés étaient les personnes les mieux placées pour évaluer les effets des sondages pendant les campagnes électorales ainsi que leur influence sur les électeurs. Personne n'a prétendu, au cours des présentes procédures, que les députés étaient motivés par quelque autre intérêt que celui de renforcer l'intégrité du processus électoral en évitant que les électeurs soient induits en erreur sur des faits parce qu'on leur refuse la possibilité de bien les examiner et d'en discuter.

d) La preuve

Une grande partie de la preuve présentée au juge des requêtes était composée d'études réalisées dans le domaine des sciences sociales. À cet égard, le juge Somers a, avec raison, affirmé ce qui suit, à la p. 142:

[I]t would be a mistake to look only at social science evidence in assessing whether the objective is pressing and substantial. . . . Of course, social science data are ready evidence of the importance of different problems, but it is not the only evidence courts should consider, nor should it be given decisive weight or considered requisite to government action. Thus, even if social science evidence is found to be inconclusive, it is still possible to ground a pressing objective on evidence of extended public debate of an issue or by looking at the actions of other democracies. On this application, it is clear from the number of times a concern about polling was raised by the public and in reports stemming from public consultation, that many considered this to be a pressing issue. . . . In a democracy, it is to be expected that representatives will react to such a debate, either through private members bills or government legislation; it might be an institutional failure if they did not. [Emphasis added.]

[TRADUCTION] [C]e serait une erreur que d'examiner seulement la preuve fondée sur les sciences sociales pour évaluer si l'objectif est urgent et réel. [. . .] Bien entendu, les données produites par les sciences sociales sont des éléments de preuve disponibles sur l'importance de divers problèmes, mais il ne s'agit pas des seuls éléments de preuve que les tribunaux doivent examiner et il ne faut pas non plus leur accorder un poids décisif ni les considérer comme un préalable à l'action gouvernementale. En conséquence, même si la preuve fondée sur les sciences sociales est jugée non concluante, il demeure possible d'étayer l'existence d'un objectif urgent en prouvant qu'une question fait l'objet d'un large débat public ou en examinant les mesures prises dans d'autres démocraties. Dans le cadre de la présente requête, il ressort clairement du nombre de fois que des préoccupations concernant les sondages ont été soulevées par le public et dans des rapports issus de consultations publiques que de nombreuses personnes estiment qu'il s'agit d'une question urgente. [. . .] Dans une démocratie, on s'attend à ce que les élus réagissent à un tel débat, soit par le dépôt par des députés de projets de loi, soit par des mesures législatives sur initiative du gouvernement; le défaut d'agir des élus pourrait bien constituer un manquement institutionnel. [Je souligne.]

As outlined earlier in these reasons, Somers J. had ample material to support his position that, taken as a whole, the evidence "serves to buttress the respondent's contention that the unregulated distribution of poll results is not without its potential problems" (p. 121). It must be pointed out that the Court of Appeal unanimously accepted Somers J.'s observations and findings of facts regarding his s. 1 analysis (see (1996), 30 O.R. (3d) 350, at pp. 359-60). The evidence shows that there exists a long-standing concern about the publication of opinion survey results during election campaigns in Canada. In the last 30 years at least, several reports have studied and discussed this issue in depth.

33 Comme je l'ai souligné, le juge Somers disposait amplement d'éléments au soutien de sa conclusion que la preuve, prise globalement, [TRADUCTION] «étaye la prétention de l'intimé que la distribution non réglementée des résultats de sondages n'est pas sans problèmes potentiels» (p. 121). Il convient de souligner que la Cour d'appel a unanimement accepté les observations et les conclusions de fait du juge Somers en ce qui concerne son analyse selon l'article premier (voir (1996), 30 O.R. (3d) 350, aux pp. 359 et 360). Il ressort de la preuve que la publication des sondages d'opinion pendant les campagnes électorales constitue une préoccupation de longue date au Canada. Au cours des 30 dernières années tout au moins, plusieurs rapports ont examiné et analysé la question en profondeur.

In the instant case, at p. 143, Somers J. rightly found that

34 En l'espèce, le juge Somers a à juste titre conclu, à la p. 143,

it is reasonable to presume that polls can harm the electoral process. I rely here on the following evidence:

[TRADUCTION] [qu'i]l est raisonnable de présumer que les sondages peuvent porter atteinte au processus électoral. Je me fonde à cet égard sur les éléments de preuve suivants:

(1) the sheer prevalence of polling results (22 national polls reported during the 1988 election, mentioned in some 30 per cent of television coverage);

(2) awareness of poll results amongst 70 to 80 per cent of the public;

(3) methodological information necessary of critical evaluation is very frequently absent from reporting;

(4) the lack of a corrective response time when polls are published close to election day.

In reaching these conclusions, Somers J. makes specific reference to several findings of the Lortie Commission. Referring to its finding, at p. 457 of its Final Report, that "recent research provides strong support for the proposition that published opinion polls can significantly influence campaigns and voters", he commented (at p. 118) that "[t]he Commission based this conclusion on the fact that '[o]ur research demonstrates that polls did have measurable effects on the conduct of election campaigns and the choice voters make' (p. 456)."

35 As he stated, at p. 119:

. . . the evidence presented dealt not only with the effect of polls on voters, but also with problems associated with the undue influence, late publication and accuracy of polls. The evidence pointed to a general worry about the "undue influence" of opinion polls on the election process. This influence is said to flow from two related factors. The first is that the polls are presented as scientific and authoritative. The second is that despite this presentation, the public is often not given the information needed to gauge a poll's true accuracy. [Emphasis added.]

This is further explained in the Lortie Commission Final Report (p. 455 quoted at p. 119 of the judgment):

Because they are presented as "scientific", published opinion polls raise issues of public confidence in the integrity of the electoral process. Notwithstanding their

1) le simple fait de l'omniprésence des sondages (22 sondages nationaux ont été recensés pendant la campagne électorale de 1988 et mentionnés dans 30 pour 100 des reportages télévisés);

2) la connaissance, par 70 à 80 pour 100 du public, des résultats des sondages;

3) l'absence très fréquente, dans les reportages, de l'information nécessaire sur la méthodologie utilisée pour faire une appréciation critique des sondages;

4) l'absence d'un délai de rectification lorsque les sondages sont publiés peu de temps avant le jour du scrutin.

À l'appui de ses conclusions, le juge Somers réfère expressément à plusieurs constatations de la Commission Lortie. Se référant à la conclusion suivante, qui figure à la p. 475 du Rapport final de la Commission Lortie: «Bien que les maisons de sondage ne cessent de répéter que leurs données affectent peu le vote, des recherches récentes tendent à prouver le contraire», le juge Somers fait le commentaire qui suit (à la p. 118): [TRADUCTION] «[l]a Commission a fondé cette conclusion sur le fait qu'il ressortait de ses recherches que "les sondages ont effectivement une influence mesurable sur la conduite des campagnes électorales et sur les choix de l'électorat" (pp. 473 et 474).»

Comme dit le juge Somers, à la p. 119:

[TRADUCTION] . . . la preuve présentée portait non seulement sur l'effet des sondages sur les électeurs, mais également sur des problèmes liés à l'influence indue des sondages, à leur publication tard dans les campagnes électorales et à leur exactitude. La preuve a révélé l'existence d'une inquiétude généralisée à l'égard de l'«influence indue» des sondages d'opinion sur le processus électoral. Cette influence découlerait, affirme-t-on, de deux facteurs connexes. Le premier est le fait que les sondages sont présentés comme ayant un caractère scientifique et faisant autorité. Le deuxième est que, malgré qu'ils soient présentés ainsi, il arrive souvent qu'on ne fournisse pas au public l'information nécessaire pour évaluer leur exactitude. [Je souligne.]

Des explications supplémentaires sont données dans le Rapport final de la Commission Lortie (à la p. 473, et citées à la p. 119 du jugement):

Parce qu'ils sont présentés comme «scientifiques», les sondages d'opinion diffusés par les médias suscitent des inquiétudes quant à la confiance du public dans l'in-

claims to scientific validity and accuracy in representing the views of all potential voters, opinion polls are susceptible to many forms of error and misrepresentation. The apparent precision of the data they report fails to reflect the fact that they are estimates of the distribution of opinion at a given time. Yet their apparent authority gives them considerable influence over the conduct of campaigns and the choices made by voters. [Emphasis added.]

Somers J. also found, at p. 142, that the international review of legislation regarding publication of opinion poll results during elections was "strong evidence of a pressing objective". At least six European Union countries have some form of polling blackout, ranging in duration from five days in Spain to the entire length of the election in Portugal. French regulations prohibit publication during the last week before a round of voting for presidential, legislative, or European elections. In Belgium, the prohibition lasts 30 days. Greece, Brazil, South Africa, South Korea, Japan, and Australia enacted legislation to regulate or ban the publication of poll results. The Lachapelle Study, *supra*, concluded its international survey, at p. 68, by asserting that:

A review of the legislation of various countries reveals that governments tend toward outright banning of polls near the end of election campaigns rather than requiring the publication of a specifications sheet. Only France has chosen both options. However, every law is imperfect and can only partially regulate as multifaceted a practice as polling. [Emphasis added.]

The fact that so many democratic, industrialized nations have passed legislation in this particular area is further evidence of the importance of the problem. Extensive polling is a relatively recent phenomenon. That some countries have not responded does not detract from the fact that many have. To make the response of others to political or

tégrité du processus électoral. En dépit de la précision scientifique revendiquée par leurs auteurs, les sondages sont sujets à maintes erreurs et distorsions. La précision apparente de leurs données occulte le fait qu'ils ne sont jamais qu'une estimation de la distribution de l'opinion à un moment donné. Leur apparence de rigueur leur confère néanmoins une influence considérable sur la conduite des campagnes et l'issue des scrutins. [Je souligne.]

Le juge Somers conclut également, à la p. 142, que l'examen des dispositions législatives en vigueur dans d'autres pays relativement à la publication des résultats de sondages d'opinion pendant les campagnes électorales apportait [TRADUCTION] «une preuve solide de l'existence d'un objectif urgent». Au moins six pays membres de l'Union européenne interdisent, dans une plus ou moins large mesure, la publication des sondages pendant les campagnes électorales. La durée de cette interdiction va de cinq jours en Espagne à toute la durée de la campagne électorale au Portugal. En France, il est interdit de publier des sondages pendant la semaine qui précède un tour de scrutin dans le cadre des élections présidentielles, législatives ou européennes. En Belgique, la durée de l'interdiction est de 30 jours. En outre, des mesures législatives réglementant ou interdisant la publication de sondages ont été adoptées en Grèce, au Brésil, en Afrique du Sud, en Corée du Sud, au Japon et en Australie. L'Étude Lachapelle, *op. cit.*, a conclu son survol de la situation à l'échelle internationale, en affirmant ce qui suit, à la p. 79:

Il ressort de ce survol de la législation de divers pays que les gouvernements ont davantage tendance à interdire carrément les sondages vers la fin des campagnes électorales plutôt que d'exiger la publication d'une fiche technique, seule la France ayant choisi ces deux options. Toutefois, toute législation demeure en soi imparfaite et ne peut que partiellement réglementer une pratique, telle celle des sondages, ayant de multiples facettes. [Je souligne.]

Le fait qu'autant de nations industrialisées de tradition démocratique aient adopté des mesures législatives en la matière est une preuve supplémentaire de l'importance du problème. La prolifération des sondages est un phénomène relativement récent. Le fait que certains pays n'ont pas réagi à ce phénomène n'enlève rien au fait que de nom-

social concerns a pre-requisite to legislation would transform the *Charter* into a sword against social progress and stultify government action.

37 In their factum, the appellants refer to a decision of the Alberta Court of Appeal, *Canada (Attorney General) v. Somerville*, [1996] 8 W.W.R. 199, to support the view that Parliament's objective as to the impugned legislation is not permissible under the *Charter*. In *Somerville*, the Court of Appeal held that certain provisions of the *Canada Elections Act* which, among other things, limited third party advertising expenses during a federal election campaign to a maximum of $1,000 per individual, were contrary to freedom of expression under the *Charter*. Conrad J.A., Harradence J.A. concurring, stated, at pp. 228 and 231, that:

> The Attorney General argues that unrestricted third party advertising could distort the political process.
>
> . . .
>
> This legislation bans input. This is a case where the objective of the legislation is not trying to balance expenditures of outside groups, the press and parties. Rather, one is led to conclude that the very aim or purpose of this legislation is to ensure that third parties cannot be heard in any effective way and that political parties are entitled to preferential protection. Its objective strikes at the core of these fundamental rights and freedoms, and is arguably *legislation which has as its very purpose the restriction of these rights and freedoms, which can never be justified*. [Emphasis added by the appellants.]

In *Libman*, *supra*, at para. 56, the *Somerville* decision was unanimously criticized inasmuch as this Court declared "that the objective of Quebec's referendum legislation [of promoting fairness in a democratic process through a certain equality of resources] is highly laudable, as is that of the *Canada Elections Act*". In *Libman*, the system set

breux autres l'ont fait. Ériger la prise de mesures par d'autres pays à l'égard de problèmes politiques ou sociaux en préalable à l'adoption de mesures législatives en la matière aurait pour effet de faire de la *Charte* une arme contre le progrès social et d'étouffer l'action gouvernementale.

Dans leur mémoire, les appelantes se sont référées à l'arrêt *Canada (Attorney General) c. Somerville*, [1996] 8 W.W.R. 199, de la Cour d'appel de l'Alberta au soutien de leur prétention que l'objectif que vise le Parlement par la disposition législative contestée n'est pas autorisé par la *Charte*. Dans cet arrêt, la Cour d'appel a conclu que certaines dispositions de la *Loi électorale du Canada* ayant notamment pour effet de limiter à 1 000 $ par personne les frais de publicité que peuvent engager des tiers lors des campagnes électorales fédérales étaient incompatibles avec la liberté d'expression garantie par la *Charte*. Le juge Conrad a déclaré ceci, avec l'appui du juge Harradence, aux pp. 228 et 231:

> [TRADUCTION] Le procureur général prétend que la publicité illimitée par les tiers peut dénaturer le processus politique.
>
> . . .
>
> La mesure législative en cause interdit à des personnes de s'exprimer. Dans la présente affaire, l'objectif de la mesure législative n'est pas d'établir un équilibre entre les dépenses engagées par des groupes extérieurs, la presse et les parties. On est plutôt amené à conclure que le but ou l'objet même de cette mesure est de faire en sorte que les tiers ne puissent se faire entendre de manière efficace et que certains partis politiques jouissent d'une protection préférentielle. Son objectif touche au cœur même de ces libertés et droits fondamentaux, et il est possible de soutenir qu'il s'agit *d'une mesure législative qui a pour objet la restriction de ces droits et libertés, restriction qui ne peut jamais être justifiée*. [Soulignement et italiques ajoutés par les appelantes.]

Dans l'arrêt *Libman*, précité, au par. 56, l'arrêt *Somerville* a été unanimement critiqué dans la mesure où notre Cour a déclaré que «l'objectif de la loi référendaire québécoise [qui consiste à favoriser l'équité du processus démocratique en visant à égaliser les ressources disponibles] est fort louable, au même titre que l'objectif de la *Loi électo-*

up by the referendum legislation restricted independent spending, thus freedom of expression, in order "to preserve a balance in the promotion of the options and favour an informed and truly free exercise of the right to vote" (para. 54 (emphasis added)). The instant case aims at this very objective.

Considering that the legislative objective of s. 322.1 of the *Canada Elections Act* is consistent with and indeed enhances the objectives underlying freedom of expression, among them the ability of voters to make informed choices and the promotion of political and social participation, that Parliament's concern is clearly pressing and substantial, in that it is directed to the realisation of the important collective goal of safeguarding the integrity of the electoral process (*Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 38), I conclude that the objective of preventing the potentially distorting effect of public opinion survey results that are released late in an election campaign when there is no longer a sufficient opportunity to respond is a sufficiently important objective which meets the first step of the analysis under s. 1 of the *Charter*.

3. *Proportionality Test*

(a) Rational Connection

Parliament has chosen to ban the publication, dissemination and broadcast of poll results from midnight on Friday before polling day through the end of polling day. "The essence of rational connection is a causal relationship between the objective of the law and the measures enacted by the law. This is often a difficult matter to establish by evidence, and the Supreme Court of Canada has not always insisted on direct proof of the causal relationship." (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 35-29.) In *RJR-MacDonald*, *supra*, the Court unanimously agreed that a causal relationship between advertising and tobacco product consumption could be

rale du Canada». Dans *Libman*, le régime établi par la loi référendaire limitait les sommes que les particuliers pouvaient engager et, de ce fait, portait atteinte à la liberté d'expression de ces derniers «pour préserver l'équilibre dans la diffusion des options et favoriser un exercice éclairé et véritablement libre du droit de vote» (par. 54 (je souligne)). L'objectif visé en l'espèce est exactement le même.

38 Étant donné que l'objectif visé par l'art. 322.1 de la *Loi électorale du Canada* est compatible avec les objectifs qui sous-tendent la liberté d'expression, notamment la capacité des électeurs de faire des choix éclairés et l'encouragement de la participation des citoyens à la vie politique et sociale et de fait les favorise, et que la préoccupation du législateur est clairement urgente et réelle, en ce qu'elle tend à la réalisation d'un but collectif important — savoir la sauvegarde de l'intégrité du processus électoral (*Harvey c. Nouveau Brunswick (Procureur général)*, [1996] 2 R.C.S. 876, au par. 38), je conclus que l'objectif qui consiste à prévenir l'effet déformant susceptible de découler de la publication de résultats de sondages tard dans les campagnes électorales, lorsqu'il ne reste plus assez de temps pour y répondre, constitue un objectif suffisamment important pour satisfaire au premier volet de l'analyse selon l'article premier de la *Charte*.

3. *Le critère de la proportionnalité*

a) Le lien rationnel

39 Le Parlement a choisi d'interdire la publication, l'annonce et la diffusion de résultats de sondages entre minuit le vendredi qui précède le jour du scrutin et la fermeture des bureaux de scrutin. [TRADUCTION] «L'essence du lien rationnel est l'existence d'un lien de causalité entre l'objectif de la règle de droit et les mesures édictées par celle-ci. Ce lien de causalité est souvent difficile à établir en preuve, et la Cour suprême du Canada n'a pas toujours insisté pour qu'on en fasse la preuve directe». (P. W. Hogg, *Constitutional Law of Canada* (éd. à feuilles mobiles), vol. 2, à la p. 35-29.) Dans l'arrêt *RJR-MacDonald*, précité, la Cour a accepté à l'unanimité qu'un lien de causalité

based either on common sense, reason, or logic (La Forest J., at para. 86; McLachlin J., at paras. 156-58; and Iacobucci J., at para. 184), even though the evidence may be admittedly inconclusive. In *Butler*, *supra*, Sopinka J. found, at p. 502, that it was "reasonable to presume" that there is a causal relationship between obscenity and harm to society. Similarly, in *Ross*, *supra*, La Forest J., writing for the Court, held, at para. 101, that it was "reasonable to anticipate" that there is a causal link between anti-Semitic activity by school teachers outside school and discriminatory attitudes within school.

entre la publicité et la consommation de produits du tabac pouvait être fondé sur le bon sens, la raison ou la logique (le juge La Forest, au par. 86; le juge McLachlin, aux par. 156 à 158; et le juge Iacobucci, au par. 184), même si la preuve peut, reconnaît-on, être non concluante. Dans *Butler*, précité, le juge Sopinka a conclu, à la p. 502, qu'il est «raisonnable de supposer» qu'il existe un lien de causalité entre l'obscénité et le préjudice causé à la société. De même, dans *Ross*, précité, le juge La Forest, s'exprimant au nom de la Cour, a conclu, au par. 101, qu'il était «raisonnable de s'attendre» à ce qu'il existe un lien de causalité entre les activités antisémites d'enseignants à l'extérieur des écoles et les attitudes discriminatoires qui avaient cours à l'intérieur de celles-ci.

40 In the instant case, the rational connection is self-evident. Opinion polls significantly influence voter choice and electoral campaigns. It follows that the publication of inaccurate, though authoritative, opinion survey results that go uncorrected may well lead to voters making misinformed decisions. Logically, there is a reasoned apprehension that voters will be deprived of the full exercise of their franchise. Its importance is measured by the significant influence of polls on voters and the prevalence of misleading polls. Ensuring that polls that cannot be adequately, publicly and independently evaluated as to their correctness because of insufficient time are not published clearly addresses this problem. Voters are free to cast their ballot as they see fit; however, the democratic process cares about each voter and should not tolerate the fact that, in the pooling booth, some voters would express themselves on the basis of misleading, or potentially misleading, information that is *de facto* immunized from scrutiny and criticism.

En l'espèce, le lien rationnel est évident. Les sondages d'opinion influencent de façon importante le choix des électeurs et les campagnes électorales. Il s'ensuit que la publication de résultats de sondages qui, quoiqu'ils fassent autorité, sont inexacts et ne sont pas rectifiés, peut fort bien amener les électeurs à prendre des décisions mal éclairées. Logiquement, il existe une appréhension raisonnée que certains électeurs soient privés de la possibilité d'exercer pleinement leur droit de vote. L'importance de cette appréhension se mesure à l'influence des sondages sur les électeurs et à la fréquence des sondages trompeurs. Or, le fait d'interdire la publication de sondages dont l'exactitude ne peut, par manque de temps, être évaluée de manière adéquate, publique et indépendante, vise clairement à résoudre ce problème. Les électeurs sont libres de voter comme ils l'entendent. Cependant, le processus démocratique implique chaque électeur et ne devrait pas tolérer le fait que, dans l'isoloir, certains électeurs expriment leur choix sur la foi de renseignements trompeurs ou potentiellement trompeurs, renseignements qui sont *de facto* à l'abri de tout examen ou critique.

(b) Minimal Impairment

b) L'atteinte minimale

41 In my view, there is no doubt that s. 322.1 constitutes a genuine mediation between the rights of voters to receive information in a timely fashion, and the right of pollsters and publishers freely to provide the information they want. Not only does

À mon avis, il ne fait aucun doute que l'art. 322.1 constitue un véritable compromis entre le droit des électeurs d'obtenir de l'information en temps utile et celui des sondeurs et des diffuseurs de fournir librement l'information de leur choix.

the legislation protect the rights of voters but it does so by serving one of the very purposes of freedom of expression, that is informing while allowing for political debate and discussion. As mentioned earlier, the provision also strikes a balance between two basic aspects of voters' right to information, that are, on the one hand, the availability of accessible, unrestricted, plentiful, diversified information and, on the other, the timely availability of factual information that may be misleading so as to allow for scrutiny and criticism.

Non seulement cette mesure législative protège-t-elle les droits des électeurs, mais elle le fait en servant l'un des objectifs mêmes de la liberté d'expression, celui d'informer le public tout en permettant la discussion et les débats politiques. Comme je l'ai déjà dit, cette disposition établit également un équilibre entre deux aspects fondamentaux du droit des électeurs à l'information: d'une part, la disponibilité d'une information accessible, abondante, diversifiée et non assortie de restrictions; d'autre part, l'accès en temps utile à l'information factuelle qui est susceptible d'être trompeuse, de manière à en permettre l'examen minutieux et la critique.

In matching means to ends and asking whether rights are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck (*Irwin Toy*, *supra*, at p. 993). As the majority also held in *Irwin Toy*, at p. 999: "This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups." I share the respondent's view that this Court should not second-guess the wisdom of Parliament in its endeavour to draw the line between competing credible evidence, once it has been established, on the civil standard of proof, that Parliament's objective was pressing and substantial:

42 En comparant la fin et les moyens et en se demandant s'il a été porté atteinte le moins possible aux droits en cause, le législateur qui est appelé à arbitrer les revendications de groupes concurrents sera obligé de trouver le point d'équilibre sans certitude absolue quant à la réponse optimale (*Irwin Toy*, précité, à la p. 993). Comme ont également conclu les juges de la majorité dans cet arrêt, à la p. 999: «Cette Cour n'adoptera pas une interprétation restrictive de la preuve en matière de sciences humaines, au nom du principe de l'atteinte minimale, et n'obligera pas les législatures à choisir les moyens les moins ambitieux pour protéger des groupes vulnérables.» Je suis d'avis comme l'intimé que notre Cour ne devrait pas mettre en doute la sagesse du Parlement dans ses efforts pour faire la part des choses à même les éléments de preuve contradictoires mais par ailleurs crédibles, une fois qu'il a été établi, suivant la norme de preuve applicable en matière civile, que l'objectif du législateur est urgent et réel:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.
>
> (*Irwin Toy*, at p. 993.)

> Pour trouver le point d'équilibre entre des groupes concurrents, le choix des moyens, comme celui des fins, exige souvent l'évaluation de preuves scientifiques contradictoires et de demandes légitimes mais contraires quant à la répartition de ressources limitées. Les institutions démocratiques visent à ce que nous partagions tous la responsabilité de ces choix difficiles. Ainsi, lorsque les tribunaux sont appelés à contrôler les résultats des délibérations du législateur, surtout en matière de protection de groupes vulnérables, ils doivent garder à l'esprit la fonction représentative du pouvoir législatif.
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> (*Irwin Toy*, à la p. 993.)

43 At this stage, the question is whether there is a reasonable basis, on the evidence tendered, for concluding that a blackout on all opinion polls during the last weekend of an election campaign and during election day impaired freedom of expression as little as possible given the government's pressing and substantial objective (*Irwin Toy*, at p. 994). Parliament is not bound to find the least intrusive nor the best means. This would be too high a standard for our elected representatives to meet. In *RJR-MacDonald*, *supra*, at para. 160, McLachlin J. stated:

> [T]he government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. . . . [Emphasis added.]

(See also *Harvey v. New Brunswick (Attorney General)*, *supra*, at para. 47, *per* La Forest J.)

In *Keegstra*, *supra*, Dickson C.J. also noted at pp. 784-85:

> In assessing the proportionality of a legislative enactment to a valid governmental objective, however, s. 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a *Charter* right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all

À ce stade-ci la question est de savoir s'il existe, à la lumière de la preuve présentée, un fondement raisonnable permettant de conclure que l'imposition d'un embargo visant tous les sondages d'opinion durant la fin de semaine précédant le jour du scrutin et le jour du scrutin lui-même porte atteinte le moins possible à la liberté d'expression compte tenu de l'objectif urgent et réel poursuivi par le gouvernement (*Irwin Toy*, à la p. 994). Le législateur n'est pas tenu de trouver le moyen le moins attentatoire ni encore le meilleur moyen. Il s'agirait d'une norme trop élevée pour nos élus. Dans *RJR-MacDonald*, précité, au par. 160, le juge McLachlin déclare ceci:

> [L]e gouvernement doit établir que 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 restriction doit être «minimale», c'est-à-dire que la loi doit être soigneusement adaptée de façon à ce que l'atteinte aux droits ne dépasse pas ce qui est nécessaire. Le processus d'adaptation est rarement parfait et les tribunaux doivent accorder une certaine latitude au législateur. Si la loi se situe à l'intérieur d'une gamme de mesures raisonnables, les tribunaux ne concluront pas qu'elle a une portée trop générale simplement parce qu'ils peuvent envisager une solution de rechange qui pourrait être mieux adaptée à l'objectif de la violation . . . [Je souligne.]

(Voir également *Harvey c. Nouveau-Brunswick (Procureur général)*, précité, au par. 47, le juge La Forest.)

Dans *Keegstra*, précité, le juge en chef Dickson dit aussi, aux pp. 784 et 785:

> Dans l'appréciation de la proportionnalité d'une disposition législative avec un objectif gouvernemental valable, toutefois, l'article premier ne doit pas jouer dans tous les cas de manière à contraindre le gouvernement à n'intervenir que de la manière qui porte le moins possible atteinte à un droit ou à une liberté garantis par la *Charte*. Il se peut en effet qu'il y ait plusieurs moyens d'atteindre un objectif urgent et réel, dont chacun impose un degré plus ou moins grand de restriction à un droit ou à une liberté. Dans ces circonstances, le gouvernement peut légitimement recourir à une mesure plus restrictive, soit isolément soit dans le cadre d'un plan d'action plus étendu, pourvu que cette mesure ne fasse pas double emploi, qu'elle permette de réaliser l'objectif de façons qui seraient impossibles par le biais d'autres mesures, et qu'elle soit à tous autres égards proportion-

other respects proportionate to a valid s. 1 aim. [Emphasis added.]

One can conceive of alternatives to the impugned measure. In *RJR-MacDonald*, *supra*, at para. 160, McLachlin J. stated: "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail" (emphasis added). I conclude that these alternative measures cannot pretend to equally serve the objective of preventing the potentially distorting effect of public opinion survey results that are released late in an election campaign when there is no longer a sufficient opportunity to respond, and be as effective when compared to the measure at issue.

One of the suggested alternatives is mandatory publication of methodological information. Since poll results would be allowed to be published up until the last minute of the election campaign, it supposes that voters can, looking at that methodological information, decide for themselves if the poll was properly conducted and ascertain whether the results are reliable. Absent sufficient time for public discussion of the poll results, it is unlikely that this alternative would be of real assistance as voters may lack the requisite knowledge to properly assess the results. The publication of methodological information is useful when analysts and political parties have sufficient time to evaluate its validity.

The second proposed solution is to create a punishment for publishing false poll results. Once again, the proposal suffers from serious shortcomings. Firstly, the prohibition is unlikely to prevent voters from being misled. Despite successful prosecution, the damage to voters would already have been done. Secondly, even if one were to assume that such a prohibition, coupled with severe sanctions, would serve as a deterrent, it would only aim at intentional deception. Consequently erroneous polls whose results will not have been considered

née à un objectif légitime aux fins de l'article premier. [Je souligne.]

44 On peut concevoir des solutions autres que la mesure contestée. Dans *RJR-MacDonald*, précité, au par. 160, le juge McLachlin déclare que «si le gouvernement omet d'expliquer pourquoi il n'a pas choisi une mesure beaucoup moins attentatoire et tout aussi efficace, la loi peut être déclarée non valide» (je souligne). J'arrive à la conclusion qu'aucune de ces solutions de rechange ne saurait prétendre servir aussi bien l'objectif visé, savoir éviter l'effet potentiellement déformant de résultats de sondages publiés tard dans la campagne électorale, alors qu'il ne reste plus assez de temps pour y répliquer, et être aussi efficace que la mesure en litige.

45 L'une des solutions de rechange proposées est la publication obligatoire d'information sur la méthodologie utilisée. Comme la publication de résultats de sondages serait autorisée jusqu'à la toute fin de la campagne électorale, les électeurs seraient en mesure, à partir de cette information, de décider par eux-mêmes si un sondage a été établi convenablement et de déterminer si ses résultats sont fiables. En l'absence d'une période qui soit suffisamment longue pour permettre la discussion publique des résultats des sondages, il est peu probable que cette solution soit vraiment utile, car il est possible que les électeurs n'aient pas les connaissances requises pour évaluer convenablement ces résultats. La publication d'information méthodologique est utile lorsque analystes et partis politiques ont suffisamment de temps pour évaluer sa validité.

46 La deuxième solution proposée est de pénaliser la publication de faux résultats de sondages. Cette proposition présente elle aussi de sérieuses lacunes. Premièrement, l'interdiction n'empêcherait vraisemblablement pas les électeurs d'être induits en erreur. Même si des poursuites étaient intentées avec succès, le tort aurait déjà été causé. Deuxièmement, même dans l'hypothèse qu'une telle interdiction, assortie de peines sévères, aurait un effet dissuasif, elle ne viserait que les cas de tromperie intentionnelle. En conséquence, des son-

due to lack of time will still mislead voters and remain unpunished.

47 In summary, there is simply no equally effective alternative to the current short-term blackout for achieving the legislative objective.

48 What is then the scope of s. 322.1? It is claimed that s. 322.1 is overbroad in that it prohibits polls of all kinds regardless of their scientific nature or quality. I agree with the Court of Appeal's finding that the provision prohibits all opinion surveys, regardless of how informal they may be, "hamburger polls" included. The expression "hamburger polls" describes what is sometimes used as a marketing device during elections where goods are matched to political candidates or parties. The sales of each item are then claimed to reflect public sentiment. As amusing as it may sound, the expression "hamburger polls" tends to suggest a clear cut line between reliable poll results and misleading poll results. There is no such clear demarcation. To limit the ban to polls that are acceptable to the scientific community leaves out polls that, some voters may wrongly be led to believe, are representative or based on scientific methodology, and complicates enforcement of the provision. On the other hand, the information conveyed by "hamburger polls" is of such questionable nature that any infringement of *Charter* rights is minimal, at best.

49 I add that, considering the main legislative objective, I share my colleague's view that the impugned legislation does not apply to the discussion of previously released poll results. After stating two purposes for s. 322.1, namely to provide voters with a rest period and to guard them against

dages erronés, dont les résultats n'auraient pas été examinés faute de temps, continueraient d'induire en erreur les électeurs, et leur publication resterait impunie.

En résumé, il n'existe tout simplement pas de solution de rechange aussi efficace que le court embargo en vigueur actuellement pour réaliser l'objectif visé par la loi.

Quelle est donc alors la portée de l'art. 322.1? On prétend que l'art. 322.1 a une portée trop large en ce qu'il interdit la publication de tous les types de sondages, indépendamment de leur nature ou qualité scientifiques. Je souscris à la conclusion de la Cour d'appel que la disposition visée interdit tous les sondages d'opinion, si informels qu'ils soient, y compris les [TRADUCTION] «votes au hamburger» («*hamburger polls*»). Cette expression désigne un truc de marketing parfois utilisé lors de campagnes électorales et au moyen duquel on vend des biens de consommation en les associant à des partis politiques ou à des candidats. Le nombre d'articles de chaque type ainsi vendus est ensuite présenté comme le reflet de l'opinion publique. Aussi amusante qu'elle puisse paraître, l'expression «votes au hamburger» tend à indiquer l'existence d'une ligne de démarcation nette entre les résultats de sondages fiables et les résultats trompeurs. Or, une telle ligne de démarcation n'existe pas. Le fait de limiter l'application de l'interdiction aux sondages jugés acceptables par la communauté scientifique a pour effet de permettre la publication de sondages que certains électeurs pourraient à tort considérer comme représentatifs ou fondés sur une méthodologie scientifique, en plus de rendre plus difficile la mise en œuvre de la mesure. Par ailleurs, l'information communiquée par les «votes au hamburger» est à ce point douteuse que toute atteinte à des droits garantis par la *Charte* est minimale, tout au plus.

J'ajoute que, compte tenu du principal objectif de la mesure législative en cause, je suis d'avis comme mon collègue que la disposition contestée n'interdit pas l'analyse des résultats de sondages déjà publiés. Après avoir fait état de deux objectifs sous-tendant l'art. 322.1, c'est-à-dire le fait d'ac-

an inaccurate poll which occurs late in the campaign, my colleague writes, at para. 99:

> Accepting these as the two objectives of s. 322.1, it is my view that any ambiguity in the words of the section should be interpreted in accordance with those purposes, rather than to frustrate them. I conclude, therefore, that Somers J. was correct in interpreting the prohibition in s. 322.1 as applying only to "new" poll results, i.e. results that are undisclosed as of midnight on the Friday before election day. Far from preventing old poll results from being mentioned, the very *raison d'être* of the section is that those old poll results should be aired and discussed in the media so that their accuracy can be fully determined in public debate.

The legislation prohibits broadcast, publication and dissemination. *Ejusdem generis*, these expressions refer only to the initial release of poll results. In comparison, French and Belgian regulations more clearly ban the publication, broadcast and commentary of the surveys.

The impugned limitation minimizes the risks of publication and dissemination of misleading poll results on or just before the crucial moment of the polling day, by allowing just enough time (72 hours approximately), from Friday prior to election day to the closing of polling stations on election day, to collect any undisclosed methodological information, assess poll results, discuss the assessment, criticize the analyses, and disseminate the results of the discussions throughout the electorate. This period is very shortlived, especially for the analysis of a cross-Canada opinion poll and the airing of the analysis, having regard to the time allotted for voting and the restriction on broadcasting and advertising on polling day and the day preceding.

The Lachapelle Study suggested 72 hours, while the Lortie Commission recommended 48. Profes-

corder aux électeurs une période de répit et de les protéger contre la publication, tard dans les campagnes électorales, de sondages inexacts, mon collègue écrit ceci au par. 99:

> Acceptant qu'il s'agit là des deux objectifs de l'art. 322.1, je suis d'avis que toute ambiguïté des mots employés dans cette disposition doit être dissipée de manière à favoriser et non à contrecarrer la réalisation de ces objectifs. En conséquence, je conclus que le juge Somers a eu raison de considérer que l'interdiction prévue à l'art. 322.1 s'applique uniquement aux résultats de «nouveaux» sondages, c'est-à-dire aux résultats qui n'ont pas encore été communiqués à minuit le vendredi qui précède le jour du scrutin. Loin d'empêcher que l'on fasse état des résultats de sondages déjà publiés, la raison d'être même de cet article est la diffusion et la discussion de ces sondages dans les médias de sorte que leur exactitude puisse être débattue pleinement en public.

La disposition en cause interdit l'annonce, la publication et la diffusion des résultats de sondages. Or, suivant la règle *ejusdem generis*, ces expressions ne visent que la communication initiale des résultats de sondages. Par comparaison, en France et en Belgique, la réglementation applicable interdit plus clairement la publication, l'annonce et le commentaire de sondages.

50 La restriction contestée réduit au minimum les risques de publication et de diffusion de résultats de sondages trompeurs au moment décisif, soit le jour du scrutin, ou tout juste avant celui-ci, en accordant tout juste assez de temps (environ 72 heures) — soit du vendredi précédant le jour du scrutin jusqu'à la fermeture des bureaux de scrutin le jour de l'élection — pour recueillir toute information méthodologique non divulguée, évaluer les résultats des sondages, discuter cette évaluation, critiquer les analyses et communiquer les résultats des discussions à l'électorat. Ce délai est très court, surtout pour faire l'analyse d'un sondage pancanadien et la diffuser, compte tenu du temps consacré au vote et des restrictions en matière de radiodiffusion et de publicité applicables le jour du scrutin et le jour qui le précède.

51 L'Étude Lachapelle proposait une période de 72 heures, alors que la Commission Lortie recomman-

sor Lachapelle submitted, at p. 157 of his study, that:

> The 72-hour blackout suggested here would put print and broadcast journalists on the same footing and would respond to a long-standing grievance among broadcast journalists that they face more restrictions than their print colleagues. The legislator could envisage eliminating the 48-hour rule entirely, but such a route might jeopardize a relative consensus on the need to limit all partisan information at the end of a campaign. A supplementary 24 hours would enable citizens to exercise their moral right to reply, which would encourage public discussion, especially when it is a matter of deciding who will govern us for the next few years. Broadcasters and citizens should, therefore, draw dividends from this measure.

The 48-hour rule mentioned by Professor Lachapelle refers to s. 213(1) of the *Canada Elections Act* which provides that:

> **213.** (1) Any person is guilty of an offence who, for the purpose of promoting or opposing a particular registered party or the election of a particular candidate, directly or indirectly,
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> (*a*) . . . the one day immediately preceding polling day or on polling day, advertises on the facilities of any broadcasting undertaking; or
>
> (*b*) procures for publication or acquiesces in the publication, . . . on the one day preceding polling day or on polling day of an advertisement in a periodical publication.

In *Irwin Toy*, *supra*, at issue was the determination of the upper age limit for the protection of children from advertising. This Court held that the legislature was not obliged to confine itself solely to protecting the most clearly vulnerable group. It was only required to exercise reasonable judgment in specifying the vulnerable group. The Court quoted Dickson C.J. in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 781-82:

> I might add that I do not believe there is any magic in the number seven as distinct from, say, five, ten, or fifteen employees as the cut-off point for eligibility for the

dait une période de 48 heures. Le professeur Lachapelle écrit, à la p. 181 de son étude:

> Une période de restriction totale de soixante-douze heures ne fera que corriger une situation législative anormale qui place les radiodiffuseurs et les diffuseurs dans des catégories différentes, et répondre aux historiques demandes des journalistes des médias électroniques qui affirment être davantage réglementés que leurs collègues de la presse écrite. Le législateur pourrait envisager d'éliminer complètement la règle du quarante-huit heures, mais une telle avenue pourrait remettre en cause un certain consensus sur la nécessité de limiter l'information partisane en fin de campagne. Une période de vingt-quatre heures supplémentaires permettrait aux citoyens et citoyennes d'exercer un droit de réplique qui ne peut que favoriser la discussion publique, surtout lorsqu'il s'agit de décider qui gouvernera le pays pour les prochaines années. Diffuseurs et citoyens devraient donc retirer les dividendes de cette mesure.

La règle des 48 heures mentionnée par le professeur Lachapelle est celle prévue au par. 213(1) de la *Loi électorale du Canada*, qui se lit:

> **213.** (1) Est coupable d'une infraction quiconque, dans le but de favoriser ou de contrecarrer, directement ou indirectement, un parti enregistré en particulier ou l'élection d'un candidat en particulier:
>
> *a*) soit, [. . .] la veille du scrutin ou le jour du scrutin, fait de la publicité en utilisant les installations d'une entreprise de radiodiffusion;
>
> *b*) soit, fait obtenir [. . .], la veille du scrutin ou le jour du scrutin, la publication d'une annonce dans une publication périodique, ou y consent.

Dans l'arrêt *Irwin Toy*, précité, la question en litige était de déterminer jusqu'à quel âge les enfants devaient être protégés contre la publicité. Notre Cour a conclu que le législateur n'était pas tenu de se contenter de protéger uniquement le groupe le plus manifestement vulnérable. Il était seulement tenu d'exercer de façon raisonnable son jugement dans la définition du groupe vulnérable. La Cour a cité les propos du juge en chef Dickson dans *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, aux pp. 781 et 782:

> J'ajouterais que je ne vois rien de magique dans le choix du chiffre sept plutôt que, disons, cinq, dix ou quinze employés comme étant le nombre limite pour

exemption. In balancing the interests of retail employees to a holiday in common with their family and friends against the s. 2(*a*) interests of those affected the Legislature engaged in the process envisaged by s. 1 of the *Charter*. A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line. [Emphasis added.]

Based upon the current legislation, the reports and the studies available, Parliament reasonably determined, as it was entitled to do, that a 72-hour period was necessary to allow meaningful scrutiny of poll results during an election campaign.

Furthermore, the limitation period only affects one mode of expression: opinion poll results respecting how electors will vote at an election or respecting an election issue that would permit the identification of a political party or candidate. This mode of expression is not a primary source of information concerning relevant political facts. It mainly constitutes information as to the effect of relevant political information on potential voters. Candidates and political parties, through the media, are still allowed to disseminate their program across the electorate and to carry on their campaign, within the other limits prescribed by the *Canada Elections Act*, which are not currently at issue.

Many elements of information can factor into influencing voters: statistics, financial information, speeches, news, etc. When Parliament identifies one matter of concern, it has no absolute duty to identify and regulate each and every factor. It is entitled to determine the urgency of addressing a particular problem and the appropriate means of doing so. As La Forest J. put it for the majority in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 317-18:

être admissible à l'exemption. En évaluant les intérêts qu'ont les salariés du commerce de détail à bénéficier d'un jour commun de congé avec leurs familles et leurs amis par rapport aux droits que possèdent les personnes touchées en vertu de l'al. 2*a*), le législateur s'est engagé dans le processus envisagé par l'article premier de la *Charte*. Une «limite raisonnable» est une limite qui, compte tenu des principes énoncés dans l'arrêt *Oakes*, pouvait être raisonnablement imposée par le législateur. Les tribunaux ne sont pas appelés à substituer des opinions judiciaires à celles du législateur quant à l'endroit où tracer une ligne de démarcation. [Je souligne.]

Se fondant sur la législation qui existait ainsi que sur les rapports et études disponibles, le Parlement a décidé, comme il avait le droit de le faire, qu'une période de 72 heures était nécessaire pour permettre un examen utile de l'ensemble des résultats de sondages dévoilés durant une campagne électorale.

52 En outre, la période d'interdiction ne touche qu'un seul mode d'expression: les résultats de sondages d'opinion sur les intentions de vote des électeurs ou sur une question électorale qui permettrait d'identifier un parti politique ou un candidat. Ce mode d'expression n'est pas une source primaire d'information sur les faits politiques pertinents. Il constitue principalement une source d'information sur l'effet de renseignements politiques pertinents sur les électeurs. Les candidats et les partis politiques, par l'entremise des médias, continuent d'être autorisés à diffuser leur programme parmi l'électorat et à poursuivre leur campagne, dans le respect des autres limites prévues par la *Loi électorale du Canada*, lesquelles ne sont pas en cause dans le présent pourvoi.

53 Bon nombre d'éléments d'information peuvent contribuer à influencer les électeurs: notamment les statistiques, l'information financière, les discours et les nouvelles. Lorsqu'il décèle un sujet de préoccupation, le Parlement n'a pas l'obligation absolue de relever et de réglementer chacun des facteurs en cause. Il a le droit de décider s'il est urgent de s'attaquer à un problème particulier et de choisir les moyens appropriés de le faire. Comme l'a dit le juge La Forest, au nom de la majorité, dans *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, aux pp. 317 et 318:

In looking at this type of issue, it is important to remember that a Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. . . . This Court has had occasion to advert to possibilities of this kind. In *R. v. Edwards Books and Art Ltd.* [[1986] 2 S.C.R. 713], Dickson C.J., there dealing with the regulation of business and industry, had this to say, at p. 772:

> I might add that in regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy. In this context, I agree with the opinion expressed by the United States Supreme Court in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), at p. 489:
>
> > Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. [Emphasis added.]

Dans l'examen de ce genre de questions, il est important de se rappeler qu'un législateur ne peut être tenu de traiter tous les aspects d'un problème à la fois. Il doit certainement pouvoir adopter des mesures progressives. [. . .] Notre Cour a eu l'occasion de discuter de possibilités de ce genre. Dans l'arrêt *R. c. Edwards Books and Art Ltd.* [[1986] 2 R.C.S. 713], le juge en chef Dickson, traitant de la réglementation du commerce et de l'industrie, dit, à la p. 772:

> Je pourrais ajouter qu'en réglementant une industrie ou un commerce, il est loisible au législateur de limiter sa réforme législative à des secteurs où il semble y avoir des préoccupations particulièrement urgentes ou à des catégories où cela semble particulièrement nécessaire. À cet égard, je partage l'opinion exprimée par la Cour suprême des États-Unis dans l'arrêt *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), à la p. 489:
>
> > [TRADUCTION] Les maux que l'on trouve dans un même domaine peuvent avoir des dimensions et des proportions différentes, et exiger des redressements différents. Du moins, le législateur peut le croire . . . Ou la réforme peut se faire étape par étape, en ne s'attaquant qu'à la phase du problème que le législateur estime la plus critique . . . Le législateur peut sélectionner une phase dans un domaine et y apporter un redressement, tout en négligeant les autres. [Je souligne.]

Both the motions judge and the Court of Appeal held that inaccurate polls at the end of an election campaign constitute a reasonable concern. The respondent has not to show that this concern is more serious or is causing more harm to the electoral process or to individual voters than any other potentially misleading information. There is no such standard under the *Charter*. Holding so would have the effect of transforming the *Charter* into an impediment to social progress. As Somers J. found, studies and reports, as well as bills in the House of Commons, and legislation in other democratic countries support Parliament's reasonable finding that the concern at bar was serious.

Tant le juge des requêtes que la Cour d'appel ont décidé que la publication de sondages inexacts en fin de campagne électorale constituait une préoccupation raisonnable. L'intimé n'a pas à établir que cette préoccupation est plus sérieuse ou cause davantage préjudice au processus électoral ou aux électeurs que toute autre information susceptible d'induire en erreur. Il n'existe aucune norme de la sorte dans l'application de la *Charte*. Conclure ainsi aurait pour effet de faire de la *Charte* un obstacle au progrès social. Comme a conclu le juge Somers, plusieurs études et rapports, ainsi que les projets de loi déposés devant la Chambre des communes et les mesures législatives en vigueur dans d'autres pays démocratiques appuient la conclusion raisonnable du Parlement qu'il y avait là motif sérieux d'inquiétude.

54 My colleague asserts, at paras. 112 and 113, that:

Mon collègue affirme, aux par. 112 et 113, que:

In this case, however, the social science evidence did not establish that the Canadian voter is a vulnerable group relative to pollsters and the media who publish polls. The presumption in this Court should be that the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information. . . . However, no evidence has been presented before this Court that voters have suffered from any misapprehensions regarding the accuracy of any single poll. Indeed, the fact that polls conducted contemporaneously yield differing results, or that poll results can fluctuate dramatically over time, suggests that voters have experience with the shortcomings of some polls. . . . Voters are constantly exposed to opinion poll results throughout the election and a single inaccurate poll result is likely to be spotted and discounted appropriately.

. . . What I have said in the previous paragraph suggests, as a matter of logic, that there is reason to believe that, notwithstanding the scientific "aura" of polls, the Canadian voter is likely to be aware of a seriously inaccurate poll. Indeed, the more serious the inaccuracy, the more likely the awareness of the error. [Emphasis added.]

With respect, I must differ for two reasons. While voters may be credited with some knowledge of the reliability of poll results generally, surely it is legitimate for Parliament to provide them with an opportunity of distinguishing "poor" from "good" polls. As I mentioned earlier, it is concern as to the prevalence of the publication of "poor" polls which has prompted the legislation. An opportunity to analyse, discuss and criticize published poll results is required in all cases, be it by any individual voter or more likely by analysts and others, in sufficient time for a public airing of diverse opinions. In addition, while my colleague acknowledges the pressing and substantial legislative objective and its rational connection to the impugned measure, he apparently finds the evidence submitted by the government insufficiently specific and conclusive to justify the impairment. The effect of potentially inaccurate opinion poll results must be measured having regard to the effect of opinion poll results generally. Reasoning based on the belief that voters will show discerne-

En l'espèce, toutefois, la preuve fondée sur les sciences sociales n'a pas établi que les électeurs canadiens forment un groupe vulnérable par rapport aux sondeurs et aux médias qui publient les sondages. Notre Cour doit présumer que l'électeur canadien est un être rationnel, capable de tirer des leçons de son expérience et de juger de façon indépendante de la valeur de certaines sources d'information électorale. [. . .] Toutefois, il n'a été présenté à la Cour aucun élément de preuve établissant que les électeurs ont été victimes de méprise quant à l'exactitude d'un sondage. En effet, le fait que des sondages effectués simultanément produisent des résultats différents ou que les résultats des sondages peuvent fluctuer radicalement dans le temps permet de supposer que les électeurs connaissent les imperfections des sondages. [. . .] Les électeurs sont constamment bombardés de sondages pendant toute la campagne, et il est probable qu'un sondage aux résultats inexacts sera repéré et écarté comme il se doit.

. . . Les observations que j'ai formulées au paragraphe précédent suggèrent, d'un point de vue logique, qu'il y a des raisons de croire que, malgré l'«aura» de caractère scientifique des sondages, il est probable que les électeurs canadiens se rendent compte que les résultats d'un sondage sont sérieusement inexacts. À vrai dire, plus l'inexactitude est grande, plus il y a de chances que les électeurs en soient conscients. [Je souligne.]

Avec égards, je dois exprimer mon désaccord et ce pour deux raisons. Même si on peut reconnaître aux électeurs certaines connaissances sur la fiabilité des résultats de sondages, de façon générale, il est bien sûr légitime pour le Parlement de leur donner la possibilité de distinguer les «bons» sondages des «mauvais». Comme je l'ai dit précédemment, c'est l'inquiétude découlant de la publication fréquente de «mauvais» sondages qui a incité à l'adoption de la disposition législative en cause. Dans tous les cas, il faut que les électeurs ou plus vraisemblablement les analystes et d'autres personnes intéressées aient la possibilité d'analyser, de discuter et de critiquer les résultats des sondages, et qu'ils disposent à cette fin d'un délai suffisant pour que les divers points de vue puissent être rendus publics. En outre, bien que mon collègue reconnaisse l'existence de l'objectif urgent et réel et son lien rationnel avec la mesure contestée, il juge apparemment la preuve soumise par le gouvernement insuffisamment précise et concluante pour justifier l'atteinte. L'effet de résultats de son-

ment in their reliance on polls and that only some voters are influenced does not belie nor answer the fact that the influence of polls both on the choice of voters and on the conduct of electoral campaigns is significant.

dage potentiellement inexacts doit être mesuré en tenant compte de l'effet des résultats des sondages en général. Le fait de raisonner que les électeurs vont, croit-on, faire montre de discernement avant de se fier aux sondages, et que seulement certains électeurs sont influencés par les sondages ne contredit ni ne réfute le fait que les sondages ont une influence importante sur le choix des électeurs et sur le déroulement des campagnes électorales.

55 My colleague also asserts, at para. 117:

> The Canadian voter is not a historically vulnerable or disadvantaged group. Nor, as has been explained above, is the autonomy or dignity of any single group under attack from, or even facing the contrary interests of, another potentially more powerful group. Nor can it be said that there is a shared understanding amongst Canadians that a single inaccurate poll will mislead Canadians to an extent which . . . is "undue". I am, therefore, unable to accept that the harm which the government is seeking to prevent affects a large number of voters, or that such possible distortions are significant to the conduct of an election, without more specific and conclusive evidence to that effect. [Emphasis added.]

Mon collègue affirme également ce qui suit, au par. 117:

> Les électeurs canadiens ne constituent pas, historiquement, un groupe vulnérable ou défavorisé. Pas plus d'ailleurs, comme il a été expliqué précédemment, que l'autonomie ou la dignité de quelque groupe que ce soit n'est attaquée par un autre groupe potentiellement plus puissant, ni même confrontée aux intérêts opposés d'un tel groupe. En outre, il est impossible d'affirmer qu'il existe, au sein de la population canadienne, une perception commune voulant qu'un seul sondage inexact puisse tromper les Canadiens dans une mesure qui [. . .] est «indue». Je ne puis donc accepter que le préjudice que le gouvernement cherche à prévenir affecte un grand nombre d'électeurs ou que de telles déformations potentielles de la réalité ont une influence importante sur le déroulement des élections, sans disposer de preuves plus précises et concluantes à cet effet. [Je souligne.]

56 With respect, everyone is vulnerable to misinformation which cannot be verified. As I have pointed out, a multiplicity of potentially inaccurate polls offers little protection to the public. Our democracy, and its electoral process, finds its strength in the vote of each and every citizen. Each citizen, no matter how politically knowledgeable one may be, has his or her own reasons to vote for a particular candidate and the value of any of these reasons should not be undermined by misinformation.

Avec égards, chacun est vulnérable à une mauvaise information qui ne peut être vérifiée. Comme je l'ai souligné, une multiplicité de sondages potentiellement inexacts offre peu de protection au public. Notre démocratie — et son processus électoral — tire sa force du vote de chacun des citoyens. Chaque citoyen, quel que soit son degré de connaissance de la politique, a ses raisons bien à lui de voter pour un candidat donné, et la valeur de ces raisons ne doit pas être amoindrie par une mauvaise information.

57 The findings of the Lortie Commission in its Final Report (at p. 457) bear repeating:

> Although the industry in general has become highly professional since public polling was introduced in Canada in 1941, the incidence of technically deficient and poorly reported polls is still substantial. In recent

Il vaut de répéter les conclusions suivantes formulées par la Commission Lortie dans son Rapport final (à la p. 475):

> Bien que l'industrie du sondage en général ait atteint un haut niveau de professionnalisme depuis l'apparition des sondages d'opinion au Canada en 1941, le nombre d'enquêtes techniquement déficientes et mal présentées

elections, there have been instances of misleading polls, some because of technical errors and others because of partisan misrepresentation. There have even been allegations of fraudulent polls, where the data were said to have been fabricated to counter a poll showing the opposition in the lead. Such "bogus" polls and the more common misrepresented poll have been released to the media in many democracies. (Cantril 1991, 67; Worcester 1991, 199; Hoy 1989, 189-202) It is the willingness of the media to report such polls that makes them significant and troublesome. [Emphasis added.]

In other words, opinion poll results have a significant influence. They are subject to error, misrepresentation and open to manipulation. Elections, by their very nature, are a battleground for diverging interests, each striving for the favour of electors. Polls are one instrument in the armoury of the contestants. The intense conflicts of interest in an election are an inducement to manipulation. Parliament, acting on the conclusions of extensive studies and research after consideration over many years and in response to a broad public concern with the benefit of the background experience of its own members, has chosen to enact a modest measure of protection of voters against factual misinformation.

(c) Proportionate Effects

In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889, Lamer C.J. rephrased the third part of the *Oakes* test of proportionality:

> . . . there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. [Emphasis in original.]

The salutary effect of s. 322.1 is to promote the right of voters not to be misled in the exercise of their right to vote. At the end of an election campaign, opinion poll results have the potential to irreparably mislead voters, particularly strategic

demeure important. Certains sondages publiés à l'occasion d'élections récentes étaient entachés d'erreurs techniques, et d'autres étaient présentés de façon partiale. On a même signalé des sondages carrément frauduleux, dont les données auraient été fabriquées de toutes pièces pour contrer un sondage plaçant l'adversaire en tête. Les médias de maints pays démocratiques ont publié de tels sondages «bidon» et, de façon plus courante, des sondages présentés de manière trompeuse (Cantril 1991, 67; Worcester 1991, 199; Hoy 1989, 189-202). En fait, ces «sondages» posent un problème dans la mesure où les médias sont prêts à les diffuser. [Je souligne.]

58 En d'autres mots, les résultats des sondages d'opinion ont une influence importante. Ils peuvent être l'objet d'erreurs, de fausses représentations ou de manipulation. De par leur nature même, les élections sont le champ de bataille où s'affrontent des intérêts divergents, qui luttent pour s'attirer la faveur des électeurs. Les sondages sont un instrument dans l'arsenal des concurrents. Les intenses chocs d'intérêts qui se produisent durant une élection sont autant d'incitations à la manipulation. Au terme de nombreuses années de réflexion, le Parlement, répondant à une préoccupation largement répandue dans le public, donnant suite aux conclusions de longues études et recherches et profitant de l'expérience en la matière de ses propres membres, a choisi d'édicter une mesure modeste, qui vise à protéger les électeurs contre la mauvaise information factuelle.

c) La proportionnalité des effets

59 Dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, à la p. 889, le juge en chef Lamer a reformulé la troisième étape du volet de la proportionnalité du critère établi dans l'arrêt *Oakes*:

> . . . il doit y avoir proportionnalité entre les effets préjudiciables des mesures restreignant un droit ou une liberté et l'objectif, et il doit y avoir proportionnalité entre les effets préjudiciables des mesures et leurs effets bénéfiques. [Souligné dans l'original.]

60 L'effet bénéfique de l'art. 322.1 est qu'il favorise le droit des électeurs de ne pas être induits en erreur lorsqu'ils exercent leur droit de vote. Les résultats de sondages d'opinion diffusés en fin de campagne électorale peuvent induire les électeurs

voters, because of the purportedly scientific, reliable nature of most opinion poll results. The deleterious effect of the measure is that s. 322.1 deprives some voters, who rely on polls to make their decision, of some late campaign opinion poll results. This deleterious effect is quite limited, when one considers the delay between conducting the poll and ultimately publishing its results. In fact, what is prohibited is the publication of results of polls conducted at best three days or more before polling day, as against polls conducted five or more days before polling day. And as we can see from Table 1.11 of the Lachapelle Study, *supra*, at pp. 113-15, a polling organization could take up to seven days to interview their respondents for a cross-Canada survey. This tends to detract from both the accuracy and the timeliness of the "snapshot". As I pointed out earlier, a strategic voter cannot cast a significant vote if the information required to exercise that vote is not discussed and scrutinized in order to assess its real value. Poll results which cannot be assessed in a timely manner may actually deprive voters of the effective exercise of their franchise.

en erreur de façon irrémédiable, particulièrement ceux qui votent de manière stratégique, étant donné que la plupart des sondages se veulent scientifiques et fiables. L'effet préjudiciable de l'art. 322.1 est qu'il prive des électeurs qui se fondent sur les sondages pour prendre leur décision des résultats de certains sondages d'opinion effectués tard dans les campagnes électorales. Or, cet effet préjudiciable est très limité, si l'on tient compte du délai entre la réalisation du sondage et la publication de ses résultats. En fait, ce qui est interdit c'est la publication des résultats de sondages effectués au mieux trois ou quatre jours avant la date du scrutin, par opposition à la publication de résultats de sondages effectués au moins cinq jours avant l'élection. Comme nous pouvons le constater à la lecture du Tableau 1.11 qui figure aux pp. 130 à 132 de l'Étude Lachapelle, *op. cit.*, une maison de sondage met parfois jusqu'à sept jours pour faire les entrevues avec les répondants dans le cadre d'un sondage pancanadien. Ce fait tend à réduire l'exactitude et à l'à-propos de «l'image éclair». Comme je l'ai déjà souligné, la personne qui désire voter stratégiquement ne peut pas le faire de façon utile si l'information requise à cette fin n'est pas examinée minutieusement et discutée afin d'en évaluer la valeur réelle. Les résultats de sondages qui ne peuvent être évalués en temps utile peuvent, dans les faits, avoir pour effet d'empêcher les électeurs d'exercer leur droit de vote de façon effective.

61 As to the effects of the measure on freedom of expression, on the one hand, s. 322.1 precludes the media from publishing polls on the last weekend of the election campaign and on polling day. This ban causes minimal impairment to freedom of expression because of its very short duration and because of the lack of satisfactory alternatives available to tailor the measure to the legislative objective. On the other hand, s. 322.1 has a positive impact on freedom of expression. It promotes debate and truth in political discussion since it gives voters the opportunity to be informed about the existence of misleading factual information. The salutary effects of the measure concerning both the right to vote and freedom of expression

Pour ce qui est des effets de la mesure sur la liberté d'expression, d'une part, l'art. 322.1 empêche les médias de publier des résultats de sondages pendant le dernier week-end de la campagne électorale ainsi que le jour du scrutin. En raison de sa très courte durée et de l'absence de solutions de rechange permettant d'adapter la mesure à l'objectif de la loi, cette interdiction porte atteinte de façon minimale à la liberté d'expression. D'autre part, l'art. 322.1 a un effet positif sur la liberté d'expression. En effet, il favorise l'échange des idées et l'émergence de la vérité dans les discussions politiques puisqu'il permet aux électeurs d'être informés de l'existence de renseignements factuels trompeurs. Les effets bénéfiques qu'a la

thus outweigh the deleterious effects caused by the impugned provision.

III. Conclusion

I therefore find that s. 322.1 of the *Canada Elections Act* does not infringe the right to vote as guaranteed under s. 3 of the *Charter* and that, while it restricts freedom of expression within the meaning of s. 2(*b*) of the *Charter*, it constitutes a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter* and hence does not violate the *Charter*.

IV. Disposition

For the above reasons, I would answer the constitutional questions posed by Lamer C.J. as follows:

1. Does s. 322.1 of the *Canada Elections Act*, R.S.C., 1985, c. E-2, as amended, infringe s. 2(*b*) and/or s. 3 of the *Canadian Charter of Rights and Freedoms*?

Answer: Section 322.1 of the *Canada Elections Act* does not infringe s. 3 of the *Charter* but infringes s. 2(*b*) of the *Charter*.

2. If s. 322.1 of the *Canada Elections Act* infringes s. 2(*b*) and/or s. 3 of the *Canadian Charter of Rights and Freedoms*, is s. 322.1 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: The infringement of s. 2(*b*) of the *Charter* by s. 322.1 is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*.

I would therefore dismiss the appeal with costs throughout.

disposition contestée à la fois sur le droit de vote et sur la liberté d'expression l'emportent donc sur ses effets préjudiciables.

III. La conclusion

62 Je conclus donc que l'art. 322.1 de la *Loi électorale du Canada* ne porte pas atteinte au droit de vote garanti par l'art. 3 de la *Charte* et que, même s'il restreint la liberté d'expression garantie à l'al. 2*b*) de la *Charte*, il constitue une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte*, et que, de ce fait, il ne viole pas celle-ci.

IV. Le dispositif

63 Pour les motifs qui précèdent, je suis d'avis de répondre de la façon suivante aux questions constitutionnelles énoncées par le juge en chef Lamer:

1. L'article 322.1 de la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2, et ses modifications, contrevient-il à l'al. 2*b*) ou à l'art. 3 de la *Charte canadienne des droits et libertés*, ou aux deux à la fois?

Réponse: L'article 322.1 de la *Loi électorale du Canada* ne porte pas atteinte à l'art. 3 de la *Charte*, mais contrevient à l'al. 2*b*) de ce texte.

2. Si l'article 322.1 de la *Loi électorale du Canada* contrevient à l'al. 2*b*) ou à l'art. 3 de la *Charte canadienne des droits et libertés*, ou aux deux à la fois, constitue-t-il une limite raisonnable prescrite par une règle de droit, dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, aux fins de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse: L'atteinte à l'al. 2*b*) de la *Charte* par l'art. 322.1 est une limite raisonnable prescrite par une règle de droit, dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, aux fins de l'article premier de la *Charte*.

64 Je suis donc d'avis de rejeter le pourvoi avec dépens devant toutes les cours.

The judgment of Cory, McLachlin, Iacobucci, Major and Bastarache JJ. was delivered by

65 BASTARACHE J. — This appeal concerns the constitutional validity of s. 322.1 of the *Canada Elections Act*, R.S.C., 1985, c. E-2, which prohibits the broadcasting, publication, or dissemination of opinion survey results in the final days of a federal election campaign. More specifically, the provision is challenged in light of freedom of expression and the right to vote as protected by ss. 2(*b*) and 3 of the *Canadian Charter of Rights and Freedoms*.

I. Factual Background

66 The appellants Thomson Newspapers Company Limited and Southam Inc. brought an application under rule 14.05(3)(g.1) of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, for the following relief:

> (a) a declaration that s. 322.1 of the *Canada Elections Act* is of no force and effect in that it violates ss. 2(*b*) and 3 of the *Canadian Charter of Rights and Freedoms* and is not justified under s. 1; and
>
> (b) a declaration directing that no proceedings may be brought under s. 322.1 pursuant to s. 126 of the *Criminal Code*, R.S.C., 1985, c. C-46, or any other statute or law.

67 On May 15, 1995, Somers J. of the Ontario Court (General Division) denied the appellants' application on the basis that the impugned provision, although violating freedom of expression, was nonetheless justified under s. 1 of the *Charter*. Somers J. found no violation of the right to vote. On August 19, 1996, the Ontario Court of Appeal (Catzman, Carthy and Charron JJ.A.) dismissed the appeal and agreed with Somers J. that the right to vote had not been violated and the infringement of freedom of expression was justified.

Version française du jugement des juges Cory, McLachlin, Iacobucci, Major et Bastarache rendu par

LE JUGE BASTARACHE — Le présent pourvoi porte sur la constitutionnalité de l'art. 322.1 de la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2, qui interdit d'annoncer, de publier ou de diffuser les résultats de sondages sur les intentions de vote au cours des derniers jours des campagnes électorales fédérales. Plus précisément, la disposition est contestée sur le fondement de la liberté d'expression et du droit de vote protégés respectivement par l'al. 2*b*) et l'art. 3 de la *Charte canadienne des droits et libertés*.

I. Les faits

Les appelantes Thomson Newspapers Company Limited et Southam Inc. ont présenté, en application de l'al. 14.05(3)g.1) des Règles de procédure civile de l'Ontario, R.R.O. 1990, Règl. 194, une requête sollicitant les mesures de redressement suivantes:

> a) une déclaration portant que l'art. 322.1 de la *Loi électorale du Canada* est inopérant parce qu'il viole l'al. 2*b*) et l'art. 3 de la *Charte canadienne des droits et libertés* et qu'il n'est pas justifié au sens de l'article premier;
>
> b) une déclaration portant qu'aucune procédure pour contravention à l'art. 322.1 ne peut être engagée sur le fondement de l'art. 126 du *Code criminel*, L.R.C. (1985), ch. C-46, ou de toute autre loi ou règle de droit.

Le 15 mai 1995, le juge Somers de la Cour de l'Ontario (Division générale) a rejeté la requête des appelantes pour le motif que, même si la disposition contestée portait atteinte à la liberté d'expression, elle était néanmoins justifiée au sens de l'article premier de la *Charte*. Il a conclu à l'absence de violation du droit de vote. Le 19 août 1996, la Cour d'appel de l'Ontario (les juges Catzman, Carthy et Charron) a rejeté l'appel et statué, à l'instar du juge Somers, que le droit de vote n'avait pas été violé et que l'atteinte à la liberté d'expression était justifiée.

II. Relevant Constitutional and Statutory Provisions

Canadian Charter of Rights and Freedoms

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

2. Everyone has the following fundamental freedoms:

. . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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

Canada Elections Act, R.S.C., 1985, c. E-2

255. The Chief Electoral Officer shall appoint a Commissioner of Canada Elections, in this Act referred to as the "Commissioner", whose duties, under the general supervision of the Chief Electoral Officer, shall be to ensure that the provisions of this Act are complied with and enforced.

256. (1) No prosecution for an offence under this Act or for an offence under section 126 of the *Criminal Code* in relation to anything that this Act forbids or requires to be done shall be instituted except with the prior consent in writing of the Commissioner.

322.1 No person shall broadcast, publish or disseminate the results of an opinion survey respecting how electors will vote at an election or respecting an election issue that would permit the identification of a political party or candidate from midnight the Friday before polling day until the close of all polling stations.

Criminal Code, R.S.C., 1985, c. C-46

126. (1) Every one who, without lawful excuse, contravenes an Act of Parliament by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of an indictable

II. Les dispositions constitutionnelles et législatives pertinentes

Charte canadienne des droits et libertés

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

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;

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

Loi électorale du Canada, L.R.C. (1985), ch. E-2

255. Le directeur général des élections doit nommer un commissaire aux élections fédérales, appelé dans la présente loi le «commissaire», qui a pour fonctions, sous la surveillance générale du directeur général des élections, de veiller à ce que les dispositions de la présente loi soient respectées et appliquées.

256. (1) Le consentement écrit du commissaire aux élections fédérales doit être préalablement obtenu avant d'intenter toute poursuite pour une infraction à la présente loi ou pour une infraction prévue à l'article 126 du *Code criminel* relativement à une obligation ou une prohibition prévue à la présente loi.

322.1 Il est interdit d'annoncer, de publier ou de diffuser les résultats d'un sondage sur les intentions de vote des électeurs ou sur une question électorale qui permettrait d'identifier un parti politique ou un candidat entre minuit le vendredi qui précède le jour du scrutin et la fermeture de tous les bureaux de scrutin.

Code criminel, L.R.C. (1985), ch. C-46

126. (1) À moins qu'une peine ne soit expressément prévue par la loi, quiconque, sans excuse légitime, contrevient à une loi fédérale en accomplissant volontairement une chose qu'elle défend ou en omettant volontairement de faire une chose qu'elle prescrit, est coupable

offence and liable to imprisonment for a term not exceeding two years.

III. Judicial History

A. *Ontario Court (General Division)* (1995), 24 O.R. (3d) 109

69 In the course of a survey of the social science evidence concerning the nature of opinion polls, Somers J. found that they have a recognized impact on the electoral choice of individual voters. Although the precise extent of this impact was difficult to characterize, he also found that there was widespread concern amongst experts, the public and participants in the electoral process about the effect of opinion polls. This concern related to the influence of polls generally, as well as to the potential influence of inaccurate polls published late in an election campaign. Somers J. observed that there was disagreement in the evidence about the overall effect of polls on elections and that no consensus existed in favour of the ban imposed by s. 322.1. He considered the polling ban to be part of a wider package of restrictions in the *Canada Elections Act* whose general purpose was to ensure fair elections.

70 With respect to the scope of s. 322.1, Somers J. concluded that the polling ban does not cover internal communications between clients and pollsters, but is directed at the dissemination of poll results to the electorate. He also excluded from the scope of s. 322.1 "hamburger polls", namely marketing ploys used to sell consumer goods which are matched with political parties or candidates. In Somers J.'s view, these polls are clearly not statistical representations of opinion in general, and therefore, do not qualify as "opinion surveys". Finally, Somers J. considered whether s. 322.1 prohibits discussion of all poll results including results that were published prior to the commencement of the ban. He concluded, at p. 132, that it

d'un acte criminel et passible d'un emprisonnement maximal de deux ans.

III. L'historique des procédures

A. *Cour de l'Ontario (Division générale)* (1995), 24 O.R. (3d) 109

Au cours de l'examen de la preuve fondée sur les sciences sociales concernant la nature des sondages d'opinion, le juge Somers a conclu que ceux-ci ont un effet reconnu sur les choix électoraux des individus. Même si l'étendue précise de cet effet était difficile à quantifier, il a également conclu à l'existence d'une préoccupation répandue au sein des experts, du public en général et des participants au processus électoral quant à l'effet des sondages d'opinion. Cette préoccupation concernait l'influence des sondages de façon générale ainsi que l'influence potentielle de sondages inexacts publiés tard dans les campagnes électorales. Le juge Somers a souligné que la preuve révélait l'existence d'un désaccord relativement à l'effet général des sondages sur les élections, et qu'il ne se dégageait aucun consensus en faveur de l'interdiction prévue à l'art. 322.1. Il a estimé que les restrictions touchant les sondages font partie d'un ensemble plus vaste de restrictions établies par la *Loi électorale du Canada* et dont l'objectif général est d'assurer l'équité du processus électoral.

Au sujet du champ d'application de l'art. 322.1, le juge Somers a conclu que l'interdiction frappant la publication des résultats des sondages ne vise pas les communications internes entre clients et sondeurs, mais plutôt la diffusion à l'électorat des résultats de ces sondages. Il a également exclu du champ d'application de l'art. 322.1 les [TRADUCTION] «votes au hamburger» («*hamburger polls*»), c'est-à-dire des trucs de marketing qui sont utilisés pour vendre des biens de consommation en les associant à des partis politiques ou à des candidats. De l'avis du juge Somers, ces enquêtes ne donnent manifestement pas une représentation statistique de l'opinion des électeurs en général et, de ce fait, ne peuvent pas être assimilées à des «sondages». Enfin, le juge Somers s'est demandé si l'art. 322.1 interdit l'analyse des résultats de tous les sondages,

would be absurd to prohibit discussion of these earlier polls:

> One of the purposes of the legislation is to provide a response time to those who consider themselves victims of misleading polls. One of the most effective ways of responding is to refer to previous polls and show how the new poll is inconsistent with or less accurate than earlier polls. If such discussion of earlier polls is barred then the right to full response contemplated by Parliament is seriously weakened.

On the constitutional issues, Somers J. found, as the respondent conceded, that s. 322.1 infringed s. 2(*b*) of the *Charter*. Moreover, with regard to the type of expression at stake, Somers J. stated, at p. 135, that "even if polling is not, properly speaking, the political or partisan expression that is deemed most deserving of protection, it is by its very subject matter close to the core of s. 2(*b*)". The right to vote contained in s. 3 of the *Charter* was found not to have been infringed. Somers J. wrote, at p. 137:

> While the right to information gives substance to the right to vote, it remains ancillary to it. This means that under s. 3, the constitutional question is not directly whether the "right to information" was breached but whether a restriction placed on information has diminished or undermined the right to vote in a genuine election.

On the facts of this case, Somers J. concluded that the 72-hour polling ban was sufficiently short that it did not vitiate or truly undermine strategic voting based on poll results.

Somers J. found that s. 322.1 is a justifiable limit on freedom of expression under s. 1 of the *Charter*. He observed, at p. 142, that "even if

y compris ceux publiés avant le début de la période d'interdiction. Concluant, à la p. 132, qu'il serait absurde d'interdire l'analyse de sondages déjà réalisés, il a dit ceci:

> [TRADUCTION] L'un des objectifs de la loi est d'accorder un temps de réplique aux personnes qui s'estiment victimes de sondages trompeurs. L'un des moyens de réplique les plus efficaces est de faire état de sondages antérieurs et de montrer en quoi le nouveau sondage est incompatible avec les précédents ou moins précis qu'eux. Si l'analyse des sondages antérieurs est interdite, alors le droit de réplique envisagé par le législateur est sérieusement affaibli.

71 En ce qui concerne les questions constitutionnelles, le juge Somers a statué — tout comme a concédé l'intimé — que l'art. 322.1 portait atteinte à l'al. 2*b*) de la *Charte*. En outre, pour ce qui est du type d'expression en cause, le juge Somers a déclaré, à la p. 135 que, [TRADUCTION] «même si le sondage n'est pas, à strictement parler, la forme d'expression politique ou partisane considérée la plus digne de protection, cette activité est néanmoins, de par son objet même, étroitement rattachée aux valeurs fondamentales protégées à l'al. 2*b*)». Il a été jugé que le droit de vote prévu à l'art. 3 de la *Charte* n'avait pas été violé. Le juge Somers a dit ce qui suit, à la p. 137:

> [TRADUCTION] Même si le droit à l'information donne corps au droit de vote, il lui demeure néanmoins accessoire. Cela signifie que la question constitutionnelle que soulève l'art. 3 ne consiste pas directement à se demander si le «droit à l'information» a été violé, mais plutôt si la restriction de l'information a eu pour effet de limiter ou de compromettre le droit de voter dans une élection honnête.

À la lumière des faits de l'espèce, le juge Somers a conclu que la période de 72 heures pendant laquelle il est interdit de publier les résultats des sondages n'est pas assez longue pour gêner ou véritablement compromettre l'exercice du vote stratégique sur la foi des résultats en question.

72 Le juge Somers a statué que l'art. 322.1 est une limite justifiable apportée à la liberté d'expression au sens de l'article premier de la *Charte*. Il a sou-

social science evidence is found to be inconclusive, it is still possible to ground a pressing objective on evidence of extended public debate of an issue or by looking at the actions of other democracies". The widespread concern about the effects of polls and the presence of polling bans in other democratic countries was, in Somers J.'s view, strong evidence of a pressing objective. A rational connection between the publication of polls and harm to the electoral process was also found. Parliament was said to have a "reasoned apprehension of harm" in the present case, following the test applied in *R. v. Butler*, [1992] 1 S.C.R. 452. In Somers J.'s opinion, this apprehension of harm was based on: (a) the sheer prevalence of poll results; (b) the public's awareness of poll results; (c) the failure to publish methodological information along with poll results; and (d) the potentially undue impact of polls published late in an election campaign. Further, Somers J. found that s. 322.1 minimally impairs freedom of expression and that alternative means — such as the mandatory publication of methodological information or measures designed to deter false polls — would be less effective. He added that these alternative measures would fail to adequately further one of Parliament's objectives: to give the voter a period of rest and reflection prior to the vote. Finally, Somers J. indicated that the present case is similar to the situation in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, where Parliament had to balance the claims of competing groups and evaluate uncertain social science evidence. In Somers J.'s view, Parliament should be accorded a wide margin of flexibility in legislating in this area. The application was therefore dismissed with costs.

ligné, à la p. 142, que [TRADUCTION] «même si la preuve fondée sur les sciences sociales est jugée non concluante, il demeure possible d'étayer l'existence d'un objectif urgent en prouvant qu'une question fait l'objet d'un large débat public ou en examinant les mesures prises dans d'autres démocraties». L'existence d'une préoccupation répandue en ce qui concerne les effets des sondages ainsi que les interdictions de publication frappant ceux-ci dans d'autres pays démocratiques constituait, de l'avis du juge Somers, une preuve solide de l'existence d'un objectif urgent. Il a aussi conclu à l'existence d'un lien rationnel entre la publication des sondages et un préjudice causé au processus électoral. Il a affirmé que le législateur fédéral avait, dans le présent cas, une «appréhension raisonnée du préjudice», suivant le critère appliqué dans *R. c. Butler*, [1992] 1 R.C.S. 452. De l'avis du juge Somers, cette appréhension se fondait sur les éléments suivants: a) le simple fait de l'omniprésence des sondages; b) la connaissance par le public des résultats de ces sondages; c) l'omission de publier avec les sondages de l'information sur la méthodologie utilisée; d) l'effet potentiellement indu de la publication de sondages tard dans les campagnes électorales. En outre, le juge Somers a conclu que l'art. 322.1 constitue une atteinte minimale à la liberté d'expression et que les solutions de rechange proposées — par exemple la publication obligatoire de données sur la méthodologie utilisée ou des mesures visant à dissuader la publication de faux sondages — seraient moins efficaces. Il a précisé que ces solutions de rechange ne permettraient pas de favoriser adéquatement un des objectifs poursuivis par le législateur, savoir celui d'accorder aux électeurs une période de répit et de réflexion avant la tenue du scrutin. Enfin, le juge Somers a indiqué que le présent cas était assimilable à la situation en cause dans l'affaire *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, où le législateur devait soupeser les droits de groupes ayant des intérêts opposés et évaluer des éléments de preuve incertains fondés sur les sciences sociales. Le juge Somers a dit être d'avis qu'il faut accorder au législateur une grande marge de manœuvre afin de légiférer sur ce domaine. La requête a donc été rejetée avec dépens.

B. *Ontario Court of Appeal* (1996), 30 O.R. (3d) 350

The Court of Appeal disagreed with Somers J. regarding the ambit of s. 322.1. It held that the phrase "opinion surveys" should be read broadly to include not only scientific surveys, but also phone-in or mail-in polls, and even less scientific methods of gathering information, such as exit and "hamburger" polls. The Court of Appeal also disagreed with Somers J.'s conclusion that the prohibition in s. 322.1 is limited to new survey results. In the Court of Appeal's view, s. 322.1 applies to publication or discussion of all opinion survey results, whether in the public domain prior to the commencement of the ban or not. There was agreement, however, with Somers J.'s view that internal or private communications are not caught by s. 322.1.

On the constitutional issues, the Court of Appeal was in substantial agreement with the analysis of Somers J. As to the character of the harm addressed by the publication ban, the Court of Appeal described the purpose somewhat more narrowly, at p. 353:

There is, however, no empirical evidence as to the extent or nature of the influence of opinion polls upon the voter, nor can it be said with certainty that the impact of opinion polls is undue. The real concern is that when opinion surveys are published as bare results, without methodological information, they have the potential to be deceiving, and even with such information they may require a response to explain their true significance.

The court found, at p. 359:

It is surely a substantial and pressing objective to respond to widespread perceptions that opinion surveys can be distorting and that response time is needed to avoid that danger, all in aid of creating a level playing

B. *Cour d'appel de l'Ontario* (1997), 30 O.R. (3d) 350

73 La Cour d'appel a exprimé son désaccord avec le juge Somers relativement au champ d'application de l'art. 322.1. Elle a statué qu'il faut interpréter de manière large l'expression «sondages» et considérer qu'elle vise non seulement les sondages scientifiques, mais aussi les sondages téléphoniques ou postaux, et même les méthodes de cueillette d'information encore moins scientifiques, tels les sondages effectués à la sortie des bureaux de scrutin et les «votes au hamburger». La Cour d'appel a également exprimé son désaccord avec la conclusion du juge Somers selon laquelle l'interdiction prévue à l'art. 322.1 se limite aux résultats de nouveaux sondages. De l'avis de la Cour d'appel, cette disposition s'applique aux résultats de tous les sondages, qu'ils soient ou non dans le domaine public avant l'entrée en vigueur de l'interdiction. Elle a toutefois souscrit à l'opinion du juge Somers que les communications internes ou privées échappent à l'application de l'art. 322.1.

74 Pour ce qui est des questions constitutionnelles, la Cour d'appel a été d'accord dans l'ensemble avec l'analyse du juge Somers. Quant à la nature du préjudice visé par l'interdiction de publication, la Cour d'appel a décrit l'objet de cette mesure de façon relativement plus étroite, à la p. 353:

[TRADUCTION] Il n'existe cependant aucune preuve empirique concernant l'étendue ou la nature de l'influence qu'exercent sur les électeurs les sondages d'opinion, et il n'est pas non plus possible d'affirmer avec certitude que ces sondages ont un effet indu. La véritable inquiétude est le fait que, lorsque les sondages publiés ne font état que des résultats bruts, sans aucune donnée sur la méthodologie utilisée, ils peuvent induire en erreur, et que même lorsque de telles données sont fournies, une réplique peut être nécessaire pour expliquer leur sens véritable.

75 La Cour d'appel a tiré la conclusion suivante, à la p. 359:

[TRADUCTION] Constitue certes un objectif urgent et réel le fait de tenir compte de la perception répandue que les sondages d'opinion peuvent déformer la réalité et qu'un temps de réplique est nécessaire pour parer à ce danger,

field at that critical point in the electoral process when the candidates are about to be selected.

76 The Court of Appeal also agreed with Somers J. that the ban on opinion survey results does not violate the right to vote under s. 3 of the *Charter*. The court held, at p. 358:

> We accept that, as a general principle, the right to cast an informed ballot carries with it the right to information necessary to permit electors to vote rationally and in an informed manner. . . . The right to cast an informed ballot does not, in our view, elevate the provision of a snapshot of the mood of the electorate at a particular time to the level of a constitutional entitlement during the last three days of an election campaign.

77 The Court of Appeal found the infringement of the freedom of expression to be justified under s. 1 of the *Charter*. The court stated, at p. 360:

> There was serious controversy on a social scientific subject as to the effect of polls upon the electorate, combined with the manifest fact that the publication of bare results does not tell the whole story and thus may well be misleading. This constitutes a reasonable apprehension of harm and the rational connection is then further exhibited by directing the legislation to the final three days of the election.

Even the broader interpretation of s. 322.1 favoured by the Court of Appeal was found to pass the minimal impairment analysis. In the result, the appeal was dismissed with costs.

IV. Issues

78 The following constitutional questions were stated by the Chief Justice on March 27, 1997:

1. Does s. 322.1 of the *Canada Elections Act*, R.S.C., 1985, c. E-2, as amended, infringe s. 2(*b*) and/or s. 3 of the *Canadian Charter of Rights and Freedoms*?

2. If s. 322.1 of the *Canada Elections Act* infringes s. 2(*b*) and/or s. 3 of the *Canadian Charter of Rights and Freedoms*, is s. 322.1 a reasonable limit pre-

tout cela afin de favoriser l'égalité des chances à cette étape cruciale du processus électoral où on est sur le point de choisir parmi les divers candidats.

La Cour d'appel a également convenu avec le juge Somers que l'interdiction frappant les résultats de sondages ne viole pas le droit de vote conféré par l'art. 3 de la *Charte*. Elle a statué ainsi, à la p. 358:

> [TRADUCTION] Nous acceptons, en tant que principe général, que le droit des électeurs de voter de façon éclairée emporte celui d'obtenir l'information nécessaire pour leur permettre de le faire de manière rationnelle et éclairée. [. . .] Selon nous, le droit de voter de façon éclairée n'a pas pour effet d'ériger en garantie constitutionnelle la fourniture, au cours des trois derniers jours d'une campagne électorale, d'une image ponctuelle de l'humeur de l'électorat à un moment particulier.

La Cour d'appel a conclu que la violation de la liberté d'expression était justifiée au sens de l'article premier de la *Charte*. Elle a déclaré ce qui suit, à la p. 360:

> [TRADUCTION] Il existait une sérieuse controverse sur un sujet touchant les sciences sociales, soit l'effet des sondages sur l'électorat, conjuguée au fait manifeste que la publication de données brutes ne brosse pas un tableau complet de la situation et peut donc fort bien induire en erreur. Cela constitue une appréhension raisonnable de préjudice, et l'existence d'un lien rationnel ressort en outre du fait que la disposition vise les trois derniers jours de la campagne électorale.

Même l'interprétation plus large de l'art. 322.1 favorisée par la Cour d'appel a été jugée acceptable suivant l'analyse de l'atteinte minimale. En conséquence l'appel a été rejeté avec dépens.

IV. Les questions en litige

Les questions constitutionnelles suivantes ont été énoncées par le Juge en chef le 27 mars 1997:

1. L'article 322.1 de la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2, et ses modifications, contrevient-il à l'al. 2*b*) ou à l'art. 3 de la *Charte canadienne des droits et libertés*, ou aux deux à la fois?

2. Si l'article 322.1 de la *Loi électorale du Canada* contrevient à l'al. 2*b*) ou à l'art. 3 de la *Charte canadienne des droits et libertés*, ou aux deux à la fois,

scribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Canadian Charter of Rights and Freedoms*?

constitue-t-il une limite raisonnable prescrite par une règle de droit, dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, aux fins de l'article premier de la *Charte canadienne des droits et libertés*?

V. The Right to Vote

I find it necessary, at the outset of my analysis on the right to vote, to distinguish between the two *Charter* rights at issue in the present case. It is significant, for instance, that s. 3 of the *Charter*, which guarantees the citizen's right to vote, is not subject to override under s. 33 of the *Charter*. This means that a statutory provision which violates s. 3, and is not saved by s. 1, cannot be insulated from *Charter* review by Parliament or a provincial legislature. By contrast, s. 2(*b*) of the *Charter*, which protects free expression, is subject to override under s. 33. Even though the override power is rarely invoked, the fact that s. 3 is immune from such power clearly places it at the heart of our constitutional democracy.

V. Le droit de vote

79 J'estime nécessaire, en commençant l'analyse du droit de vote, d'établir une distinction entre les deux droits garantis par la *Charte* qui sont en jeu dans le présent cas. Par exemple, il est significatif que l'art. 3 de la *Charte*, qui garantit le droit de vote des citoyens, ne puisse faire l'objet d'une dérogation fondée sur l'art. 33 de la *Charte*. Il s'ensuit que ni le Parlement ni les législatures provinciales ne peuvent soustraire à un examen fondé sur la *Charte* une disposition législative qui viole l'art. 3 et dont la validité n'est pas sauvegardée par l'article premier. À l'opposé, il est possible, en vertu de l'art. 33, de déroger à l'al. 2*b*) de la *Charte*, qui garantit la liberté d'expression. Même si ce pouvoir de dérogation est rarement invoqué, le fait que l'art. 3 soit soustrait à son application fait clairement de cette disposition un des éléments centraux de notre démocratie constitutionnelle.

Moreover, in cases where freedom of expression and the right to vote may overlap or come into conflict, it is necessary to find an appropriate balance between both sets of rights. Support for this conclusion may be found in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. In that decision, this Court considered the balance to be achieved between the right to a fair trial and freedom of expression, in the context of publication bans. Lamer C.J. wrote for the majority, at p. 877:

80 Qui plus est, dans les cas où il y a soit chevauchement de la liberté d'expression et du droit de vote soit conflit entre ces droits, il est nécessaire d'établir un équilibre approprié entre ces deux catégories de droits. Cette conclusion trouve appui dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Dans cet arrêt, notre Cour s'est interrogée, dans le contexte d'interdictions de publication, sur l'équilibre qui doit être établi entre le droit à un procès équitable et la liberté d'expression. Le juge en chef Lamer a dit ceci, au nom de la majorité, à la p. 877:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

Il faut se garder d'adopter une conception hiérarchique qui donne préséance à certains droits au détriment d'autres droits, tant dans l'interprétation de la *Charte* que dans l'élaboration de la common law. Lorsque les droits de deux individus sont en conflit, comme cela peut se produire dans le cas d'une interdiction de publication, les principes de la *Charte* commandent un équilibre qui respecte pleinement l'importance des deux catégories de droits.

In my view, these comments are equally applicable where the right to vote overlaps with the right to free expression. Each right is distinct and must be given effect.

81 It is noteworthy, as well, that the scope of s. 2(*b*), unlike the scope of s. 3, has been well canvassed by this Court. Most recently, the broad interpretation of the scope of s. 2(*b*) was affirmed in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569. There, the Court wrote, at para. 31: "Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(*b*) of the Canadian *Charter*".

82 Turning to s. 3, this Court has only dealt with the scope of the right to vote in limited contexts, namely electoral boundaries, the disqualification of inmates from voting, and voting in a referendum; see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438; and *Haig v. Canada*, [1993] 2 S.C.R. 995. This Court has not addressed the scope of s. 3 in the context of access to information during an election. In my view, it is not necessary to decide on the informational content of s. 3 in the context of this case. The purpose of s. 3 was stated clearly by McLachlin J. in *Reference re Provincial Electoral Boundaries (Sask.)*, *supra*, at p. 183, as the "right to 'effective representation'"; see also *Haig*, *supra*, at p. 1031. Accordingly, to constitute an infringement of the right to vote, a restriction on information would have to undermine the guarantee of effective representation.

83 This position accords with the jurisprudence of the European Court of Human Rights and the European Commission of Human Rights. Article 3 of the First Protocol to the European *Convention for the Protection of Human Rights and Fundа-*

À mon avis, ces observations sont également applicables en cas de chevauchement du droit de vote et du droit à la liberté d'expression. Chacun de ces droits est un droit distinct et il faut lui donner effet.

De plus, il convient de signaler que le champ d'application de l'al. 2*b*), contrairement à celui de l'art. 3, a été examiné de manière approfondie par notre Cour. Tout récemment, l'interprétation large du champ d'application de l'al. 2*b*) a été confirmée dans *Libman c. Québec (Procureur général)*, [1997] 3 R.C.S. 569. Notre Cour y a dit ceci, au par. 31: «À moins que l'expression ne soit communiquée d'une manière qui exclut la protection, telle la violence, la Cour reconnaît que toute activité ou communication qui transmet ou tente de transmettre un message est comprise dans la garantie de l'al. 2*b*) de la *Charte* canadienne».

En ce qui concerne l'art. 3, la Cour ne s'est penchée sur la portée du droit de vote que dans des contextes limités, c'est-à-dire les circonscriptions électorales, l'inhabilité des détenus à voter et l'exercice du droit de vote dans le cadre d'un référendum; voir *Renvoi relatif aux circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158; *Sauvé c. Canada (Procureur général)*, [1993] 2 R.C.S. 438; et *Haig c. Canada*, [1993] 2 R.C.S. 995. Notre Cour n'a pas été appelée à examiner le champ d'application de l'art. 3 dans le contexte de l'accès à l'information pendant une campagne électorale. À mon avis, il n'est pas nécessaire, dans le cadre du présent pourvoi, de statuer sur l'aspect informationnel de l'art. 3. Dans le *Renvoi relatif aux circonscriptions électorales provinciales (Sask.)*, précité, à la p. 183, le juge McLachlin a clairement énoncé l'objet de cette disposition comme étant le «droit à une "représentation effective"»; voir également l'arrêt *Haig*, précité, à la p. 1031. Par conséquent, pour qu'il y ait violation du droit de vote, la limitation de l'information doit compromettre la garantie d'une représentation effective.

Ce point de vue est compatible avec la jurisprudence de la Cour européenne des droits de l'homme et celle de la Commission européenne des droits de l'homme. Aux termes de l'art. 3 du Premier protocole à la *Convention de sauvegarde*

mental Freedoms, March 20, 1952, Europ. T.S. No. 9, provides that parties to the Convention "undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". The European Court has held that this provision guarantees the right to vote; see Eur. Court H.R., *Mathieu-Mohin and Clerfayt* case, judgment of 2 March 1987, Series A No. 113. However, neither the European Court nor the European Commission has equated the right to vote with a right to information *per se*. Rather, in *Mathieu-Mohin and Clerfayt*, *supra*, the European Court equated the right to vote with the right to participate in the electoral process. This same principle was applied by the European Commission in *Bowman v. United Kingdom* (1996), 22 E.H.R.R. C.D. 13. In that case, the Commission considered legislation that restricted "single-issue" campaigning by individuals other than the electoral candidates. The applicant, who had been charged for distributing leaflets outlining the views of three electoral candidates on abortion, complained that her right to free expression had been violated. The Commission agreed and held that there was an unjustified violation of freedom of expression. With regard to the applicant's right to vote, the Commission wrote, at p. CD18:

> The Commission has had regard to whether the expression of opinion or information on "single issues" addressed by individuals or groups with strongly-held views may operate in particular constituencies so as to "distort" election results. It has previously considered in the context of Article 3 of the First Protocol . . . that one of the legitimate objectives of national electoral systems is to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. . . . The Government has not, however, produced any argument to the effect that "single issue" campaigning of the kind illustrated in the applicant's case would distract voters from the political platforms which are the basis of national party campaigns to such a degree as would hinder the electoral process. [Emphasis added.]

des droits de l'homme et des libertés fondamentales, 20 mars 1952, S.T. Europ. nº 9, les parties à la Convention «s'engagent à organiser, à des intervalles raisonnables, des élections libres au scrutin secret, dans les conditions qui assurent la libre expression de l'opinion du peuple sur le choix du corps législatif». La Cour européenne a statué que cette disposition garantissait le droit de vote; voir Cour eur. D.H., affaire *Mathieu-Mohin et Clerfayt*, arrêt du 2 mars 1987, série A nº 113. Cependant, ni la Cour européenne ni la Commission européenne n'ont assimilé le droit de vote au droit à l'information en soi. Au contraire, dans l'affaire *Mathieu-Mohin et Clerfayt*, précitée, la Cour européenne a assimilé le droit de vote au droit de participer au processus électoral. Le même principe a été appliqué par la Commission européenne dans la décision *Bowman c. United Kingdom* (1996), 22 E.H.R.R. C.D. 13. Dans cette affaire, la Commission a examiné une mesure législative qui limitait le droit des individus qui n'étaient pas candidats aux élections de faire campagne sur une «question unique». La demanderesse, qui avait été accusée d'avoir distribué des feuillets exposant la position de trois candidats sur la question de l'avortement, a prétendu que son droit à la liberté d'expression avait été violé. La Commission lui a donné raison et a conclu qu'il y avait eu atteinte injustifiée à la liberté d'expression. Voici ce qu'elle a dit au sujet du droit de vote de la demanderesse, à la p. CD18:

> [TRADUCTION] La Commission s'est demandé si le fait que des particuliers ou des groupes aux idées bien arrêtées expriment une opinion ou donnent de l'information sur une «question unique» peut avoir pour effet de «fausser» le résultat du scrutin dans certaines circonscriptions. La Commission a déjà jugé, dans le contexte de l'article 3 du Premier protocole, [. . .] qu'un des objectifs légitimes d'un système électoral national est de canaliser les courants de pensée de façon à promouvoir l'émergence d'une volonté politique suffisamment claire et cohérente [. . .] Le gouvernement n'a cependant pas présenté d'arguments établissant que le fait de faire campagne sur une «question unique», campagne du genre de celle menée par la demanderesse, est de nature à distraire les électeurs des programmes électoraux sur lesquels sont fondées les campagnes des partis nationaux au point d'entraver le processus électoral. [Je souligne.]

84 In the present instance, it was argued that the partial ban on election polls hinders the electoral process because some of the voters are deprived of information relevant to the exercise of their right to vote. The Court of Appeal considered, at p. 358, that s. 3 only guarantees access to information "necessary to permit electors to vote rationally and in an informed manner", and that poll results did not fall into that category. My conclusion that s. 322.1 is an unjustified limit on free expression makes it unnecessary to deal with this issue. I prefer to leave the issue aside mostly because the evidence with regard to the relationship between the kind of information banned and the integrity of the election process is too sparse.

Dans la présente affaire, on a prétendu que l'interdiction partielle de publier les résultats de sondages sur les intentions de vote constitue une entrave au processus électoral, car certains électeurs sont privés d'information pertinente à l'exercice de leur droit de vote. La Cour d'appel a conclu, à la p. 358, que l'art. 3 ne garantit l'accès qu'à l'information [TRADUCTION] «nécessaire pour [. . .] permettre [aux électeurs] de [voter] d'une manière rationnelle et éclairée» et que cette information n'inclut pas les résultats des sondages. Ma conclusion selon laquelle l'art. 322.1 constitue une limite injustifiée de la liberté d'expression rend inutile l'examen de cette question. Je préfère la laisser de côté, principalement parce que la preuve relative au lien existant entre le type d'information visé par l'interdiction et l'intégrité du processus électoral est trop limitée.

VI. Freedom of Expression

VI. La liberté d'expression

A. *Section 2(b) of the Charter*

A. *L'alinéa 2b) de la Charte*

85 Before this Court, the respondent conceded, as it did in the courts below, that there was a *prima facie* infringement of freedom of expression. This concession was well-founded. Section 322.1 clearly infringes on the guarantee in s. 2(*b*) of the *Charter*, in accordance with the test set out in *Irwin Toy*, *supra*. First, there can be no doubt that the publication of polling information, and more specifically opinion survey results, is an activity that conveys meaning and, therefore, falls within the ambit of s. 2(*b*). Second, s. 322.1 restricts freedom of expression by prohibiting the broadcasting, publication or dissemination of opinion survey results during the final three days of an election campaign. The freedom of expression is clearly infringed by this ban.

L'intimé a reconnu, tant devant notre Cour que devant les juridictions inférieures, qu'il y avait atteinte *prima facie* à la liberté d'expression. Cette concession était bien fondée. En effet, l'art. 322.1 porte manifestement atteinte à la garantie prévue par l'al. 2*b*) de la *Charte*, selon le critère dégagé dans l'arrêt *Irwin Toy*, précité. Premièrement, il ne fait aucun doute que la publication d'information touchant les sondages, et plus précisément les résultats de ceux-ci, est une activité qui transmet un message et qui, par conséquent, entre dans le champ d'application de l'al. 2*b*). Deuxièmement, l'art. 322.1 limite la liberté d'expression en interdisant d'annoncer, de publier ou de diffuser les résultats de sondages sur les intentions de vote au cours des trois derniers jours de la campagne électorale. La liberté d'expression est nettement violée par cette interdiction

86 Before turning to the justification analysis under s. 1 of the *Charter*, I pause to note that, in addition to polling, there are various other activities subject to restriction during a federal election. These restrictions, as set out in the *Canada Elections Act*, include limits on spending and controls on advertising. In my view, it is impossible to make any

Avant de passer à l'analyse de la justification conformément à l'article premier de la *Charte*, je tiens à signaler que, outre les sondages, diverses autres activités font l'objet de restrictions au cours des campagnes électorales fédérales. Ces restrictions, prévues par la *Loi électorale du Canada*, sont notamment les limites visant les dépenses et

generalizations regarding the scope or constitutional validity of these provisions. Each type of restriction, including s. 322.1, must be considered in its own context. Although Somers J. noted that the partial ban on polling is part of a larger package of restrictions, there is no justification for finding that all restrictions must be considered globally. Each restriction is adopted to address a particular set of circumstances and it is in that light that each one must be analysed.

les mesures de contrôle visant la publicité. Il est selon moi impossible de généraliser en ce qui concerne le champ d'application ou la validité constitutionnelle de ces dispositions. Chaque restriction, y compris celle prévue à l'art. 322.1, doit être examinée suivant le contexte qui lui est propre. Même si le juge Somers a souligné que l'interdiction partielle visant les sondages s'inscrit dans un ensemble plus vaste de restrictions, rien ne justifie de conclure que toutes les restrictions doivent être considérées globalement. Chacune vise une situation particulière et c'est sous cet éclairage qu'elle doit être analysée.

B. *Justification Under Section 1 of the Charter*

B. *La justification conformément à l'article premier de la Charte*

1. Contextual Factors

1. Les facteurs contextuels

The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

87 L'analyse fondée sur l'article premier doit être réalisée en accordant une grande attention au contexte. Cette démarche est incontournable car le critère élaboré dans *R. c. Oakes*, [1986] 1 R.C.S. 103, exige du tribunal qu'il dégage l'objectif de la disposition contestée, ce qu'il ne peut faire que par un examen approfondi de la nature du problème social en cause. De même, la proportionnalité des moyens utilisés pour réaliser l'objectif urgent et réel visé ne peut être évaluée qu'en s'attachant étroitement au détail et au contexte factuel. Essentiellement, le contexte est l'indispensable support qui permet de bien qualifier l'objectif de la disposition attaquée, de décider si cet objectif est justifié et d'apprécier si les moyens utilisés ont un lien suffisant avec l'objectif valide pour justifier une atteinte à un droit garanti par la *Charte*.

Characterizing the context of the impugned provision is also important in order to determine the type of proof which a court can demand of the legislator to justify its measures under s. 1. This question is suitably addressed at the outset because it affects the entirety of the s. 1 analysis, and because of the nature of the evidence in this case. In discussing whether a ban on advertising aimed at children minimally impaired the freedom of

88 Il importe également de qualifier le contexte de la disposition contestée pour déterminer le type de preuve que le tribunal peut demander au législateur d'apporter pour justifier ses mesures au regard de l'article premier. Il convient de régler cette question dès le départ, d'une part parce qu'elle a une incidence sur l'ensemble de l'analyse fondée sur l'article premier, et, d'autre part, en raison de la nature de la preuve dans le cas qui nous occupe. Examinant la question de savoir si l'interdiction visant la publicité destinée aux enfants portait le moins possible atteinte à la liberté d'expression, le

expression, Dickson C.J. and Lamer and Wilson JJ. observed in *Irwin Toy*, *supra*, at pp. 993-94:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. . . . Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. . . .
>
> In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. . . .
>
> In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective. [Emphasis added.]

In *Butler*, *supra*, Sopinka J. found the social science evidence relating pornography to violence or other harms directed at women by men to be inconclusive. Nonetheless, he found that there was a rational connection between the impugned provision and the measures adopted by the legislature (at pp. 502 and 504):

> While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.
>
> . . .
>
> I am in agreement with . . . the view that Parliament was entitled to have a "reasoned apprehension of harm" resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations. [Emphasis added.]

juge en chef Dickson a fait les observations suivantes dans *Irwin Toy*, précité, aux pp. 993 et 994:

> Pour trouver le point d'équilibre entre des groupes concurrents, le choix des moyens, comme celui des fins, exige souvent l'évaluation de preuves scientifiques contradictoires et de demandes légitimes mais contraires quant à la répartition de ressources limitées. [. . .] Ainsi, lorsque les tribunaux sont appelés à contrôler les résultats des délibérations du législateur, surtout en matière de protection de groupes vulnérables, ils doivent garder à l'esprit la fonction représentative du pouvoir législatif . . .
>
> Il arrive parfois qu'au lieu d'arbitrer entre des groupes différents, le gouvernement devienne plutôt ce qu'on pourrait appeler l'adversaire singulier de l'individu dont le droit a été violé . . .
>
> En l'espèce, la Cour est appelée à évaluer des preuves contradictoires, qui relèvent des sciences humaines, quant aux moyens appropriés de faire face au problème de la publicité destinée aux enfants. La question est de savoir si le gouvernement était raisonnablement fondé, compte tenu de la preuve offerte, à conclure qu'interdire toute publicité destinée aux enfants portait le moins possible atteinte à la liberté d'expression étant donné l'objectif urgent et réel que visait le gouvernement. [Je souligne.]

Dans *Butler*, précité, le juge Sopinka a déclaré non concluante la preuve fondée sur les sciences sociales qui faisait un lien entre la pornographie et la violence et d'autres torts faits aux femmes par les hommes. Néanmoins, il a conclu à l'existence d'un lien rationnel entre la disposition attaquée et les mesures adoptées par le législateur (aux pp. 502 et 504):

> Bien qu'il puisse être difficile, voire impossible, d'établir l'existence d'un lien direct entre l'obscénité et le préjudice causé à la société, il est raisonnable de supposer qu'il existe un lien causal entre le fait d'être exposé à des images et les changements d'attitude et de croyance.
>
> . . .
>
> Je suis d'accord avec [. . .] [l']avis que le Parlement avait le droit d'avoir [TRADUCTION] «une appréhension raisonnée du préjudice» résultant de la désensibilisation des personnes exposées à du matériel représentant des relations sexuelles dans un contexte de violence, de cruauté et de déshumanisation. [Je souligne.]

In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, McLachlin J. addressed more explicitly the relationship between the standard of proof required under s. 1 and the nature of the problem which Parliament was seeking to remedy. That case involved the application of s. 2(*b*) to certain restraints on tobacco advertising and promotion which had been adopted by Parliament. After noting that the distinction described in *Irwin Toy* between the government as social mediator and the government as singular antagonist "may not always be easy to apply", she observed, at para. 135:

> This said, I accept that the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament's choice. The difficulty of devising legislative solutions to social problems which may be only incompletely understood may also affect the degree of deference that the courts accord to Parliament or the Legislature.

She emphasized, however, that this does not diminish the usual standard of proof required under s. 1, simply that that standard might be satisfied in different ways depending on the nature of the legislative objective (at para. 137):

> As the s. 1 jurisprudence has established, the civil standard of proof on a balance of probabilities at all stages of the proportionality analysis is more appropriate: *Oakes*, *supra*, at p. 137; *Irwin Toy*, *supra*, at p. 992. . . . Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view: see *Snell v. Farrell*, [1990] 2 S.C.R. 311. [Emphasis added.]

McLachlin J. applied this test under the rational connection stage of the proportionality analysis based on the following characterization (at para. 154):

> Where, however, legislation is directed at changing human behaviour, as in the case of the *Tobacco Products Control Act*, the causal relationship may not be sci-

Dans *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, le juge McLachlin a traité plus explicitement du rapport entre la norme de preuve applicable dans le cadre de l'article premier et la nature du problème que le législateur cherchait à régler. L'affaire concernait l'application de l'al. 2*b*) à certaines restrictions adoptées par le Parlement en matière de publicité et de promotion des produits du tabac. Après avoir souligné que la distinction faite dans l'arrêt *Irwin Toy* entre le rôle du gouvernement en tant qu'arbitre dans la société et celui d'adversaire singulier «pourrai[t] ne pas être toujours facil[e] d'application», elle a fait observer ceci, au par. 135:

> Cela dit, je reconnais que le problème auquel la loi tente de remédier risque d'avoir une incidence sur le degré de respect dont le tribunal devrait faire preuve à l'égard du choix du Parlement. De même, la difficulté de concevoir des solutions législatives à des problèmes sociaux qui pourraient bien n'être que partiellement compris peut aussi avoir une incidence sur le degré de respect dont les tribunaux feront preuve envers le législateur fédéral ou provincial.

Elle a toutefois souligné que cela n'avait pas pour effet d'abaisser la norme de preuve appliquée habituellement dans le cadre de l'article premier, mais tout simplement d'indiquer qu'il est possible d'y satisfaire par des moyens différents compte tenu de la nature de l'objectif visé par la loi (au par. 137):

> Comme l'établit la jurisprudence relative à l'article premier, la norme de preuve qui convient, à toutes les étapes de l'analyse de la proportionnalité, est celle qui s'applique en matière civile, c'est-à-dire la preuve selon la prépondérance des probabilités: *Oakes*, précité, à la p. 137; *Irwin Toy*, précité, à la p. 992. [. . .] Pour satisfaire à la norme de preuve en matière civile, on n'a pas à faire une démonstration scientifique; la prépondérance des probabilités s'établit par application du bon sens à ce qui est connu, même si ce qui est connu peut comporter des lacunes du point de vue scientifique: voir l'arrêt *Snell c. Farrell*, [1990] 2 R.C.S. 311. [Je souligne.]

Le juge McLachlin a appliqué ce critère à l'étape de l'examen du lien rationnel, dans le cadre de l'analyse de la proportionnalité, en s'appuyant sur la qualification suivante (au par. 154):

> Par contre, dans les cas où une loi vise une modification du comportement humain, comme dans le cas de la *Loi réglementant les produits du tabac*, le lien causal pour-

entifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective: *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 768 and 777; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 503. [Emphasis added.]

rait bien ne pas être mesurable du point de vue scientifique. Dans ces cas, notre Cour s'est montrée disposée à reconnaître l'existence d'un lien causal entre la violation et l'avantage recherché sur le fondement de la raison ou de la logique, sans insister sur la nécessité d'une preuve directe de lien entre la mesure attentatoire et l'objectif législatif: *R. c. Keegstra*, [1990] 3 R.C.S. 697, aux pp. 768 et 777; *R. c. Butler*, [1992] 1 R.C.S. 452, à la p. 503. [Je souligne.]

89 The issue of the standard and type of proof required under s. 1 arises with particular acuity in the case at bar because the social science evidence, as in these previous cases, is in a state of some controversy. In light of this inconclusive evidence, the government submitted it is not for this Court to second-guess the judgment of the legislature when it has made a reasonable assessment that an apprehension of harm exists. It also argued that "common sense applied to what is known establishes the reasonableness of Parliament's assessment of the situation".

La question de la norme et du type de preuve que commande l'article premier se pose avec une acuité particulière dans la présente instance parce que, tout comme dans ces arrêts antérieurs, la preuve fondée sur les sciences sociales est, dans une certaine mesure, encore controversée. Vu cette preuve non concluante, le gouvernement a soutenu qu'il n'appartient pas à la Cour de remettre en question le jugement du législateur qui, après avoir fait une appréciation raisonnable de la situation, a conclu à l'existence d'une appréhension de préjudice. Le gouvernement a également plaidé que [TRADUCTION] «l'application du bon sens aux éléments connus établit le caractère raisonnable de l'appréciation de la situation qu'a faite le législateur».

90 I agree with McLachlin J.'s remarks in *RJR-MacDonald* that it is difficult to draw a sharp distinction between legislation in which the state is the antagonist of the individual, and that in which it is acting as a mediator between different groups. Indeed, nothing in these cases suggests that there is one category of cases in which a low standard of justification under s. 1 is applied, and another category in which a higher standard is applied. In my view, these cases further the contextual approach to s. 1 by indicating that the vulnerability of the group which the legislator seeks to protect (as in *Irwin Toy*, *supra*, at p. 995; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 88), that group's own subjective fears and apprehension of harm (as in *R. v. Keegstra*, [1990] 3 S.C.R. 697, *per* McLachlin J., at p. 857), and the inability to measure scientifically a particular harm in question, or the efficaciousness of a remedy (as in *Butler*, *supra*, at p. 502), are all factors of which the court must take account in assessing whether a limit has been demonstrably justified according to

Je souscris aux propos du juge McLachlin dans *RJR-MacDonald* selon lesquels il est difficile d'établir une distinction nette entre les mesures législatives dans le cadre desquelles l'État agit en tant qu'adversaire singulier de l'individu et celles où il agit en tant que médiateur entre différents groupes. De fait, rien dans les arrêts susmentionnés ne tend à indiquer qu'il existe une catégorie de cas auxquels s'applique une norme peu exigeante de justification dans le cadre de l'article premier et une autre catégorie à laquelle s'applique une norme plus élevée. À mon avis, ces précédents étayent davantage le recours à une approche contextuelle dans l'application de l'article premier en indiquant que la vulnérabilité du groupe que le législateur cherche à protéger (comme dans *Irwin Toy*, précité, à la p. 995; *Ross c. Conseil scolaire du district nº 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825, au par. 88), les craintes subjectives et la crainte de préjudice entretenue par ce groupe (comme dans *R. c. Keegstra*, [1990] 3 R.C.S. 697, motifs du juge McLachlin, à la p. 857), et l'incapa-

the civil standard of proof. They do not represent categories of standard of proof which the government must satisfy, but are rather factors which go to the question of whether there has been a demonstrable justification. I propose to return to these factors in more detail in the course of a contextual approach to s. 1.

cité de mesurer scientifiquement le préjudice particulier en cause ou l'efficacité d'une réparation (comme dans *Butler*, précité, à la p. 502), sont autant de facteurs que le tribunal doit prendre en considération lorsqu'il décide si une restriction est justifiée suivant la norme de preuve applicable en matière civile. Ce ne sont pas des catégories de norme de preuve auxquelles le gouvernement doit satisfaire, mais bien des facteurs touchant la question de savoir s'il y a une justification démontrable. Je me propose de revenir plus en détail sur ces facteurs dans le cours de l'application de l'approche contextuelle à l'article premier.

Another contextual factor to be considered is the nature of the activity which is infringed. The degree of constitutional protection may vary depending on the nature of the expression at issue (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1355-56; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 246-47; *Keegstra*, *supra*, at p. 760; *RJR-MacDonald*, *supra*, at paras. 71-73 and 132; *Libman*, *supra*, at para. 60). This is not because a lower standard is applied, but because the low value of the expression may be more easily outweighed by the government objective. In this case, the speech infringed is political information. While opinion polls may not be the same as political ideas, they are nevertheless an important part of the political discourse, as manifested by the attention such polls receive in the media and in the public at large, and by the fact that political parties themselves purchase and use such information. Indeed, the government argues that opinion polls have an excessive impact on the electoral choices made by voters. As a genre of speech, unlike hate speech or pornography, this expression is not intrinsically harmful or demeaning to certain members of society because of its direct impact, or its impact on others. It is without moral content, and yet it is widely perceived as a valuable and important part of the discourse of elections in this country. The government urges, however, that under some circumstances polls may

91 Un autre facteur contextuel qui doit être pris en considération est la nature de l'activité à laquelle il est porté atteinte. Le degré de protection constitutionnelle peut varier selon la nature de la forme d'expression en cause (*Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, aux pp. 1355 et 1356; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232, aux pp. 246 et 247; *Keegstra*, précité, à la p. 760; *RJR-MacDonald*, précité, aux pp. 71 à 73 et 132; *Libman*, précité, au par. 60). Ce n'est pas parce qu'une norme moins exigeante est appliquée, mais plutôt parce que, compte tenu dans certains cas de la faible valeur de la forme d'expression en cause, l'objectif du gouvernement l'emporte plus facilement sur celle-ci. Dans le présent cas, le discours visé par l'atteinte est l'information politique. Même si les sondages ne sont pas assimilables aux opinions politiques, ils sont néanmoins un élément important du discours politique, comme en témoignent, d'une part, l'attention qu'ils reçoivent dans les médias et au sein du public en général, et, d'autre part, le fait que les partis politiques eux-mêmes achètent et utilisent ce type d'information. De fait, le gouvernement prétend que les sondages ont une influence excessive sur les choix électoraux des citoyens. Contrairement à la propagande haineuse ou à la pornographie, cette forme d'expression n'est pas intrinsèquement préjudiciable ou avilissante pour certains membres de la société à cause soit de son effet direct sur eux soit de son effet sur autrui. Quoique dénuée de contenu moral, elle est pourtant largement perçue comme un élément précieux et impor-

come to have an effect which interferes with the ability of individuals to make an informed choice.

92 According to the purposes I describe below, there are two groups who might be negatively affected by polls: first, there are those who incorrectly assume that polls are a perfect measure of voting results on election day, and rely on them to an excessive degree in consequence; second, there are those voters who are perfectly aware of the general shortcomings of polls as predictions of the result on election day, but who are misled by the publication of an inaccurate poll result. Even assuming there to be some likelihood of these dangers, which shall be discussed more fully in the course of the s. 1 analysis proper, there can be no question that opinion surveys regarding political candidates or electoral issues are part of the political process and, thus, at the core of expression guaranteed by the *Charter*. As Dickson C.J. stated in *Keegstra*, *supra*, at pp. 763-64:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

In that case, hate speech was found to interfere with the ability of a specific and identifiable group to participate in the political process by directly undermining their dignity and their membership in the community. The same could be said of pornographic expression in *Butler*. And in *Irwin Toy*, the interest of advertisers meant that there was a likelihood that such speech would be manipulative of children and would play on their vulnerability.

tant du discours électoral dans notre pays. Toutefois, le gouvernement affirme que, dans certaines circonstances, il est possible que les sondages aient pour effet de diminuer la capacité de certains individus de faire un choix éclairé.

Suivant les objectifs que je vais décrire plus loin, deux groupes risquent de subir un préjudice du fait des sondages: premièrement, il y a les personnes qui supposent à tort que les sondages indiquent parfaitement quels seront les résultats du scrutin le jour de l'élection et qui, en conséquence, se fient à ceux-ci d'une manière excessive; deuxièmement, il y a les personnes qui savent parfaitement que les sondages en général ne permettent pas de prédire les résultats le jour du scrutin, mais qui sont induites en erreur par la publication d'un sondage inexact. Même en supposant une certaine vraisemblance à ces dangers, qui seront examinés de manière plus approfondie dans le cours de l'analyse fondée sur l'article premier proprement dite, il ne fait aucun doute que les sondages concernant les candidats ou les enjeux électoraux font partie du processus politique et sont, de ce fait, au cœur de la liberté d'expression garantie par la *Charte*. Comme l'a dit le juge en chef Dickson dans *Keegstra*, précité, aux pp. 763 et 764:

> Le lien entre la liberté d'expression et le processus politique est peut-être la cheville ouvrière de la garantie énoncée à l'al. 2*b*), et ce lien tient dans une large mesure à l'engagement du Canada envers la démocratie. La liberté d'expression est un aspect crucial de cet engagement démocratique, non pas simplement parce qu'elle permet de choisir les meilleures politiques parmi la vaste gamme des possibilités offertes, mais en outre parce qu'elle contribue à assurer un processus politique ouvert à la participation de tous.

Dans cette affaire, il a été jugé que la propagande haineuse entravait la participation d'un groupe précis et identifiable au processus politique en amoindrissant sa dignité et son sentiment d'appartenance à la collectivité. La même affirmation pouvait être faite dans *Butler* qui portait sur l'expression pornographique. Dans *Irwin Toy*, compte tenu de l'intérêt des annonceurs, il était vraisemblable que le discours en cause aurait un effet manipulateur à l'égard des enfants et jouerait sur leur vulnérabilité.

In each of these cases, the type of speech involved systematically and consistently undermined the position of some members of society. There is no evidence in this case that there is any such systematic opposition between the interests or position of the Canadian voter and opinion surveys. The government argues that there is the potential that some inaccurate poll might undermine the freedom of choice of the Canadian voter, or that some voters might be excessively influenced by polls. Leaving those exceptional or potential cases aside, polls are not generally inimical to the interests of Canadian voters. They are sought after and widely valued which, independently of their value to any one voter or specific content, places this type of speech at the core of the political process.

93 Dans chacune de ces affaires, le type d'expression en cause amoindrissait de façon systématique et uniforme la situation de certains membres de la société. Il n'y a aucune preuve, en l'espèce, de l'existence d'une telle opposition systématique entre les intérêts ou la situation des électeurs canadiens et les sondages. Le gouvernement prétend qu'il y a un risque que certains sondages inexacts puissent porter atteinte à la liberté de choix des électeurs ou que certains électeurs canadiens soient influencés de manière excessive par les sondages. Hormis ces cas exceptionnels ou potentiels, les sondages ne sont généralement pas incompatibles avec les intérêts des électeurs canadiens. Ils sont recherchés et largement appréciés, de sorte que, indépendamment de leur valeur pour un électeur donné ou de leur contenu précis, ce type de discours est au cœur du processus politique.

Although the *Libman* case involved expression related to political campaigning, there was a likelihood that the genre of paid political advertising would significantly manipulate the political discourse to the advantage of those with greater financial resources (paras. 50-51). *Libman* is not dissimilar to *Irwin Toy* in the sense that, under certain circumstances, the nature of the interests (i.e., a single party or faction with a great preponderance of financial resources) of the speakers could make the expression itself inimical to the exercise of a free and informed choice by others. The government does not suggest that there is any such systematic or structural danger in the case of opinion surveys, but relies simply on the possibility of an inaccurate poll, or the disproportionate reaction by certain voters to polls generally. These may be important objectives and will be assessed below; but the possibility of harm arising from the unfortuitous publication of an inaccurate poll does not displace the general nature of this expression as political expression at the core of s. 2(*b*).

94 Même si l'arrêt *Libman* concernait une forme d'expression rattachée aux campagnes politiques, il était vraisemblable que le genre d'annonces politiques payées qui étaient en cause dans cette affaire influencent de façon considérable le débat politique en faveur de ceux qui disposent de plus grandes ressources financières (par. 50 et 51). L'affaire *Libman* n'est pas sans similarité avec l'affaire *Irwin Toy* en ce sens que, dans certaines circonstances, la nature des intérêts (c'est-à-dire le fait qu'un parti ou une faction dispose d'une supériorité considérable du point de vue des ressources financières) de ceux qui s'expriment pourrait rendre la forme d'expression elle-même incompatible avec l'exercice par les autres intéressés d'un choix libre et éclairé. Le gouvernement ne suggère pas l'existence d'un tel danger systématique ou structurel dans le cas des sondages, mais invoque simplement la possibilité d'un sondage inexact ou d'une réaction disproportionnée de la part de certains électeurs aux sondages en général. Il s'agit là d'objectifs qui peuvent être importants et qui seront appréciés plus loin, mais la possibilité d'un préjudice résultant de la publication non fortuite d'un sondage inexact ne change pas la nature générale de cette forme d'expression, qui relève de l'expression politique au cœur de l'al. 2*b*).

95 I would conclude that the nature of the expression in issue here does not *prima facie* suggest that a deferential approach is appropriate in this case.

2. Legislative Objective

96 The characterization of the objective of s. 322.1 and the nature of the harm which it hopes to remedy are virtually correlatives of one another, and constitute the crucial first step in the s. 1 analysis. Unfortunately, the decisions below and some of the submissions before us have been unnecessarily vague in stating the precise objective of the limitation in issue, leaving many unanswered questions as to the proper approach to the s. 1 analysis. The respondent submitted before us that the objective of s. 322.1 is "to prevent the distorting effect of public opinion survey results which are released late in the election when there is no longer a sufficient opportunity to respond". But what is the exact nature of this "distorting effect"? The Court of Appeal did not elucidate any more precise objective than this. By contrast, Somers J. articulated four objectives from the legislative history of the provision which more precisely characterized the purpose of the limit on freedom of expression: prevention of dissemination of false information; prevention of polling information from being presented in a misleading way that lent an aura of scientific precision to poll results; a period of rest and reflection for voters prior to going to the polls; and a period of response after the final poll has been published, presumably to respond to its potential inaccuracy or simply to question the importance of polls in general. Before this Court, the respondent submitted that the sole objective of the provision on which it was relying was to provide a period during which the accuracy of a poll could be publicly questioned and debated, so that the scientific validity and accuracy of any particular poll would be more fully known to Canadian voters. The harm, then, which the provision purportedly addresses is the possibility that the scientific accuracy of polls may be overestimated by Canadian voters in a particular election and that

Je suis d'avis de conclure que la nature de la forme d'expression en litige dans le présent cas ne tend pas à indiquer, à première vue, qu'une approche empreinte de retenue est appropriée en l'espèce.

2. L'objectif législatif

La qualification de l'objectif de l'art. 322.1 et la nature du préjudice qu'il est censé corriger sont pratiquement en corrélation, et constituent la première étape cruciale de l'analyse fondée sur l'article premier. Malheureusement, les décisions des juridictions inférieures ainsi que certaines des observations qui nous ont été soumises ont énoncé de manière inutilement vague l'objectif précis de la restriction en litige, laissant bien des questions sans réponse en ce qui concerne la démarche appropriée pour l'analyse fondée sur l'article premier. Devant nous, l'intimé a fait valoir que l'art. 322.1 a pour objectif [TRADUCTION] «de prévenir l'effet de déformation de la réalité que peut créer la publication des résultats de sondages tard dans une campagne électorale, lorsqu'il ne reste plus de temps pour y répliquer». Mais en quoi consiste précisément cet «effet déformant»? La Cour d'appel n'a pas énoncé d'objectif plus précis que celui-là. Par contraste, le juge Somers a, à partir de l'historique de la disposition, formulé quatre objectifs définissant plus précisément l'objet de la restriction à la liberté d'expression: prévenir la diffusion de faux renseignements; empêcher que des renseignements touchant les sondages soient présentés d'une manière trompeuse, propre à donner une aura de caractère scientifique aux résultats des sondages; donner aux électeurs une période de répit et de réflexion avant le scrutin; accorder une période de réplique après la publication du dernier sondage, vraisemblablement pour répondre aux inexactitudes qu'il pourrait contenir ou tout simplement pour s'interroger sur l'importance des sondages en général. Devant notre Cour, l'intimé a plaidé que le seul objectif qu'il invoquait était celui qui consiste à accorder une période permettant de remettre en question l'exactitude d'un sondage et d'en débattre publiquement de façon à bien renseigner les électeurs canadiens sur la validité et l'exactitude scientifiques d'un sondage donné. En conséquence, le préjudice censé visé par la disposi-

they may cast their vote based on this inaccurate perception.

As mentioned in the previous section, the voter's misapprehension of the true significance of a poll could be the result of either of two quite different reasons: first, the voter might systematically overestimate the validity and accuracy of poll results; or, second, there might be a poll which falls below the normal standard of accuracy of polling which Canadians are generally entitled to expect. This latter type of poll is more simply described as a bad poll, a false poll, or an inaccurate poll. The respondent is not explicit as to which distorting effect it refers, and the judgments below, as well as legislative pronouncements at the time of its passage, reflect this obscurity. The danger of the systematically overreliant voter is suggested in the purpose described by Somers J. as the need for "a rest period" so that the frenzy of polls will die down and voters will be encouraged to forget about the polls and concentrate on issues. This purpose is evident in the final report of the Royal Commission on Electoral Reform and Party Financing ("Lortie Commission") entitled *Reforming Electoral Democracy* (1991), vol. 1, which concluded, at p. 460, that a polling ban was necessary to "provide voters with a period of reflection at the end of campaign to assess the parties and candidates". The second purpose of the legislation, to guard against an inaccurate poll which occurs late in the campaign, has nothing to do with a period of repose or reflection. Rather, the purpose is to provide an opportunity for the last opinion surveys on which the voter might base his or her vote to be subjected to public scrutiny. In this way, the voter will have the best information possible about the accuracy of the latest polls, and will not cast a vote without a potentially inaccurate opinion survey having been publicly scrutinized.

tion est la possibilité que l'exactitude scientifique des sondages puisse être surestimée par les électeurs canadiens au cours d'une campagne électorale donnée et qu'ils votent en fonction de cette perception inexacte.

97 Comme je l'ai dit dans la section précédente, il est possible qu'un électeur se méprenne sur la signification réelle d'un sondage pour deux raisons très différentes: premièrement, il peut surestimer systématiquement la validité et l'exactitude des résultats des sondages; ou, deuxièmement, il peut arriver qu'un sondage ne respecte pas le niveau normal d'exactitude en la matière auquel les Canadiens sont en droit de s'attendre. On peut qualifier plus simplement ce dernier type de sondage de mauvais sondage, de faux sondage ou de sondage inexact. L'intimé ne précise pas à quel effet déformant il se réfère, et les décisions des juridictions inférieures ainsi que les propos des parlementaires au moment de l'adoption de la disposition sont tout aussi obscurs. Le danger que les électeurs accordent systématiquement aux sondages une importance exagérée est suggéré dans l'objectif que le juge Somers a décrit comme étant la nécessité d'une «période de répit» durant laquelle la frénésie des sondages s'atténuerait et les électeurs seraient encouragés à oublier les sondages et à se concentrer sur les enjeux. Cet objectif est énoncé de façon manifeste dans le rapport final de la Commission royale sur la réforme électorale et le financement des partis («Commission Lortie») intitulé *Pour une démocratie électorale renouvelée* (1991), vol. 1, qui a conclu, aux pp. 478 et 479, à la nécessité d'interdire la publication des sondages pour «accorde[r] à l'électorat une période de réflexion à la fin de la campagne». Le deuxième objectif de la loi — savoir celui de protéger contre les sondages inexacts publiés tard dans les campagnes — n'a rien à voir avec une période de répit ou de réflexion. Il s'agit plutôt de donner la possibilité de discuter publiquement les derniers sondages sur lesquels les électeurs pourraient se fonder pour voter. De cette façon, ceux-ci possèdent la meilleure information possible au sujet de l'exactitude des derniers sondages et ne se rendent pas aux urnes avant que des sondages potentiellement inexacts aient été débattus publiquement.

98 At a higher level of generality, the purpose of providing more accurate information to Canadian voters is that they are more capable of making a free and informed choice, which engenders a freer and fairer election process. It is said that the election process will also be perceived as fairer by the electorate with this restriction in place. This, in turn, strengthens democracy. For the purpose of the s. 1 analysis, however, it is desirable to state the purpose of the limiting provision as precisely and specifically as possible so as to provide a clear framework for evaluating its importance, and the precision with which the means have been crafted to fulfil that objective (*RJR-MacDonald*, *supra*, at para. 144; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 110).

99 Accepting these as the two objectives of s. 322.1, it is my view that any ambiguity in the words of the section should be interpreted in accordance with those purposes, rather than to frustrate them. I conclude, therefore, that Somers J. was correct in interpreting the prohibition in s. 322.1 as applying only to "new" poll results, i.e. results that are undisclosed as of midnight on the Friday before election day. Far from preventing old poll results from being mentioned, the very *raison d'être* of the section is that those old poll results should be aired and discussed in the media so that their accuracy can be fully determined in public debate.

3. Is the Objective Pressing and Substantial?

100 For clarity, I propose to examine each purpose separately, beginning with the "period of rest" purpose. I will examine this purpose briefly as the respondent all but withdrew this as part of its argument before this Court. However, I still consider this analysis necessary as the vague references to the "distorting effect" of polls could still accommodate this purpose. Moreover, there is little doubt that this was one of the original purposes of Parliament in enacting the provision. In addition to the statement in the final report of the Lortie Commis-

À un degré plus élevé de généralité, l'objectif qui consiste à fournir des renseignements plus exacts aux électeurs canadiens vise à les rendre plus aptes à faire un choix libre et éclairé, ce qui engendre un processus électoral plus libre et plus équitable. On affirme que, grâce à la restriction en cause, le processus électoral sera perçu par l'électorat comme plus équitable, situation qui, à son tour, renforcera la démocratie. Pour les besoins de l'analyse fondée sur l'article premier, toutefois, il est souhaitable d'énoncer de façon aussi précise et spécifique que possible, d'une part, l'objectif de la disposition attentatoire afin d'établir un cadre clair pour évaluer son importance, et, d'autre part, la précision avec laquelle les moyens choisis ont été conçus pour réaliser cet objectif (*RJR-MacDonald*, précité, au par. 144; *Vriend c. Alberta*, [1998] 1 R.C.S. 493, au par. 110).

Acceptant qu'il s'agit là des deux objectifs de l'art. 322.1, je suis d'avis que toute ambiguïté des mots employés dans cette disposition doit être dissipée de manière à favoriser et non à contrecarrer la réalisation de ces objectifs. En conséquence, je conclus que le juge Somers a eu raison de considérer que l'interdiction prévue à l'art. 322.1 s'applique uniquement aux résultats de «nouveaux» sondages, c'est-à-dire aux résultats qui n'ont pas encore été communiqués à minuit le vendredi qui précède le jour du scrutin. Loin d'empêcher que l'on fasse état des résultats de sondages déjà publiés, la raison d'être même de cet article est la diffusion et la discussion de ces sondages dans les médias de sorte que leur exactitude puisse être débattue pleinement en public.

3. L'objectif est-il urgent et réel?

Par souci de clarté, je me propose d'examiner chaque objectif séparément, en commençant par celui fondé sur la «période de répit». Je ne vais m'y arrêter que brièvement car l'intimé l'a pour ainsi dire abandonné dans sa plaidoirie devant notre Cour. Toutefois, je continue de considérer que cette analyse est nécessaire parce que les vagues allusions à l'«effet déformant» des sondages pourraient encore se rattacher à cet objectif. De plus, il fait peu de doute que c'était l'un des objectifs initiaux du législateur lorsqu'il a édicté la

sion mentioned above, Senator Rivest, in introducing the bill containing s. 322.1 in the Upper House, declared that it was an attempt to [TRANSLATION] "reconcile the freedom of speech and the freedom of the press with the right of the voters to make a judgement peacefully, come election time": *Debates of the Senate*, April 29, 1993, at p. 3117.

disposition en litige. Outre les remarques précitées tirées du rapport final de la Commission Lortie, le sénateur Rivest, qui a présenté le projet de loi contenant l'art. 322.1 à la Chambre haute, a déclaré que celui-ci tentait de «marier la liberté d'expression et la liberté de presse avec la liberté et le droit du citoyen de pouvoir porter un jugement en toute quiétude au moment des élections»: *Débats du Sénat*, 29 avril 1993, à la p. 3117.

An examination of this purpose reveals some disturbing assumptions. First, this purpose does not rely on the inaccuracy of any opinion survey results. Rather, it suggests that Canadians will become so mesmerized by the flurry of polls appearing in the media that they will forget the issues upon which they should actually be concentrating. This reasoning cannot be countenanced. Canadian voters must be presumed to have a certain degree of maturity and intelligence. They have the right to consider the results of polls as part of a strategic exercise of their vote. It cannot be assumed that in so doing they will be so naïve as to forget the issues and interests which motivate them to vote for a particular candidate. Nor can Canadians be presumed to assume that polls are absolutely accurate in predicting outcomes of elections and that they thus will overvalue poll results. Many polls are released in the course of an election campaign which belies the suggestion that any one poll could be perceived as authoritative. These opinion polls yield differing results even when conducted contemporaneously, and, perhaps more importantly, opinion poll results fluctuate dramatically over time. I cannot accept, without gravely insulting the Canadian voter, that there is any likelihood that an individual would be so enthralled by a particular poll result as to allow his or her electoral judgment to be ruled by it.

101 L'examen de cet objectif révèle quelques suppositions troublantes. Premièrement, cet objectif n'est pas fondé sur l'inexactitude des résultats de sondages donnés. Il suppose plutôt que les Canadiens sont tellement hypnotisés par l'avalanche de sondages publiés dans les médias qu'ils en oublient les enjeux sur lesquels ils devraient plutôt se concentrer. Ce raisonnement ne peut être admis. Il faut présumer aux électeurs canadiens un certain degré de maturité et d'intelligence. Ils ont le droit de tenir compte des résultats des sondages pour voter d'une manière stratégique. On ne peut supposer que, en agissant ainsi, ils sont à ce point naïfs qu'ils oublient les enjeux et les intérêts qui les motivent à voter pour un candidat donné. On ne peut non plus supposer que les Canadiens présument que les sondages prédisent avec une exactitude absolue l'issue du scrutin et, pour cette raison, surestiment les résultats des sondages. Bon nombre de sondages sont publiés au cours d'une campagne électorale, ce qui contredit l'idée qu'un sondage en particulier puisse être perçu comme faisant autorité. Ces sondages produisent des résultats différents même quand ils sont réalisés en même temps, et, fait plus important peut-être, les résultats des sondages fluctuent radicalement sur une période donnée. Je ne peux admettre, sans faire gravement insulte aux électeurs canadiens, qu'il y ait la moindre chance qu'un individu soit tellement séduit par les résultats d'un sondage donné que, au moment de voter, il laisse ceux-ci l'emporter sur son jugement.

I am thus unable to perceive, and nor has the government seriously argued before us, that any pressing and substantial objective is served by the existence of a "rest period" for polls prior to the election date. I would, therefore, find that s. 322.1

102 Je suis donc incapable de concevoir — d'ailleurs le gouvernement n'a pas sérieusement plaidé devant nous — que l'existence d'une «période de répit» en matière de sondages avant le jour du scrutin serve un objectif urgent et réel. En consé-

is not justified under s. 1 according to this objective.

103 The more difficult question is whether the blackout period can be justified by the other legislative purpose, which is to prevent an inaccurate poll from having an impact on voter choice because of a lack of response time prior to the voter casting his or her ballot. The first step in determining whether this is a pressing and substantial objective is to determine whether such a poll would actually influence voter choice, and to what extent; the second step is to evaluate the likelihood of an inaccurate poll being published.

104 Although the extent of the influence of polls on voter choice is uncertain, there is evidence suggesting that it may be significant. The key evidence in this case was gathered by the Lortie Commission and presented in its final report. The Lortie Commission, *supra*, at p. 457, concluded that: "Notwithstanding the frequent assertion of pollsters that their data have minimal influence on voters, recent research provides strong support for the proposition that published opinion polls can significantly influence campaigns and voters". More specifically, the Commission asserted that "the argument that published polls do not influence voter choice or affect the conduct of campaigns is simply untenable" (p. 458). Thus, the Commission found that polls not only have a general impact on the conduct of an election, but that they affect voter choice. The harmful influence, according to the Commission, arose because opinion polls are subject to errors which are not fully disclosed to the public (at p. 455):

> Because they are presented as 'scientific', published opinion polls raise issues of public confidence in the integrity of the electoral process. Notwithstanding their claims to scientific validity and accuracy in representing the views of all potential voters, opinion polls are susceptible to many forms of error and misrepresentation. The apparent precision of the data they report fails to reflect the fact that they are estimates of the distribution of opinion at a given time. Yet their apparent authority gives them considerable influence over the conduct of

quence, je conclus que, au regard de cet objectif, l'art. 322.1 n'est pas justifié au sens de l'article premier.

La question plus difficile est de savoir si l'embargo peut être justifié par l'autre objectif de la disposition, savoir le fait d'empêcher qu'un sondage inexact influence la décision des électeurs en raison de l'absence d'un temps de réplique avant le scrutin. Pour décider s'il s'agit d'un objectif urgent et réel, il faut, dans un premier temps, se demander si un tel sondage influencerait réellement le choix des électeurs, et, si oui, dans quelle mesure il le ferait. Dans un deuxième temps, il faut évaluer le risque qu'un sondage inexact soit publié.

Quoique la mesure dans laquelle les sondages influencent la décision des électeurs soit incertaine, il existe des éléments de preuve tendant à indiquer qu'elle peut être importante. Les éléments clés dans le cas qui nous intéresse ont été recueillis par la Commission Lortie, qui les a présentés dans son rapport final. À la p. 475, celle-ci a tiré la conclusion suivante: «Bien que les maisons de sondage ne cessent de répéter que leurs données affectent peu le vote, des recherches récentes tendent à prouver le contraire». Plus précisément, la Commission a affirmé qu'«il est impossible de soutenir que la publication des sondages n'influence pas le choix des électeurs et électrices ou la conduite des campagnes» (p. 476). En conséquence, la Commission a conclu que non seulement les sondages ont une incidence générale sur la conduite des élections, mais qu'ils influencent également le choix des électeurs. Suivant la Commission, l'influence préjudiciable des sondages est imputable au fait qu'ils sont sujets à des erreurs qui ne sont pas divulguées intégralement au grand public (à la p. 473):

> Parce qu'ils sont présentés comme «scientifiques», les sondages d'opinion diffusés par les médias suscitent des inquiétudes quant à la confiance du public dans l'intégrité du processus électoral. En dépit de la précision scientifique revendiquée par leurs auteurs, les sondages sont sujets à maintes erreurs et distorsions. La précision apparente de leurs données occulte le fait qu'ils ne sont jamais qu'une estimation de la distribution de l'opinion à un moment donné. Leur apparence de rigueur leur confère néanmoins une influence considérable sur la

campaigns and the choices made by voters. [Emphasis added.]

Again, I would observe that there appear to be two strains of thought in this passage: first, that the accuracy of any poll may be overestimated by Canadians, and second, that some polls may fall below the standard of accuracy generally expected through error or misrepresentation. I have found above that the first of these objectives is not of pressing and substantial concern justified under s. 1. However, the Lortie Commission appears also to be concerned about the influence of an inaccurate poll. The Lachapelle Study (*Polls and the Media in Canadian Elections: Taking the Pulse* (1991)) and the *White Paper on Election Law Reform* (1986) were considerably less certain of this influence, however. Drawing on the evidence presented to the Lortie Commission, Professor Lachapelle was able to identify a number of discrete influences of opinion polls, including: the bandwagon effect (rallying to support the leader in the polls); the underdog effect (rallying to support the trailing candidate); the demotivating effect (abstaining from voting); the motivating effect (encouraging voters to cast their ballots); the strategic effect (electors decide how to vote on the basis of the relative popularity of parties); and the free-will effect (voting to prove the polls wrong); see Lachapelle Study, *supra*, at pp. 13-14. There is dispute, however, regarding the overall influence on election results. For instance, it is suggested that one effect is simply counterbalanced by another and, therefore, the overall influence of polls is nil; see White Paper, *supra*, at p. 26. Professor Lachapelle cautioned that "no definitive conclusion about the actual impact of polls can be drawn from these briefs" (p. 14), and that "theories about the decline of political parties and the undue influence of polls on voters have not been convincingly supported" (p. 29).

Although the overall influence of polls may not have been scientifically established as "undue", I would nevertheless conclude that there is evidence of significant influence of polls on the electoral

conduite des campagnes et l'issue des scrutins. [Je souligne.]

Encore une fois, je ferai observer que ce passage semble traduire deux courants de pensée: premièrement, que l'exactitude de tout sondage peut être surestimée par les Canadiens, et, deuxièmement, que certains sondages peuvent, en raison d'erreurs et de distorsions, ne pas respecter le niveau d'exactitude auquel on s'attend généralement. J'ai déjà conclu que le premier de ces objectifs n'est pas une préoccupation urgente et réelle justifiée au sens de l'article premier. Toutefois, la Commission Lortie semble s'inquiéter aussi de l'influence des sondages inexacts. L'Étude Lachapelle (*Les sondages et les médias lors des élections au Canada: le pouls de l'opinion* (1991)) et le *Livre blanc sur la réforme de la loi électorale* (1986) sont beaucoup moins affirmatifs sur ce point. À partir de la preuve présentée à la Commission Lortie, le professeur Lachapelle a pu recenser différents effets des sondages, entre autres: le ralliement au vainqueur («*bandwagon effect*»); le ralliement au candidat en difficulté («*underdog effect*»); l'effet démobilisateur (on s'abstient par certitude de gagner); l'effet mobilisateur (les sondages incitent à aller voter); le vote stratégique (l'électeur décide pour qui voter en fonction de la popularité des partis); et le libre arbitre (on vote pour faire mentir les sondages); voir l'Étude Lachapelle, *op. cit.*, aux pp. 15 et 16. Il n'y a cependant pas unanimité quant à leur influence globale sur les résultats des élections. Par exemple, certains prétendent qu'un effet donné est tout simplement neutralisé par un autre, de sorte que l'influence globale des sondages serait nulle; voir le Livre blanc, *op. cit.*, à la p. 27. Le professeur Lachapelle a fait les mises en garde suivantes: «[a]ucune réponse définitive ne peut être tirée de ces mémoires quant à l'impact réel des sondages» (p. 16); «[l]es thèses sur le déclin des partis ou les diverses interprétations sur l'influence indue qu'ils [les sondages] exercent sur les électeurs et électrices n'ont jusqu'à présent pas apporté de résultats très convaincants» (p. 32).

105 Même s'il n'a peut-être pas été scientifiquement établi que les sondages ont globalement une influence «indue», je conclurais néanmoins qu'il y a des preuves d'une influence importante des son-

process and on individual electoral choice. Although the overall effect of these polls may be difficult to discern or predict, this evidence suggests that an uncertain number of voters might be influenced in their electoral choice by this false information. The pernicious aspect of an inaccurate poll is that no voter could discover its true nature because of the lack of response time.

106 The possibility of the publication of an inaccurate poll is not *de minimis*. The Lortie Commission, *supra*, at p. 457, reported that:

> Although the industry in general has become highly professional since public polling was introduced in Canada in 1941, the incidence of technically deficient and poorly reported polls is still substantial. In recent elections, there have been instances of misleading polls, some because of technical errors and others because of partisan misrepresentation. There have even been allegations of fraudulent polls, where the data were said to have been fabricated to counter a poll showing the opposition in the lead. Such "bogus" polls and the more common misrepresented poll have been released to the media in many democracies. (Cantril 1991, 67; Worcester 1991, 199; Hoy 1989, 189-202) It is the willingness of the media to report such polls that makes them significant and troublesome.

The close relationship between some polling organizations and political parties also suggests that polls released as purportedly scientific measures of public opinion could be subject to manipulation (Lachapelle Study, *supra*, at p. 133).

107 There is also evidence of public and governmental concern to guard against inaccurate polls which are published late in the campaign and which thus cannot be subject to the same scrutiny as polls published earlier in the election. The respondent submitted the results of a poll indicating that 45 percent of Canadians are in favour of such a ban, 28 percent are opposed, and 27 percent had no opinion. As a simple matter of logic, moreover, clear evidence of the influence of polls on individual voter choice, combined with indications that such inaccurate polls are not a remote possibility, suggests that the voting decision of those who rely

dages sur le processus électoral et sur les choix électoraux individuels. Quoique l'effet global de ces sondages puisse être difficile à cerner ou à prédire, ces preuves tendent à indiquer qu'un nombre indéterminé d'électeurs sont susceptibles d'être influencés par cette information erronée. Un sondage inexact a un effet pernicieux en ce qu'aucun électeur ne peut découvrir sa vrai nature vu l'absence d'un temps de réplique.

La possibilité qu'un sondage inexact soit publié n'est pas négligeable. La Commission Lortie, *op. cit.*, à la p. 475, a signalé ceci:

> Bien que l'industrie du sondage en général ait atteint un haut niveau de professionnalisme depuis l'apparition des sondages d'opinion au Canada en 1941, le nombre d'enquêtes techniquement déficientes et mal présentées demeure important. Certains sondages publiés à l'occasion d'élections récentes étaient entachés d'erreurs techniques, et d'autres étaient présentés de façon partiale. On a même signalé des sondages carrément frauduleux, dont les données auraient été fabriquées de toutes pièces pour contrer un sondage plaçant l'adversaire en tête. Les médias de maints pays démocratiques ont publié de tels sondages «bidon» et, de façon plus courante, des sondages présentés de manière trompeuse (Cantril 1991, 67, Worcester 1991, 199; Hoy 1989, 189-202). En fait, ces «sondages» posent un problème dans la mesure où les médias sont prêts à les diffuser.

Les liens étroits qui existent entre des maisons de sondage et des partis politiques tend également à indiquer que des sondages présentés comme des mesures scientifiques pourraient être l'objet de manipulations (Étude Lachapelle, *op. cit.*, à la p. 152).

Il y a également des éléments de preuve indiquant l'existence, tant au sein du grand public que du gouvernement, d'un souci de se prémunir contre les sondages inexacts qui sont publiés tard durant les campagnes et ne peuvent, par conséquent, être examinés aussi attentivement que ceux publiés plus tôt. L'intimé a présenté les résultats d'un sondage indiquant que 45 pour 100 des Canadiens sont pour une telle interdiction, que 28 pour 100 s'y opposent et que 27 pour 100 des répondants n'ont pas exprimé d'opinion. Qui plus est, d'un simple point de vue logique, l'existence d'une preuve claire de l'influence des sondages sur

on polls as part of their decision-making process could be distorted. The possibility of such a distortion is clearly a matter which the government may legitimately be concerned to remedy.

les choix électoraux individuels, conjuguée aux indications que de tels sondages inexacts ne sont pas qu'une vague possibilité, tend à indiquer que la décision de ceux qui se basent sur les sondages pour voter pourrait être faussée. La possibilité d'une telle distorsion est manifestement une préoccupation à laquelle le gouvernement peut légitimement vouloir remédier.

The validity of this concern is attenuated, however, by an important disjunction between the evidence and the harm which the legislation purports to address. The evidence and conclusions presented by the Lortie Commission and the Lachapelle Study relate to the influence of polls in the aggregate; the purported objective of this legislation relates to the inaccuracy of an individual poll which undeservedly benefits from the perception of scientific accuracy as a result of the generally high standards of accuracy maintained by polls, and by its presentation in the media as a scientific measure. But an opinion poll does not appear in a vacuum. Rather, it is published chronologically after a series of other polls which have been measuring public opinion throughout the election. In all likelihood, other polls conducted by other polling organizations will appear in other media outlets during the three days prior to election day. Thus, to the extent that any single poll is inaccurate, this will possibly be apparent to voters who are aware of the results of other polls, both those published immediately prior to this final period before the election, and those appearing in the media at the same time as the inaccurate poll. The more polls which appear during this period, the less likely that voters will base their decisions on the inaccurate poll. Moreover, the severity of the error, which one might speculate might enhance the influence of the error, would be offset by increased ease with which the mistake would be identified. In addition, voters' experience with opinion polls in previous elections will have demonstrated that opinion polls are of variable value and accuracy as predictive measures of the outcome of an election.

108

La validité de cette préoccupation est toutefois amoindrie par l'important écart qui existe entre la preuve et le tort auquel la loi est censée remédier. La preuve et les conclusions présentées par la Commission Lortie et l'Étude Lachapelle portent sur l'influence des sondages globalement; l'objectif censément visé par la loi se rattache à l'inexactitude d'un sondage donné, qui bénéficie à tort d'une perception d'exactitude scientifique en raison du niveau généralement élevé d'exactitude des sondages et du fait que les médias le présentent comme une mesure scientifique. Mais un sondage n'est pas fait dans l'abstrait. Au contraire, il est publié chronologiquement, dans une série de sondages mesurant l'opinion publique durant une campagne électorale. Selon toute vraisemblance, d'autres sondages effectués par d'autres maisons seront diffusés par d'autres médias au cours des trois derniers jours précédant le scrutin. Par conséquent, dans la mesure où un sondage donné est inexact, cette situation sera possiblement évidente aux électeurs qui sont au fait des résultats d'autres sondages, tant ceux publiés immédiatement avant le sprint final que ceux diffusés par les médias durant la même période que le sondage inexact. Plus il y a de sondages durant cette période, moins grand est le risque que les électeurs basent leur décision sur le sondage inexact. De plus, la gravité de l'erreur, élément qui, peut-on supposer, pourrait augmenter l'influence de celle-ci, serait contrebalancée par la facilité accrue avec laquelle cette erreur serait décelée. Au surplus, l'expérience acquise par les électeurs à l'égard des sondages au cours des élections précédentes leur aura démontré que les sondages ont une valeur et une exactitude variables en tant que moyens de prédire l'issue d'un scrutin.

109 Notwithstanding this qualification, I conclude that the purpose of guarding against the possible influence of inaccurate polls late in the election campaign by allowing for a period of criticism and scrutiny immediately prior to election day, is a pressing and substantial objective. As this Court stated in *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 38, measures that "maintain and enhance the integrity of the electoral process . . . [are] always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic society". The purpose of this particular limitation on expression is to ensure that information which the evidence indicates has an important influence on the choice of at least some voters is presented according to the standards of accuracy which polls are normally expected to attain. When pollsters and the media present information which aspires to certain scientific standards of quality, and which invites reliance by voters in the exercise of their vote, then the government may legitimately be concerned. Such information is qualitatively different from partisan rhetoric, or even journalistic reporting which aspires to certain standards of accuracy and objectivity. Polling information is presented scientifically which reflects relatively settled and defined standards for determining accuracy. To the extent that the votes of some might be distorted as a result of polls being presented in a misleading fashion, this is a pressing and substantial objective.

Malgré cette réserve, je conclus que l'objectif qui consiste à prévenir l'influence possible de sondages inexacts publiés tard dans la campagne électorale par l'instauration d'une période de critique et d'examen immédiatement avant le jour du scrutin est un objectif urgent et réel. Comme l'a dit notre Cour dans *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876, au par. 38, des mesures qui «maint[iennent] et [. . .] renforc[ent] l'intégrité du processus électoral [. . .] [sont] toujours une préoccupation urgente et réelle de toute société qui prétend suivre les préceptes d'une société libre et démocratique». L'objectif de la présente restriction de la liberté d'expression est de faire en sorte que des données qui, selon la preuve, ont une influence importante sur la décision d'au moins certains électeurs soient présentées avec le niveau d'exactitude qu'on attend normalement des sondages. Lorsque les sondeurs et les médias présentent des données qui sont censées respecter certaines normes scientifiques de qualité et auxquelles les électeurs sont invités à se fier dans l'exercice de leur droit de vote, il est alors légitime pour le gouvernement d'être préoccupé. De telles données sont qualitativement différentes de la rhétorique partisane, ou même de la couverture journalistique qui prétend à certaines normes d'exactitude et d'objectivité. L'information touchant les sondages est présentée scientifiquement, ce qui emporte le respect de normes relativement bien établies et définies en matière de détermination de l'exactitude. Dans la mesure où la décision de certains électeurs pourrait être faussée par suite de résultats de sondages présentés d'une manière trompeuse, cet objectif est urgent et réel.

4. Rational Connection

110 The three-day blackout period on the publication of polls will serve, to some degree, the purpose of preventing the use of inaccurate polls by voters. The blackout period gives critics the opportunity to assess the methodological information made available by the pollster and to question the validity of the poll on that basis. To that extent, the ban is rationally connected to the purpose of the legislation. However, s. 322.1 does not prevent an opinion survey from being released without any information as to methodology. Thus, there may be

4. Le lien rationnel

L'embargo de trois jours sur les sondages permet, dans une certaine mesure, de réaliser l'objectif qui consiste à empêcher l'utilisation de sondages inexacts par les électeurs. Elle donne aux critiques la possibilité d'évaluer l'information fournie par le sondeur sur la méthodologie qu'il a utilisée et de mettre en doute la validité du sondage sur ce plan. Dans cette mesure, l'interdiction a un lien rationnel avec l'objet de la loi. Toutefois, l'art. 322.1 n'empêche pas la diffusion d'un sondage qui n'est pas accompagné de renseignements

cases where it would be impossible for outside observers to scrutinize or challenge the validity of a poll. In those cases, the most that could be achieved by the blackout period is that the validity of a poll could be undermined by pointing out the failure of the pollster to publish the methodology of the poll. Having mentioned this infirmity in the connection between the purpose of the provision and the means designed to carry out that purpose, I prefer to focus my analysis of the inadequacies of this legislation under the rubric of minimal impairment.

5. Minimal Impairment

Section 322.1 does not minimally impair the right to freedom of expression guaranteed in the *Charter* and is, therefore, not justified under s. 1. Indeed, it is my view that s. 322.1 is a very crude instrument in serving the purpose articulated by the government in this case. To repeat, that objective is to prevent or minimize the distorting effect of inaccurate opinion polls, and, in particular, opinion polls released late in an election which may have an undue influence on voters and which are not subject to adequate criticism prior to the voter relying on them. As I have stated at the outset, the type of proof required to discharge the burden of justification on the government may vary from case to case depending on the context. In this section, I address a number of contextual factors pertaining to the seriousness and likelihood of the harm, as well as the standard and methods of proof in a case such as this one involving the evaluation of social science evidence and human behaviour. These contextual factors bear on the degree of deference which a court should accord to the particular means chosen to implement a legislative purpose; see *RJR-MacDonald*, *supra*, at paras. 132 and 160.

The first factor which could militate in favour of a deferential approach towards the legislation is the vulnerability of the group sought to be protected. In this case, however, the social science

méthodologiques. En conséquence, il pourrait survenir des cas où il serait impossible à des observateurs indépendants d'examiner ou de contester la validité d'un sondage. En pareils cas, l'embargo permettrait tout au plus d'attaquer la validité d'un sondage en signalant l'omission du sondeur de publier des renseignements sur la méthodologie utilisée pour effectuer le sondage. Ayant mentionné cette déficience du lien entre l'objectif de la disposition et les moyens conçus pour le réaliser, je préfère faire porter mon analyse sur les lacunes de la mesure législative sous la rubrique de l'atteinte minimale.

5. L'atteinte minimale

111 L'article 322.1 ne porte pas atteinte le moins possible au droit à la liberté d'expression garanti par la *Charte* et il n'est donc pas justifié au sens de l'article premier. De fait, je suis d'avis que cette disposition est un instrument très grossier pour réaliser l'objectif énoncé par le gouvernement en l'espèce. Je le répète, cet objectif est de prévenir ou de réduire au minimum l'effet déformant des sondages inexacts et, en particulier, des sondages publiés tard dans les campagnes électorales, qui peuvent exercer une influence indue sur les électeurs et qui ne font pas l'objet d'une critique suffisante avant que les électeurs se fondent sur leurs résultats. Comme je l'ai dit au début, le type de preuve requise pour permettre au gouvernement de s'acquitter de son fardeau de justification peut varier d'un cas à l'autre, selon le contexte. Dans la présente section, je m'arrête à divers facteurs contextuels touchant à la gravité du préjudice et à sa vraisemblance, ainsi qu'à la norme et aux méthodes de preuve applicables dans un cas comme celui qui nous occupe, où il faut évaluer les comportements humains et une preuve fondée sur les sciences sociales. Ces facteurs contextuels concernent le degré de retenue dont le tribunal devrait faire montre à l'égard des moyens particuliers choisis pour réaliser un objectif législatif; voir l'arrêt *RJR-MacDonald*, précité, aux par. 132 et 160.

112 Le premier facteur susceptible de favoriser l'application d'une approche empreinte de retenue vis-à-vis de la loi est la vulnérabilité du groupe que celle-ci vise à protéger. En l'espèce, toutefois, la

evidence did not establish that the Canadian voter is a vulnerable group relative to pollsters and the media who publish polls. The presumption in this Court should be that the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information. As Professor Lachapelle's Study indicates, some voters clearly do consider polls to be of some value in making their electoral decision (*supra*, at p. 13). However, no evidence has been presented before this Court that voters have suffered from any misapprehensions regarding the accuracy of any single poll. Indeed, the fact that polls conducted contemporaneously yield differing results, or that poll results can fluctuate dramatically over time, suggests that voters have experience with the shortcomings of some polls. Indeed, perhaps the most important contextual factor in the analysis of this case is that polls are widely available throughout the election period in large numbers and from differing media sources. Professor Lachapelle reports, *supra*, at p. 86, that a total of 59 polls were published during the 1988 national election campaign, 22 of them national in scope, and 37 regional. Voters are constantly exposed to opinion poll results throughout the election and a single inaccurate poll result is likely to be spotted and discounted appropriately.

preuve fondée sur les sciences sociales n'a pas établi que les électeurs canadiens forment un groupe vulnérable par rapport aux sondeurs et aux médias qui publient les sondages. Notre Cour doit présumer que l'électeur canadien est un être rationnel, capable de tirer des leçons de son expérience et de juger de façon indépendante de la valeur de certaines sources d'information électorale. Comme l'indique l'étude du professeur Lachapelle, certains électeurs estiment que les sondages peuvent éclairer leur décision (*op. cit.*, à la p. 15). Toutefois, il n'a été présenté à la Cour aucun élément de preuve établissant que les électeurs ont été victimes de méprise quant à l'exactitude d'un sondage. En effet, le fait que des sondages effectués simultanément produisent des résultats différents ou que les résultats des sondages peuvent fluctuer radicalement dans le temps permet de supposer que les électeurs connaissent les imperfections des sondages. De fait, le facteur contextuel peut-être le plus important dans l'analyse du présent cas est le fait qu'on a accès, durant toute la campagne électorale, à un large éventail de sondages diffusés par des médias différents. D'après le professeur Lachapelle, *op. cit.*, à la p. 100, 59 sondages en tout ont été publiés durant la campagne électorale fédérale de 1988, 22 sondages pancanadiens et 37 régionaux. Les électeurs sont constamment bombardés de sondages pendant toute la campagne, et il est probable qu'un sondage aux résultats inexacts sera repéré et écarté comme il se doit.

113 The government responded to the paucity of evidence relating to this specific issue by stating that it was sufficient "to show a reasoned apprehension of harm. . . . [I]t is sufficient if it is reasonable to presume that there is a casual [*sic*] relationship between them". It relied on a number of cases for the proposition that even in the face of inconclusive social science evidence, the Court has adopted a deferential approach to determining whether the harm exists and in assessing the justification of the measures chosen to prevent those harms: *Butler*, *supra*, *RJR-MacDonald*, *supra*, *Libman*, *supra*, *Keegstra*, *supra*, and *Irwin Toy*, *supra*. In my view, the principles developed in those cases are not applicable here for three fundamental reasons. First, the presumptions which the Court made in

Le gouvernement a obvié au manque de preuve sur ce point précis en affirmant qu'il suffisait de [TRADUCTION] «démontrer une appréhension raisonnée de préjudice [. . .] [C]ela suffit s'il est raisonnable de présumer l'existence d'un lien de causalité entre les deux». Il a invoqué un certain nombre d'arrêts au soutien de la proposition selon laquelle, même en présence d'une preuve non concluante fondée sur les sciences sociales, la Cour a adopté une approche empreinte de retenue afin de statuer sur l'existence d'un préjudice et, le cas échéant, de décider si les mesures choisies pour prévenir le préjudice étaient justifiés: *Buttler*, précité, *RJR-MacDonald*, précité, *Libman*, précité, *Keegstra*, précité, et *Irwin Toy*, précité. À mon avis, les principes élaborés dans ces arrêts ne s'ap-

those cases were not refuted by any contrary logical reasoning. That is not the case here. What I have said in the previous paragraph suggests, as a matter of logic, that there is reason to believe that, notwithstanding the scientific "aura" of polls, the Canadian voter is likely to be aware of a seriously inaccurate poll. Indeed, the more serious the inaccuracy, the more likely the awareness of the error. This is not to say, of course, that some voters might not be misled by an inaccurate poll and cast their vote on what amounts to a misrepresentation. Indeed, that possibility is precisely what I have found constitutes the pressing and substantial objective of this provision. The point here is simply that the claims of widespread or significant harm based on logical inferences derived from surrounding factors are not compelling in the context of factors which refute such logical inferences. As a matter of logical reasoning and inference, I find the government's claims of harm to be controverted by surrounding circumstances which suggest that the Canadian voter is already sensitive to the danger which the government is seeking to remedy.

pliquent pas en l'espèce et ce pour trois raisons fondamentales. Premièrement, les présomptions énoncées par la Cour dans ces affaires n'ont pas été réfutées par un raisonnement logique contraire. Tel n'est pas le cas en l'espèce. Les observations que j'ai formulées au paragraphe précédent suggèrent, d'un point de vue logique, qu'il y a des raisons de croire que, malgré l'«aura» de caractère scientifique des sondages, il est probable que les électeurs canadiens se rendent compte que les résultats d'un sondage sont sérieusement inexacts. À vrai dire, plus l'inexactitude est grande, plus il y a de chances que les électeurs en soient conscients. Ce qui ne veut pas dire, bien entendu, que certains électeurs ne pourraient pas être induits en erreur par un sondage inexact et voter en s'appuyant sur ce qui équivaut à une présentation inexacte des faits. De fait, cette possibilité est précisément ce qui, ai-je conclu, constitue l'objectif urgent et réel visé par cette disposition. Le point ici est simplement que les prétentions relatives à l'existence d'un préjudice répandu ou important, qui sont fondées sur des inférences logiques tirées de facteurs contextuels, ne sont pas convaincantes en présence de facteurs réfutant ces inférences. Du point de vue du raisonnement et de l'inférence logiques, j'estime que les prétentions du gouvernement relatives au préjudice sont contredites par les circonstances, qui tendent à indiquer que les électeurs canadiens sont déjà sensibilisés au danger que le gouvernement cherche à écarter.

Second, there is no suggestion in this case that the interests of the voter and of the pollster are opposed, or that the latter will systematically attempt to manipulate the former. This sets this case apart from cases involving advertisers (such as *Irwin Toy*, *Libman* or *RJR-MacDonald*), where advertisers encouraged choices which served their particular interests. Although it was legal for each of them to pursue those interests, and therefore legitimate to do so, there was a danger of undue manipulation in the first two cases, and of serious health consequences for individual Canadians in the third. Thus, not only was the government dealing with a situation in which expression would be used to manipulate vulnerable groups, but also in which there was a balancing of conflicting but

114 Deuxièmement, rien ne tend à indiquer, en l'espèce, que les intérêts des électeurs et des sondeurs sont opposés ou que ces derniers vont tenter systématiquement de manipuler les premiers. Ce fait distingue donc le cas qui nous occupe de ceux qui mettaient en cause des annonceurs (par exemple les affaires *Irwin Toy*, *Libman* ou *RJR-MacDonald*), où les annonceurs encourageaient des choix qui servaient leurs propres intérêts. Même s'il était légal pour chacun d'eux de favoriser ces intérêts et, partant, légitime de le faire, il y avait un risque de manipulation indue dans les deux premiers cas, et un risque de conséquences graves pour la santé des consommateurs canadiens dans le troisième. Par conséquent, non seulement le gouvernement était-il aux prises avec une situation

legitimate social interests. None of those elements are present in the case at bar. There is no interest which favours inaccurate or misleading polls being foisted on the Canadian public. The media have an interest in providing poll results which are of interest to Canadians and which uphold their reputation for integrity and accuracy. Pollsters have an interest in maintaining a reputation for accurately measuring public opinion and election results. Although some individual polling firms have close relationships with particular parties which might encourage them, consciously or unconsciously, to tailor their methodologies in favour of their valued client, the polling industry as a whole does not favour one party over another (Lachapelle Study, *supra*, at p. 133). To the extent that individual polls may reflect a bias, divergent opinion survey results reflecting these biases will be obvious to voters and diminish the scientific aura of those polls. Voters, the third interested group, also desire accurate polls so that if they choose to rely on them, the most accurate and timely polls will be available. Unlike the advertising cases, this is not a case in which the government is intervening against a powerful interest to prevent expression from being a means of manipulation and oppression.

dans laquelle la liberté d'expression serait utilisée pour manipuler des groupes vulnérables, mais également où des intérêts sociaux opposés mais légitimes devaient être conciliés. Ni l'un ni l'autre de ces éléments n'est présent en l'espèce. Il n'y a en présence aucun intérêt favorisant la présentation à l'électorat canadien de sondages inexacts ou trompeurs. Les médias ont intérêt à diffuser des sondages qui intéressent les Canadiens et qui étayent leur propre réputation d'intégrité et d'exactitude. Pour leur part, les sondeurs ont intérêt à maintenir leur réputation en ce qui concerne la précision avec laquelle ils mesurent l'opinion publique et prédisent l'issue des scrutins. Bien que certaines maisons de sondage soient étroitement associées à l'un ou l'autre des partis politiques, ce qui pourrait les encourager, consciemment ou non, à adapter leur méthodologie de façon à favoriser le client auquel elles tiennent, dans l'ensemble les sondeurs ne favorisent pas un parti plus qu'un autre (Étude Lachapelle, *op. cit.*, à la p. 153). Dans la mesure où certains sondages pourraient refléter un parti pris, leurs résultats divergents — traduisant ce parti pris — seront évidents aux électeurs et diminueront leur aura de caractère scientifique. Les électeurs, le troisième groupe intéressé, désirent eux aussi des sondages exacts afin de pouvoir compter, si c'est là leur volonté, sur les sondages les plus exacts et les plus à-propos. Contrairement aux affaires de publicité, il ne s'agit pas, en l'espèce, d'un cas où le gouvernement intervient contre des intérêts puissants pour empêcher que la liberté d'expression devienne un moyen de manipulation et d'oppression.

115 Third, the reasonable apprehension of harm test has been applied where it has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society. This has been accepted, in particular, when it is difficult or impossible to establish scientifically the type of harm in question. The respondent relied particularly on the reasoning in *Butler*, *supra*, to justify the reasoned apprehension of harm standard. In my view, the reasoning used in that case is not applicable here. In *Butler*, the difficulty of scientifically proving the harm in question was not

Troisièmement, le critère de l'appréhension raisonnable de préjudice a été appliqué dans des cas où l'on affirmait, sans en faire la preuve, que, de par sa nature même, la forme d'expression en cause empêche des individus ou des groupes d'être des membres à part entière de la société. Une telle conclusion est acceptée, en particulier, lorsqu'il est difficile ou impossible de prouver scientifiquement le type de préjudice en cause. Les intimés ont invoqué spécialement le raisonnement énoncé dans *Butler*, précité, pour justifier la norme fondée sur l'appréhension raisonnée du préjudice. À mon avis, le raisonnement fait dans cette affaire n'est

the only feature of the case justifying the application of the reasonable or reasoned apprehension of harm test. First, there was, in that case, "a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole" (p. 479). In this regard, at least, the reasonable apprehension of harm test was unnecessary. The difficulty which required the application of the reasonable apprehension of harm test was determining exactly what representations of a sexual nature were degrading or dehumanizing. Sopinka J. quotes, at p. 481, from Wilson J.'s judgment in *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494:

> The problem is that we know so little of the consequences we are seeking to avoid. Do obscene movies spawn immoral conduct? Do they degrade women? Do they promote violence? The most that can be said, I think, is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way. It must therefore be controlled when it gets out of hand, when it becomes "undue".

Sopinka J. devised a test, at p. 485, which stated that depictions of a sexual nature would not be protected by the *Charter* where society perceived such depictions as likely to "predispos[e] persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men". He found the anti-pornography provision in that case to be rationally connected to the valid objective of the legislation because Parliament had a "reasoned apprehension of harm" (p. 504) that sexual representations of women which were degrading affected men's attitudes in such a way that encouraged degrading treatment of women.

pas applicable en l'espèce. Dans *Butler*, la difficulté de prouver scientifiquement le préjudice en question n'était pas le seul aspect de l'affaire qui justifiait l'application du critère de l'appréhension raisonnée ou raisonnable de préjudice. Premièrement, dans cette affaire, il existait «un important courant d'opinions selon lequel la représentation de personnes qui subissent un traitement sexuel dégradant ou déshumanisant entraîne un préjudice, notamment à l'égard des femmes et, par conséquent, de l'ensemble de la société» (p. 479). À cet égard, du moins, le critère de l'appréhension raisonnable de préjudice était inutile. La difficulté qui commandait l'application de ce critère résidait dans la question de savoir quelles représentations de choses sexuelles étaient dégradantes ou déshumanisantes. À la p. 481, le juge Sopinka a repris les observations faites par le juge Wilson dans *Towne Cinema Theatres Ltd. c. La Reine*, [1985] 1 R.C.S. 494:

> Le problème est que nous savons très peu de choses sur les conséquences que nous cherchons à éviter. Les films obscènes provoquent-ils une conduite immorale? Sont-ils dégradants pour les femmes? Favorisent-ils la violence? On peut tout au plus affirmer, à mon avis, que le public a conclu que l'exposition à des choses qui dégradent les dimensions humaines de la vie à une dimension moins qu'humaine ou simplement physique doit avoir certaines conséquences nocives. Elle doit par conséquent être refrénée lorsqu'elle dépasse les bornes, lorsqu'elle devient «indue».

Dans *Butler*, précité, à la p. 485, le juge Sopinka a conçu un critère indiquant que les représentations sexuelles ne seraient pas protégées par la *Charte* lorsque la société percevrait celles-ci comme étant susceptibles de «prédispose[r] une personne à agir de façon antisociale comme, par exemple, le fait pour un homme de maltraiter physiquement ou mentalement une femme». Il a conclu que la disposition de lutte contre la pornographie en cause dans cette affaire avait un lien rationnel avec l'objectif valide visé par la loi, parce que le Parlement avait «une appréhension raisonnée du préjudice» (p. 504), que les représentations sexuelles avilissant les femmes modifiaient les attitudes des hommes au point d'encourager le traitement dégradant des femmes.

116 In the context of that decision, there was substantial evidence that depiction of degrading treatment of women leads, to an indeterminate extent, to degrading treatment of women in society. Although the precise nature of the link between depiction and attitudes, and from attitudes to actual harmful behaviour towards women, could not be conclusively proven, there was evidence that this harm actually occurred. The presumption also accords with certain logical inferences and shared perceptions of human behaviour which we might simply call "common sense". Sopinka J. concluded that the line between permissibly and impermissibly degrading representations of sexuality should be based on a collective social understanding of what Canadians believe could lead to anti-social behaviour. While courts should not use common sense as a cover for unfounded or controversial assumptions, it may be appropriately employed in judicial reasoning where the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap. Canadians presume that expressions which degrade individuals based on their gender, ethnicity, or other personal factors may lead to harm being visited upon them because this is within most people's everyday experience. In part, this is because of what we know and perhaps have experienced in our own lives about degrading representations of our personal identity. In part, it is because we know that groups which have historically been disadvantaged in economic or social terms are vulnerable to such expression. In part, it is because our values encourage us to be solicitous of vulnerable groups and to err on the side of caution where their welfare is at stake. In part, it is based on the short logical leap that degrading representations, and exhortation of certain views which degrade the humanity of others, can beget that behaviour. It is also because we know that such representations and exhortations can themselves be harmful for those who are forced to endure the heightened risk of harm.

Dans le contexte de cette décision, il y avait une preuve considérable indiquant que le fait de représenter des traitements avilissants pour les femmes entraîne, dans une mesure indéterminée, de tels traitements contre les femmes dans la société. Quoique la nature précise du lien entre ces représentations et les attitudes, et entre les attitudes et un comportement préjudiciable concret envers les femmes, ne pouvait être établie de façon concluante, il y avait des preuves que ce préjudice se produisait réellement. La présomption concorde également avec certaines inférences logiques et certaines perceptions partagées concernant le comportement humain, qu'on pourrait appeler simplement le «sens commun». Le juge Sopinka a conclu que la ligne de démarcation entre les représentations dégradantes acceptables et les représentations dégradantes inacceptables des choses sexuelles devait être fondée sur la perception collective qu'a la société canadienne des choses susceptibles d'entraîner un comportement antisocial. Même si les tribunaux ne doivent pas invoquer le sens commun pour masquer des suppositions sans fondement ou controversées, ils peuvent toutefois l'utiliser à juste titre dans leur raisonnement lorsque la possibilité de préjudice relève des connaissances et expériences quotidiennes des Canadiens ou lorsqu'il y a chevauchement de constatations des faits et de jugements de valeur. Les Canadiens présument que les formes d'expression qui avilissent des individus du fait de leur sexe, de leur origine ethnique ou d'autres caractéristiques personnelles peuvent finir par leur être préjudiciables, parce qu'il s'agit d'une situation qu'ils sont pour la plupart à même de constater dans leur quotidien. Cela s'explique, en partie, par le fait que chacun d'entre nous a eu connaissance, dans sa propre vie, de l'effet de représentations dégradantes sur son identité personnelle ou en a peut-être fait l'expérience, et, en partie, par le fait que nous savons que les groupes qui ont été défavorisés dans le passé sur le plan économique ou social sont vulnérables à cette forme d'expression. Cela s'explique aussi par le fait que nos valeurs nous encouragent à faire montre de sollicitude à l'endroit des groupes vulnérables et à pécher par excès de prudence quand leur bien-être est en jeu. Cela s'explique en outre en partie par la facilité avec laquelle il est possible

As McLachlin J. put it in *Keegstra*, *supra*, at pp. 857-58:

> To view hate propaganda as "victimless" in the absence of any proof that it moved its listeners to hatred is to discount the wrenching impact that it may have on members of the target group themselves. For Jews, many of whom have personally been touched by the terrible consequences of the degeneration of a seemingly civilized society into unparalleled barbarism, statements such as Keegstra's may raise very real fears of history repeating itself. Moreover, it is simply not possible to assess with any precision the effects that expression of a particular message will have on all those who are ultimately exposed to it. . . . These considerations undermine the notion that we can draw a bright line between provisions which are justifiable because they require proof that hatred actually resulted, and provisions which are unjustifiable because they require only an intent to promote hatred.

Common sense reflects common understandings. In these cases dealing with pornography and hate speech, common understandings were accepted by the Court because they are widely accepted by Canadians as facts, and because they are integrally related to our values, which are the bedrock of any s. 1 justification. As a result, the Court did not demand a scientific demonstration or the submission of definitive social science evidence to establish that the line drawn by Parliament was perfectly drawn.

In my view, the case at bar does not approach this category of reasoning. The Canadian voter is not a historically vulnerable or disadvantaged group. Nor, as has been explained above, is the autonomy or dignity of any single group under attack from, or even facing the contrary interests of, another potentially more powerful group. Nor

de conclure que les représentations dégradantes et la défense de certaines idées qui avilissent autrui peuvent engendrer un tel comportement. Cela s'explique également par le fait que nous savons que de telles représentations et idées peuvent elles-mêmes être préjudiciables à ceux qui sont obligés de supporter le risque accru de préjudice. Comme l'a dit le juge McLachlin dans l'arrêt *Keegstra*, précité, aux pp. 857 et 858:

> Dire que la propagande haineuse «ne fait pas de victime» quand il n'est pas prouvé qu'elle a incité ses destinataires à la haine c'est faire abstraction de l'effet déchirant qu'elle peut avoir sur les membres du groupe cible eux-mêmes. Chez les juifs, nombre desquels ont été personnellement touchés par les conséquences terribles de la dégénérescence d'une société apparemment civilisée vers une barbarie sans parallèle, des déclarations comme celles de Keegstra peuvent faire naître des craintes très réelles que l'Histoire se répète. Par ailleurs, il n'est simplement pas possible de déterminer avec exactitude les effets que l'expression d'un message donné aura sur tous ceux qui finiront par l'entendre. [. . .] Ces considérations mettent en doute la notion que nous pouvons tirer une ligne de démarcation très nette entre les dispositions qui sont justifiables parce qu'elles exigent la preuve que la haine a réellement été provoquée et celles qui sont injustifiables parce qu'elles n'exigent que l'intention de fomenter la haine.

Le sens commun reflète les perceptions communes. Dans les affaires portant sur la pornographie et la propagande haineuse, la Cour a accepté les perceptions communes parce qu'elles sont largement considérées par les Canadiens comme des faits et parce qu'elles font partie intégrante de nos valeurs, qui sont le fondement de toute justification conformément à l'article premier. En conséquence, la Cour n'a pas exigé une démonstration scientifique ou la présentation d'une preuve décisive fondée sur les sciences sociales pour établir que la ligne de démarcation tirée par le législateur était tout à fait appropriée.

117 À mon avis, ce type de raisonnement ne peut être fait dans le présent cas. Les électeurs canadiens ne constituent pas, historiquement, un groupe vulnérable ou défavorisé. Pas plus d'ailleurs, comme il a été expliqué précédemment, que l'autonomie ou la dignité de quelque groupe que ce soit n'est attaquée par un autre groupe potentiellement

can it be said that there is a shared understanding amongst Canadians that a single inaccurate poll will mislead Canadians to an extent which, in the words of Wilson J. in *Towne Cinema Theatres*, is "undue". I am, therefore, unable to accept that the harm which the government is seeking to prevent affects a large number of voters, or that such possible distortions are significant to the conduct of an election, without more specific and conclusive evidence to that effect. Although there is a pressing and substantial objective in this case because there is a clear possibility that some voters might be misled by such polls, I am not willing to go further and accept that the harm in this case warrants a significant level of deference to the government in fashioning means which trespass on the freedom of expression.

plus puissant, ni même confrontée aux intérêts opposés d'un tel groupe. En outre, il est impossible d'affirmer qu'il existe, au sein de la population canadienne, une perception commune voulant qu'un seul sondage inexact puisse tromper les Canadiens dans une mesure qui, pour reprendre le terme employé par le juge Wilson dans l'arrêt *Towne Cinema Theatres*, est «indue». Je ne puis donc accepter que le préjudice que le gouvernement cherche à prévenir affecte un grand nombre d'électeurs ou que de telles déformations potentielles de la réalité ont une influence importante sur le déroulement des élections, sans disposer de preuves plus précises et concluantes à cet effet. Même si, en l'espèce, il existe un objectif urgent et réel du fait qu'il est nettement possible que certains électeurs puissent être induits en erreur par de tels sondages, je ne suis pas disposé à aller plus loin et à admettre que, dans le présent cas, le préjudice justifie de faire montre d'un degré important de retenue envers le gouvernement pour les mesures transgressant la liberté d'expression qu'il a conçues.

118 In determining whether a restriction is justified under s. 1 as minimally impairing the freedom of expression, this Court has stated (in *RJR-MacDonald*, *supra*, at para. 160):

> As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. . . . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Emphasis added.]

Relativement à la question de savoir si une restriction est justifiée au sens de l'article premier parce qu'elle constitue une atteinte minimale à la liberté d'expression, notre Cour a dit ceci (dans *RJR-MacDonald*, précité, au par. 160):

> À la deuxième étape de l'analyse de la proportionnalité, le gouvernement doit établir que 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 restriction doit être «minimale», c'est-à-dire que la loi doit être soigneusement adaptée de façon à ce que l'atteinte aux droits ne dépasse pas ce qui est nécessaire. Le processus d'adaptation est rarement parfait et les tribunaux doivent accorder une certaine latitude au législateur. Si la loi se situe à l'intérieur d'une gamme de mesures raisonnables, les tribunaux ne concluront pas qu'elle a une portée trop générale simplement parce qu'ils peuvent envisager une solution de rechange qui pourrait être mieux adaptée à l'objectif et à la violation [. . .] Par contre, si le gouvernement omet d'expliquer pourquoi il n'a pas choisi une mesure beaucoup moins attentatoire et tout aussi efficace, la loi peut être déclarée non valide. [Je souligne.]

The application of these words is largely informed by the contextual factors which I have already can-

L'application de ces remarques dépend en grande partie des facteurs contextuels que j'ai déjà exa-

vassed. In my view, little deference should be shown in this case where the contextual factors mentioned above indicate that the government has not established that the harm which it is seeking to prevent is widespread or significant.

The provision in this case is also overbroad and underbroad in relation to the purpose of the legislation. The ban imposed in this case is overbroad because it prohibits in the final three days of an election campaign the publication and use by voters of all those polls which would meet the usual standards of accuracy. Its underbreadth has already been mentioned in the rational connection analysis: the blackout period may not adequately disabuse voters of an erroneous impression left by a poll which did not disclose its methodology to critics or the public. Indeed, as a matter of logic, the utility of the ban as a period of response and criticism is gravely undermined by the failure to require the publication of methodological information. Both the Lortie Commission, *supra*, at p. 464, and Professor Lachapelle, *supra*, at pp. 154-55, recommended that methodological information be disclosed in addition to a blackout period. In his affidavit before this Court (Case on Appeal, at pp. 92 *et seq.*), Professor Lachapelle, at para. 29, states:

> Even if sufficient information is available to assess the reliability of the survey, or if the survey results are inaccurately reported, an adequate period of time is required to effectively challenge or correct the published report. If an accurate public opinion survey is released on the day before an election, there will be no meaningful opportunity for public debate or response.

This evidence supports the view that the mandatory disclosure of methodological information combined with a blackout period fulfils the government's purpose more effectively than the mandatory disclosure alone. What we are dealing with here, however, is a blackout period without a mandatory disclosure of methodology. In assessing whether this provision is narrowly tailored, the

minés de manière approfondie. Je suis d'avis qu'il convient de faire montre de peu de retenue dans la présente affaire, car les facteurs contextuels précités indiquent que le gouvernement n'a pas établi que le préjudice qu'il cherche à prévenir est répandu ou important.

119 De plus, la disposition en litige a une portée à la fois trop générale et trop limitée relativement à l'objectif de la loi. L'interdiction imposée en l'espèce est trop générale en ce qu'elle a pour effet d'interdire, durant les trois derniers jours des campagnes électorales, la publication et l'utilisation par les électeurs de tous les sondages qui respectent les normes habituelles d'exactitude. Pour ce qui est de sa portée trop limitée, elle a déjà été signalée dans l'analyse du lien rationnel: il est possible que l'embargo ne dissipe pas suffisamment chez les électeurs l'impression erronée laissée par un sondage dont la méthodologie n'a pas été communiquée aux critiques ou au public. De fait, sur le plan de la logique, l'utilité de l'embargo en tant que période de réaction et de critique est sérieusement amoindrie par l'omission d'exiger la publication de renseignements sur la méthodologie utilisée. Tant la Commission Lortie, *op. cit.*, à la p. 482, que le professeur Lachapelle, *op. cit.*, aux pp. 178, 180 et 181, ont recommandé, en plus d'un embargo, la communication des données méthodologiques. Dans son affidavit produit devant notre Cour (dossier, aux pp. 92 et suiv.), le professeur Lachapelle dit ceci, au par. 29:

> [TRADUCTION] Même s'il y a suffisamment d'information pour apprécier la fiabilité du sondage, ou si les résultats du sondage ne sont pas rapportés de manière inexacte, une période suffisante est nécessaire pour permettre de contester efficacement le reportage publié ou pour le corriger. Si un sondage d'opinion exact est diffusé le jour qui précède le scrutin, il n'y aura pas de possibilité réelle d'en débattre publiquement ou d'y réagir.

Ce témoignage étaye le point de vue selon lequel la communication obligatoire des données méthodologiques, conjuguée à un embargo, permet de réaliser plus efficacement l'objectif du gouvernement que la seule communication obligatoire. Cependant, nous sommes en présence d'un embargo sans communication obligatoire de la méthodologie. Pour déterminer si cette disposition

obvious alternative which Parliament could have adopted was a mandatory disclosure of methodological information without a publication ban. Indeed, British Columbia has enacted just such a measure, as has the State of New York in the United States (*Election Act*, R.S.B.C. 1996, c. 106, s. 235; NY statute cited in Lachapelle Study, *supra*, at p. 51). Although such a provision would still leave the door open to inaccurate poll results published immediately prior to the election having some impact, that possibility would be significantly reduced both by virtue of the reader's initial access to those methodological data, and by the opportunity for rapid response by parties whose interests are prejudiced by the inaccurate poll. The government has not explained, however, how or whether this danger is any less than that of a poll published prior to the three-day blackout period without methodological data which is effectively immune from the reasoned criticism which the blackout period purports to allow. The failure to address or explain the reason for not adopting a significantly less intrusive measure which appears as effective as that actually adopted weighs heavily against the justifiability of this provision.

a été conçue strictement, la solution de rechange évidente qui aurait pu être retenue par le législateur est la communication obligatoire des données méthodologiques sans interdiction de publication. De fait, la Colombie-Britannique a édicté une telle mesure, tout comme l'a fait l'État de New York (*Election Act*, R.S.B.C. 1996, ch. 106, art. 235; la loi de l'État de New York citée dans l'Étude Lachapelle, *op. cit.*, à la p. 59). Bien qu'une telle disposition laisse encore subsister la possibilité que la publication des résultats d'un sondage inexact immédiatement avant le jour du scrutin ait quelque influence, cette possibilité serait considérablement amoindrie du fait que les électeurs auraient accès aux données méthodologiques et que les partis auxquels ce sondage serait préjudiciable auraient la possibilité de répliquer rapidement. Le gouvernement n'a toutefois pas expliqué en quoi ce danger est moins grand que celui créé par un sondage qui est publié avant l'embargo, sans information méthodologique, et qui échappe dans les faits à la critique raisonnée que l'embargo est censé permettre. L'omission d'exposer ou d'expliquer la raison pour laquelle on a écarté une mesure beaucoup moins attentatoire, qui semble aussi efficace que celle effectivement prise, milite fortement contre la reconnaissance du caractère justifiable de cette disposition.

120 The respondent countered this concern by suggesting that a law requiring pollsters to publish methodological information along with the poll results is actually more intrusive on the freedom of expression than the three-day ban. I would reject this argument. Without making any ruling on the constitutionality of such a measure, I would simply refer to the words of McLachlin J. in *RJR-MacDonald*, *supra*, at para. 163: "As this Court has observed before, it will be more difficult to justify a complete ban on a form of expression than a partial ban: *Ramsden v. Peterborough (City)*, [[1993] 2 S.C.R. 1084], at pp. 1105-6; *Ford v. Quebec (Attorney General)*, [[1988] 2 S.C.R. 712], at pp. 772-73." Whether a ban over a three-day period can properly be described as a "complete ban" is a subtle point. It is clear, however, that a provision which prohibited the publication of opinion polls without methodological information

L'intimé a répondu à cet argument en affirmant qu'une loi obligeant les sondeurs à publier des données méthodologiques en même temps que les résultats du sondage porte dans les faits davantage atteinte à la liberté d'expression que l'interdiction de publication pendant trois jours. Je rejette cet argument. Sans me prononcer sur la constitutionnalité d'une telle mesure, je citerai simplement les propos suivants du juge McLachlin dans *RJR-MacDonald*, précité, au par. 163: «Comme notre Cour l'a déjà fait remarquer, il sera plus difficile de justifier l'interdiction totale d'une forme d'expression que l'interdiction partielle: *Ramsden c. Peterborough (Ville)*, [[1993] 2 R.C.S. 1084], aux pp. 1105 et 1106, et *Ford c. Québec (Procureur général)*, [[1988] 2 R.C.S. 712], aux pp. 772 et 773.» La question de savoir si une interdiction de trois jours peut à juste titre être qualifiée d'«interdiction totale» est un point subtil. Il est toutefois

would be less intrusive to freedom of expression than a ban on publication of polling information during a crucial period. In the first case, the speaker has a choice: by complying with the prescribed conditions, he or she may engage in the speech. In the case of the ban, the speaker has no such choice: the information may not be expressed regardless of any choice the speaker makes. I emphasize in saying this, that I do not here pronounce on the constitutionality of such a provision. I am merely rejecting the respondent's claim that the current legislative provision is the least intrusive measure which the government could have chosen to achieve its purpose.

évident qu'une disposition qui interdirait la publication des sondages non accompagnés de données méthodologiques porterait moins atteinte à la liberté d'expression qu'une interdiction de publier de l'information touchant les sondages durant une période cruciale. Dans le premier cas, celui qui désire s'exprimer a un choix à faire: s'il choisit de se plier aux conditions prescrites, il peut s'exprimer. Dans le cas de l'interdiction, il n'a pas ce choix: l'information ne peut être communiquée, peu importe ce qu'il aurait décidé. En disant cela, je tiens à préciser que je ne me prononce pas sur la constitutionnalité d'une telle disposition. Je rejette simplement l'argument de l'intimé selon lequel la disposition existante est la mesure la moins attentatoire que le gouvernement pouvait retenir pour réaliser son objectif.

The respondent pointed to the presence of similar blackout periods on public opinion surveys in other democratic countries to support its argument that this measure fell within the permissible range of alternatives. I do not find this evidence to be highly persuasive. Although a number of countries do have such provisions, most democratic countries have minimal or no restrictions on polling information; Lachapelle Study, *supra*, at pp. 52-62. This may be contrasted with the evidence before the Court in *Butler*, *supra*, at p. 497, to the effect that most free and democratic countries had legislation similar to that under scrutiny. Moreover, some of the bans on publication of polling information in other countries extend for very long periods, even the entire election campaign. This suggests that the purpose of those bans may be something other than ensuring that polls are as accurate as possible, which is the only permissible objective under our *Charter*. Where the approach in other countries is variable, or is in some relevant way different from the legislation under scrutiny in Canada, then those legislative measures must be examined more closely to determine their precise purpose and whether those purposes are of persuasive force here. Not only may the social context be quite different from that in Canada, but also the legal context within which measures restricting the

121 L'intimé a invoqué l'existence d'embargos semblables sur les sondages d'opinion dans d'autres pays démocratiques au soutien de son argument que cette mesure fait partie des solutions permises. Je ne trouve pas cette preuve très convaincante. Même si un certain nombre de pays ont effectivement adopté de telles dispositions, la plupart des pays démocratiques ne limitent que très peu ou pas du tout l'information touchant les sondages: Étude Lachapelle, *op. cit.*, aux pp. 61 à 72. On peut comparer cette preuve avec celle qui a été soumise à notre Cour dans *Butler*, précité, à la p. 497, et qui établissait que la plupart des pays libres et démocratiques possédaient des textes législatifs de la nature de celui en litige dans cette affaire. En outre, les interdictions de publication visant l'information touchant les sondages en vigueur dans certains pays sont de très longue durée, s'étendant dans certains cas à toute la campagne électorale. Ce fait suggère qu'ils n'ont peut-être pas pour objet d'assurer la publication des sondages les plus exacts possible, seul objectif autorisé sous le régime de notre *Charte*. Quand la solution adoptée dans d'autres pays varie ou est, sous quelque aspect pertinent, différente de la loi contestée au Canada, les mesures législatives étrangères doivent être étudiées plus attentivement afin de dégager leur objectif précis et de déterminer si cet objectif

freedom of speech are evaluated may be dissimilar. In the absence of some consensus in the international context, or of evidence explaining why the provisions adopted in some other free and democratic countries are compelling given the situation in Canada, the experience of some other countries as a justification under s. 1 should not be accorded great weight. This is no more than to say that the example of those countries which do not have such provisions is of as much weight in evaluating whether the legislation is justified as those which do. The key question, once the divergence of approach in the international community is established, is whether the values of Canadian society — of which the *Charter* itself forms a part — are more in accord with one approach rather than the other. The respondent has not taken this extra step in his analysis of those countries which do have publication bans, and therefore, I find this evidence neutral to the outcome of this case.

a une valeur persuasive au Canada. Non seulement le contexte social peut être complètement différent de celui qui existe au Canada, mais le contexte juridique dans lequel les mesures restreignant la liberté d'expression sont évaluées peut lui aussi être différent. En l'absence d'un certain consensus au niveau international ou de preuve expliquant pourquoi les dispositions adoptées dans d'autres pays libres et démocratiques ont une valeur persuasive compte tenu de la situation canadienne, il n'y pas lieu d'accorder beaucoup de poids à l'expérience de quelques autres pays en tant que justification dans le cadre de l'article premier. Cela revient tout au plus à dire que, pour décider si le texte de loi est justifié, l'exemple des pays qui ne possèdent pas de telles dispositions a autant de poids que celui des pays qui n'en ont pas. La question clé, une fois établie la divergence des solutions retenues dans le reste du monde, est de savoir si les valeurs de la société canadienne — dont la *Charte* elle-même fait partie — s'accordent mieux avec une solution plutôt qu'une autre. L'intimé n'a pas fait cette démarche supplémentaire dans son analyse de la situation des pays qui ont établi des interdictions de publication, et, par conséquent, j'estime que cette preuve a un effet neutre sur l'issue du présent pourvoi.

122 In summary, I find that the blackout period does not minimally impair the freedom of expression guaranteed in the *Charter*, and is therefore not justified under s. 1. The harm which the legislature is seeking to prevent does not warrant a high degree of deference to the legislature. Unlike the situation in *Butler*, *Ross*, *Keegstra*, and *Irwin Toy*, the government is not dealing with a vulnerable group which is in danger of manipulation or abuse because of an essential opposition of interests, or because of the nature of the speech itself. There were other measures which would have achieved the government's purpose equally well or even better than the publication ban, and which would have been far less intrusive to the freedom of expression. Finally, the experience of the international community is inconclusive.

En résumé, je suis d'avis que l'embargo n'est pas une atteinte minimale à la liberté d'expression garantie par la *Charte* et qu'il n'est donc pas justifié au sens de l'article premier. Le préjudice que le législateur cherche à prévenir ne justifie pas de faire montre d'un degré élevé de retenue envers ce dernier. Contrairement à la situation dans les arrêts *Butler*, *Ross*, *Keegstra* et *Irwin Toy*, le gouvernement n'est pas concerné par un groupe vulnérable, qui risque d'être victime de manipulation ou d'abus en raison d'un choc fondamental d'intérêts ou de la nature du discours en cause lui-même. Il existe d'autres mesures qui auraient permis de réaliser l'objectif du gouvernement et ce tout aussi bien, voire encore mieux que l'interdiction de publication, et qui auraient été beaucoup moins attentatoires à la liberté d'expression. Finalement, l'expérience au niveau international n'est pas concluante.

6. Proportionality Between the Deleterious Effects and the Benefits of the Ban

The third stage of the proportionality analysis was originally formulated in *Oakes*, *supra*, at p. 140, as ensuring a general proportionality between the measures and the pressing and substantial objective of the provision under scrutiny:

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

This formulation has been criticized as merely duplicating what is already accomplished by the first two stages of the proportionality analysis. As a practical matter, this is confirmed by the jurisprudence of this Court: there appears to be no case in which a measure was justified by the first two steps of the proportionality analysis, but then found unjustified by an application of the third step.

More recent cases have reformulated the third stage of the proportionality analysis in order to give it a distinct scope and function. In *Dagenais*, *supra*, at pp. 887-88, Lamer C.J. articulated the test as follows:

> . . . I believe that the third step of the second branch of the *Oakes* test requires both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual sal-

6. La proportionnalité entre les effets préjudiciables et les effets bénéfiques de l'interdiction

123 La troisième étape de l'analyse de la proportionnalité a été formulée pour la première fois dans l'arrêt *Oakes*, précité, à la p. 140, comme moyen d'assurer une proportionnalité générale entre les mesures et l'objectif urgent et réel de la disposition examinée:

> Même si un objectif est suffisamment important et même si on a satisfait aux deux premiers éléments du critère de proportionnalité, il se peut encore qu'en raison de la gravité de ses effets préjudiciables sur des particuliers ou sur des groupes, la mesure ne soit pas justifiée par les objectifs qu'elle est destinée à servir. Plus les effets préjudiciables d'une mesure sont graves, plus l'objectif doit être important pour que la mesure soit raisonnable et que sa justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Cette formulation a été critiquée parce qu'elle ne ferait que reprendre ce qui est déjà accompli par les deux premières étapes de l'analyse de la proportionnalité. Dans la pratique, cette critique est confirmée par la jurisprudence de notre Cour: il ne semble pas y avoir d'affaire où une mesure dont la justification a été démontrée aux deux premières étapes de l'analyse de la proportionnalité a ensuite été déclarée injustifiée au terme de la troisième étape.

124 Dans des arrêts plus récents, la troisième étape de l'analyse de la proportionnalité a été reformulée pour lui conférer un champ d'application et un rôle distincts. Dans *Dagenais*, précité, le juge en chef Lamer a énoncé le critère dans les termes suivants, aux pp. 887 et 888:

> . . . j'estime que la troisième étape du second volet du critère formulé dans *Oakes* nécessite que l'objectif qui sous-tend la mesure et les effets bénéfiques qui résultent en fait de sa mise en application soient proportionnels à ses effets préjudiciables sur les libertés et droits fondamentaux. Un objectif législatif peut être urgent et réel, le moyen choisi peut avoir un lien rationnel avec cet objectif, et il se peut qu'il n'existe aucune autre mesure portant moins atteinte aux droits. Néanmoins, et bien que l'importance de l'objectif même (lorsqu'il est considéré dans l'abstrait) l'emporte sur les effets préjudiciables sur les droits garantis, il reste possible que les effets

utary effects of the legislation will not be sufficient to justify these negative effects. [Emphasis in original.]

He went on, at p. 889, to state:

I would, therefore, rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. [Emphasis in original.]

In my view, the first part of this reformulation is already achieved by virtue of the first two parts of the *Oakes* proportionality test. The subsequent development of the *Oakes* test, particularly the broad contextual approach which has been adopted by this Court since the decision in the *Edmonton Journal* case, ensures that the rational connection and the minimal impairment tests are sufficient to determine whether there is a proportionality between the deleterious effects of a measure, and its objective. Once a determination had been made that there is a pressing and substantial objective behind the infringing measure which may justify some infringement of the *Charter*, then the first and second stages of the *Oakes* proportionality analysis assess whether there is a coherence and an efficiency between those measures and the justified purpose. The relevant efficiency measured at the second stage of the proportionality analysis is whether it infringes on the *Charter* right to the minimum extent possible while still fulfilling the justified purpose.

125 The third stage of the proportionality analysis performs a fundamentally distinct role. Determining whether there is a pressing and substantial objective behind the provision under scrutiny necessarily occurs in the abstract, before the specific nature of the legislation and its impact on the *Charter* right has been analysed. Of course, ascertaining that objective requires a consideration of what the provision actually does, as well as documentary evidence as to what the legislator thought it was doing. Moreover, the relevant purpose is the purpose specific to the provision which limits the *Charter* right. But the purpose must, nevertheless, be articulated abstractly because a purpose is a

bénéfiques réels de la disposition législative ne soient pas suffisants pour justifier ces effets négatifs. [Souligné dans l'original.]

Il a ajouté ceci, à la p. 889:

Je reprendrais donc la troisième partie du critère *Oakes* comme suit: il doit y avoir proportionnalité entre les effets préjudiciables des mesures restreignant un droit ou une liberté et l'objectif, et il doit y avoir proportionnalité entre les effets préjudiciables des mesures et leurs effets bénéfiques. [Souligné dans l'original.]

À mon avis, l'objet de la première partie de cette reformulation est déjà accompli par les deux premiers éléments du critère de la proportionnalité de l'arrêt *Oakes*. Le développement ultérieur du critère établi dans *Oakes*, en particulier l'analyse largement contextuelle retenue par notre Cour depuis l'arrêt *Edmonton Journal*, fait en sorte que les critères du lien rationnel et de l'atteinte minimale sont suffisants pour permettre de décider s'il y a proportionnalité entre les effets préjudiciables d'une mesure et l'objectif visé par celle-ci. Une fois qu'il est jugé que la mesure attentatoire vise un objectif urgent et réel susceptible de justifier une certaine atteinte à la *Charte*, les première et deuxième étapes de l'analyse de la proportionnalité prévue par l'arrêt *Oakes* permettent alors de statuer sur la cohérence et l'efficacité de la mesure et de l'objectif justifié. Pour mesurer l'efficacité à la deuxième étape de l'analyse de la proportionnalité, on se demande si la mesure porte le moins possible atteinte à un droit garanti par la *Charte* tout en permettant de réaliser l'objectif justifié.

La troisième étape de l'analyse de la proportionnalité joue un rôle fondamentalement distinct. L'examen de la disposition en cause, afin de déterminer si elle repose sur un objectif urgent et réel, se fait nécessairement dans l'abstrait, avant l'analyse de la nature précise de la mesure législative et de son effet sur le droit garanti par la *Charte*. Évidemment, il faut, pour dégager cet objectif, étudier l'effet concret de la disposition ainsi que la preuve documentaire concernant l'effet que recherchait le législateur. De plus, l'objectif pertinent de la disposition est l'objectif particulier qui restreint le droit garanti par la *Charte*. Cependant, l'objectif doit néanmoins être formulé en termes abstraits,

goal or outcome which, by definition, may be achieved in different ways. Before the specific effects of the measure in question have been scrutinized and concretized through the first two steps of the proportionality analysis, it is often difficult to assess, in the abstract, the possible impact on *Charter* freedoms of a laudable legislative objective. The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. As Professor Jamie Cameron states ("The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 *Osgoode Hall L.J.* 1, at p. 66):

> . . . this branch of the section 1 analysis asks an important question. By assessing the proportionality of its deleterious effects and salutary benefits it considers, in direct and explicit terms, whether the consequences of the violation are too great when measured against the benefits that may be achieved. As such, it is the only part of the current analysis to acknowledge the harm or cost of justifiable limits: that a constitutional right has been violated.

The deleterious effects which may arise from an infringement of the *Charter* may be general, in the sense that any serious infringement of the right to freedom of expression may impair the climate of free exchange of ideas which is an essential value of our society; or the deleterious effects may be specific, in that a particular benefit which would

car un objectif est un but ou un résultat qui, par définition, peut être réalisé de diverses manières. Avant que les effets précis de la mesure en question aient été examinés à fond puis dégagés à l'issue des deux premières étapes de l'analyse de la proportionnalité, il est souvent difficile d'apprécier, dans l'abstrait, l'effet possible d'un objectif législatif louable sur des libertés garanties par la *Charte*. Les première et deuxième étapes de l'analyse de la proportionnalité ne portent pas sur le rapport entre les mesures et le droit en question garanti par la *Charte*, mais plutôt sur le rapport entre les objectifs de la loi et les moyens employés. Même si l'étape de l'atteinte minimale du critère de la proportionnalité tient nécessairement compte de la mesure dans laquelle il est porté atteinte à une valeur prévue par la *Charte*, la norme qui doit être appliquée en bout de ligne consiste à se demander s'il est porté atteinte le moins possible au droit garanti par la *Charte* compte tenu de la validité de l'objectif législatif. La troisième étape de l'analyse de la proportionnalité donne l'occasion d'apprécier, à la lumière des détails d'ordre pratique et contextuel qui ont été dégagés aux première et deuxième étapes, si les avantages découlant de la limitation sont proportionnels aux effets préjudiciables, mesurés au regard des valeurs consacrées par la *Charte*. Comme le dit le professeur Jamie Cameron, dans «The Past, Present, and Future of Expressive Freedom Under the *Charter*» (1997), 35 *Osgoode Hall L.J.* 1, à la p. 66:

> [TRADUCTION] . . . ce volet de l'analyse fondée sur l'article premier pose une question importante. L'évaluation de la proportionnalité des effets préjudiciables et des effets bénéfiques de la violation soulève, directement et explicitement, la question de savoir si les conséquences de celle-ci sont disproportionnées aux avantages pouvant en découler. En tant que tel, ce volet est la seule partie de l'analyse actuelle qui reconnaît le préjudice ou coût des limites justifiables: c'est-à-dire le fait qu'un droit garanti par la Constitution a été violé.

Les effets préjudiciables susceptibles de découler d'une atteinte à la *Charte* peuvent avoir soit un caractère général, en ce sens que toute atteinte grave au droit à la liberté d'expression est susceptible d'altérer le climat de libre échange des idées qui est une valeur essentielle de notre société; soit un caractère particulier, en ce qu'ils font obstacle à

accrue from the speech in question is prevented. Although both of these possible effects will and should be considered in deciding whether there is a pressing and substantial objective of the legislation, the focus at that stage is more in determining whether there is a significant harm which the government is addressing. Comparing the harm which may be prevented with the harm of the infringement itself is a balancing which can most effectively take place within the context of the proportionality analysis.

un avantage déterminé qui découle de la forme d'expression en question. Même si ces deux effets possibles doivent être pris en considération et le sont pour décider si la loi repose sur un objectif urgent et réel, cette étape de l'analyse porte davantage sur la question de savoir si le gouvernement vise à remédier à un préjudice important. Le fait de comparer le préjudice qui peut être évité et le préjudice causé par l'atteinte elle-même est une mise en équilibre qui peut être réalisée avec le plus d'efficacité dans le contexte de l'analyse de la proportionnalité.

126 This approach accords with the analysis in *R. v. Laba*, [1994] 3 S.C.R. 965, where the reformulated proportionality test proposed by Lamer C.J. in *Dagenais*, *supra*, was applied. The issue in *Laba* was the constitutionality of a provision which made it an offence to sell stolen ore unless the defendant could establish that he or she was the lawful owner. This was challenged under s. 11(*d*) of the *Charter*. Sopinka J. writing for the Court, at p. 1006, found that the specific objective of the provision was "to facilitate the prosecution of offenders given the special problem of proof" regarding the ownership of ore. He also found that the measure was not minimally impairing of s. 11(*d*) even given the validity of the purpose of the legislation. But he went on to state, at p. 1011:

Cette méthode concorde avec l'analyse effectuée dans *R. c. Laba*, [1994] 3 R.C.S. 965, où la Cour a appliqué la reformulation du critère de la proportionnalité proposée par le juge en chef Lamer dans *Dagenais*, précité. Dans *Laba*, la question en litige était la constitutionnalité d'une disposition qui interdisait à toute personne de vendre du minerai volé à moins qu'elle n'établisse qu'elle en est le propriétaire. Cette disposition a été contestée sur le fondement de l'al. 11*d*) de la *Charte*. Le juge Sopinka, s'exprimant pour la Cour, a conclu, à la p. 1006, que la disposition avait précisément pour but «de faciliter les poursuites contre les contrevenants, compte tenu du problème de preuve» en ce qui concerne la propriété du minerai. Il a en outre conclu que la mesure ne portait pas atteinte le moins possible à l'al. 11*d*), même en tenant compte de la validité de l'objectif de la disposition législative. Toutefois, il a ajouté ceci, à la p. 1011:

> Even if I were persuaded that the imposition of a legal burden was clearly more effective in achieving Parliament's objective, I would find that it fails the proportionality test because of the excessive invasion of the presumption of innocence having regard to the degree of advancement of Parliament's purpose. [Emphasis added.]

> Même si j'étais convaincu qu'il serait nettement plus efficace d'imposer une charge ultime pour atteindre l'objectif du législateur, j'arriverais à la conclusion que cela ne satisfait pas au critère de proportionnalité à cause de l'empiétement excessif sur la présomption d'innocence compte tenu de la contribution à la réalisation de l'objectif du législateur. [Je souligne.]

This analysis directly addresses the relationship between otherwise justified measures and the extent of harm to the *Charter* right. This weighing exercise necessarily admits of some subjectivity, but this is lessened by the analysis of the purposes, the rationality, and the efficiency of the legislation required by the previous stages of the *Oakes* test.

Cette analyse porte directement sur le rapport entre des mesures par ailleurs justifiées et l'étendue du préjudice causé au droit garanti par la *Charte*. Cette mise en balance souffre nécessairement d'une certaine subjectivité, mais cette lacune est atténuée par l'analyse des objectifs, du lien rationnel et de l'efficacité de la disposition législative qui est requise par les volets précédents du critère de l'arrêt *Oakes*.

The impact on freedom of expression in this case is profound. This is a complete ban on political information at a crucial time in the electoral process. The ban interferes with the rights of voters who want access to the most timely polling information available, and with the rights of the media and pollsters who want to provide it. It is an interference with the flow of information pertaining to the most important democratic duty which most Canadians will undertake in their lives: their choice as to who will govern them. Such a polling ban also sends the message that the media in their role as a reporter of information, and not as an advertiser, can be muzzled by the government. Rather than approaching the problem of inaccurate polls as a question of too little information, or added incentives for preventing the publication of inaccurate polls, the government constrains the range of evaluations that a voter is permitted to make in fulfilling their sacred democratic function as a citizen. It justifies such a measure on the basis that some indeterminate number of voters might be unable to spot an inaccurate poll result and might rely to a significant degree on the error, thus perverting their electoral choice.

127 Dans le présent cas, l'effet sur la liberté d'expression est profond. Il s'agit d'une interdiction complète visant de l'information politique à un moment crucial du processus électoral. Cette interdiction porte atteinte, d'une part, aux droits des électeurs qui veulent avoir accès à l'information la plus à-propos disponible en matière de sondage, et, d'autre part, aux droits des médias et des sondeurs qui désirent fournir cette information. Il s'agit d'une atteinte à la circulation d'information se rapportant à la fonction démocratique la plus importante dont s'acquittent la plupart des Canadiens au cours de leur vie: le choix de ceux qui vont les gouverner. De plus, le message que transmet une telle interdiction de publication des sondages est que les médias, non pas en tant que publicitaires, mais en tant que communicateurs d'information, peuvent être muselés par le gouvernement. Plutôt que de considérer le problème des sondages inexacts comme un problème d'insuffisance d'information ou de besoin d'incitatifs supplémentaires afin de prévenir la publication de sondages inexacts, le gouvernement limite l'éventail des évaluations que les électeurs sont autorisés à faire dans l'accomplissement de leur devoir démocratique sacré de citoyens. Il justifie pareille mesure en soutenant qu'un nombre indéterminé d'électeurs pourraient être incapables de déceler des résultats de sondage inexacts et pourraient, dans une mesure importante, s'appuyer sur l'erreur, ce qui fausserait leur choix électoral.

In my analysis above, I have found that despite the many factors militating against the realization of this misinformed choice, including the presence of many other polls in the public domain both prior to and concurrent with the erroneous poll, such a scenario is conceivable for a small number of voters. However, in my view, the government cannot take the most uninformed and naïve voter as the standard by which constitutionality is assessed. To quote the words of Frankfurter J. speaking in another context: "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children" (*Butler v. Michigan*, 352 U.S. 380 (1957), at p. 383). Just as Frankfurter J. could not accept that the standard of indecency for adults should be

128 Dans l'analyse qui précède, j'ai conclu que, malgré les nombreux facteurs qui tendent à empêcher un tel choix mal éclairé de se concrétiser, notamment la présence de nombreux autres sondages dans le domaine public tant avant le sondage erroné que simultanément, un tel scénario est concevable à l'égard d'un petit nombre d'électeurs. Toutefois, je suis d'avis que le gouvernement ne peut pas faire de l'électeur le moins informé et le plus naïf la norme au regard de laquelle la constitutionnalité doit être appréciée. Pour reprendre les propos formulés par le juge Frankfurter, dans un autre contexte: [TRADUCTION] «L'effet de ce texte de loi est de condamner la population adulte du Michigan à ne lire que ce qui est convenable pour les enfants» (*Butler c. Michigan*, 352 U.S. 380

determined according to the vulnerability of a child, nor can I accept here a measure which decides that information which is desired and can be rationally and properly assessed by the vast majority of the voting electorate should be withheld because of a concern that a very few voters might be so confounded that they would cast their vote for a candidate whom they would not have otherwise preferred. That is to reduce the entire Canadian public to the level of the most unobservant and naïve among us. This concern is also very remote from any danger that the guarantee of effective representation will be undermined.

(1957), à la p. 383). Tout comme le juge Frankfurter ne pouvait accepter que, dans le cas des adultes, la norme en matière d'indécence soit déterminée en fonction de la vulnérabilité des enfants, je ne peux accepter, en l'espèce, une mesure disposant que des renseignements qui sont désirés et qui peuvent être évalués rationnellement et adéquatement par la vaste majorité des électeurs ne peuvent être communiqués parce qu'on craint qu'un très petit nombre d'entre eux pourraient être à ce point décontenancés par ces renseignements qu'ils voteraient pour un candidat qu'ils n'auraient pas appuyé autrement. Cela revient à réduire l'entière population canadienne au niveau des moins perspicaces et des plus naïfs d'entre nous. Cette préoccupation est également très éloignée de tout danger d'atteinte à la garantie de représentation effective.

129 My view is that, given the state of the evidence before the Court on this issue, the postulated harm will seldom occur. The benefits of the ban are, therefore, marginal. The deleterious effects are substantial. First, the ban sends the general message that the media can be constrained by government not to publish factual information. Second, it interferes with the reporting function of the media with respect to the election, which is an interference with the freedom of the media when its participation is most crucial to self-governance. These are the deleterious effects as they relate to the freedom of the speaker. But third, the ban denies access to electoral information which some voters may consider very useful in deciding their vote. If they feel that their votes are better informed as a result of having this information, then the ban not only interferes with their freedom of expression, but with their perception of the freeness and validity of their vote. This undermines the very faith in the electoral process which the government suggests is one of the rationales for this ban.

Je suis d'avis que, compte tenu de la preuve devant notre Cour sur cette question, le préjudice qui a été posé en postulat ne se produit que rarement. Les avantages de l'interdiction sont par conséquent minimes. Les effets préjudiciables sont considérables. Premièrement, l'interdiction transmet le message général que les médias peuvent être empêchés par le gouvernement de publier de l'information factuelle. Deuxièmement, il entrave le rôle de communicateurs de l'information des médias en période électorale, ce qui constitue une atteinte à la liberté d'expression des médias au moment où leur participation revêt une importance cruciale pour la démocratie. Voilà quels sont les effets préjudiciables par rapport à la liberté d'expression de la personne qui s'exprime. Mais, troisièmement, l'interdiction nie l'accès à une information électorale que certains électeurs peuvent considérer très utile pour arrêter leur choix. S'ils estiment que leur vote est plus éclairé parce qu'ils disposent de cette information, alors l'interdiction porte non seulement atteinte à leur liberté d'expression, mais également à leur perception que leur vote est libre et valide. Cette situation mine la confiance même dans le processus électoral qui, au dire du gouvernement, est précisément l'un des objectifs de l'interdiction.

130 In my view, the doubtful benefits of this ban are outweighed by its significant and tangible delete-

À mon avis, les effets préjudiciables importants et tangibles de l'interdiction l'emportent sur ses

rious effects and therefore is not justified under the third stage of the proportionality analysis. The very serious invasion of the freedom of expression of all Canadians is not outweighed by the speculative and marginal benefits postulated by the government. This is not to say that there is no possibility for Parliament to legislate with regard to the dangers that represent bad polls. As mentioned earlier, the present legislation was found to be defective not with regard to its purpose, but with regard to the fact that the means chosen to carry out that purpose did not satisfy the minimal impairment and proportionality tests.

VII. Disposition

I find that s. 322.1 of the *Canada Elections Act* infringes s. 2(*b*) of the *Charter* and that it is not a reasonable limit on freedom of expression under s. 1. Accordingly, I would allow the appeal with costs and declare s. 322.1 of the *Canada Elections Act* to be inconsistent with the *Charter* and hence of no force or effect by reason of s. 52 of the *Constitution Act, 1982*. I would answer the constitutional questions in the following manner:

1. Does s. 322.1 of the *Canada Elections Act*, R.S.C., 1985, c. E-2, as amended, infringe s. 2(*b*) and/or s. 3 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes with respect to s. 2(*b*), and no comment with respect to s. 3.

2. If s. 322.1 of the *Canada Elections Act* infringes s. 2(*b*) and/or s. 3 of the *Canadian Charter of Rights and Freedoms*, is s. 322.1 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

avantages douteux, et elle n'est donc pas justifiée selon le troisième volet de l'analyse de la proportionnalité. L'atteinte très grave à la liberté d'expression de tous les Canadiens n'est pas écartée par les avantages hypothétiques minimes avancés par le gouvernement. Ce qui ne veut pas dire qu'il est impossible au législateur de légiférer à l'égard des dangers que créent les mauvais sondages. Comme je l'ai dit plus tôt, la loi existante a été jugée défectueuse au regard non pas de son objectif, mais plutôt du fait que les moyens choisis pour réaliser cet objectif ne satisfont pas aux critères de l'atteinte minimale et de la proportionnalité.

VII. Le dispositif

J'arrive à la conclusion que l'art. 322.1 de la *Loi électorale du Canada* porte atteinte à l'al. 2*b*) de la *Charte* et qu'il n'est pas une limite raisonnable à la liberté d'expression au sens de l'article premier. En conséquence, j'accueillerais le pourvoi avec dépens et déclarerais l'art. 322.1 de la *Loi électorale du Canada* incompatible avec la *Charte* et par conséquent inopérant par application de l'art. 52 de la *Loi constitutionnelle de 1982*. Je répondrais aux questions constitutionnelles de la manière suivante: 131

1. L'article 322.1 de la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2, et ses modifications, contrevient-il à l'al. 2*b*) ou à l'art. 3 de la *Charte canadienne des droits et libertés*, ou aux deux à la fois?

Réponse: Oui pour ce qui est de l'al. 2*b*), mais aucun commentaire pour ce qui est de l'art. 3.

2. Si l'article 322.1 de la *Loi électorale du Canada* contrevient à l'al. 2*b*) ou à l'art. 3 de la *Charte canadienne des droits et libertés*, ou aux deux à la fois, constitue-t-il une limite raisonnable prescrite par une règle de droit, dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, aux fins de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse: Non.

Appeal allowed with costs, LAMER C.J. *and* L'HEUREUX-DUBÉ *and* GONTHIER JJ. *dissenting.*

Pourvoi accueilli avec dépens, le juge en chef LAMER *et les juges* L'HEUREUX-DUBÉ *et* GONTHIER *sont dissidents.*

Solicitors for the appellants: McCarthy Tétrault, Toronto.

Procureurs des appelantes: McCarthy Tétrault, Toronto.

Solicitor for the respondent: The Attorney General of Canada, Toronto.

Procureur de l'intimé: Le procureur général du Canada, Toronto.

Solicitors for the intervener the Attorney General of British Columbia: Arvay Finlay, Victoria.

Procureurs de l'intervenant le procureur général de la Colombie-Britannique: Arvay Finlay, Victoria.

Solicitor for the intervener the Canadian Civil Liberties Association: Sydney L. Goldenberg, Toronto.

Procureur de l'intervenante l'Association canadienne des libertés civiles: Sydney L. Goldenberg, Toronto.

Greater Vancouver Transportation Authority *Appellant*

v.

Canadian Federation of Students — British Columbia Component and British Columbia Teachers' Federation *Respondents*

and

Attorney General of New Brunswick, Attorney General of British Columbia, Adbusters Media Foundation and British Columbia Civil Liberties Association *Interveners*

- and -

British Columbia Transit *Appellant*

v.

Canadian Federation of Students — British Columbia Component and British Columbia Teachers' Federation *Respondents*

and

Attorney General of New Brunswick, Attorney General of British Columbia, Adbusters Media Foundation and British Columbia Civil Liberties Association *Interveners*

Greater Vancouver Transportation Authority *Appelante*

c.

Fédération canadienne des étudiantes et étudiants — Section Colombie-Britannique et British Columbia Teachers' Federation *Intimées*

et

Procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, Adbusters Media Foundation et Association des libertés civiles de la Colombie-Britannique *Intervenants*

- et -

British Columbia Transit *Appelante*

c.

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et

Procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, Adbusters Media Foundation et Association des libertés civiles de la Colombie-Britannique *Intervenants*

INDEXED AS: GREATER VANCOUVER TRANSPORTATION AUTHORITY *v.* CANADIAN FEDERATION OF STUDENTS — BRITISH COLUMBIA COMPONENT

Neutral citation: 2009 SCC 31.

File No.: 31845.

2008: March 25; 2009: July 10.

RÉPERTORIÉ : GREATER VANCOUVER TRANSPORTATION AUTHORITY *c.* FÉDÉRATION CANADIENNE DES ÉTUDIANTES ET ÉTUDIANTS — SECTION COLOMBIE-BRITANNIQUE

Référence neutre : 2009 CSC 31.

N° du greffe : 31845.

2008 : 25 mars; 2009 : 10 juillet.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Application of Charter — Transit authorities' advertising policies permitting commercial but not political advertising on public transit vehicles — Actions brought alleging that transit authorities' policies violated freedom of expression — Whether entities which operate public transit systems "government" within meaning of s. 32 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Freedom of expression — Advertisements on buses — Transit authorities' advertising policies permitting commercial but not political advertising on public transit vehicles — Whether advertising policies infringing freedom of expression — If so, whether infringement can be justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Constitutional law — Charter of Rights — Reasonable limits prescribed by law — Transit authorities' advertising policies permitting commercial but not political advertising on public transit vehicles — Policies infringing freedom of expression —Whether policies are "law" within meaning of s. 1 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Remedy — Transit authorities' advertising policies permitting commercial but not political advertising on public transit vehicles — Policies unjustifiably infringing freedom of expression — Declaration that policies are of "no force or effect" sought — Whether declaration ought to be based on s. 52 of Constitution Act, 1982 or s. 24(1) of Canadian Charter of Rights and Freedoms — Whether policies are "law" within meaning of s. 52 of Constitution Act, 1982.

The appellant transit authorities, the Greater Vancouver Transportation Authority ("TransLink") and British Columbia Transit ("BC Transit"), operate

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 LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Application de la Charte — Politiques publicitaires de commissions de transport autorisant la publicité commerciale mais non la publicité politique sur les véhicules de transport en commun — Actions alléguant que les politiques portent atteinte à la liberté d'expression — Les entités qui exploitent des réseaux de transport en commun font-elles partie du « gouvernement » au sens de l'art. 32 de la Charte canadienne des droits et libertés?

Droit constitutionnel — Charte des droits — Liberté d'expression — Publicité sur les autobus — Politiques publicitaires de commissions de transport autorisant la publicité commerciale mais non la publicité politique sur les véhicules de transport en commun — Les politiques violent-elles le droit à la liberté d'expression? — Dans l'affirmative, l'atteinte peut-elle être justifiée? — Charte canadienne des droits et libertés, art. 1, 2b).

Droit constitutionnel — Charte des droits — Limites raisonnables prévues par une règle de droit — Politiques publicitaires de commissions de transport autorisant la publicité commerciale mais non la publicité politique sur les véhicules de transport en commun — Politiques portant atteinte à la liberté d'expression — Les politiques constituent-elles des « règles de droit » au sens de l'article premier de la Charte canadienne des droits et libertés?

Droit constitutionnel — Charte des droits — Réparation — Politiques publicitaires de commissions de transport autorisant la publicité commerciale mais non la publicité politique sur les véhicules de transport en commun — Politiques portant indûment atteinte à la liberté d'expression — Demande d'un jugement déclarant les politiques inopérantes — Le jugement déclaratoire doit-il se fonder sur l'art. 52 de la Loi constitutionnelle de 1982 ou sur l'art. 24(1) de la Charte canadienne des droits et libertés? — Les politiques constituent-elles des « règles de droit » au sens de l'art. 52 de la Loi constitutionnelle de 1982?

Les commissions de transport appelantes, Greater Vancouver Transportation Authority (« TransLink ») et British Columbia Transit (« BC Transit »), exploitent

* Bastarache J. took no part in the judgment.

* Le juge Bastarache n'a pas participé au jugement.

public transportation systems in British Columbia. They refused to post the respondents' political advertisements on the sides of their buses on the basis that their advertising policies permit commercial but not political advertising on public transit vehicles. The respondents commenced an action alleging that articles 2, 7 and 9 of the transit authorities' policies had violated their right to freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The trial judge dismissed the action, finding that the respondents' right to freedom of expression had not been infringed. The majority of the Court of Appeal reversed the trial judgment and declared articles 7 and 9 of the advertising policies to be of no force or effect either on the basis of s. 52(1) of the *Constitution Act, 1982* or on the basis of s. 24(1) of the *Charter*.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ.: Both BC Transit and TransLink are "government" within the meaning of s. 32 of the *Charter*. On the face of the provision, the *Charter* applies not only to Parliament, the legislatures and the government themselves, but also to all matters within the authority of those entities. BC Transit is a statutory body designated by legislation as an "agent of the government" and it cannot operate autonomously from the provincial government, since the latter has the power, by means of regulations, to exercise substantial control over its day-to-day activities. Although TransLink is not an agent of the government, it is substantially controlled by a local government entity — the Greater Vancouver Regional District — and is therefore itself a government entity. Since the transit authorities are government entities, the *Charter* applies to all their activities, including the operation of the buses they own. [14] [17] [21] [24-25]

The s. 2(*b*) claim should not be resolved using the *Baier* framework. The transit authorities' policies do not prevent the respondents from using the advertising service as a means of expression. Only the content of their advertisements is restricted. Thus, their claim cannot be characterized as one against underinclusion. Nor can it be characterized as a positive right claim. The respondents are not requesting that the government support or enable their expressive activity by providing them with a particular means of expression from which they are excluded. They seek the freedom to express themselves — by means of an existing platform they are entitled to use — without undue state

des réseaux de transport en commun en Colombie-Britannique. Elles ont refusé de diffuser les publicités à caractère politique des intimées sur les côtés de leurs autobus au motif que leurs politiques en la matière autorisaient la publicité commerciale, mais non la publicité politique, sur les véhicules de transport en commun. Dans l'action qu'elles ont intentée, les intimées ont allégué que les articles 2, 7 et 9 des politiques des commissions de transport portaient atteinte à leur liberté d'expression garantie à l'al. 2*b*) de la *Charte canadienne des droits et libertés*. Le juge de première instance a conclu que le droit des intimées à la liberté d'expression n'avait pas été violé et il a rejeté l'action. Les juges majoritaires de la Cour d'appel ont infirmé le jugement et déclaré inopérants les articles 7 et 9 des politiques publicitaires sur le fondement soit du par. 52(1) de la *Loi constitutionnelle de 1982*, soit du par. 24(1) de la *Charte*.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Abella, Charron et Rothstein : BC Transit et TransLink font toutes deux partie du « gouvernement » au sens de l'art. 32 de la *Charte*. Il appert de cette disposition que la *Charte* s'applique non seulement au Parlement, aux législatures et au gouvernement lui-même, mais aussi à tous les domaines relevant d'eux. Créature législative, BC Transit est désignée « mandataire du gouvernement » et ne peut fonctionner indépendamment du gouvernement provincial car ce dernier peut, par l'adoption de règlements, exercer un grand pouvoir sur ses activités quotidiennes. TransLink n'est pas un mandataire du gouvernement, mais elle est en grande partie assujettie au gouvernement local — le district régional de Vancouver —, de sorte qu'il s'agit d'une entité gouvernementale. Puisque les commissions de transport constituent des entités gouvernementales, toutes leurs activités, y compris l'exploitation des autobus qu'elles possèdent, sont assujetties à la *Charte*. [14] [17] [21] [24-25]

Il n'y a pas lieu de statuer sur l'allégation fondée sur l'al. 2*b*) en appliquant le cadre d'analyse établi dans l'arrêt *Baier*. Les politiques des commissions de transport n'empêchent pas les intimées de recourir au service publicitaire en tant que mode d'expression. Seul le contenu de leurs publicités est visé par une restriction. On ne peut donc affirmer qu'elles allèguent le caractère trop restreint de la tribune, non plus qu'elles revendiquent un droit positif. Les intimées ne demandent pas à l'État d'appuyer ou de permettre leur activité expressive par la mise à leur disposition d'un mode d'expression en particulier auquel l'accès leur serait refusé. Elles réclament la liberté de s'exprimer — à une tribune existante

interference with the content of their expression. [26] [32] [35]

In order to determine whether the expression should be denied s. 2(*b*) protection on the basis of location, the *City of Montréal* framework should be applied. This inquiry leads to the conclusion that the transit authorities' policies infringe the respondents' freedom of expression. The proposed advertisements have expressive content that brings them within the *prima facie* protection of s. 2(*b*), and the location of this expression — the sides of buses — does not remove that protection. Not only is there some history of use of this property as a space for public expression, but there is actual use — both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression. The space allows for expression by a broad range of speakers to a large public audience and expression there could actually further the values underlying s. 2(*b*). The side of a bus is therefore a location where expressive activity is protected by s. 2(*b*) of the *Charter*. Finally, the very purpose of the impugned policies is to restrict the content of expression in the advertising space on the sides of buses. The wording of articles 2 and 7 clearly limits the content of advertisements. Article 9 is even more precise in excluding political speech. [36-38] [42] [46]

The limits resulting from the policies are "limits prescribed by law" within the meaning of s. 1 of the *Charter*. Where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law". Here, a review of the enabling legislation suggests that the transit authorities' policies were adopted pursuant to statutory powers conferred on BC Transit and TransLink. Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding. The policies are not administrative in nature, as they are not meant for internal use as an interpretive aid for "rules" laid down in the legislative scheme. Rather, the policies are themselves rules that establish the rights of the individuals to whom they apply. Moreover, the policies can be said to be general in scope, since they establish standards which are applicable to all who want to take advantage of the advertising service rather than to a specific case. They therefore fall within the meaning of the word "law" for the purposes of s. 1 and satisfy the "prescribed by law" requirement as the transit

qu'elles ont le droit d'utiliser — sans que l'État ne limite indûment la teneur de leur expression. [26] [32] [35]

Pour déterminer si la protection de l'al. 2*b*) doit être refusée à l'expression en raison du lieu, il convient d'appliquer le cadre d'analyse de l'arrêt *Ville de Montréal*. La démarche mène à la conclusion que les politiques des commissions de transport portent atteinte à la liberté d'expression des intimées. Le contenu expressif des publicités projetées justifie leur protection *prima facie* par l'al. 2*b*), et le lieu d'expression — les côtés des autobus — n'a pas pour effet d'écarter cette protection. Il y a non seulement une certaine utilisation historique du bien en cause comme lieu d'expression publique, mais aussi une utilisation réelle à cette fin, deux facteurs permettant de conclure que l'activité expressive considérée ne nuit pas à la fonction première de l'autobus — le transport en commun — et, ce qui importe encore plus, qu'elle ne mine pas les valeurs qui sous-tendent la liberté d'expression. Le lieu permet à un grand nombre d'annonceurs de s'adresser à un large auditoire et pourrait en fait promouvoir les valeurs qui sous-tendent l'al. 2*b*) de la *Charte*. L'activité expressive sur le côté d'un autobus bénéficie donc de la protection prévue à cet alinéa. Enfin, l'objet même des politiques contestées est de limiter le contenu de l'expression dans l'espace publicitaire sur les côtés des autobus. Les articles 2 et 7 restreignent expressément le contenu de la publicité. L'article 9 le fait encore plus précisément en écartant le discours politique. [36-38] [42] [46]

Les restrictions découlant des politiques sont apportées « par une règle de droit » au sens de l'article premier de la *Charte*. Lorsqu'une politique gouvernementale est autorisée par la loi, qu'elle établit une norme générale se voulant obligatoire et qu'elle est suffisamment accessible et précise, il s'agit d'une règle de nature législative constituant une « règle de droit ». En l'espèce, il appert des lois habilitantes que les politiques des commissions de transport ont été adoptées en vertu des pouvoirs légaux conférés à BC Transit et à TransLink. Il paraît simplement logique que le législateur qui autorise l'adoption de règles par une entité gouvernementale veuille également, sauf indications contraires, que ces règles soient obligatoires. Les politiques ne sont pas de nature administrative puisqu'elles ne sont pas destinées à une application interne comme guide d'interprétation de « règles » établies par le régime législatif. Elles constituent elles-mêmes des règles établissant les droits des personnes qui y sont assujetties. De plus, on peut leur attribuer une portée générale en ce qu'elles fixent des normes qui s'appliquent à toute personne désireuse de se prévaloir du service publicitaire, et non dans certains cas particuliers. Elles sont donc assimilables à des « règles de droit »

authorities' advertising policies are both accessible and worded precisely enough to enable potential advertisers to understand what is prohibited. [65] [67] [71-73]

The limits resulting from the policies are not justified under s. 1 of the *Charter*. The policies were adopted for the purpose of providing "a safe, welcoming public transit system" and this is a sufficiently important objective to warrant placing a limit on freedom of expression. However, the limits on political content imposed by articles 2, 7 and 9 are not rationally connected to the objective. It is difficult to see how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. Moreover, the means chosen to implement the objective was neither reasonable nor proportionate to the respondents' interest in disseminating their messages pursuant to their right under s. 2(*b*) of the *Charter*. The policies amount to a blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse. They therefore do not constitute a minimal impairment of freedom of expression. Advertising on buses has become a widespread and effective means for conveying messages to the general public. In exercising their control over such advertising, the transit authorities have failed to minimize the impairment of political speech, which is at the core of s. 2(*b*) protection. To the extent that articles 2, 7 and 9 prohibit political advertising on the sides of buses, they place an unjustifiable limit on the respondents' right under s. 2(*b*) of the *Charter*. [76-77] [80]

With respect to remedy, the transit authorities' policies clearly come within the meaning of "law" for the purposes of s. 52(1) of the *Constitution Act, 1982*. The transit authorities used their delegated rule-making power to adopt policies which unjustifiably limited the respondents' freedom of expression. Those policies are binding rules of general application that establish the rights of members of the public who seek to advertise on the transit authorities' buses. Since ensuring the largest numbers of potential claimants and beneficiaries of a constitutional challenge is in keeping with the spirit of the supremacy of the *Charter*, the appropriate remedy for an invalid rule of general application is one under s. 52(1) of the *Constitution Act, 1982*, and not s. 24(1) of the *Charter*. As the transit authorities' advertising policies are "law" within the meaning of s. 52(1) of the *Constitution Act, 1982*, they are therefore declared

au sens de l'article premier et elles satisfont à l'exigence de la restriction « par une règle de droit » en ce qu'elles sont à la fois accessibles et formulées avec suffisamment de précision pour permettre aux annonceurs éventuels de comprendre ce qui est écarté. [65] [67] [71-73]

Les restrictions découlant des politiques ne sont pas justifiées au regard de l'article premier de la *Charte*. Les politiques ont été adoptées dans le but d'offrir « un réseau de transport en commun sûr et accueillant » et il s'agit d'un objectif suffisamment important pour justifier la restriction de la liberté d'expression. Toutefois, l'exclusion de tout contenu politique aux articles 2, 7 et 9 n'a pas de lien rationnel avec cet objectif. On conçoit mal que la présence d'un message politique sur le côté d'un autobus puisse rendre le transport en commun moins sûr ou moins accueillant pour les usagers. En outre, le moyen choisi pour réaliser l'objectif n'est ni raisonnable ni proportionné au droit des intimées d'exercer leur liberté d'expression garantie à l'al. 2*b*) de la *Charte* en diffusant leurs messages. Une forme d'expression à laquelle est attaché un grand prix est totalement exclue d'un espace public qui constitue un important lieu d'expression publique. Les politiques ne portent donc pas atteinte le moins possible à la liberté d'expression. On recourt désormais couramment à l'espace publicitaire des autobus pour communiquer efficacement de l'information au grand public. Dans l'exercice de leur pouvoir sur l'utilisation de cet espace, les commissions de transport n'ont pas respecté le critère de l'atteinte minimale à la liberté d'expression politique, laquelle est au cœur de la protection prévue à l'al. 2*b*). Dans la mesure où ils interdisent la publicité politique sur les côtés des autobus, les articles 2, 7 et 9 des politiques restreignent de manière injustifiée la liberté d'expression des intimées garantie à l'al. 2*b*) de la *Charte*. [76-77] [80]

Au chapitre de la réparation, les politiques des commissions de transport constituent clairement des « règles de droit » au sens du par. 52(1) de la *Loi constitutionnelle de 1982*. Les commissions de transport ont exercé leur pouvoir de réglementation délégué pour adopter des politiques qui restreignent de façon injustifiée la liberté d'expression des intimées. Leurs politiques sont des règles obligatoires d'application générale qui établissent les droits des citoyens d'utiliser l'espace publicitaire des autobus. Étant donné que l'élargissement du bassin des personnes susceptibles d'intenter un recours sur le fondement de la Constitution et des personnes susceptibles d'en bénéficier est conforme à l'esprit qui sous-tend la suprématie de la *Charte*, la réparation appropriée dans le cas d'une règle d'application générale invalide est celle qui prend appui sur le par. 52(1) de la *Loi constitutionnelle de 1982*, et non sur le par.

of no force or effect to the extent of their inconsistency. [89-90]

Per Fish J.: There is agreement that the transit authorities are subject to the *Charter*, that their advertising policies infringe s. 2(*b*) of the *Charter*, that this infringement cannot be justified under s. 1, and that the respondents are entitled to a declaration that the policies are of no force or effect. But there is disagreement with the analytical framework adopted in circumscribing freedom of expression under s. 2(*b*). [93] [100] [137]

Freedom of expression enjoys broad but not unbounded constitutional protection in Canada. It is subject to internal limits which allow government to curtail expressive activity that is inherently inconsistent with the object and purpose of s. 2(*b*), and it is subject as well to "external" limitation in virtue of s. 1 of the *Charter.* Two recognized internal limits are relied on by the transit authorities: the significant burden exception and the manifest incompatibility exception. Under the first, expressive activity will not normally be protected where it imposes on the government a significant burden of assistance, in the form of expenditure of public funds, or the initiation of a complex legislative, regulatory, or administrative scheme or undertaking. Government expenditures and initiatives may be undertaken to advance *Charter* rights and freedoms in innumerable ways, but given finite resources, it is generally considered to be a matter for the legislature and not the judiciary to determine which social priorities are to receive government assistance. Second, expressive activity will also fall outside the protected zone of s. 2(*b*) where it is manifestly incompatible with the purpose or function of the space in question. Governments should not bear the burden of strictly prescribing by law and justifying limits on those kinds of expression that are so obviously incompatible with the purpose or function of the space provided. Freedom of expression is also subject to an external limitation: even if an expressive activity falls within the protected zone of s. 2(*b*), it may be validly curtailed in virtue of s. 1 of the *Charter* pursuant "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". [95-98] [103] [105] [130-131]

24(1) de la *Charte*. Comme les politiques publicitaires des commissions de transport s'entendent de « règles de droit » au sens du par. 52(1) de la *Loi constitutionnelle de 1982*, elles peuvent par conséquent être déclarées inopérantes dans la mesure de leur incompatibilité. [89-90]

Le juge Fish : Certes les commissions de transport sont assujetties à la *Charte*, leurs politiques publicitaires portent atteinte au droit garanti à l'al. 2*b*) de la *Charte*, l'atteinte ne peut être justifiée au regard de l'article premier et les intimées ont droit à un jugement déclarant les politiques inopérantes, mais il convient d'appliquer un cadre d'analyse différent pour circonscrire la liberté d'expression que garantit l'al. 2*b*). [93] [100] [137]

Au Canada, la liberté d'expression jouit d'une protection constitutionnelle étendue, mais non illimitée. Elle fait l'objet de limitations internes qui permettent à l'État de restreindre l'activité expressive qui est intrinsèquement incompatible avec l'objet et la raison d'être de l'al. 2*b*), ainsi que d'une limitation « externe » découlant de l'article premier de la *Charte*. Les commissions de transport invoquent deux limitations internes reconnues : l'exception de l'obligation substantielle et celle de l'incompatibilité manifeste. Suivant la première exception, l'activité expressive n'est habituellement pas protégée lorsqu'elle impose à l'État une obligation d'aide substantielle, qu'il s'agisse de dépenser des fonds publics ou de mettre en branle un régime ou un projet complexe d'ordre législatif, réglementaire ou administratif. Des dépenses et des mesures gouvernementales peuvent être entreprises d'innombrables façons pour promouvoir les droits et libertés constitutionnels, mais vu la limitation des ressources disponibles, on considère généralement qu'il appartient au législateur, et non aux tribunaux, de déterminer les priorités sociales justifiant l'appui de l'État. Suivant la deuxième exception, la protection de l'al. 2*b*) ne sera refusée à l'activité expressive que lorsque celle-ci sera manifestement incompatible avec la raison d'être ou la fonction de l'espace en cause. L'État ne devrait pas être strictement tenu d'apporter une restriction dans une règle de droit et de la justifier lorsqu'elle vise un type d'expression qui est si clairement incompatible avec la raison d'être ou la fonction de l'espace offert. La liberté d'expression fait aussi l'objet d'une limitation externe : même lorsqu'elle bénéficie de la protection prévue à l'al. 2*b*), l'activité expressive peut, suivant l'article premier, être légitimement restreinte « 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 ». [95-98] [103] [105] [130-131]

Neither the significant burden nor the manifest incompatibility exception to the general rule of broad protection enshrined in s. 2(*b*) applies in this case. The respondents' request would not impose a significant burden on the transit authorities. Little change is needed to remove the infringing restrictions and the steps that would have to be taken require no meaningful expenditure of funds and no new operating initiatives of significance. They involve no administrative reorganization, restructuring or expansion that can reasonably be characterized as "burdensome". Also, advertisements conveying a political message are not incompatible — let alone manifestly incompatible — with a commercial and public service advertising facility. Having chosen to make the sides of buses available for expression on such a wide variety of matters, the transit authorities cannot, without infringing s. 2(*b*) of the *Charter*, arbitrarily exclude a particular kind or category of expression that is otherwise permitted by law. There is no inherent conflict between political advertisements on the sides of buses and orderly transportation. [97] [116-117] [121] [123]

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By Deschamps J.

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Ni l'exception de l'obligation substantielle ni celle de l'incompatibilité manifeste à la règle générale de la protection étendue que consacre l'al. 2*b*) ne s'appliquent en l'espèce. Faire droit à la demande des intimées n'imposerait pas une obligation substantielle aux commissions de transport. Peu de changements sont nécessaires pour supprimer les restrictions attentatoires, et les mesures requises n'exigent pas de dépenses importantes ni de grands changements sur le plan de l'exploitation. Ces mesures n'impliquent pas de réorganisation administrative, de restructuration ou d'expansion pouvant raisonnablement être qualifiée de « contraignante ». Aussi, la publicité renfermant un message politique n'est pas incompatible — et encore moins manifestement incompatible — avec un service publicitaire à vocation commerciale et publique. Après avoir permis que leurs véhicules servent de supports à l'expression sur une grande variété de sujets, les commissions de transport ne peuvent, sans violer la garantie prévue à l'al. 2*b*) de la *Charte*, écarter arbitrairement une sorte ou une catégorie particulière d'expression par ailleurs légale. Il n'y a pas de conflit intrinsèque entre la publicité politique sur les côtés des autobus et le transport sans heurts. [97] [116-117] [121] [123]

Jurisprudence

Citée par la juge Deschamps

Arrêt appliqué : *Montréal (Ville) c. 2952-1366 Québec Inc.*, 2005 CSC 62, [2005] 3 R.C.S. 141; **distinction d'avec l'arrêt :** *Baier c. Alberta*, 2007 CSC 31, [2007] 2 R.C.S. 673; **arrêts mentionnés :** *Lehman c. City of Shaker Heights*, 418 U.S. 298 (1974); *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Harrison c. Université de la Colombie-Britannique*, [1990] 3 R.C.S. 451; *Stoffman c. Vancouver General Hospital*, [1990] 3 R.C.S. 483; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139; *Ramsden c. Peterborough (Ville)*, [1993] 2 R.C.S. 1084; *Haig c. Canada*, [1993] 2 R.C.S. 995; *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *R. c. Therens*, [1985] 1 R.C.S. 613;

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APPEAL from a judgment of the British Columbia Court of Appeal (Southin, Prowse and Lowry JJ.A.), 2006 BCCA 529, 275 D.L.R. (4th) 221, [2007] 4 W.W.R. 575, 233 B.C.A.C. 81, 386 W.A.C. 81, 64 B.C.L.R. (4th) 29, 148 C.R.R. (2d) 203, [2006] B.C.J. No. 3042 (QL), 2006 CarswellBC 2887, reversing a decision of Halfyard J., 2006 BCSC 455, 266 D.L.R. (4th) 403, 139 C.R.R. (2d) 148, [2006] B.C.J. No. 729 (QL), 2006 CarswellBC 865. Appeal dismissed.

David F. Sutherland and *Clark Roberts*, for the appellant the Greater Vancouver Transportation Authority.

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Mark G. Underhill and *Catherine J. Boies Parker*, for the respondents.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Neena Sharma and *Jennifer J. Stewart*, for the intervener the Attorney General of British Columbia.

Ryan D. W. Dalziel and *Audrey Boctor*, for the intervener the Adbusters Media Foundation.

Chris W. Sanderson, *Q.C.*, and *Chelsea D. Wilson*, for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ. was delivered by

[1] Deschamps J. — Can government entities, in managing their property, disregard the right of individuals to political expression in public places? The appellant transit authorities answered this question in the affirmative and refused to post the respondents' political advertisements on the sides of buses on the basis that their advertising policies

Holland, Denys C., and John P. McGowan. *Delegated Legislation in Canada*. Toronto : Carswell, 1989.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Southin, Prowse et Lowry), 2006 BCCA 529, 275 D.L.R. (4th) 221, [2007] 4 W.W.R. 575, 233 B.C.A.C. 81, 386 W.A.C. 81, 64 B.C.L.R. (4th) 29, 148 C.R.R. (2d) 203, [2006] B.C.J. No. 3042 (QL), 2006 CarswellBC 2887, qui a infirmé une décision du juge Halfyard, 2006 BCSC 455, 266 D.L.R. (4th) 403, 139 C.R.R. (2d) 148, [2006] B.C.J. No. 729 (QL), 2006 CarswellBC 865. Pourvoi rejeté.

David F. Sutherland et *Clark Roberts*, pour l'appelante Greater Vancouver Transportation Authority.

George K. Macintosh, *c.r.*, et *Timothy Dickson*, pour l'appelante British Columbia Transit.

Mark G. Underhill et *Catherine J. Boies Parker*, pour les intimées.

Gaétan Migneault, pour l'intervenant le procureur général du Nouveau-Brunswick.

Neena Sharma et *Jennifer J. Stewart*, pour l'intervenant le procureur général de la Colombie-Britannique.

Ryan D. W. Dalziel et *Audrey Boctor*, pour l'intervenante Adbusters Media Foundation.

Chris W. Sanderson, *c.r.*, et *Chelsea D. Wilson*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Abella, Charron et Rothstein rendu par

[1] La juge Deschamps — Un organisme public peut-il gérer ses biens sans égard au droit des particuliers à l'expression politique dans un espace ou un endroit public? Les commissions de transport appelantes ont estimé qu'elles le pouvaient. Elles ont donc refusé de diffuser les publicités à caractère politique des intimées sur les côtés de leurs

permit commercial but not political advertising on public transit vehicles. This appeal raises the issues of whether those policies must comply with the *Canadian Charter of Rights and Freedoms* and, if so, whether they violate the respondents' right under s. 2(*b*) of the *Charter* to freedom of expression and whether such a breach can give rise to a declaration that the policies are invalid under s. 52 of the *Constitution Act, 1982*.

1. Facts and Judicial History

[2] The appellants, the Greater Vancouver Transportation Authority ("TransLink") and British Columbia Transit ("BC Transit"), are corporations that operate public transportation systems in British Columbia. TransLink is responsible for running the transit system in the area under the jurisdiction of the Greater Vancouver Regional District ("GVRD"), whereas BC Transit operates in British Columbia communities outside the GVRD. For years, the appellants (the "transit authorities") have earned revenue by posting advertisements on their buses.

[3] In the summer and fall of 2004, the respondents, the Canadian Federation of Students — British Columbia Component ("CFS") and the British Columbia Teachers' Federation ("BCTF"), attempted to purchase advertising space on the sides of buses operated by the transit authorities. The CFS, a society which represents thousands of college and university students in B.C., sought to encourage more young people to vote in a provincial election scheduled for May 17, 2005 by posting, on buses, advertisements about the election. The first advertisement, which was to run the length of the bus, would have depicted a silhouette of a crowd at a concert with the following text:

Register now. Learn the issues. Vote May 17, 2005.
ROCKTHEVOTEBC.com

The second advertisement was a "banner ad" placed along the top of the bus which would have read in one long line as follows:

autobus au motif que leurs politiques en la matière autorisaient la publicité commerciale, mais non la publicité politique, sur les véhicules de transport en commun. Le présent pourvoi soulève la question de savoir si ces politiques doivent respecter la *Charte canadienne des droits et libertés*. Dans l'affirmative, la Cour doit déterminer si les politiques portent atteinte à la liberté d'expression des intimées garantie à l'al. 2*b*) de la *Charte* et, le cas échéant, s'il y a lieu de les invalider en application de l'art. 52 de la *Loi constitutionnelle de 1982*.

1. Faits et historique des procédures judiciaires

[2] Les sociétés appelantes, Greater Vancouver Transportation Authority (« TransLink ») et British Columbia Transit (« BC Transit »), exploitent des réseaux de transport en commun en Colombie-Britannique. TransLink gère le réseau de transport dans le territoire qui relève du district régional de Vancouver (« DRV »), et BC Transit exerce ses activités ailleurs en Colombie-Britannique. Depuis des années, les appelantes (les « commissions de transport ») tirent des revenus de l'affichage d'annonces dans l'espace publicitaire de leurs autobus.

[3] À l'été et à l'automne 2004, les intimées, la Fédération canadienne des étudiantes et étudiants — Section Colombie-Britannique (« FCEE ») et la British Columbia Teachers' Federation (« BCTF »), ont tenté de louer l'espace publicitaire sur les côtés des autobus des commissions de transport. Représentant des milliers d'étudiants des niveaux collégial et universitaire en Colombie-Britannique, la FCEE voulait, au moyen de messages publicitaires affichés sur les autobus, inciter les jeunes à voter aux élections provinciales du 17 mai 2005. Dans la première publicité devant occuper toute la longueur de l'autobus, la silhouette d'une foule assistant à un concert était accompagnée du texte suivant :

[TRADUCTION] Inscrivez-vous maintenant. Renseignez-vous sur les enjeux. Votez le 17 mai 2005.
ROCKTHEVOTEBC.com

La deuxième publicité — une bande censée occuper la partie supérieure de l'autobus — comportait le texte suivant sur une seule et même ligne :

Tuition fees ROCKTHEVOTEBC.com Minimum wage ROCKTHEVOTEBC.com Environment ROCKTHEVOTE BC.com

The BCTF, a society and trade union which is the exclusive bargaining agent for more than 40,000 public school teachers in B.C., sought to voice its concern about changes in the public education system by posting the following message:

2,500 fewer teachers, 114 schools closed.
Your kids. Our students. Worth speaking out for.

[4] The transit authorities refused to post the respondents' advertisements on the basis that such advertisements were not permitted by their advertising policies. The transit authorities had adopted essentially identical advertising policies, which included the following provisions:

POLICY:

. . .

2. Advertisements, to be accepted, shall be limited to those which communicate information concerning goods, services, public service announcements and public events.

. . .

Standards and Limitations

. . .

7. No advertisement will be accepted which is likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy;

. . .

9. No advertisement will be accepted which advocates or opposes any ideology or political philosophy, point of view, policy or action, or which conveys information about a political meeting, gathering or event, a political party or the candidacy of any person for a political position or public office;

[TRADUCTION] Frais de scolarité ROCKTHEVOTE BC.com Salaire minimum ROCKTHEVOTEBC.com Environnement ROCKTHEVOTEBC.com

Pour sa part, la BCTF, organisation syndicale et unique agent de négociation de plus de 40 000 enseignants de la Colombie-Britannique, voulait faire connaître son inquiétude au sujet de changements survenus dans le système d'éducation public. Son message était le suivant :

[TRADUCTION] 2 500 enseignants en moins. 114 écoles fermées.
Vos enfants. Nos élèves. Ça vaut la peine de se faire entendre.

[4] Les commissions de transport ont refusé les messages des intimées au motif que leur diffusion était contraire à leurs politiques publicitaires. Chacune de ces politiques essentiellement identiques comportait les dispositions suivantes :

[TRADUCTION]

POLITIQUE :

. . .

2. Seule est acceptée la publicité qui communique de l'information sur des biens, des services, des messages d'intérêt public et des événements publics.

. . .

Conditions et restrictions

. . .

7. Est exclue toute publicité susceptible, au regard des normes sociales reconnues, d'offenser une personne ou un groupe de personnes ou de susciter la controverse.

. . .

9. Est exclue toute publicité qui promeut ou conteste une idéologie ou une philosophie politique, un point de vue, une politique ou une mesure, ou qui renseigne sur une assemblée, un rassemblement ou un événement politique, un parti politique ou la candidature d'une personne à une fonction politique ou à une charge publique.

[5] The respondents commenced the present action, alleging that articles 2, 7 and 9 of the transit authorities' policies had violated their right to freedom of expression guaranteed by s. 2(*b*) of the *Charter*. The respondents restricted their claim for relief to a declaration, "pursuant to s. 52 of the *Constitution Act, 1982*, that [articles] 2, 7 and 9 of the advertising policies are unconstitutional and of no force and effect".

[6] Halfyard J. of the British Columbia Supreme Court dismissed the action (2006 BCSC 455, 266 D.L.R. (4th) 403). He determined that both BC Transit and TransLink were subject to the *Charter* since they were "government" within the meaning of s. 32 of the *Charter*. However, he concluded, on the basis of the factors set out in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 ("*City of Montréal*"), and in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), that the respondents' right to freedom of expression had not been infringed. In his view, since there was no history of permitting political or advocacy advertising on the sides of buses, the location was not a "public place".

[7] Halfyard J. went on to state that, had he found that the transit authorities' policies infringed the respondents' freedom of expression, he would have concluded that the total ban on political and other advocacy advertising was not a reasonably minimal impairment of freedom of expression and that the alleged benefits of the advertising restrictions did not outweigh their detrimental effects. Nevertheless, he would have found that the advertising policies failed the s. 1 test on the basis that the limits they imposed were not limits prescribed by law.

[8] The British Columbia Court of Appeal reversed the trial judgment (2006 BCCA 529, 64 B.C.L.R. (4th) 29). On the question of freedom of expression, Prowse J.A., writing for the majority, concluded that the trial judge had erred in finding that the transit authorities' advertising policies did not infringe the respondents' right to freedom of expression. In her view, Halfyard J. had

[5] Dans l'action à l'origine du présent pourvoi, les intimées ont allégué que les articles 2, 7 et 9 des politiques des commissions de transport avaient porté atteinte à leur liberté d'expression garantie à l'al. 2*b*) de la *Charte*. Elles n'ont demandé, à titre de réparation, qu'un jugement [TRADUCTION] « fondé sur l'art. 52 de la *Loi constitutionnelle de 1982* déclarant inconstitutionnels et inopérants les articles 2, 7 et 9 des politiques publicitaires ».

[6] Le juge Halfyard de la Cour suprême de la Colombie-Britannique les a déboutées (2006 BCSC 455, 266 D.L.R. (4th) 403). Il a statué que BC Transit et TransLink étaient assujetties à la *Charte* puisqu'elles faisaient partie du « gouvernement » au sens de l'art. 32 de la *Charte*, mais que le droit des intimées à la liberté d'expression n'avait pas été violé au regard des facteurs énoncés dans l'arrêt *Montréal (Ville) c. 2952-1366 Québec Inc.*, 2005 CSC 62, [2005] 3 R.C.S. 141 (« *Ville de Montréal* »), et dans la décision *Lehman c. City of Shaker Heights*, 418 U.S. 298 (1974). À son avis, le côté d'un autobus ne constituait pas un « espace public » parce que la publicité politique ou partisane n'y avait jamais été autorisée.

[7] Le juge Halfyard a ajouté que si les politiques des commissions de transport avaient violé le droit à la liberté d'expression des intimées, l'interdiction totale de la publicité politique ou partisane n'aurait pas constitué une atteinte raisonnablement minimale à la liberté d'expression, et les avantages allégués de la limitation de la publicité ne l'auraient pas emporté sur ses effets préjudiciables. Il aurait en outre conclu que les politiques publicitaires ne résistaient pas à l'analyse fondée sur l'article premier puisque, selon lui, les restrictions qu'elles prévoyaient n'étaient pas apportées par une règle de droit.

[8] La Cour d'appel de la Colombie-Britannique a infirmé le jugement de première instance (2006 BCCA 529, 64 B.C.L.R. (4th) 29). Au sujet de la liberté d'expression, la juge Prowse a estimé au nom des juges majoritaires que le juge de première instance avait commis une erreur en concluant que les politiques publicitaires des commissions de transport ne violaient pas le droit à la liberté d'expression

erred, in applying *City of Montréal*, in considering the content of the advertisement and had mistakenly elevated the historical use of the sides of buses from a potential indicator that a place is a "public place" to an actual prerequisite for finding that it is. According to Prowse J.A., BC Transit and TransLink had a history of permitting advertising on their buses, and expression in this location could not therefore be viewed as inimical to the function of the buses as vehicles for public transportation.

[9] Regarding s. 1 of the *Charter*, Prowse J.A. declined to embark on her own analysis of whether the transit authorities' policies were "law" within the meaning of s. 1, and she neither accepted nor rejected the trial judge's finding on the issue. She felt that it was inappropriate to engage in this discussion given that the parties' submissions on s. 1 were insufficient. On a similar basis, she chose not to rule definitively on the issues of remedy, merely stating that if the policies were "law" within the meaning of s. 1, she could make an order under s. 52, and if they were not "law", she also had jurisdiction under s. 24(1) to make a similar order. Thus, she declared, without identifying the remedial provision upon which her order was actually based, that articles 7 and 9 of the advertising policies were of no force or effect. Although the validity of article 2 was raised before the trial judge, it was not referred to in the conclusion of the Court of Appeal.

[10] Southin J.A., dissenting, would have dismissed the appeal. In her view, what was at issue was the freedom of expression of both the transit authorities and the respondents. According to Southin J.A.'s interpretation, s. 2(*b*) includes a freedom not to publish a message or, in other words, it does not confer a right of access to "media of communication". Furthermore, in her view, there were no signs of state oppression in the transit authorities' refusal to post the respondents' advertisements.

des intimées. Selon elle, le juge Halfyard avait eu tort d'appliquer l'arrêt *Ville de Montréal* en tenant compte de la teneur de la publicité et en considérant l'utilisation antérieure des côtés des autobus non plus comme un simple indice possible du caractère public d'un espace, mais comme une condition essentielle à une conclusion en ce sens. À ses yeux, BC Transit et TransLink ayant déjà autorisé la publicité sur leurs autobus, on ne pouvait alors considérer que l'expression y était incompatible avec la fonction des véhicules, à savoir le transport en commun.

[9] Pour ce qui est de l'article premier de la *Charte*, la juge Prowse a refusé d'entreprendre sa propre analyse quant à savoir si la politique de chacune des commissions de transport constituait une « règle de droit ». Elle n'a ni accepté ni rejeté la conclusion du juge de première instance sur ce point. Cette analyse lui a paru inopportune, car les prétentions des parties portant sur l'article premier étaient insuffisantes. Pour les mêmes raisons, elle a décidé de ne pas se prononcer de façon définitive sur la question de la réparation, se contentant de dire que si chacune des politiques constituait une « règle de droit » au sens de l'article premier, elle pourrait rendre l'ordonnance en application de l'art. 52 et, dans le cas contraire, elle pourrait se prévaloir du par. 24(1) pour rendre une ordonnance au même effet. Sans préciser la disposition réparatrice en vertu de laquelle elle le faisait, elle a donc déclaré inopérants les articles 7 et 9 de chacune des politiques publicitaires. Bien que la validité de l'article 2 ait été soulevée devant le juge de première instance, la conclusion de la Cour d'appel ne mentionne pas cet article.

[10] Dissidente, la juge Southin aurait rejeté l'appel. À son avis, le litige opposait la liberté d'expression des commissions de transport à celle des intimées. Suivant son interprétation, l'al. 2*b*) comprenait la liberté de ne pas diffuser un message ou, en d'autres termes, il ne conférait aucun droit d'accès aux « moyens de communication ». En outre, elle ne voyait aucune manifestation d'oppression par l'État dans le refus des commissions de transport de diffuser les publicités des intimées.

[11] The transit authorities sought and were granted leave to appeal to this Court with respect to the constitutional validity of articles 2, 7 and 9 of the transit authorities' policies.

2. Issues

[12] There are four issues in this appeal: (1) whether the entities which operate the public transit systems in the GVRD and elsewhere in British Columbia are subject to the *Charter*; (2) if so, whether the impugned policies adopted by these entities infringe the respondents' right to freedom of expression; (3) if so, whether the limits imposed by those policies are "reasonable limits prescribed by law" within the meaning of s. 1 of the *Charter*; and (4) whether a declaration can be made under s. 52 of the *Constitution Act, 1982* with respect to the policies.

3. Analysis

3.1 *Section 32 of the Charter: The Principles*

[13] Section 32 identifies the entities to which the *Charter* applies. It reads:

> **32.** (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[14] On the face of the provision, the *Charter* applies not only to Parliament, the legislatures and the government themselves, but also to all matters within the authority of those entities. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, La Forest J. explained the rationale for the broad reach of s. 32 as follows (at para. 48):

> Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those

[11] Les commissions de transport ont obtenu la permission d'en appeler devant notre Cour concernant la validité constitutionnelle des articles 2, 7 et 9 de leurs politiques publicitaires.

2. Questions en litige

[12] Quatre questions sont en litige. Premièrement, les sociétés qui exploitent les réseaux de transport en commun dans le DRV et ailleurs en Colombie-Britannique sont-elles assujetties à la *Charte*? Deuxièmement, dans l'affirmative, les politiques contestées adoptées par les sociétés portent-elles atteinte au droit à la liberté d'expression des intimées? Troisièmement, dans l'affirmative, chacune de ces politiques constitue-t-elle une « règle de droit » établissant des limites raisonnables au sens de l'article premier de la *Charte*? Et quatrièmement, ces politiques peuvent-elles faire l'objet d'un jugement déclaratoire fondé sur l'art. 52 de la *Loi constitutionnelle de 1982*?

3. Analyse

3.1 *Les principes sous-tendant l'art. 32 de la Charte*

[13] L'article 32, qui détermine l'assujettissement à la *Charte*, est libellé comme suit :

> **32.** (1) La présente charte s'applique :
>
> *a*) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;
>
> *b*) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

[14] Il appert de cette disposition que la *Charte* s'applique non seulement au Parlement, aux législatures et au gouvernement lui-même, mais aussi à tous les domaines relevant d'eux. Dans l'arrêt *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, le juge La Forest explique la raison d'être de la grande portée de l'art. 32 (par. 48) :

> Si la *Charte* devait en effet ne s'appliquer qu'aux organismes faisant institutionnellement partie du

that are — as a simple matter of fact — governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender. [Emphasis added.]

[15] In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J. reviewed the position the Court had taken in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (university), *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (university), *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 (hospital), *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (college), and *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 (college), on the issue of the status of various entities as "government". Writing for a unanimous Court, he summarized the applicable principles as follows (at para. 44):

. . . the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a

gouvernement et non à ceux qui sont de nature gouvernementale (ou qui accomplissent des actes gouvernementaux) dans les faits, le gouvernement fédéral et les provinces pourraient facilement se soustraire aux obligations que la *Charte* leur impose en octroyant certains de leurs pouvoirs à d'autres entités et en leur faisant exécuter des fonctions ou appliquer des politiques qui sont, en réalité, gouvernementales. Autrement dit, le Parlement, les législatures provinciales et la branche exécutive des gouvernements fédéral ou provinciaux n'auraient qu'à créer des organismes distincts d'eux et à leur conférer le pouvoir d'exécuter des fonctions gouvernementales pour échapper aux contraintes que la *Charte* impose à leurs activités. De toute évidence, cette façon de faire réduirait indirectement la portée de la protection prévue par la *Charte* d'une manière que le législateur pourrait difficilement avoir voulue et entraînerait des conséquences pour le moins indésirables. En effet, compte tenu de leur importance fondamentale, les droits garantis par la *Charte* doivent être protégés contre toute tentative visant à en réduire indûment la portée ou à échapper complètement aux obligations qui en découlent. [Je souligne.]

[15] Dans l'arrêt *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, le juge La Forest s'est penché sur le point de vue adopté par la Cour dans les arrêts *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229 (université), *Harrison c. Université de la Colombie-Britannique*, [1990] 3 R.C.S. 451 (université), *Stoffman c. Vancouver General Hospital*, [1990] 3 R.C.S. 483 (hôpital), *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570 (collège), et *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211 (collège), au sujet du caractère « gouvernemental » de diverses entités. Au nom des juges unanimes de la Cour, il résume comme suit les principes applicables (par. 44) :

. . . il peut être jugé que la *Charte* s'applique à une entité pour l'une ou l'autre des deux raisons suivantes. Premièrement, il peut être décidé que l'entité elle-même fait partie du « gouvernement » au sens de l'art. 32. Une telle conclusion requiert l'examen de la question de savoir si l'entité dont les actes ont suscité l'allégation d'atteinte à la *Charte* peut — soit de par sa nature même, soit à cause du degré de contrôle exercé par le gouvernement sur elle — être à juste titre considérée comme faisant partie du « gouvernement » au sens du par. 32(1). En pareil cas, toutes les activités de l'entité sont assujetties à la *Charte*,

non-governmental actor, correctly be described as "private". Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

indépendamment du fait que l'activité en cause pourrait à juste titre être qualifiée de « privée » si elle était exercée par un acteur non gouvernemental. Deuxièmement, une activité particulière d'une entité peut être sujette à révision en vertu de la *Charte* si cette activité peut être attribuée au gouvernement. Il convient alors d'examiner non pas la nature de l'entité dont l'activité est contestée, mais plutôt la nature de l'activité elle-même. Autrement dit, il faut, en pareil cas, s'interroger sur la qualité de l'acte en cause plutôt que sur la qualité de l'acteur. Si l'acte est vraiment de nature « gouvernementale » — par exemple, la mise en œuvre d'un régime légal ou d'un programme gouvernemental donné — l'entité qui en est chargée est assujettie à l'examen fondé sur la *Charte*, mais seulement en ce qui a trait à cet acte, et non à ses autres activités privées.

[16] Thus, there are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*.

[16] Deux avenues s'offrent donc pour déterminer si la *Charte* s'applique aux activités d'une entité : l'examen de la nature de l'entité ou celui de ses activités. Si on conclut que l'entité fait partie du « gouvernement », soit par sa nature même, soit à cause du pouvoir substantiel que l'État exerce sur elle, toutes ses activités sont assujetties à la *Charte*. Si l'entité comme telle ne fait pas partie du gouvernement, mais qu'elle exerce tout de même des activités gouvernementales, seules les activités pouvant être qualifiées de gouvernementales par nature sont assujetties à la *Charte*.

3.1.1 Application of the Principles to the Transit Authorities

3.1.1 Application des principes aux commissions de transport

[17] In this Court, BC Transit does not address the trial judge's conclusion that it is itself "government" within the meaning of s. 32 of the *Charter*. It is clearly a government entity. It is a statutory body designated by legislation as an "agent of the government", with a board of directors whose members are all appointed by the Lieutenant Governor in Council (*British Columbia Transit Act*, R.S.B.C. 1996, c. 38, ss. 2(5) and 4(1)). Moreover, the Lieutenant Governor in Council has the power to manage BC Transit's affairs and operations by means of regulations (s. 32(2)). Thus, BC Transit cannot be said to be operating autonomously from the provincial government, since the latter has the power to exercise substantial control over its day-to-day activities.

[17] Devant notre Cour, BC Transit n'a formulé aucune observation concernant la conclusion du juge de première instance selon laquelle elle fait elle-même partie du « gouvernement » au sens de l'art. 32 de la *Charte*. Il s'agit clairement d'une entité gouvernementale par nature. Créature législative, elle est désignée [TRADUCTION] « mandataire du gouvernement » et dotée d'un conseil d'administration dont les membres sont tous nommés par le lieutenant-gouverneur en conseil (*British Columbia Transit Act*, R.S.B.C. 1996, ch. 38, par. 2(5) et 4(1)). En outre, ce dernier a le pouvoir de diriger les activités de BC Transit par l'adoption de règlements (par. 32(2)). BC Transit ne peut donc pas être considérée comme une entité indépendante du gouvernement provincial, car ce dernier a un grand pouvoir sur son fonctionnement quotidien.

[18] As for TransLink, it argues that the trial judge and the majority of the Court of Appeal erred in finding that it is "government" within the meaning of s. 32 of the *Charter*. Prowse J.A. found that because TransLink is controlled by the GVRD, which itself is "government" within the meaning of s. 32, it is an apparatus of government. She based her finding that the GVRD was governmental in nature on s. 5 of the *Local Government Act*, R.S.B.C. 1996, c. 323 ("LGA"), which defines "local government" as "the council of a municipality" and "the board of a regional district". She added that regional districts are corporations (s. 173), that they are governed by boards (s. 174) and that the boards consist of municipal directors and electoral area directors (s. 783(1)). Furthermore, the LGA describes regional districts as "independent, responsible and accountable order[s] of government within their jurisdiction" and states that a regional district is intended to provide "good government for its community" (s. 2(a)). The GVRD therefore clearly falls within the definition of "local government".

[18] Pour sa part, TransLink prétend que le juge de première instance et les juges majoritaires de la Cour d'appel ont conclu à tort qu'elle fait partie du « gouvernement » au sens de l'art. 32 de la *Charte*. La juge Prowse est arrivée à la conclusion que TransLink appartient à l'appareil gouvernemental parce qu'elle relève du DRV, qui fait lui-même partie du « gouvernement » au sens de l'art. 32. Sa conclusion que le DRV est par nature assimilable au gouvernement repose sur l'art. 5 de la *Local Government Act*, R.S.B.C. 1996, ch. 323 (« LGA »), suivant lequel [TRADUCTION] « gouvernement local » s'entend du « conseil d'une municipalité » et du « conseil d'un district régional ». La juge a en outre fait observer qu'un district régional est une société (art. 173), que dirige un conseil (art. 174), lui-même composé d'administrateurs municipaux et d'administrateurs de secteurs électoraux (par. 783(1)). De plus, la LGA dispose que le district régional est un [TRADUCTION] « palier de gouvernement indépendant et responsable sur son territoire » et que sa raison d'être est de veiller au [TRADUCTION] « bon gouvernement dans l'intérêt de la collectivité » (al. 2a)). Le DRV est donc clairement un « gouvernement local ».

[19] One might add to the criteria upon which Prowse J.A. based her conclusion the facts that, subject to specific limitations established in the LGA, a regional district may operate any service that the board considers necessary or desirable for its geographic area (s. 796(1)), and that it may recover the costs of its services (s. 803(1)). Moreover, the board of a regional district has the power to make bylaws which are enforceable by fine or by imprisonment (s. 266(1)). Consequently, not only is the GVRD designated as "government" in the LGA, but the legislature has granted it powers consistent with that status.

[19] On pourrait ajouter aux critères invoqués par la juge Prowse le fait que, sous réserve des restrictions particulières établies en vertu de la LGA, un district régional peut exploiter tout service que le conseil juge nécessaire ou souhaitable sur son territoire (par. 796(1)) et recouvrer le coût de ses services (par. 803(1)). Par ailleurs, son conseil peut prendre des règlements et les faire respecter au moyen d'amendes ou de peines d'emprisonnement (par. 266(1)). Ainsi, le DRV fait non seulement partie du « gouvernement » suivant la LGA, mais le législateur lui accorde des pouvoirs en conséquence.

[20] Having established that the GVRD is "government", Prowse J.A. went on to conclude that the GVRD exercises substantial control over TransLink:

[20] Après avoir déterminé que le DRV fait partie du « gouvernement », la juge Prowse conclut qu'il exerce un grand pouvoir sur TransLink :

. . . the GVRD has substantial control over the day-to-day operations of TransLink which, when combined with the GVRD's powers to appoint the vast majority of

[TRADUCTION] . . . le DRV exerce sur le fonctionnement quotidien de TransLink un grand pouvoir qui, jumelé à celui de nommer la grande majorité des membres du

the members of TransLink's board of directors, satisfies the control test posited by the authorities. To the extent that the GVRD does not have complete control over TransLink, control is shared by the provincial government. In either case, I conclude that TransLink cannot be viewed to be operating independently or autonomously in a manner similar to either universities or hospitals. It has no independent agenda other than that provided in its constituent *Act* and no history of being an entity independent of government. [para. 93]

[21] Prowse J.A. came to this conclusion after reviewing the *Greater Vancouver Transportation Authority Act*, S.B.C. 1998, c. 30, and remarking that the GVRD must appoint 12 of the 15 directors on TransLink's board (s. 8(1) and (2)) and must ratify TransLink's strategic transportation plan (s. 14(4)), that TransLink must "prepare all its capital and service plans and policies and carry out all its activities and services in a manner that is consistent with its strategic transportation plan" (s. 14(3)), and that the GVRD must ratify bylaws relating to a variety of taxes and levies (ss. 25(3), 29(5), 29.1(5) and 133(5)). Although TransLink is not an agent of the government, Prowse J.A. concluded that it is substantially controlled by a local government entity — the GVRD — and is therefore itself a government entity. The control mechanisms are substantial, and I agree with Prowse J.A.'s analysis and conclusion on this issue.

[22] The conclusion that TransLink is a government entity is also supported by the principle enunciated by La Forest J. in *Eldridge* (at para. 42) and *Godbout* (at para. 48) that a government should not be able to shirk its *Charter* obligations by simply conferring its powers on another entity. The creation of TransLink by statute in 1998 and the partial vesting by the province of control over the region's public transit system in the GVRD was not a move towards the privatization of transit services, but an administrative restructuring designed to place more power in the hands of local governments (B.C.C.A. reasons, at paras. 75-79). The devolution of provincial responsibilities for public transit to the GVRD cannot therefore be viewed as having created a "*Charter*-free" zone for the public transit system in Greater Vancouver.

conseil d'administration, satisfait au critère établi par la jurisprudence. Dans la mesure où TransLink ne relève pas entièrement du DRV, elle relève aussi en partie du gouvernement provincial. Dans un cas comme dans l'autre, j'arrive à la conclusion que TransLink ne peut être considérée comme une entité exerçant ses activités de façon indépendante à l'instar d'une université ou d'un hôpital. Elle n'a pas d'autres objectifs que ceux prévus dans sa loi constitutive et elle n'a jamais constitué une entité indépendante du gouvernement. [par. 93]

[21] La juge Prowse arrive à cette conclusion après avoir constaté que suivant la *Greater Vancouver Transportation Authority Act*, S.B.C. 1998, ch. 30, le DRV nomme 12 des 15 administrateurs de TransLink (par. 8(1) et (2)) et ratifie son plan stratégique de transport (par. 14(4)), TransLink [TRADUCTION] « établit ses plans et ses politiques en matière d'immobilisations et de services, exerce ses activités et offre ses services conformément à son plan stratégique de transport » (par. 14(3)) et le DRV ratifie les règlements se rapportant à divers taxes et prélèvements (par. 25(3), 29(5), 29.1(5) et 133(5)). TransLink n'est pas un mandataire du gouvernement mais, pour la juge Prowse, elle est en grande partie assujettie au gouvernement local — le DRV —, de sorte qu'il s'agit d'une entité gouvernementale. Les indices de cet assujettissement sont importants, et je suis d'accord avec l'analyse et la conclusion de la juge Prowse sur ce point.

[22] Le principe énoncé par le juge La Forest dans les arrêts *Eldridge* (par. 42) et *Godbout* (par. 48) — le gouvernement ne devrait pas pouvoir se soustraire aux obligations que lui impose la *Charte* en octroyant simplement ses pouvoirs à une autre entité — étaye également la conclusion que TransLink est une entité gouvernementale. La création légale de TransLink en 1998 et le transfert partiel au DRV du pouvoir de la province sur le réseau de transport en commun de la région ne visaient pas la privatisation des services de transport, mais plutôt la réorganisation administrative par l'octroi de pouvoirs accrus aux gouvernements locaux (motifs de la Cour d'appel, par. 75-79). On ne saurait donc conclure que ce transfert de pouvoirs provinciaux au DRV a soustrait le réseau de transport en commun du Grand Vancouver à l'application de la *Charte*.

[23] At this point, I should mention that the legislation considered by the courts below has been repealed since the time of the events at issue in this case. Pursuant to the *South Coast British Columbia Transportation Authority Act*, S.B.C. 1998, c. 30, TransLink's activities are now conducted by the South Coast British Columbia Transportation Authority. The provisions of the new statute are not before the Court, and I need not comment on them here.

[24] In summary, both BC Transit and TransLink are "government" within the meaning of s. 32 of the *Charter*. Consequently, it is not necessary to enquire into the nature of individual activities, because all their activities are subject to the *Charter*, regardless of whether a given activity can correctly be described as "private" (*Eldridge*, at para. 44).

3.2 *Section 2(b) of the Charter*

[25] Since I have established that, for the purposes of s. 32 of the *Charter*, the transit authorities are government entities, it follows that the *Charter* applies to all their activities, including the operation of the buses they own. As I mentioned above, the transit authorities have earned revenues from advertising posted on their buses for years. BC Transit has permitted advertising inside its buses since the 1980s and on the outsides for over a decade, and TransLink has permitted advertising on the outsides of its buses ever since it came into existence in 1998. The transit authorities' policies, which regulate both the content and the form of advertisements, are at the heart of the debate. The respondents sought to post various advertisements on the sides of buses, and their requests were rejected by the transit authorities on the basis that articles 2, 7 and 9 of the policies prohibited political advertisements or advertisements of a controversial nature.

[26] The respondents submit that articles 2, 7 and 9 unjustifiably infringe their rights under s. 2(*b*) of the *Charter*. In the respondents' view, their claim centres on the use of government property for public expression without undue state interference with the content of their expression, and should

[23] Signalons au passage que les dispositions législatives considérées par les tribunaux inférieurs ont été abrogées depuis les événements à l'origine du litige. La *South Coast British Columbia Transportation Authority Act*, S.B.C. 1998, ch. 30, confie désormais les activités de TransLink à South Coast British Columbia Transportation Authority. Les dispositions de la nouvelle loi ne sont pas visées par le présent pourvoi, et il n'y a pas lieu de les commenter.

[24] En résumé, BC Transit et TransLink font toutes deux partie du « gouvernement » au sens de l'art. 32 de la *Charte*. Il n'est donc pas nécessaire d'examiner la nature de chacune de leurs activités, car elles sont toutes assujetties à la *Charte*, peu importe qu'elles puissent à juste titre être qualifiées de « privées » (arrêt *Eldridge*, par. 44).

3.2 *L'alinéa 2b) de la Charte*

[25] Puisque les commissions de transport constituent des entités gouvernementales aux fins de l'art. 32 de la *Charte*, toutes leurs activités, y compris l'exploitation des autobus qu'elles possèdent, sont assujetties à la *Charte*. Je rappelle que depuis des années, les commissions de transport tirent des revenus de la publicité sur les autobus. BC Transit autorise la publicité à l'intérieur des véhicules depuis les années 1980 et à l'extérieur depuis plus d'une décennie. TransLink autorise la publicité sur la partie extérieure des autobus depuis sa création en 1998. Les commissions de transport réglementent le contenu et la forme de la publicité. Leurs politiques en la matière sont au cœur du litige. Les intimées ont demandé l'affichage de différentes publicités sur les côtés des autobus, et les commissions de transport ont refusé au motif que les articles 2, 7 et 9 de leur politique respective interdisaient la publicité politique ou celle prêtant à controverse.

[26] Les intimées soutiennent que les articles 2, 7 et 9 portent indûment atteinte aux droits que leur garantit l'al. 2*b*) de la *Charte*. Elles disent revendiquer le droit à l'utilisation de biens gouvernementaux aux fins d'expression publique sans restriction injustifiée de la teneur de leur expression par l'État, de

therefore be resolved using the analysis for public space expression set out by this Court in *City of Montréal*. The transit authorities counter that the respondents are seeking to gain access to a particular platform for expression and that they are invoking the *Charter* to place these government entities under a positive obligation to make buses available for their expression. More specifically, BC Transit describes the respondents' claim as one of underinclusion on the basis that they are seeking to have the scope of the advertising service extended to include political advertising. In addition, both BC Transit and TransLink characterize the claim as a positive rights claim on the basis that the respondents cannot engage in the expression at issue without their support or enablement. Accordingly, the transit authorities state that the claim should be resolved using the framework set out in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, rather than by applying the *City of Montréal* test, as the trial judge and the majority of the Court of Appeal have done in the case at bar.

[27] This Court has long taken a generous and purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charter* (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295). It has not departed from this general principle in the context of s. 2(*b*): *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 588; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 748-49 and 766-67; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697. An activity by which one conveys or attempts to convey meaning will *prima facie* be protected by s. 2(*b*) (*Irwin Toy*, at pp. 968-69). Furthermore, the Court has recognized that s. 2(*b*) protects an individual's right to express him or herself in certain public places (*Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (airports); *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 (utility poles); and *City of Montréal*, at para. 61 (city streets)). Therefore, not only is expressive activity *prima facie* protected, but so too is the right to such activity in certain public locations (*City of Montréal*, at para. 61).

sorte que la question devrait être tranchée en fonction du cadre d'analyse établi par notre Cour dans l'arrêt *Ville de Montréal* relativement à l'expression dans un espace ou un endroit public. Les commissions de transport rétorquent que les intimées revendiquent plutôt l'accès à une tribune particulière et qu'elles invoquent la *Charte* pour imposer à l'État l'obligation positive de mettre les autobus à leur disposition aux fins d'expression. Plus précisément, BC Transit estime que les intimées plaident la restriction excessive puisqu'elles demandent que la publicité acceptée englobe celle dont la teneur est politique. De plus, pour BC Transit et TransLink, il s'agit de la revendication d'un droit positif en ce que les intimées ne peuvent s'exprimer comme elles le veulent sans que les appelantes appuient l'activité expressive ou la permettent. De l'avis des commissions de transport, il faudrait donc trancher en fonction du cadre d'analyse que la Cour a établi dans l'arrêt *Baier c. Alberta*, 2007 CSC 31, [2007] 2 R.C.S. 673, et non appliquer le test de l'arrêt *Ville de Montréal* comme l'ont fait en l'espèce le juge de première instance et les juges majoritaires de la Cour d'appel.

[27] Depuis longtemps, la Cour interprète de manière généreuse et téléologique les droits et libertés garantis par la *Charte* (*Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295). Son interprétation de l'al. 2*b*) ne fait pas exception : *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, p. 588; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, p. 748-749 et 766-767; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697. L'activité par laquelle on transmet ou tente de transmettre un message bénéficie de prime abord de la protection de l'al. 2*b*) (*Irwin Toy*, p. 968-969). De plus, la Cour a reconnu que l'al. 2*b*) protège le droit individuel de s'exprimer dans certains endroits ou espaces publics (*Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139 (aéroport); *Ramsden c. Peterborough (Ville)*, [1993] 2 R.C.S. 1084 (poteau électrique); *Ville de Montréal*, par. 61 (voie publique)). La *Charte* protège donc de prime abord non seulement l'activité expressive, mais aussi le droit de l'exercer dans certains lieux publics (*Ville de Montréal*, par. 61).

[28] However, s. 2(*b*) of the *Charter* is not without limits and governments will not be required to justify every restriction on expression under s. 1 (*Baier*, at para. 20). The method or location of expression may exclude it from protection: for example, violent expression or threats of violence fall outside the scope of the s. 2(*b*) guarantee, and individuals do not have a constitutional right to express themselves on *all* government property.

[29] As well, although s. 2(*b*) protects everyone from undue government interference with expression, it generally does not go so far as to place the government under an obligation to facilitate expression by providing individuals with a particular *means* of expression (*Haig v. Canada*, [1993] 2 S.C.R. 995). Thus, where the government creates such a means, it is generally entitled to determine which speakers are allowed to participate. A speaker who is excluded from such means does not have a s. 2(*b*) right to participate unless she or he meets the criteria set out in *Baier*. Of course, other constitutional obligations — those under s. 15 of the *Charter*, for example — still apply.

[30] In *Baier*, Rothstein J., writing for the majority, summarized the criteria for identifying the limited circumstances in which s. 2(*b*) requires the government to extend an underinclusive means of, or "platform" for, expression to a particular group or individual. In that case, schoolteachers were challenging Alberta legislation which prohibited them from running for election as school trustees. Rothstein J. observed that the teachers, by seeking access to a government-created platform for expression, were asking the government to enable their expressive activity and were therefore asserting a positive right. The question that must be answered in the case at bar, therefore, is whether the *Baier* analysis is triggered.

[31] The transit authorities' advertising policies authorize any "[a]dvertisements . . . which communicate information concerning goods, services, public service announcements and public events"

[28] Cependant, la protection offerte à l'al. 2*b*) de la *Charte* n'est pas illimitée, et le gouvernement n'a pas à justifier au regard de l'article premier toute restriction de la liberté d'expression (*Baier*, par. 20). Le mode ou le lieu de l'expression peut écarter la protection : par exemple, l'expression violente ou la menace de recourir à la violence ne bénéficient pas de la garantie constitutionnelle, et la *Charte* ne garantit pas à chacun le droit de s'exprimer dans *tout* espace gouvernemental.

[29] Aussi, même si l'al. 2*b*) protège chacun contre la restriction injustifiée de l'expression par l'État, il n'oblige généralement pas ce dernier à favoriser l'expression individuelle par la mise à la disposition de chacun d'un *mode* d'expression en particulier (*Haig c. Canada*, [1993] 2 R.C.S. 995). Ainsi, lorsqu'il crée un mode d'expression, l'État est généralement admis à décider de ceux qui pourront s'en prévaloir. La personne qui n'y a pas accès ne peut invoquer l'al. 2*b*) à l'encontre de cette exclusion que si elle satisfait aux critères de l'arrêt *Baier*. Évidemment, d'autres obligations constitutionnelles — dont celles découlant de l'art. 15 de la *Charte* — s'appliquent toujours.

[30] Dans l'arrêt *Baier*, au nom des juges majoritaires, le juge Rothstein résume les critères permettant de déterminer les quelques circonstances dans lesquelles l'al. 2*b*) exige du gouvernement qu'il mette à la disposition d'une personne ou d'un groupe de personnes un mode d'expression ou une « tribune » dont l'accès est trop restreint. Dans cette affaire, des enseignants contestaient une loi albertaine qui leur interdisait de se porter candidats aux postes de conseillers scolaires. Le juge Rothstein a fait observer qu'en demandant l'accès à une tribune d'origine législative, les enseignants demandaient au gouvernement de leur fournir un moyen pour donner cours à leur activité expressive et visaient donc l'obtention d'une mesure positive. Il faut donc déterminer si le cadre de l'arrêt *Baier* s'applique en l'espèce.

[31] Les politiques publicitaires des commissions de transport autorisent [TRADUCTION] « la publicité qui communique de l'information sur des biens, des services, des messages d'intérêt public et des

(article 2). The policies are designed to enable a large number of speakers to reach a large audience. The respondents sought to post political advertisements on buses by means of the transit authorities' advertising service. The *content* of their expressive activity was the political message and the *means* of expression was the advertising service enabling expression on the sides of the buses. The advertisements were rejected on the basis of their political content, not on the basis that the advertising service was not available to the respondents.

[32] At first glance, since the respondents are not themselves excluded from access to the advertising service, it seems difficult to characterize their claim as one against underinclusion. The advertising service is not a platform created for a limited group of individuals or for a very narrow purpose. Rather, it is accessible to anyone who wishes to advertise and is willing to pay a fee. According to BC Transit, however, the respondents are challenging the underinclusive scope of the platform for expression on the basis that it excludes *political* advertising. Care must be taken not to confuse the notion of an underinclusive platform for expression with government limits on the content of expression. I do not need to revisit here the factors set out in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at paras. 24-26 and 31-33, and summarized in *Baier*, at para. 27 — suffice it to say that to succeed in its argument that the respondents' claim is one of underinclusiveness, BC Transit had to at least demonstrate that the respondents themselves were excluded from the particular means of expression. But this is not what the respondents are arguing. The policies do not prevent them from using the advertising service as a means of expression. Only the content of their advertisements is restricted. Thus, their claim cannot be characterized as one against underinclusion. In contrast, in *Baier*, school trusteeship was the very means of the expressive activity, and the claimants were being denied access to that means.

[33] However, both BC Transit and TransLink also characterize the claim as one for a positive right on the basis that the respondents required

événements publics » (article 2). Elles sont conçues pour permettre à un grand nombre d'annonceurs d'avoir accès à un large auditoire. Les intimées se sont adressées au service publicitaire des commissions de transport pour faire afficher leurs publicités politiques sur les autobus. La *teneur* de l'activité expressive était le message politique et le *mode* d'expression était le service publicitaire permettant l'expression sur les côtés des autobus. Les publicités ont été refusées à cause de leur teneur politique, et non parce que les intimées n'avaient pas accès au service publicitaire.

[32] À première vue, comme les intimées ne sont pas elles-mêmes privées de l'accès au service publicitaire, il paraît difficile de considérer qu'elles contestent le caractère trop restreint d'une tribune. Le service publicitaire ne constitue pas une tribune créée à l'intention d'un groupe limité de personnes ou à une fin très précise. Il est en fait à la disposition de tout annonceur disposé à payer les frais exigibles. Or, selon BC Transit, les intimées prétendent que la tribune a un caractère trop restreint parce qu'elle exclut la publicité *politique*. Il ne faut pas confondre caractère trop restreint de la tribune et restriction par l'État du contenu de l'expression. Nul besoin de revenir en l'espèce sur les facteurs énoncés dans l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016 (par. 24-26 et 31-33), et résumés dans *Baier* (par. 27). Il suffit de signaler que pour faire valoir sa thèse avec succès, BC Transit devait au moins prouver que les intimées n'avaient pas elles-mêmes accès au mode d'expression en cause. Or, ce n'est pas ce que les intimées avancent. Les politiques ne les empêchent pas de recourir au service publicitaire en tant que mode d'expression. Seul le contenu de leurs publicités est visé par une restriction. On ne peut donc affirmer que les intimées contestent le caractère trop restreint de la tribune. Enfin, dans l'affaire *Baier*, le conseil scolaire constituait le mode même de l'activité expressive, et l'accès à ce mode d'expression était refusé aux demandeurs.

[33] Or, BC Transit et TransLink attribuent toutes deux aux intimées la revendication d'un droit positif parce que celles-ci leur auraient demandé

their support and enablement to convey the messages in question. A few comments are in order.

[34] In *Baier*, Rothstein J. stated (at para. 35):

> To determine whether a right claimed is a positive right, the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity. Making the case for a negative right would require the appellants to seek freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement.

The words "act to support or enable", taken out of context, could be construed as transforming many freedom of expression cases into "positive rights claims". Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.

[35] When the reasons in *Baier* are read as a whole, it is clear that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a distinction was drawn between placing an obligation on government to provide individuals with a particular platform for expression and protecting the underlying freedom of expression of those who are free to participate in expression on a platform (para. 42). Consequently, the transit authorities' interpretation of the notion of a positive rights claim is overly broad and was in fact rejected in *Baier*. The respondents seek the freedom to express

d'appuyer et de permettre leur activité expressive par la diffusion des messages. Quelques remarques s'imposent.

[34] Dans l'arrêt *Baier*, le juge Rothstein dit ce qui suit (par. 35) :

> Pour déterminer si le droit invoqué est positif, il faut se demander si les appelants prétendent que le gouvernement devrait légiférer ou prendre d'autres mesures pour appuyer ou permettre une activité expressive. Pour que nous soyons en présence d'un droit négatif, il faudrait que les appelants cherchent à ne pas être assujettis à des dispositions législatives ou à des mesures gouvernementales supprimant une activité expressive qu'ils seraient autrement libres d'exercer sans appui ou habilitation de la part du gouvernement.

Interprétés hors contexte, les mots « mesures pour appuyer ou permettre » pourraient dans bien des cas transformer une affaire de liberté d'expression en une revendication de droit positif. L'expression dans un endroit ou un espace public suppose nécessairement quelque appui ou habilitation de la part du gouvernement. L'existence de rues, de parcs et d'autres lieux publics tient souvent à une loi ou à une mesure gouvernementale. S'il suffisait que l'État appuie ou permette l'activité expressive pour que soit justifié l'examen sous l'angle de la revendication d'un droit positif, on pourrait soutenir que la demande d'accès à un parc public par des manifestants devrait être considérée en fonction du cadre d'analyse de l'arrêt *Baier*, car pour accéder à la demande, l'État devrait permettre l'expression par la mise à disposition du moyen requis (le lieu). Ce serait mal interpréter l'arrêt *Baier*.

[35] Interprété globalement, l'arrêt *Baier* indique clairement que le fait d'appuyer ou de permettre l'activité expressive doit être relié à une demande faite à l'État de donner accès à un mode d'expression en particulier. En effet, dans cet arrêt, la Cour distingue entre imposer à l'État l'obligation de mettre une tribune donnée à la disposition de citoyens et protéger la liberté d'expression sous-jacente de ceux qui ont la faculté de se prévaloir d'une tribune (par. 42). L'interprétation de la notion de revendication d'un droit positif que préconisent les commissions de transport est donc trop large et la Cour l'a en fait rejetée dans *Baier*. Les intimées

themselves — by means of an existing platform they are entitled to use — without undue state interference with the content of their expression. They are not requesting that the government support or enable their expressive activity by providing them with a particular means of expression from which they are excluded.

[36] I find that the transit authorities have not shown that the respondents' claim falls under the *Baier* analysis. I must now determine whether the expression should be denied s. 2(*b*) protection on the basis of location. This inquiry is conducted pursuant to the analytical framework developed in *City of Montréal*.

3.2.1 Application of *City of Montréal*

[37] In order to determine whether the transit authorities' advertising policies infringe s. 2(*b*) of the *Charter*, three questions must be asked: First, do the respondents' proposed advertisements have expressive content that brings them within the *prima facie* protection of s. 2(*b*)? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by s. 2(*b*), do the transit authorities' policies deny that protection? (*City of Montréal*, at para. 56) If the policies are found to have infringed s. 2(*b*) of the *Charter*, the analysis then shifts to determining whether the infringement is justified under s. 1 of the *Charter*.

[38] The answer to the first question is not in issue. The proposed advertisements unquestionably have expressive content. The answer to the third question is also uncontroversial, although the question is not, as the trial judge suggested, whether all *political* speech is prohibited, but whether either the purpose or the effect of the government measures is to place a limit on expression. In the instant case, the very purpose of the impugned policies is to restrict the content of expression in the advertising space on the sides of buses. The wording of articles 2 and 7 clearly limits the content of advertisements. Article 9 is even more precise in excluding political speech. As the majority of the Court

réclament la liberté de s'exprimer — à une tribune existante qu'elles ont le droit d'utiliser — sans que l'État ne limite indûment la teneur de leur expression. Elles ne demandent pas à l'État d'appuyer ou de permettre leur activité expressive par la mise à leur disposition d'un mode d'expression en particulier auquel l'accès leur serait refusé.

[36] J'arrive à la conclusion que les commissions de transport n'ont pas établi que la réclamation des intimées tombe sous le coup de l'arrêt *Baier* et du cadre d'analyse qui y est établi. Il me faut maintenant déterminer si la protection de l'al. 2*b*) doit être refusée en raison du lieu. J'applique à cette fin le test de l'arrêt *Ville de Montréal*.

3.2.1 Application de l'arrêt *Ville de Montréal*

[37] Pour déterminer si les politiques publicitaires des commissions de transport portent atteinte au droit garanti à l'al. 2*b*) de la *Charte*, il faut se poser trois questions. Premièrement, le contenu expressif des publicités projetées par les intimées justifie-t-il leur protection *prima facie* par l'al. 2*b*)? Deuxièmement, dans l'affirmative, le mode ou le lieu d'expression ont-ils pour effet d'écarter cette protection? Troisièmement, si l'activité expressive est protégée par l'al. 2*b*), les politiques publicitaires en cause sont-elles attentatoires? (*Ville de Montréal*, par. 56) Si on conclut qu'il y a atteinte au droit garanti à l'al. 2*b*), il faut passer à la question de savoir si elle est justifiée au sens de l'article premier de la *Charte*.

[38] La réponse à la première question n'est pas contestée. Les publicités projetées ont assurément un contenu expressif. La réponse à la troisième question rallie également les parties. Or, contrairement à ce que laisse entendre le juge de première instance, la question n'est pas de savoir si tout discours *politique* est interdit mais bien si, par leur objet ou leur effet, les mesures gouvernementales limitent l'expression. En l'espèce, l'objet même des politiques publicitaires contestées est de limiter le contenu de l'expression dans l'espace publicitaire sur les côtés des autobus. Les articles 2 et 7 restreignent expressément le contenu de la publicité. L'article 9 le fait encore plus précisément en

of Appeal stated, the transit authorities "sought to prohibit political advertising precisely because it was political" (para. 133).

[39] Regarding the second question, the analysis is somewhat more elaborate. In *City of Montréal*, the majority of the Court set out the following test for determining whether expression in a government location is protected by s. 2(*b*) of the *Charter* (at para. 74):

> The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

[40] In the case at bar, the trial judge and the Court of Appeal came to opposite conclusions with respect to the first factor. The trial judge found that there was no history of *political* advertising on the sides of buses (trial judgment, at para. 87). For him, this finding was pivotal. However, content is not relevant to the determination of the function of a place.

[41] The fact that the historical function of a place included public expression or that its current function includes such expression is a good indication that expression in that place is constitutionally protected. Thus, a podium erected in a park for public use would necessarily be regarded as having a function that does not conflict with the purposes s. 2(*b*) is intended to serve; in fact, the very purpose of this public place would be to enhance the values underlying s. 2(*b*). However, the use of

écartant le discours politique. Comme le disent les juges majoritaires de la Cour d'appel, les commissions de transport [TRADUCTION] « voulaient interdire la publicité politique précisément parce qu'elle était de nature politique » (par. 133).

[39] Pour ce qui est de la deuxième question, l'analyse est quelque peu plus élaborée. Dans l'arrêt *Ville de Montréal*, les juges majoritaires de la Cour appliquent le test suivant pour déterminer si l'expression dans un lieu ou un espace à caractère gouvernemental est protégée à l'al. 2*b*) de la *Charte* (par. 74) :

> La question fondamentale quant à l'expression sur une propriété appartenant à l'État consiste à déterminer s'il s'agit d'un endroit public où l'on s'attendrait à ce que la liberté d'expression bénéficie d'une protection constitutionnelle parce que l'expression, dans ce lieu, ne va pas à l'encontre des objectifs que l'al. 2*b*) est censé favoriser, soit : (1) le débat démocratique; (2) la recherche de la vérité; et (3) l'épanouissement personnel. Pour trancher cette question, il faut examiner les facteurs suivants :
>
> a) la fonction historique ou réelle de l'endroit;
>
> b) les autres caractéristiques du lieu qui laissent croire que le fait de s'y exprimer minerait les valeurs sous-jacentes à la liberté d'expression.

[40] Pour ce qui est du premier facteur, le juge de première instance et la Cour d'appel arrivent à des conclusions opposées. Le juge de première instance conclut qu'il n'y a jamais eu de publicité *politique* sur les côtés des autobus (jugement de première instance, par. 87) et il accorde une importance déterminante à ce fait. Or, le contenu n'est pas pertinent pour la détermination de la fonction d'un lieu.

[41] Le fait que l'expression publique y a été permise ou qu'elle l'est actuellement est un bon indice de sa protection constitutionnelle. Ainsi, dans un parc, l'estrade destinée à l'usage des citoyens aura nécessairement une fonction qui ne va pas à l'encontre des objectifs que l'al. 2*b*) est censé promouvoir. Dans ce cas, la raison d'être même du lieu public serait en fait de promouvoir les valeurs sous-jacentes à cet alinéa. Toutefois, il est très rare que l'on conteste l'utilisation d'un bien public à des

public property for expression will very rarely be questioned on the basis of such facts. The circumstances will usually be more complex. The airport, utility poles and streets at issue in *Committee for the Commonwealth of Canada*, *Ramsden* and *City of Montréal* are examples of places whose primary function is not expression.

[42] The question is whether the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression. One way to answer this question is to look at past or present practice. This can help identify any incidental function that may have developed in relation to certain government property. Such was the case in the locations at issue in *Committee for the Commonwealth of Canada*, *Ramsden* and *City of Montréal*, where the Court found the expressive activities in question to be protected by s. 2(*b*). While it is true that buses have not been used as spaces for this type of expressive activity for as long as city streets, utility poles and town squares, there is some history of their being so used, and they are in fact being used for it at present. As a result, not only is there some history of use of this property as a space for public expression, but there is actual use — both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression.

[43] The second factor from *City of Montréal* is whether other aspects of the place suggest that expression within it would undermine the values underlying the constitutional protection. TransLink submits that its buses should be characterized as *private* publicly owned property, to which one cannot reasonably expect access. This position is untenable. The very fact that the general public has access to the advertising space on buses is an indication that members of the public would expect constitutional protection of their expression in that government-owned space. Moreover, an important aspect of a bus is that it is by nature a public, not

fins d'expression dans un tel contexte factuel. Les situations en litige sont généralement plus complexes. Par exemple, dans les arrêts *Comité pour la République du Canada*, *Ramsden* et *Ville de Montréal*, l'aéroport, le poteau électrique et la voie publique étaient un lieu ou un espace dont la fonction première n'était pas l'expression.

[42] La question est de savoir si la fonction historique ou réelle ou quelque autre caractéristique de l'espace ou du lieu est incompatible avec l'expression ou permet de conclure que l'expression dans cet espace ou dans ce lieu minerait les valeurs qui sous-tendent la liberté d'expression. L'une des avenues possibles pour trancher est celle de considérer la pratique antérieure ou actuelle. On peut ainsi découvrir toute fonction accessoire ayant pu voir le jour relativement à un bien public donné, comme cela a été le cas dans les affaires *Comité pour la République du Canada*, *Ramsden* et *Ville de Montréal*, où la Cour a reconnu l'application de la protection prévue à l'al. 2*b*). Il est vrai que l'autobus ne sert pas d'espace pour ce type d'activité expressive depuis aussi longtemps que la voie publique, le poteau électrique et la place publique, mais cette fonction existait et existe toujours. Par conséquent, il y a non seulement une certaine utilisation historique du bien en cause comme lieu d'expression publique, mais aussi une utilisation réelle à cette fin, deux facteurs permettant de conclure que l'activité expressive considérée ne nuit pas à la fonction première de l'autobus — le transport en commun — et, ce qui importe encore plus, qu'elle ne mine pas les valeurs qui sous-tendent la liberté d'expression.

[43] Le second facteur énoncé dans l'arrêt *Ville de Montréal* est celui de savoir si d'autres caractéristiques du lieu donnent à penser que le fait de s'y exprimer minerait les valeurs sous-jacentes à la protection constitutionnelle. TransLink fait valoir que ses autobus devraient être considérés comme des biens *privés* appartenant aux pouvoirs publics et auxquels nul ne peut raisonnablement s'attendre à avoir accès. L'argument ne tient pas. Le fait même que le grand public a accès à l'espace publicitaire des autobus permet de conclure que les citoyens s'attendent à la protection constitutionnelle de leur expression dans cet espace appartenant à l'État. De

a private, space. Unlike the activities which occur in certain government buildings or offices, those which occur on a public bus do not require privacy and limited access. The bus is operated on city streets and forms an integral part of the public transportation system. The general public using the streets, including people who could become bus passengers, are therefore exposed to a message placed on the side of a bus in the same way as to a message on a utility pole or in any public space in the city. Like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings. Thus, rather than undermining the purposes of s. 2(*b*), expression on the sides of buses could enhance them by furthering democratic discourse, and perhaps even truth finding and self-fulfillment.

[44] The test crafted in *City of Montréal* was intended to be flexible enough to allow courts to take into consideration factors that might become relevant to the use of old or new places for public expression (at para. 77):

> Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.

Changes in society or technology, or even changes in policy, may affect both the primary and incidental functions of government property. Where the government allows its property to be used for certain expressive activities, it does not commit itself to that use indefinitely. However, if a change in the function of a public place affects fundamental *Charter* rights, any constitutional requirements which attach to the new function must be met.

[45] In sum, this is not a case in which the Court must decide whether to protect access to a space

plus, une caractéristique importante de l'autobus est qu'il constitue par nature un espace public, et non privé. Les activités qui s'y déroulent n'exigent pas confidentialité et limitation d'accès comme celles menées dans certains édifices ou bureaux gouvernementaux. L'autobus circule sur la voie publique et fait partie intégrante du réseau de transport en commun. Les usagers de la voie publique en général, y compris les passagers éventuels, sont donc exposés au message affiché sur le côté d'un autobus tout comme ils le sont au message affiché sur un poteau électrique ou dans un espace public urbain. De plus, dans une ville, l'autobus comme la voie publique constituent des lieux publics où les gens peuvent interagir ouvertement entre eux et avec l'environnement. Loin de miner les objectifs de l'al. 2*b*), l'expression sur les côtés des autobus favorise le débat démocratique, la recherche de la vérité et l'épanouissement personnel.

[44] Le test appliqué dans l'arrêt *Ville de Montréal* se voulait suffisamment souple pour permettre la prise en considération de facteurs susceptibles de devenir pertinents pour l'utilisation d'espaces existants ou nouveaux aux fins d'expression publique (par. 77) :

> Les changements sociaux et technologiques peuvent avoir une incidence sur les endroits où l'expression mérite d'être protégée eu égard aux valeurs qui sous-tendent cette garantie. Le critère proposé tient compte de cette éventualité en permettant que d'autres facteurs que celui de la fonction historique ou réelle soient pris en considération au besoin.

L'évolution sociale ou technique, voire les changements d'ordre politique, peuvent modifier les fonctions première et accessoire d'un bien public. Le gouvernement qui permet l'utilisation de ses biens pour l'exercice de certaines activités expressives n'est pas tenu de le faire indéfiniment. Cependant, lorsque la modification apportée à la fonction d'un espace ou d'un endroit public a une incidence sur un droit fondamental garanti par la *Charte*, toute exigence constitutionnelle se rattachant à la fonction nouvelle doit être respectée.

[45] En résumé, la Cour n'est pas appelée en l'espèce à déterminer si l'accès à un espace public

where the government entity has never before recognized a right to such access. Rather, the question is whether the side of a bus, as a public place where expressive activity is already occurring, is a location where constitutional protection for free expression would be expected.

[46] I do not see any aspect of the location that suggests that expression within it would undermine the values underlying free expression. On the contrary, the space allows for expression by a broad range of speakers to a large public audience and expression there could actually further the values underlying s. 2(*b*) of the *Charter*. I therefore conclude that the side of a bus is a location where expressive activity is protected by s. 2(*b*) of the *Charter*.

[47] Consequently, I conclude that since the transit authorities' policies limit the respondents' right to freedom of expression under s. 2(*b*), the government must justify that limit under s. 1 of the *Charter*.

3.3 *Is the Limit Justified Under Section 1 of the Charter?*

[48] In order to justify the infringement of the respondents' freedom of expression under s. 1 of the *Charter*, the transit authorities must show that their policies are "reasonable limits prescribed by law" that can be "demonstrably justified in a free and democratic society". I will first address the question whether the limits imposed by the impugned policies are "prescribed by law".

[49] Although the trial judge had found that the transit authorities' advertising policies did not infringe the respondents' freedom of expression, he nevertheless went on to consider s. 1 of the *Charter*. He concluded, *inter alia*, that the impugned policies were not "law" for the purposes of s. 1 and that the infringement of s. 2(*b*) was therefore not a limit "prescribed by law". He reached this conclusion on the basis that the policies "were not made or administered in the exercise of a 'governmental'

doit être protégé là où l'entité gouvernementale n'a jamais reconnu un tel droit. Elle doit plutôt déterminer si, en tant qu'espace public, le côté d'un autobus, où s'exerce déjà l'activité expressive, constitue un lieu où l'on s'attend à ce que la liberté d'expression bénéficie de la protection constitutionnelle.

[46] Je ne vois dans ce lieu aucune caractéristique laissant croire que l'expression y minerait les valeurs sous-jacentes à la liberté d'expression. Au contraire, il permet à un grand nombre d'annonceurs de s'adresser à un large auditoire et promeut ainsi en fait les valeurs qui sous-tendent l'al. 2*b*) de la *Charte*. J'arrive donc à la conclusion que l'activité expressive sur le côté d'un autobus bénéficie de la protection prévue à cet alinéa.

[47] En conséquence, comme les politiques des commissions de transport limitent la liberté d'expression des intimées garantie à l'al. 2*b*), je conclus que le gouvernement doit justifier cette limitation au regard de l'article premier de la *Charte*.

3.3 *La limitation est-elle justifiée au regard de l'article premier de la Charte?*

[48] Pour justifier l'atteinte à la liberté d'expression des intimées au regard de l'article premier de la *Charte*, les commissions de transport doivent prouver que les restrictions que prévoient leurs politiques sont apportées « par une règle de droit, dans des limites qui [sont] raisonnables et dont la justification [peut] se démontrer dans le cadre d'une société libre et démocratique ». J'examine d'abord la question de savoir si les politiques en cause constituent des « règles de droit ».

[49] Le juge de première instance estime que les politiques publicitaires des commissions de transport ne portent pas atteinte à la liberté d'expression des intimées, mais il examine tout de même l'article premier de la *Charte*. Il conclut notamment que les politiques ne constituent pas des « règles de droit » au sens de l'article premier, de sorte que le droit garanti à l'al. 2*b*) n'est pas restreint « par une règle de droit ». Il arrive à cette conclusion parce que, selon lui, les politiques [TRADUCTION]

power or in the performance of a 'governmental' duty, and [that] the government had no involvement in the making or implementation of those policies" (trial judgment, at para. 140). Prowse J.A., writing for the majority of the Court of Appeal, declined to embark on her own analysis of the "prescribed by law" issue because the transit authorities had made no submissions on the matter. She neither accepted nor rejected the trial judge's conclusion on this issue. In this Court, the transit authorities made no submissions on the "prescribed by law" issue, while the respondents agreed with the trial judge's findings.

« n'ont été ni adoptées ni appliquées dans l'exercice d'un pouvoir "gouvernemental" ou dans l'exécution d'une obligation "gouvernementale" et que le gouvernement n'a participé d'aucune façon à leur formulation ou à leur mise en œuvre » (jugement de première instance, par. 140). Au nom des juges majoritaires de la Cour d'appel, la juge Prowse refuse de se livrer à sa propre analyse concernant la restriction « par une règle de droit » au motif que les commissions de transport n'ont pas présenté d'arguments à ce sujet. Elle ne se range pas à l'avis du juge de première instance sur ce point ni ne s'en dissocie. Devant notre Cour, les commissions de transport n'ont pas abordé la question de la restriction « par une règle de droit », alors que les intimées ont repris les conclusions du juge de première instance.

3.3.1 Case Law on the "Prescribed by Law" Requirement

[50] In its decisions on the "prescribed by law" requirement in s. 1, the Court has distinguished between challenges to government acts and challenges to "laws" (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Eldridge*, at para. 20). This case raises the latter type of claim: the policies are being challenged, not the decision made by the transit authorities pursuant to the policies. In assessing whether the impugned policies satisfy the "prescribed by law" requirement, it must first be determined whether the policies come within the meaning of the word "law" in s. 1 of the *Charter*. To do this, it must be asked whether the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application. If so, the policies can be "law" for the purposes of s. 1. At the second stage of the enquiry, to find that the limit is "prescribed" by law, it must be determined whether the policies are sufficiently precise and accessible. Professor Peter W. Hogg describes the rationale behind the "prescribed by law" requirement in *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at p. 122:

> The requirement that any limit on rights be prescribed by law reflects two values that are basic to

3.3.1 Jurisprudence relative à la restriction « par une règle de droit »

[50] La jurisprudence de notre Cour relative à la restriction « par une règle de droit » au sens de l'article premier établit une distinction entre la contestation de l'acte d'une entité gouvernementale et celle d'une règle de droit (*Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Eldridge*, par. 20). Dans la présente affaire, le second type de contestation est en cause : ce sont les politiques qui sont attaquées, non la décision prise sur leur fondement. Déterminer si la restriction découle d'une règle de droit exige d'abord que l'on établisse si la politique qui l'apporte constitue une « règle de droit » au sens de l'article premier de la *Charte*. Il faut alors examiner si l'entité gouvernementale était autorisée à adopter la politique contestée et si cette dernière constitue une règle obligatoire d'application générale. Dans l'affirmative, la politique peut constituer une « règle de droit » aux fins de l'article premier. En second lieu, il faut déterminer si la politique est suffisamment précise et accessible pour que l'on puisse conclure qu'il s'agit d'une « règle de droit ». Dans *Constitutional Law of Canada* (5e éd. 2007), vol. 2, le professeur Peter W. Hogg précise la raison d'être d'un tel examen (p. 122) :

> [TRADUCTION] L'exigence qu'un droit soit restreint par une règle de droit reflète deux valeurs

constitutionalism or the rule of law. First, in order to preclude arbitrary and discriminatory action by government officials, all official action in derogation of rights must be authorized by law. Secondly, citizens must have a reasonable opportunity to know what is prohibited so that they can act accordingly. Both these values are satisfied by a law that fulfils two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law.

[51] In *R. v. Therens*, [1985] 1 S.C.R. 613, the Court emphasized that the "prescribed by law" requirement safeguards the public against arbitrary state limits on *Charter* rights. Le Dain J. set out the Court's initial interpretation of the expression "prescribed by law" in s. 1 of the *Charter* (at p. 645):

The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.

[52] Thus, the Court does not require that the limit be prescribed by a "law" in the narrow sense of the term; it may be prescribed by a regulation or by the common law. Moreover, it is sufficient that the limit simply result by necessary implication from either the terms or the operating requirements of the "law". (See also *Irwin Toy*; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Swain*, [1991] 1 S.C.R. 933; and *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3.)

[53] The Court has also implicitly recognized other forms of limits that were not originally identified in *Therens* as being prescribed by law, including limits contained in municipal by-laws (*Ramsden* and *City of Montréal*), provisions of a collective agreement involving a government entity (*Lavigne*) and rules of a regulatory body (*Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591). Such limits satisfy the "prescribed by law" requirement

fondamentales du constitutionnalisme ou de la primauté du droit. Premièrement, pour faire obstacle aux mesures arbitraires ou discriminatoires des représentants de l'État, toute mesure attentatoire à un droit doit être autorisée par une règle de droit. Deuxièmement, le citoyen doit être raisonnablement en mesure de savoir ce qui est interdit afin d'agir en conséquence. Une règle de droit respecte ces deux valeurs lorsqu'elle remplit deux conditions : (1) elle est suffisamment accessible au citoyen et (2) elle est formulée avec suffisamment de précision pour que le citoyen puisse se comporter en conséquence et elle offre des repères à celui qui l'applique.

[51] Dans l'arrêt *R. c. Therens*, [1985] 1 R.C.S. 613, la Cour souligne que l'exigence de la restriction d'un droit constitutionnel « par une règle de droit » protège le citoyen contre l'arbitraire de l'État. Le juge Le Dain y interprète pour la première fois la notion de restriction « par une règle de droit » pour les besoins de l'article premier de la *Charte* (p. 645) :

L'exigence que la restriction soit prescrite par une règle de droit vise surtout à faire la distinction entre une restriction imposée par la loi et une restriction arbitraire. Une restriction est prescrite par une règle de droit au sens de l'art. 1 si elle est prévue expressément par une loi ou un règlement, ou si elle découle nécessairement des termes d'une loi ou d'un règlement, ou de ses conditions d'application.

[52] La Cour n'exige donc pas que le droit en cause soit restreint par une loi au sens strict du terme; il peut l'être également par un règlement ou par la common law. En outre, il suffit que la restriction découle nécessairement du libellé de la « loi » ou de ses conditions d'application. (Voir également les arrêts *Irwin Toy*; *B.C.G.E.U. c. Colombie-Britannique (Procureur général)*, [1988] 2 R.C.S. 214; *R. c. Swain*, [1991] 1 R.C.S. 933; et *R. c. Orbanski*, 2005 CSC 37, [2005] 2 R.C.S. 3.)

[53] La Cour reconnaît aussi implicitement d'autres formes de restriction par une règle de droit qui n'ont pas été mentionnées au départ dans l'arrêt *Therens*, notamment celles issues d'un règlement municipal (*Ramsden* et *Ville de Montréal*), d'une convention collective liant une entité gouvernementale (*Lavigne*) et des règles d'un organisme de réglementation (*Black c. Law Society of Alberta*, [1989] 1 R.C.S. 591). Ces textes constituent des

because, much like those resulting from regulations and other delegated legislation, their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply. In these regards, they satisfy the concerns that underlie the "prescribed by law" requirement insofar as they preclude arbitrary state action and provide individuals and government entities with sufficient information on how they should conduct themselves.

[54] The Court has likewise taken a liberal approach to the precision requirement. The majority in *Irwin Toy* explained this as follows (at p. 983):

> 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".

The Court emphasized in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at pp. 94-97, that the standard is not an onerous one. Unless the impugned law "is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools", it will be deemed to have met the "prescribed by law" requirement (p. 94).

[55] These cases show that the Court has chosen to take a flexible approach to the "prescribed by law" requirement as regards both the form (e.g., statute, regulation, municipal by-law, rule of a regulatory body or collective agreement provision) and articulation of a limit on a *Charter* right (i.e., a standard intelligible to the public and to those who apply the law). In the end, the Court has emphasized, as in *Therens*, the need to distinguish between limits which arise by law and limits which result from arbitrary state action; those resulting from arbitrary

« règles de droit » parce que, à l'instar des règlements et autres mesures législatives subordonnées, leur adoption est autorisée par une loi, ils sont obligatoires et d'application générale et ils sont suffisamment accessibles et précis pour ceux qui y sont assujettis. À cet égard, ils répondent aux préoccupations justifiant l'exigence de la restriction « par une règle de droit » dans la mesure où il s'agit de faire obstacle à l'arbitraire de l'État et d'offrir aux citoyens et aux entités gouvernementales suffisamment d'information sur la conduite à adopter.

[54] Dans l'arrêt *Irwin Toy*, la Cour interprète l'obligation de précision de manière libérale. Les juges majoritaires s'expliquent comme suit (p. 983) :

> 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 ».

Dans l'arrêt *Osborne c. Canada (Conseil du Trésor)*, [1991] 2 R.C.S. 69, p. 94-97, la Cour souligne que la norme n'est pas stricte. À moins qu'elle ne « soit [. . .] si obscur[e] que les méthodes ordinaires ne permettent pas de lui donner une interprétation le moindrement exacte », la loi contestée est réputée constituer « une règle de droit » (p. 94).

[55] Comme en font foi les arrêts susmentionnés, la Cour opte pour une interprétation souple de la « règle de droit » susceptible de restreindre un droit garanti par la *Charte*, et ce, tant sur le plan de la forme (loi, règlement, notamment municipal, règle d'un organisme de réglementation ou convention collective) que sur celui de la formulation (c'est-à-dire, une norme intelligible pour le public et celui qui l'applique). En fin de compte, la Cour insiste, comme dans l'arrêt *Therens*, sur la nécessité de distinguer entre la restriction issue de la loi et celle qui

state action continue to fail the "prescribed by law" requirement.

[56] This inclusive approach is based on a recognition that a narrow interpretation would lead to excessive rigidity in a parliamentary and legislative system that relies heavily on framework legislation and delegations of broad discretionary powers. McLachlin J. (as she then was) commented on this as follows in *Committee for the Commonwealth of Canada* (at p. 245):

> From a practical point of view, it would be wrong to limit the application of s. 1 to enacted laws or regulations. That would require the Crown to pass detailed regulations to deal with every contingency as a pre-condition of justifying its conduct under s. 1. In my view, such a technical approach does not accord with the spirit of the *Charter* and would make it unduly difficult to justify limits on rights and freedoms which may be reasonable and, indeed, necessary.

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

[57] Bearing in mind the broad interpretation given the "prescribed by law" requirement and the principles underlying the Court's approach, I must now consider whether limits resulting from policies of a government entity satisfy the "prescribed by law" requirement.

3.3.2 Government Policies and the "Prescribed by Law" Requirement

[58] Government policies come in many varieties. Oftentimes, even though they emanate from a government entity rather than from Parliament or a legislature, they are similar, in both form and substance, to statutes, regulations and other delegated legislation. Indeed, as a binding rule adopted pursuant to a government entity's statutory powers, a policy may have a legal effect similar to that of a municipal by-law or a law society's rules, both of which fall within the meaning of "law" for the purposes of s. 1. Other government policies

découle d'une mesure arbitraire de l'État, cette dernière ne satisfaisant toujours pas à l'exigence d'une restriction « par une règle de droit ».

[56] Cette approche généreuse est privilégiée parce qu'une interprétation étroite imposerait une trop grande rigidité à un système parlementaire et législatif qui s'en remet considérablement à des lois-cadres et à la délégation de larges pouvoirs discrétionnaires. Dans l'arrêt *Comité pour la République du Canada*, la juge McLachlin (maintenant Juge en chef) dit d'ailleurs à ce sujet (p. 245) :

> D'un point de vue pratique, il serait mal venu de limiter l'application de l'article premier aux lois et aux règlements adoptés par le législateur. L'État serait alors tenu d'adopter des règlements détaillés portant sur toutes les éventualités imaginables, avant de pouvoir justifier sa conduite en vertu de l'article premier. À mon avis, une approche aussi technique n'est pas conforme à l'esprit de la *Charte* et rendrait indûment difficile la justification des restrictions apportées aux droits et libertés qui peuvent être raisonnables et, de fait, nécessaires.

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

[57] Au vu de l'interprétation libérale de la Cour et des principes invoqués à l'appui, il faut maintenant déterminer si la restriction résultant d'une politique d'une entité gouvernementale satisfait à l'exigence de la restriction « par une règle de droit ».

3.3.2 Application aux politiques gouvernementales de l'exigence de la restriction « par une règle de droit »

[58] Les politiques gouvernementales ont des profils très variés. Même si elles sont adoptées par des entités gouvernementales plutôt que par le Parlement ou une assemblée législative, elles s'apparentent souvent, sur la forme et le fond, à des lois, des règlements et d'autres mesures législatives subordonnées. À titre de règle obligatoire adoptée en vertu d'un pouvoir légal conféré à une entité gouvernementale, une politique peut avoir un effet juridique semblable à celui d'un règlement municipal ou d'une règle d'un barreau provincial, qui

are informal or strictly internal, and amount in substance merely to guidelines or interpretive aids as opposed to legal rules. The question that arises is this: Does a given policy or rule emanating from a government entity satisfy the "prescribed by law" requirement? It can be seen from the case law that a distinction must be drawn between rules that are legislative in nature and rules that are administrative in nature.

[59] In *Committee for the Commonwealth of Canada*, the Court was divided on the issue of whether the internal directives or policies applied by the airport managers in administering the regulatory scheme at issue in that case were "law". In addition to provincial legislation regulating the matter, the airport administration had "an enduring and intransigent policy prohibiting all forms of solicitation and advertising" (p. 185). The trial judge found that an airport manager had been acting in accordance with this established policy when he prohibited the claimants from disseminating political messages at the airport. Lamer C.J., writing for himself and Sopinka J., expressed the opinion that because of their informal and internal nature, including the fact that they were not known to the public, the internal directives or policies could not possibly qualify as "law" prescribing the government action (p. 164).

[60] McLachlin J. (La Forest J. concurring) was of the view that the internal directives or policies were "law" because they were made pursuant to the Crown's common law right to manage its property (at p. 244):

> . . . I would incline to the view that the act of the airport officials in preventing [the claimants] from handing out leaflets and soliciting members constitutes a limit prescribed by law because the officials were acting pursuant to the Crown's legal rights as owner of the premises.

constituent tous deux des « règles de droit » aux fins de l'article premier. Il peut cependant arriver qu'une politique revête un caractère informel ou purement interne et qu'elle ne constitue essentiellement qu'une ligne directrice ou un guide d'interprétation, et non une règle juridique. La question qui se pose alors est la suivante : quelle politique ou règle d'une entité gouvernementale satisfait à l'exigence de la restriction « par une règle de droit »? Il appert de la jurisprudence qu'il faut distinguer entre une règle de nature législative et une règle de nature administrative.

[59] Dans l'arrêt *Comité pour la République du Canada*, les juges de la Cour ne se sont pas entendus sur la question de savoir si la directive ou politique interne appliquée par le directeur d'aéroport dans l'administration du règlement en cause dans cette affaire constituait une règle de droit. Outre la disposition provinciale pertinente, la direction de l'aéroport appliquait « une politique intransigeante interdisant toute forme de sollicitation et de publicité » (p. 185). Le juge de première instance a conclu que le directeur de l'aéroport avait agi conformément à cette politique établie lorsqu'il avait interdit aux intimés de diffuser leurs messages politiques dans l'aérogare. S'exprimant également au nom du juge Sopinka, le juge en chef Lamer a estimé que la directive ou politique interne ne pouvait être considérée comme une « règle de droit » fondant la mesure gouvernementale à cause de son caractère informel et interne, y compris le fait qu'elle n'était pas connue du public (p. 164).

[60] La juge McLachlin (avec l'appui du juge La Forest) a été d'avis que la directive ou politique interne constituait une « règle de droit » puisqu'elle avait été adoptée en application du droit que la common law confère à l'État d'administrer ses biens (p. 244) :

> [J]e serais encline à croire que le geste des fonctionnaires de l'aéroport qui [. . .] ont empêch[é] [les intimés] de distribuer des dépliants et de solliciter des adhésions constitue une limite prescrite par une règle de droit parce que les fonctionnaires agissaient conformément aux droits dont jouit l'État en vertu de la loi, en sa qualité de propriétaire des lieux.

[61] The decision ultimately turned on the constitutional validity of the regulations, and the question whether internal directives or policies can be considered to be "law" within the meaning of s. 1 was left without a definitive answer.

[62] The issue was again addressed in *Little Sisters*, a case concerning the use of internal guidelines by custom officials in administering the *Customs Act*. The guidelines which were in the form of a memorandum, interpreted standards set out in the legislation. Binnie J., writing for the majority, stated (at para. 85):

> . . . the Memorandum . . . was nothing more than an internal administrative aid to Customs inspectors. It was not law. It could never have been relied upon by Customs in court to defend a challenged prohibition. . . . It is the statutory decision . . . not the manual, that constituted the denial [of the claimants' freedom of expression]. It is simply not feasible for the courts to review for *Charter* compliance the vast array of manuals and guides prepared by the public service for the internal guidance of officials. The courts are concerned with the legality of the decisions, not the quality of the guidebooks, although of course the fate of the two are not unrelated.

[63] What *Committee for the Commonwealth of Canada* and *Little Sisters* demonstrate is a concern about the administrative nature of the policies and guidelines of the government entities in question. Administrative rules relate to the implementation of laws contained in a statutory scheme and are created for the purpose of administrative efficiency. The key question is thus whether the policies are focussed on "indoor" management. In such a case, they are meant for internal use and are often informal in nature; express statutory authority is not required to make them. Such rules or policies act as interpretive aids in the application of a statute or regulation. They cannot in and of themselves be viewed as "law" that prescribes a limit on a *Charter* right. An interpretive guideline or policy is not intended to establish individuals' rights and obligations or to create entitlements. Moreover, such documents are usually accessible only within

[61] La décision de la Cour a finalement reposé sur la constitutionnalité du règlement, et la question de savoir si une directive ou politique interne peut être considérée comme « une règle de droit » au sens de l'article premier n'a pas été tranchée de manière définitive.

[62] La question s'est de nouveau posée dans l'affaire *Little Sisters*. Le litige portait sur des directives internes appliquées par les fonctionnaires des douanes dans le cadre de l'administration de la *Loi sur les douanes*. Sous forme de mémorandum, ces directives interprétaient les normes établies par la loi. Au nom des juges majoritaires, le juge Binnie affirme (par. 85) :

> . . . le Mémorandum [. . .] n'était rien de plus qu'un outil administratif interne à l'intention des inspecteurs des douanes. Il n'avait pas force de loi. Il n'aurait jamais pu être invoqué en cour par les Douanes pour défendre une prohibition contestée [. . .] C'est [. . .] la décision législative, et non le guide, qui a constitué la privation [de liberté d'expression pour les demandeurs]. Il est tout simplement impossible aux tribunaux de contrôler la conformité à la *Charte* de la multitude de guides et manuels internes préparés par la fonction publique pour assister les fonctionnaires dans leur travail. Les tribunaux s'attachent à la légalité des décisions et non à la qualité des guides, bien que le sort de l'un ne soit évidemment pas indépendant du sort de l'autre.

[63] Ce que démontrent les arrêts *Comité pour la République du Canada* et *Little Sisters* est une préoccupation concernant le caractère administratif des politiques et directives des entités gouvernementales en cause. La règle de nature administrative touche à l'application de lois formant un régime législatif; sa raison d'être est l'efficacité administrative. La question déterminante est donc celle de savoir si la politique s'attache à la régie interne. Dans un tel cas, elle est destinée à une application interne et elle est souvent de nature informelle; son adoption ne requiert pas l'autorisation expresse du législateur. Une telle règle ou politique sert à l'interprétation des dispositions d'une loi ou d'un règlement. Elle ne saurait être assimilée elle-même à une règle de droit qui restreint un droit constitutionnel. Ni un guide d'interprétation ni une politique n'ont pour objet d'établir les droits et les obligations d'une personne non plus que de créer des

the government entity and are therefore unhelpful to members of the public who are entitled to know what limits there are on their *Charter* rights. No matter how broadly the word "law" is defined for the purposes of s. 1, a policy that is administrative in nature does not fall within the definition, because it is not intended to be a legal basis for government action.

[64] Where a policy is not administrative in nature, it may be "law" provided that it meets certain requirements. In order to be legislative in nature, the policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority. A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply (D. C. Holland and J. P. McGowan, *Delegated Legislation in Canada* (1989), at p. 103). For the purposes of s. 1 of the *Charter*, these rules need not take the form of statutory instruments. So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a *Charter* right.

[65] Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".

[66] The question which now remains is whether the transit authorities' advertising policies meet the "prescribed by law" requirement under s. 1 of the *Charter.*

droits. En outre, ils ne sont habituellement accessibles qu'au sein de l'entité gouvernementale et sont donc sans utilité pour informer le citoyen qui doit être en mesure de connaître toute restriction apportée à ses droits constitutionnels. La politique de nature administrative, même entendue au sens le plus large, n'est pas une « règle de droit » pour les besoins de l'article premier, car sa raison d'être n'est pas d'offrir un fondement juridique à l'action gouvernementale.

[64] La politique qui n'est pas administrative par nature et qui satisfait à certaines exigences peut constituer une « règle de droit ». Pour qu'elle soit de nature législative, la politique doit établir une norme d'application générale adoptée par une entité gouvernementale en vertu de son pouvoir de réglementation. Un tel pouvoir existe lorsque le législateur fédéral ou provincial a délégué un pouvoir à l'entité gouvernementale aux fins précisément d'adopter des règles obligatoires d'application générale établissant les droits et les obligations des personnes qui y sont assujetties (D. C. Holland et J. P. McGowan, *Delegated Legislation in Canada* (1989), p. 103). Point n'est besoin, pour l'application de l'article premier de la *Charte*, que ces règles revêtent la forme de textes réglementaires. Dans la mesure où leurs lois habilitantes permettent aux entités d'adopter des règles obligatoires, où leurs politiques établissent des droits et des obligations d'application générale plutôt que particulière et où elles sont suffisamment accessibles et précises, alors ces politiques sont réputées constituer des « règles de droit » susceptibles de restreindre un droit garanti par la *Charte*.

[65] Ainsi, lorsqu'une politique gouvernementale est autorisée par la loi, qu'elle établit une norme générale se voulant obligatoire et qu'elle est suffisamment accessible et précise, il s'agit d'une règle de nature législative qui constitue une « règle de droit ».

[66] La question à trancher dès lors est de savoir si les politiques publicitaires des commissions de transport constituent « une règle de droit » au sens de l'article premier de la *Charte*.

3.3.3 Application of the Principles to the Transit Authorities' Policies

[67] A review of the enabling legislation suggests that the transit authorities' policies were adopted pursuant to statutory powers conferred on BC Transit and TransLink.

[68] Section 3(1)(c) of the *British Columbia Transit Act* authorizes BC Transit's board of directors, with the Minister's approval, "to pursue commercial opportunities and undertake or enter into commercial ventures in respect of those systems and the authority's assets and resources". According to s. 4(4)(e) of the Act, the board of directors

> must supervise the management of the affairs of the [transit] authority and may . . . by resolution . . . establish rules for the conduct of their affairs . . . .

[69] A similar authority is conferred on TransLink's board under s. 2(4) of the *Greater Vancouver Transportation Authority Act*:

> **2**(4) The authority may carry on business, and, without limiting this, may enter into contracts or other arrangements, adopt bylaws, pass resolutions, issue or execute any other record or sue or be sued under a name prescribed by regulation of the Lieutenant Governor in Council, and any contract, bylaw, resolution or other arrangement or record entered into, adopted, passed, issued or executed, as the case may be, and any suit brought, by the authority under the prescribed name is as valid and binding as it would be were it entered into, adopted, passed, issued, executed or brought by the authority under its own name.

[70] The enabling statutes thus confer broad discretionary powers on each entity's board of directors to adopt rules regulating the conduct of its affairs, including the generation of revenue for the public transportation system through advertising sales. Further, according to documents filed in the record, the policies were "reviewed and adopted" by the boards of both entities (Appellants' Joint Record, at pp. 179 and 326). The policies

3.3.3 Application des principes aux politiques des commissions de transport

[67] Il appert des lois habilitantes que les politiques des commissions de transport ont été adoptées en vertu des pouvoirs légaux conférés à BC Transit et à TransLink.

[68] L'alinéa 3(1)c) de la *British Columbia Transit Act* autorise le conseil d'administration de BC Transit [TRADUCTION] « à saisir des occasions d'affaires et à participer à des entreprises commerciales à l'égard de ces réseaux, ainsi que des biens et des ressources de la commission », sous réserve de l'approbation du ministre. L'alinéa 4(4)e) de la Loi dispose que le conseil d'administration

> [TRADUCTION] surveille l'administration de la commission [de transport] et peut [. . .] par voie de résolution [. . .] établir des règles relatives à l'exercice de ses activités . . .

[69] Le conseil d'administration de TransLink est investi d'un pouvoir semblable au par. 2(4) de la *Greater Vancouver Transportation Authority Act* :

> [TRADUCTION]
>
> **2**(4) La commission peut exploiter une entreprise et, notamment, conclure des contrats ou d'autres arrangements, prendre des règlements, adopter des résolutions, établir d'autres documents ou ester en justice sous un nom prescrit par règlement du lieutenant-gouverneur en conseil, auquel cas la mesure est valable et lie la commission comme si elle l'avait prise sous son propre nom.

[70] Ainsi, les lois habilitantes confèrent au conseil d'administration de chacune des entités un pouvoir discrétionnaire étendu d'adopter des règles régissant l'exercice de ses activités, notamment la production de revenus pour le réseau de transport en commun grâce à la vente de publicité. En outre, suivant les documents versés au dossier, les politiques ont été [TRADUCTION] « adoptées après examen » par le conseil d'administration de chacune des deux

therefore appear to have been adopted in a formal manner.

[71] Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding. In this case, TransLink is empowered to "establish rules" and to "enter into contracts", "adopt bylaws" and "pass resolutions". Bylaws and contracts are intended to bind. In the context of the enabling provisions, it follows that resolutions have the same binding effect as the other enumerated instruments.

[72] The policies are not administrative in nature, as they are not meant for internal use as an interpretive aid for "rules" laid down in the legislative scheme. Rather, the policies are themselves rules that establish the rights of the individuals to whom they apply. Moreover, the policies can be said to be general in scope, since they establish standards which are applicable to all who want to take advantage of the advertising service rather than to a specific case. They therefore fall within the meaning of the word "law" for the purposes of s. 1 and will satisfy the "prescribed by law" requirement provided that they are sufficiently accessible and precise.

[73] In my view, the transit authorities' advertising policies are both accessible and precise. They are made available to members of the general public who wish to advertise on the transit authorities' buses, and they clearly outline the types of advertisements that will or will not be accepted. Thus, the limits on expression are accessible and are worded precisely enough to enable potential advertisers to understand what is prohibited. The limits resulting from the policies are therefore legislative in nature and are "limits prescribed by law" within the meaning of s. 1 of the *Charter*.

entités (dossier conjoint des appelantes, p. 179 et 326), de sorte qu'elles semblent avoir été adoptées de manière formelle.

[71] Il paraît logique que le législateur qui autorise l'adoption de règles par une entité gouvernementale veuille également, sauf indications contraires, que ces règles soient obligatoires. En l'espèce, TransLink peut [TRADUCTION] « établir des règles » et « conclure des contrats », « prendre des règlements » et « adopter des résolutions ». Règlements et contrats ont force obligatoire. Dans le contexte des dispositions habilitantes, on peut inférer que les résolutions ont la même force obligatoire que les autres instruments qui y sont énumérés.

[72] Les politiques ne sont pas de nature administrative puisqu'elles ne sont pas destinées à une application interne comme guide d'interprétation de « règles » établies par le régime législatif. Elles constituent elles-mêmes des règles établissant les droits des personnes qui y sont assujetties. De plus, on peut leur attribuer une portée générale en ce qu'elles fixent des normes qui s'appliquent à toute personne désireuse de se prévaloir du service publicitaire, et non dans certains cas particuliers. Elles sont donc assimilables à des « règles de droit » au sens de l'article premier et satisfont à l'exigence de la restriction « par une règle de droit » lorsqu'elles sont suffisamment accessibles et précises.

[73] À mon avis, les politiques publicitaires des commissions de transport sont à la fois accessibles et précises. Elles peuvent être consultées par tout membre du grand public désireux de se servir des autobus des commissions de transport comme support publicitaire, et elles énoncent clairement quels genres de publicité sont acceptés ou non. Ainsi, les restrictions apportées à l'expression sont accessibles et formulées avec suffisamment de précision pour permettre aux annonceurs éventuels de comprendre ce qui est écarté. Par conséquent, les politiques publicitaires sont de nature législative et des droits y sont restreints « par une règle de droit » au sens de l'article premier de la *Charte*.

3.3.4 Are the Limits Justified in a Free and Democratic Society?

[74] The next step in the analysis is to determine whether the infringement is justified in a free and democratic society. The principles were set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. For ease of reference, I will now reproduce the text of the impugned policies once again:

POLICY:

. . .

2. Advertisements, to be accepted, shall be limited to those which communicate information concerning goods, services, public service announcements and public events.

. . .

Standards and Limitations

. . .

7. No advertisement will be accepted which is likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy;

. . .

9. No advertisement will be accepted which advocates or opposes any ideology or political philosophy, point of view, policy or action, or which conveys information about a political meeting, gathering or event, a political party or the candidacy of any person for a political position or public office;

[75] The trial judge accepted, albeit with some hesitation, the transit authorities' submission that their policies had a sufficiently pressing and substantial objective of providing "a safe, welcoming public transit system" (para. 110). However, he went on to conclude that the policies were not rationally connected to the purported objective of ensuring safety, as it was doubtful that "the kind or extent of the controversy that might be provoked by such

3.3.4 Justification des restrictions dans une société libre et démocratique

[74] L'étape suivante consiste à déterminer si l'atteinte est justifiée dans le cadre d'une société libre et démocratique au regard des principes énoncés dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. Pour faciliter leur consultation, je reproduis de nouveau le libellé des politiques attaquées :

[TRADUCTION]

POLITIQUE :

. . .

2. Seule est acceptée la publicité qui communique de l'information sur des biens, des services, des messages d'intérêt public et des événements publics.

. . .

Conditions et restrictions

. . .

7. Est exclue toute publicité susceptible, au regard des normes sociales reconnues, d'offenser une personne ou un groupe de personnes ou de susciter la controverse.

. . .

9. Est exclue toute publicité qui promeut ou conteste une idéologie ou une philosophie politique, un point de vue, une politique ou une mesure, ou qui renseigne sur une assemblée, un rassemblement ou un événement politique, un parti politique ou la candidature d'une personne à une fonction politique ou à une charge publique.

[75] Le juge de première instance retient, quoique avec une certaine hésitation, la thèse des commissions de transport selon laquelle les politiques répondent à l'objectif suffisamment urgent et réel d'offrir [TRADUCTION] « un réseau de transport en commun sûr et accueillant » (par. 110). Cependant, il conclut ensuite que les politiques des commissions de transport n'ont pas de lien rationnel avec le prétendu objectif de sûreté, puisqu'il est peu

advertisements could create a safety risk" (para. 114). He also found that the total ban on political and other advocacy advertising did not constitute a minimal impairment of freedom of expression and that the alleged benefits of the advertising restrictions did not outweigh their detrimental effects (paras. 122 and 131). The Court of Appeal did not address this issue.

[76] I accept that the policies were adopted for the purpose of providing "a safe, welcoming public transit system" and that this is a sufficiently important objective to warrant placing a limit on freedom of expression. However, like the trial judge, I am not convinced that the limits on political content imposed by articles 2, 7 and 9 are rationally connected to the objective. I have some difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. It is not the political nature of an advertisement that creates a dangerous or hostile environment. Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or it advocates violence or terrorism — regardless of whether it is commercial or political in nature — that the objective of providing a safe and welcoming transit system will be undermined.

[77] Had I found a rational connection between the objective and the limits imposed by articles 2, 7 and 9, I would nevertheless have concluded that the means chosen to implement the objective was neither reasonable nor proportionate to the respondents' interest in disseminating their messages pursuant to their right under s. 2(*b*) of the *Charter* to freedom of expression. The policies allow for commercial speech but prohibit all political advertising. In particular, article 2 of the policies limits the types of advertisements that will be accepted to "those which communicate information concerning goods, services, public service announcements and public events", thereby excluding advertisements which communicate political messages. Article 7, on the other hand, refers

probable que [TRADUCTION] « la nature ou l'ampleur de la controverse susceptible d'être suscitée par les publicités présente un risque pour la sûreté » (par. 114). Il ajoute que l'exclusion totale de la publicité politique ou par ailleurs partisane ne porte pas atteinte le moins possible à la liberté d'expression et que les avantages allégués de la restriction de la publicité ne l'emportent pas sur ses effets préjudiciables (par. 122 et 131). La Cour d'appel ne se prononce pas sur ce point.

[76] Je reconnais que les politiques ont été adoptées dans le but d'offrir « un réseau de transport en commun sûr et accueillant » et qu'il s'agit d'un objectif suffisamment important pour justifier la restriction de la liberté d'expression. Toutefois, à l'instar du juge de première instance, je ne suis pas convaincue que l'exclusion de tout contenu politique aux articles 2, 7 et 9 ait un lien rationnel avec l'objectif. J'ai du mal à concevoir que la présence d'un message politique sur le côté d'un autobus puisse rendre le transport en commun moins sûr ou moins accueillant pour les usagers. Le caractère politique d'une publicité ne saurait créer un environnement dangereux ou hostile. Ce serait plutôt le caractère offensant du message — lorsque, par exemple, son contenu est discriminatoire ou incite à la violence ou au terrorisme, peu importe qu'il s'agisse d'une publicité commerciale ou politique — qui irait à l'encontre de l'objectif d'offrir un réseau de transport en commun sûr et accueillant.

[77] Si j'avais vu un lien rationnel entre l'objectif et les restrictions prévues aux articles 2, 7 et 9, je serais néanmoins arrivée à la conclusion que le moyen choisi pour réaliser l'objectif n'est ni raisonnable ni proportionné au droit des intimées d'exercer leur liberté d'expression garantie à l'al. 2*b*) de la *Charte* en diffusant leurs messages. La publicité commerciale est autorisée, mais pas la publicité politique. Plus particulièrement, l'article 2 de chacune des politiques prévoit que seule est acceptée la publicité [TRADUCTION] « qui communique de l'information sur des biens, des services, des messages d'intérêt public et des événements publics », écartant de ce fait celle qui transmet un message politique. L'article 7 renvoie pour sa part aux normes sociales reconnues pour déterminer si une publicité

to prevailing community standards as a measuring stick for whether an advertisement is likely "to cause offence to any person or group of persons or create controversy". While a community standard of tolerance may constitute a reasonable limit on offensive advertisements, excluding advertisements which "create controversy" is unnecessarily broad. Citizens, including bus riders, are expected to put up with some controversy in a free and democratic society. Finally, article 9 represents the most overt restriction on political advertisements, as it bans all forms of political content regardless of whether the message actually contributes to an unsafe or unwelcoming transit environment. In sum, the policies amount to a blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse. They therefore do not constitute a minimal impairment of freedom of expression.

[78] The fact that the limits are overbroad in the instant case does not mean that the government cannot limit speech in bus advertisements. It is clear from this Court's s. 1 jurisprudence on freedom of expression that location matters, as does the audience. Thus, a limit which is not justified in one place may be justified in another. And the likelihood of children being present matters, as does the audience's ability to choose whether to be in the place. In *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at paras. 93-94, one of the provisions at issue limited tobacco advertising that was appealing to young people or was published in places frequented or publications read by young people. This provision was held to be justified on the basis of the need to protect youths because of their vulnerability. In the criminal law context, this Court has held that the concept of indecency in the *Criminal Code* depends in part on location in that conduct that is indecent in one place may not be indecent in another more private place: *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728, at paras. 42-43; *R. v. Tremblay*, [1993] 2 S.C.R. 932, at pp. 960-61.

[79] Thus, limits on advertising are contextual. Although we are not required to review the proposed

est susceptible [TRADUCTION] « d'offenser une personne ou un groupe de personnes ou de susciter la controverse ». La norme socialement reconnue de la tolérance peut constituer un rempart raisonnable contre la publicité offensante, mais l'exclusion de toute publicité pouvant « susciter la controverse » a une portée trop grande. Dans une société démocratique, on s'attend des citoyens, y compris des usagers du transport en commun, qu'ils tolèrent un certain degré de controverse. Enfin, l'article 9 est celui qui écarte le plus explicitement la publicité politique. Il prohibe toute forme de contenu politique, que celui-ci compromette ou non la sûreté du transport en commun ou son caractère accueillant. En somme, une forme d'expression à laquelle est attaché un grand prix est exclue totalement d'un espace public qui constitue un important lieu d'expression publique. Les politiques ne portent donc pas atteinte le moins possible à la liberté d'expression.

[78] La constatation du caractère excessif de la restriction en l'espèce ne signifie pas que le gouvernement ne peut pas limiter l'expression dans l'espace publicitaire d'un autobus. Il ressort de la jurisprudence de la Cour relative à l'article premier et à la liberté d'expression que le lieu importe, tout comme l'auditoire. La limite qui n'est pas justifiée à un endroit peut donc l'être dans un autre. La présence probable d'enfants ou le caractère volontaire ou non de la présence des gens comptent également. Dans l'affaire *Canada (Procureur général) c. JTI-Macdonald Corp.*, 2007 CSC 30, [2007] 2 R.C.S. 610, l'une des dispositions en cause limitait la publicité du tabac destinée aux jeunes ou celle faite dans les lieux qu'ils fréquentaient ou dans les publications qu'ils lisaient. La Cour a conclu que la disposition était justifiée par la nécessité de protéger les jeunes en raison de leur vulnérabilité (par. 93-94). Dans le contexte pénal, elle a considéré que l'indécence au sens du *Code criminel* tenait en partie au lieu, c'est-à-dire que certains actes sont indécents à certains endroits, mais pas à d'autres, plus privés : *R. c. Labaye*, 2005 CSC 80, [2005] 3 R.C.S. 728, par. 42-43; *R. c. Tremblay*, [1993] 2 R.C.S. 932, p. 960-961.

[79] La justification de limites apportées à la publicité tient donc au contexte. Nous ne sommes

standards, the Canadian Code of Advertising Standards, which is referred to in the transit authorities' advertising policies, could be used as a guide to establish reasonable limits, including limits on discriminatory content or on ads which incite or condone violence or other unlawful behaviour. Given that the transit authorities did not raise s. 1, however, the above comment is intended merely to provide guidance on what may be justified, but the determination of what is justified will depend on the facts in the particular case.

[80] In sum, advertising on buses has become a widespread and effective means for conveying messages to the general public. In exercising their control over such advertising, the transit authorities have failed to minimize the impairment of political speech, which is at the core of s. 2(*b*) protection. I conclude that, to the extent that articles 2, 7 and 9 prohibit political advertising on the sides of buses, they place an unjustifiable limit on the respondents' right under s. 2(*b*) of the *Charter* to freedom of expression.

4. Remedy

[81] In light of the conclusion that the impugned policies violate the respondents' rights under s. 2(*b*) of the *Charter*, an appropriate remedy must be granted. The majority of the Court of Appeal declared that articles 7 and 9 of the transit authorities' advertising policies were of "no force and effect". Prowse J.A. granted the declarations sought by the respondents either on the basis of s. 52(1) of the *Constitution Act, 1982* if the policies are "law" within the meaning of that section, or on the basis of s. 24(1) of the *Charter* if they are not, as she was satisfied that the language of s. 24(1) is broad enough to encompass the remedy sought by the respondents. In this Court, BC Transit has not addressed the issue of remedy. As for TransLink, it briefly states, on the basis that the policies are not "law" for the purposes of s. 52(1) and that the respondents did not seek a declaration under

pas appelés à examiner les normes qu'il propose, mais le Code canadien des normes en publicité, auquel renvoient les politiques des commissions de transport, pourrait servir de guide pour établir des limites raisonnables, y compris en ce qui concerne le caractère discriminatoire d'une annonce publicitaire ou encore, la violence ou d'autres actes illégaux qui y sont encouragés ou tolérés. Cependant, comme les commissions de transport n'ont pas invoqué l'article premier, le commentaire qui précède ne vise qu'à offrir des repères pour déterminer ce qui est susceptible d'être justifié, toute décision à cet égard dépendant des faits de l'espèce.

[80] En somme, on recourt désormais couramment à l'espace publicitaire des autobus pour communiquer efficacement de l'information au grand public. Dans l'exercice de leur pouvoir sur l'utilisation de cet espace, les commissions de transport n'ont pas respecté le critère de l'atteinte minimale à la liberté d'expression politique, laquelle est au cœur de la protection prévue à l'al. 2*b*). J'arrive à la conclusion que dans la mesure où ils interdisent la publicité politique sur les côtés des autobus, les articles 2, 7 et 9 des politiques restreignent de manière injustifiée la liberté d'expression des intimées garantie à l'al. 2*b*).

4. Réparation

[81] Après avoir conclu que les politiques publicitaires des commissions de transport violent le droit des intimées garanti à l'al. 2*b*) de la *Charte*, il faut accorder la réparation qui s'impose. Les juges majoritaires de la Cour d'appel ont déclaré « inopérants » les articles 7 et 9 de ces politiques. La juge Prowse a rendu le jugement déclaratoire sollicité par les intimées sur le fondement soit du par. 52(1) de la *Loi constitutionnelle de 1982*, dans la mesure où chacune des politiques en cause constitue une « règle de droit » au sens de cet article, soit du par. 24(1) de la *Charte* dans le cas contraire, car elle était convaincue que le libellé de ce dernier paragraphe était assez général pour permettre l'octroi de la réparation demandée par les intimées. Devant notre Cour, BC Transit n'a pas abordé la question de la réparation. Pour sa part, TransLink indique brièvement qu'aucune réparation ne s'offre aux

s. 24(1) at trial, that no remedy is available to the respondents.

[82] McLachlin C.J., writing for a unanimous Court in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, stated that "[a] court which has found a violation of a *Charter* right has a duty to provide an effective remedy" (para. 34). The question is whether the declaration ought to be based on s. 52(1) of the *Constitution Act, 1982* or on s. 24(1) of the *Charter.*

4.1 *Choice Between Section 24(1) of the Charter and Section 52(1) of the Constitution Act, 1982*

[83] In *Ferguson*, McLachlin C.J. explained that remedies for *Charter* violations are governed by s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*, and that each of them serves different remedial purposes:

> Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights: *Big M*; *R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter*: *Schachter*; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81. [Emphasis in original; para. 61.]

[84] The respondents are challenging the constitutional validity of the impugned advertising policies. They do not seek a declaration that the transit authorities' decision to refuse to post their advertisements is of no force or effect. In other words, they are not challenging the validity of "government action" taken in administering a valid legislative

intimées parce que les politiques publicitaires ne sont pas des « règles de droit » au sens du par. 52(1) et, qu'au procès, les intimées n'ont pas sollicité de jugement déclaratoire en application du par. 24(1).

[82] Dans l'arrêt *R. c. Ferguson*, 2008 CSC 6, [2008] 1 R.C.S. 96, la juge en chef McLachlin, s'exprimant au nom de tous les juges de la Cour, affirme que « [l]e tribunal qui conclut à la violation d'un droit garanti par la *Charte* a l'obligation d'accorder une réparation efficace » (par. 34). Reste à savoir si le jugement déclaratoire doit s'appuyer sur le par. 52(1) de la *Loi constitutionnelle de 1982* ou sur le par. 24(1) de la *Charte.*

4.1 *Le choix entre le par. 24(1) de la Charte et le par. 52(1) de la Loi constitutionnelle de 1982*

[83] Dans l'arrêt *Ferguson*, la juge en chef McLachlin explique en outre que les réparations pouvant être accordées pour la violation d'un droit constitutionnel sont régies par les par. 24(1) de la *Charte* et 52(1) de la *Loi constitutionnelle de 1982*, et que chacune de ces dispositions a un objectif réparateur différent :

> Le paragraphe 52(1) offre une réparation lorsque des *dispositions législatives* violent des droits garantis par la *Charte*, que ce soit par leur objet ou par leur effet, tandis que le par. 24(1) offre un recours pour les *actes gouvernementaux* qui violent des droits garantis par la *Charte*. Il permet un recours personnel contre les actes gouvernementaux inconstitutionnels et, contrairement au par. 52(1), seule peut s'en prévaloir la partie qui allègue une atteinte à ses propres droits constitutionnels : *Big M*; *R. c. Edwards*, [1996] 1 R.C.S. 128. Notre Cour a répété à maintes reprises que la validité des lois relève de l'art. 52 de la *Loi constitutionnelle de 1982*, tandis que la validité des actes du gouvernement relève de l'art. 24 de la *Charte* : *Schachter*; *R. c. 974649 Ontario Inc.*, [2001] 3 R.C.S. 575, 2001 CSC 81. [En italique dans l'original; par. 61.]

[84] Les intimées contestent la constitutionnalité des politiques publicitaires. Elles ne sollicitent pas un jugement déclarant inopérant le refus des commissions de transport de diffuser leurs publicités. En d'autres mots, elles ne contestent pas la constitutionnalité d'« actes gouvernementaux » accomplis dans l'administration d'un régime législatif

scheme. Rather, the respondents are challenging the validity of the policies upon which the refusal was based, and therefore seek a declaration that the impugned policies themselves are of "no force or effect". On the face of the approach proposed by McLachlin C.J. in *Ferguson*, the question is whether the policies are "law" for the purposes of s. 52(1) of the *Constitution Act, 1982*. If they are, the remedy will lie in s. 52(1), not s. 24(1).

[85] Section 52(1) reads:

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

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

[86] Section 52(1) guarantees the supremacy of the Constitution of Canada. In order to ensure that supremacy, this Court has consistently espoused a broad interpretation of the concept of "law" in this context. In *Dolphin Delivery*, the Court held that s. 52(1) applies to the common law. In *Douglas/Kwantlen Faculty Assn.*, the majority held that an arbitrator had jurisdiction under s. 52(1) to remedy a *Charter* violation resulting from a provision of a collective agreement.

[87] The question, therefore, is whether binding policies of general application adopted by a government entity can be characterized as "law" for the purposes of s. 52(1). While the broad wording of s. 24(1) would appear to permit a declaration with an effect similar to that of one made under s. 52(1), it is more appropriate to deal with rules made by government entities under s. 52(1). There are two reasons for this. First, as this Court emphasized in *Ferguson*, it is important to deal with invalid "laws" under s. 52(1) and thereby ensure that inconsistent provisions are "not left on the books" (*Ferguson*, at paras. 65-66):

valide. Elles s'en prennent plutôt aux politiques qui fondent le refus et demandent donc qu'un jugement les déclare « inopérantes ». Selon l'approche proposée par la juge en chef McLachlin dans l'arrêt *Ferguson*, il faut se demander si chacune des politiques est une « règle de droit » pour les besoins du par. 52(1) de la *Loi constitutionnelle de 1982*. Dans l'affirmative, la réparation reposera sur cette disposition, et non sur le par. 24(1).

[85] Le paragraphe 52(1) de la *Loi constitutionnelle de 1982* est rédigé comme suit :

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

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

[86] Le paragraphe 52(1) garantit la suprématie de la Constitution du Canada, et afin d'assurer cette suprématie, la Cour a toujours interprété largement le terme « règle de droit » qui y est employé. Dans l'arrêt *Dolphin Delivery*, la Cour a conclu que le libellé du par. 52(1) englobait la common law. Dans l'arrêt *Douglas/Kwantlen Faculty Assn.*, les juges majoritaires ont statué que le par. 52(1) conférait à l'arbitre le pouvoir d'accorder réparation pour la violation d'un droit constitutionnel par une convention collective.

[87] Il faut donc déterminer si la politique obligatoire d'application générale adoptée par une entité gouvernementale peut être qualifiée de « règle de droit » aux fins du par. 52(1). Bien que le libellé général du par. 24(1) semble également permettre le prononcé d'un jugement déclaratoire dont l'effet est semblable à celui fondé sur le par. 52(1), il convient davantage de statuer sur les règles adoptées par une entité gouvernementale en fonction du par. 52(1), et ce, pour deux raisons. Premièrement, comme le souligne la Cour dans l'arrêt *Ferguson*, il est important de statuer sur une « règle de droit » invalide en application du par. 52(1) et de faire ainsi en sorte qu'une disposition incompatible ne demeure pas « en vigueur » (par. 65-66) :

The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies . . . .

As pointed out in *Seaboyer*, if the unconstitutional effects of laws are remediable on a case-by-case basis under s. 24(1), in theory all *Charter* violations could be addressed in this manner, leaving no role for s. 52(1). . . . [T]he risk is that the role intended for s. 52(1) would be undermined and that laws that should be struck down — over-inclusive laws that pose a real risk of unconstitutional treatment of Canadians — would remain on the books, contrary to the intention of the framers of the *Charter*.

[88] Second, because the public law requirements for jurisdiction and standing under s. 52(1) are less strict, the possibility of someone seeking a declaration of constitutional invalidity of a law is stronger in terms both of the number of potential claimants and of the number of possible fora. A binding rule of general application is not an individualized form of government action like an adjudicator's decision or a decision by a government agency concerning a particular individual or a particular set of circumstances. Rules of general application can have wide-ranging effects, which means that the broader remedy is more appropriate than an individual remedy under s. 24(1).

[89] Ensuring the largest numbers of potential claimants and beneficiaries of a constitutional challenge is in keeping with the spirit of the supremacy of the *Charter*. I conclude, therefore, that the appropriate remedy for an invalid rule of general application is one under s. 52(1) of the *Constitution Act, 1982*, not s. 24(1) of the *Charter*.

La présence du par. 52(1) et de son libellé obligatoire permet de croire que les rédacteurs de la *Charte* voulaient que les dispositions législatives inconstitutionnelles soient inopérantes dans la mesure de leur incompatibilité, et non qu'elles restent en vigueur sous réserve de l'octroi d'une réparation discrétionnaire accordée au cas par cas . . .

Comme la Cour l'a souligné dans *Seaboyer*, s'il est possible, en vertu du par. 24(1), de corriger au cas par cas les effets inconstitutionnels des dispositions législatives, on pourrait, en théorie, remédier ainsi à toutes les violations de la *Charte*, et le par. 52(1) n'aurait plus alors aucune raison d'être [. . .] [I]l y a risque que le rôle que devait jouer le par. 52(1) se trouve affaibli et que des dispositions législatives qui devraient être invalidées — parce que leur portée excessive crée un véritable risque que des Canadiens reçoivent un traitement inconstitutionnel — demeurent en vigueur, contrairement à ce que voulaient les rédacteurs de la *Charte*.

[88] Deuxièmement, au par. 52(1), les exigences moins strictes du droit public en ce qui concerne la compétence et la qualité pour agir accroissent la possibilité de faire invalider une règle de droit inconstitutionnelle eu égard au nombre de juridictions susceptibles d'être saisies et au nombre de personnes susceptibles d'intenter le recours. Une règle obligatoire d'application générale n'est pas un acte gouvernemental individualisé, comme la décision d'un arbitre ou d'un organisme gouvernemental visant une personne ou une situation en particulier. Une règle d'application générale peut avoir des répercussions à bien des égards, de sorte qu'une réparation de portée générale convient mieux qu'une réparation individuelle fondée sur le par. 24(1).

[89] L'élargissement du bassin des personnes susceptibles d'intenter un recours sur le fondement de la Constitution et des personnes susceptibles d'en bénéficier est conforme à l'esprit qui sous-tend la suprématie de la *Charte*. Par conséquent, je conclus que la réparation appropriée dans le cas d'une règle d'application générale invalide est celle qui prend appui sur le par. 52(1) de la *Loi constitutionnelle de 1982*, et non sur le par. 24(1) de la *Charte*.

4.2 *Application of the Principles to the Transit Authorities' Policies*

[90] The transit authorities' policies clearly come within the meaning of "law" for the purposes of s. 52(1) of the *Constitution Act, 1982*. They were adopted by government entities pursuant to a rule-making power. On the facts of the case, the transit authorities used their delegated rule-making power to adopt policies which unjustifiably limited the respondents' freedom of expression. Those policies are binding rules of general application that establish the rights of members of the public who seek to advertise on the transit authorities' buses. In my view, the transit authorities' advertising policies are "law" within the meaning of s. 52(1) of the *Constitution Act, 1982* and can therefore be declared of no force or effect to the extent of their inconsistency.

5. Conclusion

[91] I would dismiss the appeal with costs on the basis that the respondents' right under s. 2(*b*) of the *Charter* to freedom of expression was violated by articles 2, 7 and 9 of the transit authorities' advertising policies. Accordingly, the Court of Appeal's order is varied by the addition of a declaration that article 2 is also inconsistent with the protection of freedom of expression guaranteed under the *Charter* and of no force and effect. I would answer the constitutional questions as follows:

1. Does the *Canadian Charter of Rights and Freedoms* apply, pursuant to section 32 of the *Canadian Charter of Rights and Freedoms*, to clause 2 and the Standards and Limitations numbered 7 and 9 of the transit authorities' advertising policies?

Answer: Yes.

2. If so, do clause 2 and the Standards and Limitations numbered 7 and 9 of the transit authorities' advertising policies infringe section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

4.2 *L'application des principes aux politiques des commissions de transport*

[90] Chacune des politiques des commissions de transport constitue clairement une « règle de droit » au sens du par. 52(1) de la *Loi constitutionnelle de 1982*. Elle a été adoptée par une entité gouvernementale en vertu de son pouvoir de réglementation. En l'espèce, les commissions de transport ont exercé leur pouvoir de réglementation délégué pour adopter des politiques qui restreignent de façon injustifiée la liberté d'expression des intimées. Leurs politiques sont des règles obligatoires d'application générale qui établissent les droits des citoyens d'utiliser l'espace publicitaire des autobus. À mon avis, les politiques publicitaires des commissions de transport s'entendent de « règles de droit » au sens du par. 52(1) de la *Loi constitutionnelle de 1982* et peuvent par conséquent être déclarées inopérantes dans la mesure de leur incompatibilité.

5. Conclusion

[91] Je suis d'avis de rejeter le pourvoi avec dépens au motif que le droit à la liberté d'expression des intimées garanti à l'al. 2*b*) de la *Charte* a été violé par les articles 2, 7 et 9 des politiques publicitaires des commissions de transport. L'ordonnance de la Cour d'appel est donc modifiée de façon qu'il y soit déclaré que l'article 2 est également incompatible avec la protection de la liberté d'expression prévue par la *Charte* et inopérant. Il y a lieu de répondre aux questions constitutionnelles de la manière suivante :

1. La *Charte canadienne des droits et libertés* s'applique-t-elle, suivant son article 32, à l'article 2 et aux conditions et restrictions n^{os} 7 et 9 des politiques publicitaires des commissions de transport?

Réponse : Oui.

2. Dans l'affirmative, l'article 2 et les conditions et restrictions n^{os} 7 et 9 des politiques publicitaires des commissions de transport contreviennent-elles à l'alinéa 2*b*) de la *Charte canadienne des droits et libertés*?

Réponse : Oui.

3. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

The following are the reasons delivered by

FISH J. —

I

[92] In order to raise revenues, the appellants sold advertising space on the outside of the buses they control. Pursuant to their separate but virtually identical advertising policies, they rejected the respondents' proposed advertisements on the ground that they conveyed "political" messages.

[93] I agree with Justice Deschamps that the appellants (the "Transit Authorities") are both "government entities" and therefore subject to the *Canadian Charter of Rights and Freedoms*. I agree as well that their advertising policies infringed the respondents' freedom of expression and thereby contravened s. 2(*b*) of the *Charter*. And finally, on the record before us, I agree that this infringement cannot be justified under s. 1 of the *Charter*.

[94] With respect, however, I have followed a different and more direct route in concluding that the appellants' advertising policies contravene s. 2(*b*) of the *Charter*.

[95] My point of departure is this: In virtue of s. 2(*b*), freedom of expression enjoys broad but not unbounded constitutional protection in Canada. It is a freedom that extends to any activity that conveys or attempts to convey a meaning: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 969. But the *Charter* cannot have been intended to protect all expression, so broadly defined, at all times in every "space" or "place" under governmental control. Freedom of expression under

3. Dans l'affirmative, la contravention constitue-t-elle une restriction raisonnable apportée par une règle de droit et dont la justification peut se démontrer dans une société libre et démocratique par application de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Non.

Version française des motifs rendus par

LE JUGE FISH —

I

[92] Pour produire des recettes, les appelantes exploitaient l'espace publicitaire sur la partie extérieure de leurs autobus. Invoquant leurs politiques distinctes (mais pratiquement identiques) en la matière, elles ont refusé les annonces des intimées au motif que des messages « politiques » y étaient transmis.

[93] Je conviens avec la juge Deschamps que les appelantes (les « commissions de transport ») sont toutes deux des « entités gouvernementales » et qu'elles sont donc assujetties à la *Charte canadienne des droits et libertés*. Je conviens également que leurs politiques publicitaires ont porté atteinte à la liberté d'expression des intimées et ainsi contrevenu à l'al. 2*b*) de la *Charte*. Enfin, au vu du dossier, j'estime aussi que l'atteinte ne peut être justifiée au regard de l'article premier.

[94] Avec égards, cependant, ma démarche est différente et se veut plus directe pour arriver à la conclusion que les politiques publicitaires des appelantes violent le droit garanti à l'al. 2*b*) de la *Charte*.

[95] Mon point de départ est le suivant. Au Canada, l'al. 2*b*) confère à la liberté d'expression une protection constitutionnelle étendue mais non illimitée. Cette liberté vaut pour toute activité par laquelle on transmet ou tente de transmettre une signification (*Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 969). Or, le législateur ne peut avoir voulu que la *Charte* protège toujours l'expression, aussi largement définie, dans tout « endroit » ou « espace » relevant de l'État.

s. 2(*b*) has therefore been made subject to limitation in two respects.

[96] The first can be conceptually characterized as "internal": Some forms of expression may be validly curtailed by government because they are inherently inconsistent with the object and purpose of s. 2(*b*) of the *Charter*. They are for that reason left unsheltered by its constitutional umbrella.

[97] This internal limit on freedom of expression consists in narrowly construed exceptions to the general rule of broad protection enshrined in s. 2(*b*). Two recognized exceptions, or exclusions, are relied on by the Transit Authorities. One concerns expressive activity that would impose a *significant burden* on the government entity concerned; the other, expressive activity that is *manifestly incompatible* with the space or place where it is sought to be exercised. I shall later deal more fully with these exclusions; for the moment, it will suffice to say that neither applies in this case.

[98] Second, freedom of expression is subject to an "external" limitation as well: Even if an expressive activity falls within the protected zone of s. 2(*b*) of the *Charter*, it may be validly curtailed in virtue of s. 1 pursuant "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In this regard, I agree with Justice Deschamps that the appellants' impugned advertising policies do not pass constitutional muster. They may be properly characterized as a limit "prescribed by law" within the meaning of s. 1. As mentioned earlier, however, they are not demonstrably justified in a free and democratic society like our own.

[99] In short, the appellants' impugned advertising policies prevented the respondents from exercising the freedom of expression guaranteed to them by s. 2(*b*) of the *Charter*. This rejection of the respondents' proposed advertisements, moreover,

La liberté d'expression garantie à l'al. 2*b*) fait donc l'objet de deux limitations.

[96] La première peut être qualifiée d'« interne » sur le plan conceptuel. L'État peut limiter à bon droit certaines formes d'expression parce qu'elles sont intrinsèquement incompatibles avec l'objet et la raison d'être de l'al. 2*b*) de la *Charte*. Telle est la raison pour laquelle elles sont exclues du giron constitutionnel.

[97] Cette limitation interne de la liberté d'expression s'entend d'exceptions interprétées strictement à la règle générale de la protection étendue que consacre l'al. 2*b*). Les commissions de transport invoquent deux exceptions (ou exclusions) reconnues. L'une vise l'activité expressive qui impose une *obligation substantielle* à l'entité gouvernementale en cause, et l'autre l'activité expressive qui est *manifestement incompatible* avec l'espace ou le lieu dans lequel elle est projetée. Je reviendrai plus en détail sur ces exceptions, mais pour le moment, il suffit de dire qu'aucune ne s'applique en l'espèce.

[98] En second lieu, la liberté d'expression fait également l'objet d'une limitation « externe ». Ainsi, même lorsqu'elle bénéficie de la protection prévue à l'al. 2*b*) de la *Charte*, l'activité expressive peut, suivant l'article premier, être légitimement restreinte « 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 ». Sur ce point, je conviens avec la juge Deschamps que les politiques publicitaires contestées ne résistent pas au contrôle constitutionnel. On peut à juste titre considérer qu'elles apportent une restriction établie « par une règle de droit » au sens de l'article premier. Toutefois, je le rappelle, la justification de cette restriction ne saurait se démontrer dans une société libre et démocratique comme la nôtre.

[99] En somme, les politiques publicitaires des appelantes ont empêché les intimées d'exercer la liberté d'expression que leur garantissait l'al. 2*b*) de la *Charte*. Qui plus est, le refus opposé aux intimées n'a pas été qu'une *conséquence* des politiques

was not merely an *effect* of the restrictive advertising policies; rather, it was their very *purpose*.

[100] It is essentially on this basis that I would dismiss the appellants' appeal. And though it is apparent from what I have already said, I feel bound to state explicitly, from the outset, that I respectfully disagree with the analytical framework adopted by Justice Deschamps in circumscribing freedom of expression under s. 2(*b*) of the *Charter*.

[101] More particularly, I am unable to share my colleague's application in this case of the Court's decisions in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, and *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 ("*City of Montréal*"). In my view, *Baier* rests on its own factual foundation and was not intended to break fresh constitutional ground. Again with respect, I find that my colleague's application of *City of Montréal* adds undue complexity to the constitutional analysis required under s. 2(*b*) of the *Charter*. It unnecessarily introduces as well real risks of "overinclusion" *and* "underinclusion", which are both best avoided.

II

[102] I turn now to consider the two internal limits on free speech invoked by the Transit Authorities: First, they argue that acceptance of the respondents' advertisements would subject them to a *significant burden*; second, they submit, in effect, that the proposed advertisements are *manifestly incompatible* with the space where the respondents wish them to appear — the sides of buses used for public transportation. As mentioned earlier, I am satisfied that neither exception applies in this case.

[103] The first exception concerns freedom of expression that cannot be respected without imposing on the government *a significant burden of assistance*, in the form of expenditure of public funds, or the initiation of a complex legislative, regulatory, or administrative scheme or undertaking. This

publicitaires restrictives, mais bien la réalisation de leur *objet* même.

[100] C'est essentiellement sur ce fondement que je suis d'avis de rejeter le pourvoi des appelantes. Mais avant de poursuivre, bien que cela ressorte des propos qui précèdent, j'estime nécessaire d'exprimer formellement mon désaccord avec le cadre d'analyse utilisé par la juge Deschamps pour circonscrire la liberté d'expression que garantit l'al. 2*b*) de la *Charte*.

[101] Plus particulièrement, je ne puis souscrire à l'application qu'elle fait en l'espèce des arrêts *Baier c. Alberta*, 2007 CSC 31, [2007] 2 R.C.S. 673, et *Montréal (Ville) c. 2952-1366 Québec Inc.*, 2005 CSC 62, [2005] 3 R.C.S. 141 (« *Ville de Montréal* »). À mon sens, le premier tient aux faits particuliers en cause et la Cour n'entendait pas y établir de nouveaux principes constitutionnels. Toujours avec égards, je trouve que l'application de l'arrêt *Ville de Montréal* par ma collègue complique indûment l'analyse constitutionnelle que commande l'al. 2*b*) de la *Charte*. Elle crée inutilement un risque véritable de portée « trop large » *ou* « trop limitative », deux éventualités qu'il faut s'efforcer d'éviter.

II

[102] J'examine maintenant les deux limitations internes de la liberté d'expression invoquées par les commissions de transport. Premièrement, les appelantes font valoir que l'acceptation des annonces publicitaires des intimées leur aurait imposé une *obligation substantielle*. Deuxièmement, elles prétendent en effet que les publicités proposées sont *manifestement incompatibles* avec l'espace dans lequel les intimées veulent les insérer, à savoir les côtés de véhicules de transport en commun. Je le répète, je suis convaincu que ni l'une ni l'autre des exceptions ne s'appliquent dans la présente affaire.

[103] La première exception s'applique lorsque la liberté d'expression ne peut être respectée sans imposer à l'État *une obligation d'aide substantielle*, qu'il s'agisse de dépenser des fonds publics ou de mettre en branle un régime ou un projet complexe d'ordre législatif, réglementaire ou administratif.

internal limitation on constitutionally protected freedom of expression was recognized and applied by the Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336; *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at paras. 25-26; and *Baier.*

[104] The "significant burden" exception is itself subject, however, to an exception that has no application here, but should nonetheless be noted for the sake of completeness: A significant burden *can* be imposed on government where the claimant meets the exacting criteria set out in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, and particularly well summarized by Rothstein J. in *Baier*, at para. 27.

[105] The significant burden exception is firmly rooted in Canada's constitutional terrain. Under our system of government, the judiciary cannot be seen to direct the legislative branch to expend scarce public resources in order to satisfy *Charter* claims in a particular manner. Clearly, government expenditures and initiatives may be undertaken to advance *Charter* rights and freedoms in innumerable ways, but given finite resources, it is generally considered to be a matter for the legislature and not the judiciary to determine which social priorities are to receive government assistance. The *Dunmore* exception to this general principle is limited, and essentially arises only where a fundamental right cannot otherwise be exercised.

[106] The significant burden exception responds as well to another important concern. Judges are ill-equipped to supervise the implementation of court orders that require complex and ongoing responses on the part of state actors. Any attempt to do so may well trench on the autonomy of the executive and legislative branches of government.

Cette limitation interne apportée au droit constitutionnel à la liberté d'expression a été reconnue et appliquée par la Cour dans les arrêts suivants : *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 336; *Haig c. Canada*, [1993] 2 R.C.S. 995, p. 1035; *Assoc. des femmes autochtones du Canada c. Canada*, [1994] 3 R.C.S. 627; *Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989, par. 25-26; *Baier.*

[104] Or, l'exception de l'« obligation substantielle » fait elle-même l'objet d'une exception qui ne s'applique pas en l'espèce, mais qui mérite néanmoins d'être signalée par souci d'exhaustivité. Une obligation substantielle *peut* être imposée à l'État lorsque l'intéressé satisfait aux critères stricts de l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, que le juge Rothstein résume particulièrement bien dans l'arrêt *Baier*, au par. 27.

[105] L'exception de l'obligation substantielle est fermement enracinée dans le paysage constitutionnel canadien. Dans notre système de gouvernement, le pouvoir judiciaire ne peut enjoindre au pouvoir législatif de dépenser des fonds publics restreints pour donner suite d'une certaine manière à des demandes fondées sur la *Charte*. Certes, dépenses et mesures gouvernementales peuvent être entreprises d'innombrables façons pour promouvoir les droits et libertés constitutionnels, mais vu la limitation des ressources disponibles, on considère généralement qu'il appartient au législateur, et non aux tribunaux, de déterminer les priorités sociales justifiant l'appui de l'État. L'exception à ce principe général prévue dans l'arrêt *Dunmore* a une portée limitée et ne s'applique essentiellement que lorsqu'un droit fondamental ne peut être exercé sans un tel appui.

[106] L'exception de l'obligation substantielle tient également compte d'une autre préoccupation importante. Les tribunaux ne sont pas dotés des moyens nécessaires pour surveiller la mise en œuvre d'ordonnances judiciaires exigeant des mesures complexes et continues de la part d'acteurs gouvernementaux. Toute mesure prise néanmoins en ce sens pourrait bien entamer l'autonomie des pouvoirs exécutif et législatif du gouvernement.

[107] Justice Deschamps finds (at para. 30) that *Baier* established "the criteria for identifying the limited circumstances in which s. 2(*b*) requires the government to extend an underinclusive means of, or 'platform' for, expression to a particular group or individual". According to my colleague (at para. 32), the same concern is not present in this case, because here the policies in question exclude a particular kind of expressive *content*, not a particular *group* of individuals. Since the concern in this case is content discrimination, not group underinclusion, *Baier* does not apply.

[108] With respect, as mentioned earlier, I would hesitate to ascribe to *Baier* a constitutional significance unsupported by its particular factual foundation. *Baier* affords no principled basis for permitting group discrimination in the freedom of expression analysis. And *Baier* provides no authority for the proposition that transit authorities (or other government actors) can refuse to accept *all* advertisements from a particular group but cannot refuse to publish *some* of the group's advertisements *because of their political content*. On any view of the matter, a purposive reading of s. 2(*b*) of the *Charter* hardly favours the exclusion of a particular group over the suppression of a particular message.

[109] Indeed, except artificially, it seems difficult to divorce content discrimination from group discrimination, since many groups are bound together by the content of their shared convictions or concerns — that is, by the "message" they aspire to communicate. To still the messenger is to suppress the message.

[110] Accordingly, unlike my colleague, I do not believe that *Baier* required the Transit Authorities "to at least demonstrate that the respondents themselves were excluded from the particular means of expression" in issue here (reasons of Justice Deschamps, at para. 32 (emphasis added)). Nor do

[107] La juge Deschamps conclut au par. 30 de ses motifs que l'arrêt *Baier* établit « les critères permettant de déterminer les quelques circonstances dans lesquelles l'al. 2*b*) exige du gouvernement qu'il mette à la disposition d'une personne ou d'un groupe de personnes un mode d'expression ou une "tribune" dont l'accès est trop restreint ». Selon elle, le même souci n'est pas présent en l'espèce, car les politiques en cause excluent un type particulier de *contenu* expressif, et non un *groupe* de personnes (par. 32). Étant donné que la présente affaire porte sur la discrimination relative au contenu, et non sur l'exclusion d'un groupe, l'arrêt *Baier* ne s'applique pas.

[108] Avec égards, je le répète, j'hésite à attribuer à cet arrêt une importance constitutionnelle indépendante des faits particuliers qui le sous-tendent. La décision n'offre aucun fondement rationnel justifiant la discrimination à l'endroit d'un groupe de personnes dans le cadre de l'examen relatif à la liberté d'expression. Et on ne saurait l'invoquer à l'appui de la prétention selon laquelle les commissions de transport (ou d'autres acteurs gouvernementaux) peuvent refuser *toutes* les publicités d'un groupe en particulier, mais ne peuvent refuser *certaines* d'entre elles *en raison de leur teneur politique*. Peu importe le point de vue adopté, l'interprétation téléologique de l'al. 2*b*) de la *Charte* ne privilégie pas vraiment l'exclusion d'un groupe en particulier par rapport à la suppression d'un message donné.

[109] Il paraît en effet difficile, sauf de manière artificielle, de dissocier la discrimination relative à la teneur de celle visant un groupe, car de nombreux groupes sont liés entre eux par la teneur de leurs convictions ou de leurs préoccupations communes, c'est-à-dire par le « message » qu'ils aspirent à communiquer. Faire taire le messager c'est supprimer le message.

[110] Contrairement à ma collègue, je ne crois donc pas que, suivant l'arrêt *Baier,* les commissions de transport devaient « au moins prouver que les intimées n'avaient pas elles-mêmes accès au mode d'expression en cause » dans la présente affaire (motifs de la juge Deschamps, par. 32 (je souligne)).

I find a "positive rights analysis" helpful in this regard.

[111] Again with respect, I see no principled basis for restricting freedom of expression under the *Charter* according to whether the claim concerns a "means", a "platform" or a "statutory scheme". All three are equally subject to *Charter* scrutiny. Nor would I distinguish, in the present context, between "platforms", "forums", "spaces" and "places". Unless otherwise indicated, or the context otherwise requires, no one term is meant to exclude the others.

[112] Moreover, not every claim can be comfortably shoehorned into one preconceived slot or another: As this case demonstrates, it is not always apparent whether a particular claim seeks access to a "public space", to a government-created "platform", or to a "statutory scheme". Nor is it easy to draw explicit and conclusive distinctions between the "means", "form", or "content" of a disputed expressive activity: see Lamer J. in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at pp. 1181-82.

[113] I think it preferable to ask instead whether the respondents' claim would impose on the Transit Authorities a significant burden of assistance, as earlier defined, or otherwise involves expression that is excluded by a recognized exception from the protected zone of s. 2(*b*) of the *Charter.*

[114] The "significant burden" criterion provides a pragmatic and functional standard that responds well to constitutional concerns regarding the scope of freedom of expression in s. 2(*b*) of the *Charter.* And it is firmly rooted in prior decisions of the Court.

[115] Here, the Transit Authorities complain of four "active steps" that the respondents' claim would compel them to take: The rewriting of their

Je n'estime pas non plus que l'analyse sous l'angle de la « revendication d'un droit positif » soit utile à cet égard.

[111] Par ailleurs, je ne vois pas de fondement rationnel au fait de moduler la protection constitutionnelle accordée à la liberté d'expression selon que la revendication vise un « mode » d'expression, une « tribune » ou un « régime législatif ». Tous trois sont assujettis aux exigences de la *Charte*. Dans le présent contexte, je ne fais pas non plus de distinction entre « tribune », « espace » et « lieu ». Sauf indication contraire ou lorsque le contexte commande qu'il en aille autrement, aucun de ces éléments n'est censé exclure les autres.

[112] De plus, toute demande ne s'insère pas aisément dans une catégorie préétablie. La présente affaire montre bien qu'il n'est pas toujours patent qu'une demande donnée vise l'accès à un « espace public », à une « tribune » créée par l'État ou à un « régime législatif ». Il n'est pas non plus facile de faire des distinctions explicites et décisives entre le « mode », la « forme » et la « teneur » de l'activité expressive en cause : se reporter aux motifs du juge Lamer dans *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, p. 1181-1182.

[113] Je suis d'avis qu'il faut plutôt déterminer si acquiescer à la demande des intimées imposerait aux commissions de transport une obligation d'aide substantielle — au sens établi précédemment — ou si la demande met par ailleurs en cause une expression faisant jouer une exception reconnue à l'application de l'al. 2*b*) de la *Charte*.

[114] Le critère de l'« obligation substantielle » constitue une norme pragmatique et fonctionnelle qui tient dûment compte des préoccupations constitutionnelles liées à l'étendue de la liberté d'expression garantie à l'al. 2*b*) de la *Charte*. Qui plus est, il est solidement ancré dans la jurisprudence de notre Cour.

[115] En l'espèce, les commissions de transport s'élèvent contre quatre « mesures concrètes » qu'il leur faudrait prendre pour donner suite à la

advertising policy; the negotiation of new advertising contracts; the production and installation of the advertisements; and the provision of space and maintenance. I am satisfied that these four "active steps", individually or cumulatively considered, do not impose on the Transit Authorities a *significant burden* within the meaning of that phrase in the context of a s. 2(*b*) claim under the *Charter*.

[116] This is a case where the appellants have denied the respondents access to a commercial advertising programme already in place. Little change is needed to remove the infringing restrictions complained of by the respondents. In any event, contrary to the appellants' submission, a claim under the *Charter* can hardly be defeated on the ground that the infringing law or policy would have to be modified in order to end the infringement.

[117] The three other "active steps" invoked by the Transit Authorities are all entirely routine tasks which they already perform (or delegate to a third-party media company) on a regular basis in the normal course of their advertising programmes. They require no meaningful expenditure of funds — on the contrary, removing the impugned restriction would *increase* the appellants' advertising revenues. They require no new operating initiatives of significance. And they involve no administrative reorganization, restructuring or expansion that can reasonably be characterized as "burdensome".

[118] I would therefore reject the appellants' submission that the respondents' claim would impose a significant burden on them and is therefore unprotected by the freedom of expression guaranteed by s. 2(*b*) of the *Charter*.

III

[119] The appellants rely as well on a second exception to the freedom of expression guaranteed

demande des intimées : la révision de leur politique publicitaire, la négociation de nouveaux contrats de publicité, la production et la mise en place des publicités et l'offre d'espace et d'entretien. Je suis convaincu que, considérées individuellement ou ensemble, ces quatre « mesures concrètes » n'imposent pas aux commissions de transport une *obligation substantielle* au sens indiqué précédemment pour les besoins de l'application de l'al. 2*b*) de la *Charte*.

[116] En l'espèce, les appelantes ont refusé aux intimées l'accès à un programme de publicité commerciale déjà existant. La suppression des restrictions attentatoires contestées par les intimées requiert peu de modifications. Quoi qu'il en soit, contrairement à ce que prétendent les appelantes, une demande fondée sur la *Charte* ne saurait être rejetée au motif que la loi ou la politique contestée devrait être modifiée pour ne plus être attentatoire.

[117] Les trois autres « mesures concrètes » invoquées par les commissions de transport correspondent toutes à des tâches tout à fait banales qu'elles accomplissent déjà (ou qu'elles délèguent à une entreprise spécialisée) périodiquement dans le cours normal de leurs activités publicitaires. Elles n'exigent pas de dépenses importantes — au contraire, la suppression de la restriction ferait *s'accroître* les recettes publicitaires des appelantes. Elles ne nécessitent pas de changements importants sur le plan de l'exploitation. Et elles n'impliquent pas de réorganisation administrative, de restructuration ou d'expansion pouvant raisonnablement être qualifiée de « contraignante ».

[118] Je suis donc d'avis de rejeter la prétention des appelantes selon laquelle faire droit à la demande des intimées leur imposerait une obligation substantielle, de sorte que l'expression en cause ne bénéficierait pas de la protection prévue à l'al. 2*b*) de la *Charte*.

III

[119] Les appelantes invoquent en outre une seconde exception à la liberté d'expression garantie

by s. 2(*b*) of the *Charter*. Essentially, they submit that the rejected advertisements are manifestly incompatible, on account of their "political" messages, with the function or purpose of the appellants' programme permitting advertisements on the sides of their buses.

[120] One of the advertising policies adopted by both appellants states:

> 2. Advertisements, to be accepted, shall be limited to those which communicate information concerning goods, services, public service announcements and public events.

[121] The addition of political messages to these broad and diverse categories of permitted advertisements cannot reasonably be thought to undermine the function or purpose of the sides of buses made publicly accessible by the Transit Authorities for paid advertising. Advertisements conveying a political message are not incompatible — let alone *manifestly* incompatible — with a commercial and public service advertising facility of that sort. Having chosen to make the sides of buses available for expression on such a wide variety of matters, the Transit Authorities cannot, without infringing s. 2(*b*) of the *Charter*, arbitrarily exclude a particular kind or category of expression that is otherwise permitted by law.

[122] Moreover, the purpose or function of the "space", "place" or "platform" where freedom of expression has been restricted is for the courts to ascertain, and not for government entities to unilaterally and finally determine. Depending on the circumstances, the relevant purpose or function will be established by reference to its current or ordinary use, to historical and traditional practice, to reasonable public expectations, to clear government intent, and to other like considerations. In this case, the acknowledged purpose of the scheme for advertising on the sides of buses is to raise revenue. And the function of the buses themselves is safe, clean, and orderly transportation. But in neither respect

à l'al. 2*b*) de la *Charte*. Elles font essentiellement valoir qu'en raison de leurs messages « politiques », les publicités qu'elles ont refusées étaient manifestement incompatibles avec la fonction ou la raison d'être de leur programme autorisant la réclame sur les côtés des autobus.

[120] Voici l'une des dispositions des politiques publicitaires des appelantes :

[TRADUCTION]

> 2. Seule est acceptée la publicité qui communique de l'information sur des biens, des services, des messages d'intérêt public et des événements publics.

[121] On ne saurait raisonnablement voir dans l'adjonction du message politique à ces catégories générales et variées de publicité autorisée une mise à mal de la fonction ou de la raison d'être des côtés d'autobus que les commissions de transport mettent généralement à la disposition des annonceurs payants. La publicité renfermant un message politique n'est pas incompatible — et encore moins *manifestement* incompatible — avec un service publicitaire à vocation commerciale et publique de ce genre. Après avoir permis que leurs véhicules servent de supports à l'expression sur une grande variété de sujets, les commissions de transport ne peuvent, sans violer la garantie prévue à l'al. 2*b*) de la *Charte*, écarter arbitrairement une sorte ou une catégorie particulière d'expression par ailleurs légale.

[122] En outre, il appartient aux tribunaux de déterminer la raison d'être ou la fonction de l'« espace », du « lieu » ou de la « tribune » où la liberté d'expression fait l'objet d'une limitation; ce n'est pas aux entités gouvernementales de le faire unilatéralement et définitivement. Selon les circonstances, la raison d'être ou la fonction sera établie au regard de différentes considérations, dont l'utilisation actuelle ou habituelle, la pratique antérieure et traditionnelle, les attentes raisonnables du public et l'intention claire du gouvernement. En l'occurrence, la raison d'être reconnue de la publicité sur les côtés des autobus est la production de recettes. Et la fonction de l'autobus lui-même est le

is there an obvious incompatibility with political advertisements.

[123] On the contrary, permitting political advertising would serve *the very purpose for which the sides of buses were made generally and publicly accessible for a price* — to raise revenue. And there is no inherent conflict between political advertisements on the sides of buses and orderly transportation. If there is some other objective in limiting political advertisements that is not related to these functions and purposes of the transit system and the advertising scheme, it should fall to be considered at the s. 1 justification stage of a challenge under s. 2(*b*) of the *Charter.*

[124] Unlike Justice Deschamps (at paras. 37-47), I do not believe that *all* expressive activity attracts s. 2(*b*) protection in every government-controlled place or forum where one would expect "free expression" to be protected. In my respectful view, freedom of expression under s. 2(*b*) of the *Charter* cannot be characterized as an "all or nothing" proposition. The constitutional inquiry on a s. 2(*b*) challenge should instead focus on whether the *particular* expressive activity that has been restricted by a governmental entity enjoys protection in the space, place or forum concerned.

[125] This will preclude overinclusion in some cases and underinclusion in others. Expressive activity that is in form or content manifestly incompatible with the purpose or function of the space in question would otherwise be "piggy-backed" into the protected zone by expressive activity that is not manifestly incompatible. Conversely, a meritorious claim of infringement would be doomed by the exclusion of any expressive activity that lies outside the protected zone.

[126] For Justice Deschamps (at para. 40), "content is not relevant to the determination of the function of a place". My colleague's view may be

transport sûr, efficace et sans heurts. Aucun de ces éléments n'est manifestement incompatible avec la publicité à caractère politique.

[123] Au contraire, permettre la publicité politique serait dans le droit fil de *la raison même pour laquelle les côtés des autobus sont généralement mis à la disposition du public moyennant finances*, à savoir la production de recettes. Il n'y a pas non plus de conflit intrinsèque entre la publicité politique sur les côtés des autobus et le transport sans heurts. Tout autre objectif de l'exclusion de la publicité politique qui est étranger à ces fonctions et raisons d'être du système de transport et du service publicitaire doit être considéré à l'étape de la justification au regard de l'article premier pour les besoins d'une contestation fondée sur l'al. 2*b*) de la *Charte*.

[124] Contrairement à la juge Deschamps (par. 37-47), je ne crois pas que *toute* activité expressive bénéficie de la protection constitutionnelle en tout lieu ou à toute tribune relevant de l'État où l'on s'attendrait à la protection de la « liberté d'expression ». Avec égards, on ne peut considérer l'application de la garantie prévue à l'al. 2*b*) de la *Charte* dans une optique de « tout ou rien ». L'analyse constitutionnelle fondée sur cet alinéa doit plutôt s'attacher à la question de savoir si l'activité expressive *particulière* que l'entité gouvernementale a restreinte jouit d'une protection dans l'espace, le lieu ou la tribune en cause.

[125] Pareille démarche permet d'éviter que la portée accordée soit trop grande dans certains cas et trop restreinte dans d'autres. Sinon, l'activité expressive dont la forme ou la teneur est manifestement incompatible avec la raison d'être ou la fonction de l'espace en question réintégrerait le champ de la garantie grâce à l'activité expressive non manifestement incompatible. À l'inverse, une allégation de violation fondée serait vouée à l'échec par l'exclusion de toute activité expressive non comprise dans le champ de la garantie.

[126] Pour la juge Deschamps, « le contenu n'est pas pertinent pour la détermination de la fonction d'un lieu » (par. 40). On peut penser que son point

thought to rest on *Irwin Toy*, where the Court stated (at p. 969):

> We cannot . . . exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.

[127] The issue in *Irwin Toy*, however, was whether the expressive content in question (commercial advertising directed at children) could be restricted generally, *in any location*.

[128] Here, on the other hand, the question is whether the expression is required to be permitted in a particular space. And that question is best answered by determining whether the infringed expressive activity (advertisements with a political message) is manifestly incompatible with the purpose and function of the space in question (the sides of buses open to commercial and public service advertising generally). If it is, s. 2(*b*) protection will be denied, exactly as it would be under the test favoured by Justice Deschamps, but without any need to resort to a complex variation of the test adopted in another context in *City of Montréal*.

[129] The *manifestly incompatible* test is, moreover, entirely consistent with the Court's conclusions in prior public space expression cases, notably *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, and *City of Montréal*.

[130] I think it important to emphasize that expressive activity will fall outside the protected zone of s. 2(*b*) only if it is *manifestly* incompatible with the purpose or function of the space in question. Where the alleged incompatibility is not manifest, the infringed expressive activity falls within the freedom of expression guaranteed by s. 2(*b*) of the *Charter*. It would remain open to the government, of course, to establish that the infringement

de vue prend appui sur l'arrêt *Irwin Toy*, dans lequel notre Cour dit ce qui suit (p. 969) :

> Nous ne pouvons [. . .] écarter une activité humaine du champ de la garantie de la liberté d'expression en se basant sur le contenu ou la signification. En effet, si l'activité transmet ou tente de transmettre une signification, elle a un contenu expressif et relève à première vue du champ de la garantie.

[127] Or, dans cette affaire, la question était de savoir si le contenu expressif en cause (la publicité commerciale destinée aux enfants) pouvait être restreint généralement, *n'importe où*.

[128] En l'espèce, par contre, il faut déterminer si l'expression doit être autorisée dans un espace en particulier. La meilleure démarche pour le faire consiste à se demander si l'activité expressive à laquelle il est porté atteinte (la publicité comportant un message politique) est manifestement incompatible avec la raison d'être et la fonction de l'espace qui, sur le côté d'un autobus, est réservé à la publicité de nature commerciale ou publique en général. Dans l'affirmative, la protection prévue à l'al. 2*b*) sera refusée, précisément comme elle l'est en application du critère privilégié par la juge Deschamps, sans qu'il y ait besoin de recourir à une variante complexe du test retenu dans un autre contexte dans l'arrêt *Ville de Montréal*.

[129] De plus, le critère axé sur le caractère *manifestement incompatible* est en parfaite adéquation avec les conclusions tirées par la Cour dans d'autres affaires relatives à l'expression dans un endroit ou un espace publics, particulièrement dans les arrêts *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139, *Ramsden c. Peterborough (Ville)*, [1993] 2 R.C.S. 1084, et *Ville de Montréal*.

[130] Il me paraît important d'insister sur le fait que la protection de l'al. 2*b*) ne sera refusée à l'activité expressive que lorsque celle-ci sera *manifestement* incompatible avec la raison d'être ou la fonction de l'espace en cause. Lorsque l'incompatibilité alléguée n'est pas manifeste, l'activité expressive visée par l'atteinte bénéficie de la liberté d'expression garantie à l'al. 2*b*) de la *Charte*. Il demeure évidemment loisible à l'État de démontrer que

is constitutionally permissible, under s. 1 of the *Charter*, as a limitation that is imposed by law and demonstrably justified in a free and democratic society such as ours.

[131] But where the alleged incompatibility *is* manifest, the matter should be disposed of at the s. 2(*b*) stage of the analysis. Governments should not bear the burden of strictly prescribing by law and justifying limits on those kinds of expression that are so obviously incompatible with the purpose or function of the space provided, as the *Charter* cannot possibly have been intended to invite litigation in such obvious cases.

[132] As Peter W. Hogg suggests, "If the courts give to the guaranteed rights a broad interpretation that extends beyond their purpose, it is inevitable that the court will relax the standard of justification under s. 1 in order to uphold legislation limiting the extended right" (*Constitutional Law of Canada* (5th ed. 2007), at p. 116).

[133] By extending to manifestly incompatible expressive activity the freedom of expression guaranteed under s. 2(*b*) of the *Charter*, we would in this way lower the justification threshold under s. 1. And unnecessarily obliging the government to resort to s. 1 would unduly proliferate statutory and regulatory restrictions on freedom of expression, invite hopeless claims of infringement, and lengthen and complicate trials.

[134] Finally, I do not wish to be taken to suggest that the *significant burden* and the *manifest incompatibility* exceptions invoked by the appellants are the only expressive activities that fall outside the protected zone of s. 2(*b*) of the *Charter*. At least two other exceptions need to be noted.

[135] I have already alluded (at para. 121) to one: Expressive activity restricted by a government actor on the basis that it is prohibited under a statute that is not constitutionally challenged. Thus, for

l'atteinte est constitutionnelle au regard de l'article premier de la *Charte*, s'agissant d'une restriction par une règle de droit et dont la justification peut se démontrer dans une société libre et démocratique comme la nôtre.

[131] Mais lorsque l'incompatibilité alléguée *est* manifeste, il convient de trancher à l'étape de l'analyse fondée sur l'al. 2*b*). L'État ne devrait pas être strictement tenu d'apporter une restriction dans une règle de droit et de la justifier lorsqu'elle vise un type d'expression qui est si clairement incompatible avec la raison d'être ou la fonction de l'espace offert, car le législateur ne saurait avoir voulu que la *Charte* soit invoquée dans un cas aussi patent.

[132] Comme le laisse entendre Peter W. Hogg, [TRADUCTION] « s'ils reconnaissent à un droit garanti une portée qui va au-delà de sa raison d'être, les tribunaux assoupliront inévitablement la norme de justification au regard de l'article premier afin de valider la loi qui restreint le droit en question » (*Constitutional Law of Canada* (5e éd. 2007), p. 116).

[133] Accorder à l'activité expressive manifestement incompatible la protection que l'al. 2*b*) de la *Charte* prévoit à l'égard de la liberté d'expression abaisserait le degré de justification requis pour les besoins de l'article premier. Et obliger ainsi le gouvernement à invoquer inutilement l'article premier multiplierait indûment les mesures législatives et réglementaires restreignant la liberté d'expression, susciterait de vaines allégations d'atteinte et accroîtrait la durée et la complexité des procès.

[134] Enfin, je ne voudrais pas que l'on conclut de mes propos que les exceptions de l'*obligation substantielle* et de l'*incompatibilité manifeste* invoquées par les appelantes correspondent aux seules activités expressives ne bénéficiant pas de la protection de l'al. 2*b*) de la *Charte*. Au moins deux autres exceptions méritent d'être signalées.

[135] J'ai déjà fait allusion à l'une d'elles au par. 121 : l'activité expressive qu'un acteur gouvernemental restreint au motif qu'elle est interdite par une loi dont la constitutionnalité n'est pas contestée.

example, the appellants could properly refuse to carry on the sides of their buses an advertisement seeking donations to a designated terrorist organization, in violation of s. 83.02 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[136] Likewise, expression may be excluded from the scope of s. 2(*b*) protection solely because its form is unprotected, as in the case of expression by means of violence: see *Irwin Toy*, at p. 970; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 733 and 829; and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 105. Beyond the example of violence, the majority in *Irwin Toy* did not delineate precisely what other forms of expression will be unprotected under this rubric. And it would be inappropriate to attempt to do so here, since this exception is not at issue in this case.

[137] I would also leave for another day the relevance, on a s. 2(*b*) challenge, of the American distinction between limitations on "subject matter" and limitations on "viewpoint": see, for example, *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992). Our concern here is with a restriction on *all* political messages, and I have dealt with the issues in that light.

IV

[138] For all of these reasons, I agree with Justice Deschamps that the appellants' impugned advertising policies infringed the respondents' freedom of expression and thereby contravened s. 2(*b*) of the *Charter.*

[139] And I agree as well that the appellants' advertising policies constitute a limitation prescribed by "law" within the meaning of s. 1; that the appellants have not demonstrated that the infringing provisions of their advertising policies are demonstrably justified in a free and democratic society such as ours; and that the respondents are therefore entitled, pursuant to s. 52(1) of the *Constitution Act, 1982*, to a declaration that

Ainsi, par exemple, les appelantes pourraient à juste titre refuser d'afficher sur les côtés de leurs autobus une annonce sollicitant des dons à une organisation terroriste reconnue comme telle, contrairement à l'art. 83.02 du *Code criminel*, L.R.C. 1985, ch. C-46.

[136] De même, une expression peut être exclue de la portée de l'al. 2*b*) uniquement parce qu'elle revêt une forme non protégée, notamment lorsqu'il y a recours à la violence : voir les arrêts *Irwin Toy*, p. 970; *R. c. Keegstra*, [1990] 3 R.C.S. 697, p. 733 et 829; et *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, par. 105. Hormis l'expression violente, dans l'arrêt *Irwin Toy*, les juges majoritaires ne donnent pas d'exemples d'expression non protégée à cause de sa forme. Il serait inopportun de le faire dans la présente espèce puisque cette exception n'est pas invoquée.

[137] Le pourvoi ne se prête pas non plus à l'examen de la pertinence, dans le cadre d'une contestation prenant appui sur l'al. 2*b*), de la distinction américaine entre la restriction visant le « sujet » et celle visant le « point de vue » : voir, p. ex., *R. A. V. c. City of St. Paul*, 505 U.S. 377 (1992). La restriction considérée dans la présente affaire vise *tout* message politique, et je me suis prononcé sur les questions en litige en conséquence.

IV

[138] Pour tous ces motifs, je conviens avec la juge Deschamps que par leurs politiques publicitaires, les appelantes ont porté atteinte à la liberté d'expression des intimées et contrevenu de ce fait à l'al. 2*b*) de la *Charte.*

[139] J'estime également que les politiques publicitaires constituent une restriction « par une règle de droit » au sens de l'article premier, que les appelantes n'ont pas établi que les dispositions attentatoires de leurs politiques pouvaient se justifier dans une société libre et démocratique comme la nôtre et que les intimées ont donc droit, en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*, à un jugement déclarant inopérantes les politiques

the appellants' advertising policies, to the extent of their inconsistency with s. 2(*b*), are of no force or effect.

Appeal dismissed with costs.

Solicitors for the appellant the Greater Vancouver Transportation Authority: David F. Sutherland & Associates, Vancouver.

Solicitors for the appellant the British Columbia Transit: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondents: Underhill, Faulkner, Boies Parker Law Corporation, Vancouver.

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

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

Solicitors for the intervener the Adbusters Media Foundation: Bull, Housser & Tupper, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Lawson Lundell, Vancouver.

publicitaires des appelantes dans la mesure où elles sont incompatibles avec l'al. 2*b*).

Pourvoi rejeté avec dépens.

Procureurs de l'appelante Greater Vancouver Transportation Authority : David F. Sutherland & Associates, Vancouver.

Procureurs de l'appelante British Columbia Transit : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs des intimées : Underhill, Faulkner, Boies Parker Law Corporation, Vancouver.

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

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

Procureurs de l'intervenante Adbusters Media Foundation : Bull, Housser & Tupper, Vancouver.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Lawson Lundell, Vancouver.

Her Majesty The Queen *Appellant*;

and

David Edwin Oakes *Respondent.*

File No.: 17550.

1985: March 12; 1986: February 28.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Presumption of innocence (s. 11(d)) — Reverse onus clause — Accused presumed to be trafficker on finding of possession of illicit drug — Onus on accused to rebut presumption — Whether or not reverse onus in violation of s. 11(d) of the Charter — Whether or not reverse onus a reasonable limit to s. 11(d) and justified in a free and democratic society — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3(1), (2), 4(1), (2), (3), 8.

Criminal law — Presumption of innocence — Reverse onus — Accused presumed to be trafficker on finding of possession of illicit drug — Onus on accused to rebut presumption — Whether or not constitutional guarantee of presumption of innocence (s. 11(d) of the Charter) violated.

Respondent was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that respondent was in possession of a narcotic, respondent brought a motion challenging the constitutional validity of s. 8 of the *Narcotic Control Act*. That section provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The Crown appealed and a constitutional question was stated as to whether

Sa Majesté La Reine *Appelante*;

et

David Edwin Oakes *Intimé.*

N° du greffe: 17550.

1985: 12 mars; 1986: 28 février.

Présents: Le juge en chef Dickson et les juges Estey, McIntyre, Chouinard, Lamer, Wilson et Le Dain.

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

Droit constitutionnel — Charte des droits — Présomption d'innocence (al. 11d)) — Disposition portant inversion de la charge de la preuve — L'accusé est présumé être un trafiquant dès lors qu'il est constaté qu'il était en possession d'une drogue illicite — Il incombe à l'accusé de réfuter cette présomption — L'inversion de la charge de la preuve est-elle contraire à l'al. 11d) de la Charte? — L'inversion de la charge de la preuve apporte-t-elle à l'al. 11d) une limite qui soit raisonnable et justifiée dans une société libre et démocratique? — Charte canadienne des droits et libertés, art. 1, 11d) — Loi sur les stupéfiants, S.R.C. 1970, chap. N-1, art. 3(1), (2), 4(1), (2), (3), 8.

Droit criminel — Présomption d'innocence — Inversion de la charge de la preuve — L'accusé est présumé être un trafiquant dès lors qu'il est constaté qu'il était en possession d'une drogue illicite — Il incombe à l'accusé de réfuter cette présomption — Y a-t-il eu violation du droit constitutionnel d'être présumé innocent (al. 11d) de la Charte)?

L'intimé a été accusé d'avoir eu illégalement en sa possession un stupéfiant pour en faire le trafic, contrairement au par. 4(2) de la *Loi sur les stupéfiants*. Toutefois, il a été reconnu coupable seulement de possession. Après que le juge du procès eut conclu que, hors de tout doute raisonnable, l'intimé était en possession d'un stupéfiant, ce dernier a présenté une requête en contestation de la constitutionnalité de l'art. 8 de la *Loi sur les stupéfiants*. Cet article prévoit que si la cour constate que l'accusé était en possession d'un stupéfiant, il est présumé l'avoir été pour en faire le trafic et qu'à moins qu'il ne prouve le contraire, il doit être déclaré coupable de trafic. Le ministère public a interjeté appel devant la Cour d'appel de l'Ontario qui a conclu qu'il s'agissait d'une disposition portant «inversion de la charge de la preuve» qui est inconstitutionnelle pour le motif qu'elle viole la présomption d'innocence maintenant enchâssée dans l'al. 11*d*) de la *Charte canadienne des droits et libertés*. Le ministère public a formé un

s. 8 of the *Narcotic Control Act* violated s. 11(*d*) of the *Charter* and was therefore of no force and effect. Inherent in this question, given a finding that s. 11(*d*) of the *Charter* had been violated, was the issue of whether or not s. 8 of the *Narcotic Control Act* was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s. 1 of the *Charter*.

Held: The appeal should be dismissed and the constitutional question answered in the affirmative.

Per Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain JJ.: Pursuant to s. 8 of the *Narcotic Control Act*, the accused, upon a finding beyond a reasonable doubt of possession of a narcotic, has the legal burden of proving on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. On proof of possession, a mandatory presumption arises against the accused that he intended to traffic and the accused will be found guilty unless he can rebut this presumption on a balance of probabilities.

The presumption of innocence lies at the very heart of the criminal law and is protected expressly by s. 11(*d*) of the *Charter* and inferentially by the s. 7 right to life, liberty and security of the person. This presumption has enjoyed longstanding recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major international human rights documents. In light of these sources, the right to be presumed innocent until proven guilty requires, at a minimum, that: (1) an individual be proven guilty beyond a reasonable doubt; (2) the State must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

A provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(*d*). The fact that the standard required on rebuttal is only a balance of probabilities does not render a reverse onus clause constitutional.

Section 8 of the *Narcotic Control Act* infringes the presumption of innocence in s. 11(*d*) of the *Charter* by

pourvoi dans le cadre duquel on a formulé la question constitutionnelle de savoir si l'art. 8 de la *Loi sur les stupéfiants* est contraire à l'al. 11*d*) de la *Charte* et, par conséquent, inopérant. À supposer que l'on conclue qu'il y a eu violation de l'al. 11*d*) de la *Charte*, cette question constitutionnelle soulève alors la question de savoir si l'art. 8 de la *Loi sur les stupéfiants* constitue une limite raisonnable imposée par une règle de droit et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier de la *Charte*.

Arrêt: Le pourvoi est rejeté et la question constitutionnelle reçoit une réponse affirmative.

Le juge en chef Dickson et les juges Chouinard, Lamer, Wilson et Le Dain: Aux termes de l'art. 8 de la *Loi sur les stupéfiants*, dès qu'on conclut hors de tout doute raisonnable que l'accusé était en possession d'un stupéfiant, celui-ci a la charge ultime de prouver selon la prépondérance des probabilités qu'il n'était pas en possession de ce stupéfiant pour en faire le trafic. Une fois prouvée, la possession fait naître à l'encontre de l'accusé la présomption impérative qu'il avait l'intention de se livrer au trafic et il sera reconnu coupable, à moins qu'il ne puisse, par une preuve selon la prépondérance des probabilités, réfuter cette présomption.

La présomption d'innocence est au cœur même du droit criminel; elle est garantie expressément par l'al. 11*d*) de la *Charte* et implicitement par l'art. 7 qui garantit le droit à la vie, à la liberté et à la sécurité de la personne. Cette présomption a depuis fort longtemps droit de cité en *common law* et son acceptation générale ressort de son inclusion dans les plus importants documents internationaux relatifs aux droits de la personne. Compte tenu de ces documents, le droit d'être présumé innocent tant qu'on n'est pas déclaré coupable exige à tout le moins (1) que la culpabilité soit établie hors de tout doute raisonnable, (2) que ce soit à l'État qu'incombe la charge de la preuve et (3) que les poursuites criminelles se déroulent d'une manière conforme aux procédures légales et à l'équité.

Une disposition qui oblige un accusé à démontrer selon la prépondérance des probabilités l'inexistence d'un fait présumé qui constitue un élément important de l'infraction en question, porte atteinte à la présomption d'innocence de l'al. 11*d*). Ce n'est pas parce que la norme requise pour réfuter la présomption est la preuve selon la prépondérance des probabilités qu'une disposition portant inversion de la preuve est constitutionnelle.

L'article 8 de la *Loi sur les stupéfiants* porte atteinte à la présomption d'innocence de l'al. 11*d*) de la *Charte*

requiring the accused to prove he is not guilty of trafficking once the basic fact of possession is proven.

The rational connection test — the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision — does not apply to the interpretation of s. 11(*d*). A basic fact may rationally tend to prove a presumed fact, but still not prove its existence beyond a reasonable doubt, which is an important aspect of the presumption of innocence. The appropriate stage for invoking the rational connection test is under s. 1 of the *Charter*.

Section 1 of the *Charter* has two functions: First, it guarantees the rights and freedoms set out in the provisions which follow it; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitutional Act, 1982*) against which limitations on those rights and freedoms may be measured.

The onus of proving that a limitation on any *Charter* right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that *Charter* rights are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria justifying their being limited.

The standard of proof under s. 1 is a preponderance of probabilities. Proof beyond a reasonable doubt would be unduly onerous on the party seeking to limit the right because concepts such as "reasonableness", "justifiability", and "free and democratic society" are not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously.

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be

en obligeant l'accusé à prouver qu'il n'est pas coupable de trafic, une fois la possession établie.

Le critère du lien rationnel—le fait qu'une disposition portant inversion de la charge de la preuve puisse se justifier par l'existence d'un lien rationnel entre le fait établi et le fait présumé—ne s'applique pas à l'interprétation de l'al. 11*d*). Un fait établi peut rationnellement tendre à prouver un fait présumé sans pour autant en prouver l'existence hors de tout doute raisonnable, un aspect important de la présomption d'innocence. C'est dans le contexte de l'article premier de la *Charte* qu'il convient d'invoquer le critère du lien rationnel.

L'article premier de la *Charte* remplit deux fonctions: premièrement, il garantit les droits et libertés énoncés dans les dispositions qui le suivent; et, deuxièmement, il établit explicitement les seuls critères justificatifs (à part ceux de l'art. 33 de la *Loi constitutionnelle de 1982*) auxquels doivent satisfaire les restrictions apportées à ces droits et libertés.

La charge de prouver qu'une restriction à un droit garanti par la *Charte* est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique incombe à la partie qui demande le maintien de cette restriction. Les restrictions apportées à des droits garantis par la Constitution constituent nettement des exceptions à la garantie générale dont ceux-ci font l'objet. On présume que les droits énoncés dans la *Charte* sont garantis, à moins que la partie qui invoque l'article premier ne puisse satisfaire aux critères exceptionnels qui justifient leur restriction.

La norme de preuve applicable aux fins de l'article premier est la preuve selon la prépondérance des probabilités. La preuve hors de tout doute raisonnable imposerait une charge trop lourde à la partie qui cherche à apporter une restriction à un droit, puisque des concepts comme «le caractère raisonnable», «le caractère justifiable» et «une société libre et démocratique» ne se prêtent pas à l'application d'une telle norme. Néanmoins, le critère de la prépondérance des probabilités doit être appliqué rigoureusement.

Pour établir qu'une restriction est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique, il faut satisfaire à deux critères fondamentaux. En premier lieu, l'objectif que doivent servir les mesures qui apportent une restriction à un droit garanti par la *Charte*, doit être suffisamment important pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution. La norme doit être sévère afin que les objectifs peu importants ou contraires aux principes d'une société libre et démocratique ne bénéficient pas d'une protection. Il faut à tout le

characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective — the more severe the deleterious effects of a measure, the more important the objective must be.

Parliament's concern that drug trafficking be decreased was substantial and pressing. Its objective of protecting society from the grave ills of drug trafficking was self-evident, for the purposes of s. 1, and could potentially in certain cases warrant the overriding of a constitutionally protected right. There was, however, no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. The possession of a small or negligible quantity of narcotics would not support the inference of trafficking.

Per Estey and McIntyre JJ.: Concurred in the reasons of Dickson C.J. with respect to the relationship between s. 11(*d*) and s. 1 of the *Charter* but the reasons of Martin J.A. in the court below were adopted for the disposition of all other issues.

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moins qu'un objectif se rapporte à des préoccupations sociales, urgentes et réelles dans une société libre et démocratique, pour qu'on puisse le qualifier de suffisamment important. En deuxième lieu, la partie qui invoque l'article premier doit démontrer que les moyens choisis sont raisonnables et que leur justification peut se démontrer. Cela nécessite l'application d'une sorte de critère de proportionnalité qui comporte trois éléments importants. D'abord, les mesures doivent être équitables et non arbitraires, être soigneusement conçues pour atteindre l'objectif en question et avoir un lien rationnel avec cet objectif. De plus, le moyen choisi doit être de nature à porter le moins possible atteinte au droit en question. Enfin, il doit y avoir proportionnalité entre les effets de la mesure restrictive et l'objectif poursuivi — plus les effets préjudiciables d'une mesure sont graves, plus l'objectif doit être important.

Le souci du législateur de réduire le trafic des stupéfiants est réel et urgent. Son objectif, qui est de protéger la société contre les fléaux liés au trafic des stupéfiants est évident en soi aux fins de l'article premier, et peut justifier dans certains cas l'atteinte à un droit garanti par la Constitution. Il n'existe toutefois pas de lien rationnel entre le fait établi de la possession et le fait présumé de possession à des fins de trafic. La possession d'une quantité infime ou négligeable de stupéfiants ne justifie pas une conclusion de trafic.

Les juges Estey et McIntyre: Les motifs du juge en chef Dickson sont adoptés en ce qui concerne le lien entre l'al. 11*d*) et l'article premier de la *Charte*. Cependant, il y a adoption des motifs du juge Martin de la Cour d'appel pour ce qui est de statuer sur toutes les autres questions.

Jurisprudence

Arrêts examinés: *R. c. Shelley*, [1981] 2 R.C.S. 196; *R. v. Carroll* (1983), 147 D.L.R. (3d) 92; *R. v. Cook* (1983), 4 C.C.C. (3d) 419; *R. v. Stanger* (1983), 7 C.C.C. (3d) 337; *R. c. Appleby*, [1972] R.C.S. 303; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462; distinction faite d'avec l'arrêt: *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648; arrêts mentionnés: *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235; *R. v. O'Day* (1983), 5 C.C.C. (3d) 227; *R. c. Landry*, [1983] C.A. 408, 7 C.C.C. (3d) 555; *R. v. Therrien* (1982), 67 C.C.C. (2d) 31; *R. v. Fraser* (1982), 138 D.L.R. (3d) 488; *R. v. Kupczyniski*, Cour de comté de l'Ontario, décision inédite en date du 23 juin 1982; *R. v. Sharpe* (1961), 131 C.C.C. 75; *R. v. Silk*, [1970] 3 C.C.C. (2d) 1; *R. v. Erdman* (1971), 24 C.R.N.S. 216; *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Renvoi: Motor*

The King, [1938] S.C.R. 341; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Stock* (1983), 10 C.C.C. (3d) 319; *Re Anson and The Queen* (1983), 146 D.L.R. (3d) 661; *R. v. Holmes* (1983), 41 O.R. (2d) 250; *R. v. Whyte* (1983), 10 C.C.C. (3d) 277; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. 539; *R. v. T.* (1985), 18 C.C.C. (3d) 125; *R. v. Kowalczuk* (1983), 5 C.C.C. (3d) 25; *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34; *Re Boyle and The Queen* (1983), 41 O.R. (2d) 713; *Tot v. United States*, 319 U.S. 463 (1943); *Leary v. United States*, 395 U.S. 6 (1969); *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979); *In Re Winship*, 397 U.S. 358 (1970); *Pfunders Case (Austria v. Italy)* (1963), 6 Yearbook E.C.H.R. 740; *X against the United Kingdom*, Appl'n No. 5124/71, Collection of Decisions, E.C.H.R., 135; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Bater v. Bater*, [1950] 2 All E.R. 458; *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154; *Smith v. Smith*, [1952] 2 S.C.R. 312, referred to.

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International Covenant on Civil and Political Rights, 1966, art. 14(2).
Misuse of Drugs Act 1971, 1971 (U.K.), c. 38.
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Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3(1), (2), 4(1), (2), (3), 8.
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Convention unique sur les stupéfiants de 1961.
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Misuse of Drugs Act 1971, 1971 (U.K.), chap. 38.
Misuse of Drugs Act 1975, 1975 (N.Z.), nº 116.
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Sopinka, John and Sidney N. Lederman. *The Law of Evidence in Civil Cases*, Toronto, Butterworths, 1974.

APPEAL from a judgment of the Ontario Court of Appeal (1983), 145 D.L.R. (3d) 123, 2 C.C.C. (3d) 339, dismissing an appeal of the Crown from a judgment of Walker Prov. Ct. J. convicting the accused of simple possession on a charge of possessing narcotics for the purposes of trafficking contrary to s. 4(2) of the *Narcotic Control Act*. Appeal dismissed.

Julius Isaac, Q.C., Michael R. Dambrot and *Donna C. McGillis*, for the appellant.

Geoffrey A. Beasley, for the respondent.

The judgment of Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain JJ. was delivered by

THE CHIEF JUSTICE—This appeal concerns the constitutionality of s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. The section provides, in brief, that if the Court finds the accused in possession of a narcotic, he is presumed to be in possession for the purpose of trafficking. Unless the accused can establish the contrary, he must be convicted of trafficking. The Ontario Court of Appeal held that this provision constitutes a "reverse onus" clause and is unconstitutional because it violates one of the core values of our criminal justice system, the presumption of innocence, now entrenched in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The Crown has appealed.

d'enquête sur l'usage des drogues à des fins non médicales, Ottawa, Information Canada, 1973.
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Jacobs, Francis. *The European Convention on Human Rights*, Oxford, Clarendon Press, 1975.
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Sopinka, John and Sidney N. Lederman. *The Law of Evidence in Civil Cases*, Toronto, Butterworths, 1974.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1983), 145 D.L.R. (3d) 123, 2 C.C.C. (3d) 339, qui a rejeté un appel formé par le ministère public contre une décision dans laquelle le juge Walker de la Cour provinciale a reconnu l'accusé coupable de simple possession alors qu'il était inculpé de possession de stupéfiants pour en faire le trafic, contrairement au par. 4(2) de la *Loi sur les stupéfiants*. Pourvoi rejeté.

Julius Isaac, c.r., Michael R. Dambrot et *Donna C. McGillis*, pour l'appelante.

Geoffrey A. Beasley, pour l'intimé.

Version française du jugement du juge en chef Dickson et des juges Chouinard, Lamer, Wilson et Le Dain rendu par

LE JUGE EN CHEF—Ce pourvoi porte sur la constitutionnalité de l'art. 8 de la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1. L'article 8 prévoit en bref que, si la cour constate que l'accusé était en possession d'un stupéfiant, il est présumé l'avoir été pour en faire le trafic. À moins que l'accusé ne puisse établir le contraire, il doit être déclaré coupable de trafic. La Cour d'appel de l'Ontario a conclu que cet article constitue une disposition portant «inversion de la charge de la preuve», qui est en conséquence inconstitutionnelle pour le motif qu'elle viole l'un des principes fondamentaux de notre système de justice criminelle, savoir la présomption d'innocence qui est maintenant enchâssée dans l'al. 11*d*) de la *Charte canadienne des droits et libertés*. Le ministère public a formé un pourvoi.

I

Statutory and Constitutional Provisions

Before reviewing the factual context, I will set out the relevant legislative and constitutional provisions:

Narcotic Control Act, R.S.C. 1970, c. N-1.

3. (1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable

(*a*) upon summary conviction for a first offence, to a fine of one thousand dollars or to imprisonment for six months or to both fine and imprisonment, and for a subsequent offence, to a fine of two thousand dollars or to imprisonment for one year or to both fine and imprisonment; or

(*b*) upon conviction on indictment, to imprisonment for seven years.

4. (1) No person shall traffic in a narcotic or any substance represented or held out by him to be a narcotic.

(2) No person shall have in his possession a narcotic for the purpose of trafficking.

(3) Every person who violates subsection (1) or (2) is guilty of an indictable offence and is liable to imprisonment for life.

. . .

8. In any prosecution for a violation of subsection 4(2), if the accused does not plead guilty, the trial shall proceed as if it were a prosecution for an offence under section 3, and after the close of the case for the prosecution and after the accused has had an opportunity to make full answer and defence, the court shall make a finding as to whether or not the accused was in possession of the narcotic contrary to section 3; if the court finds that the accused was not in possession of the narcotic contrary to section 3, he shall be acquitted but if the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking, and thereafter the prosecutor shall be given an opportunity of adducing evidence to establish that the accused was in possession of the narcotic for the purpose of trafficking; if the accused establishes that he was not in possession of the narcotic for the purpose of trafficking, he shall be acquitted of the offence as charged but he shall be

I

Les dispositions législatives et constitutionnelles

Avant de passer à l'examen des faits, reproduisons les dispositions législatives et constitutionnelles pertinentes:

Loi sur les stupéfiants, S.R.C. 1970, chap. N-1.

3. (1) Sauf ainsi que l'autorisent la présente loi ou les règlements, nul ne peut avoir un stupéfiant en sa possession.

(2) Quiconque enfreint le paragraphe (1) est coupable d'une infraction et passible,

a) sur déclaration sommaire de culpabilité, pour une première infraction, d'une amende de mille dollars ou d'un emprisonnement de six mois ou à la fois de l'amende et de l'emprisonnement, et pour infraction subséquente, d'une amende de deux mille dollars ou d'un emprisonnement d'un an ou à la fois de l'amende et de l'emprisonnement; ou

b) sur déclaration de culpabilité sur acte d'accusation, d'un emprisonnement de sept ans.

4. (1) Nul ne peut faire le trafic d'un stupéfiant ou d'une substance quelconque qu'il prétend être ou estime être un stupéfiant.

(2) Nul ne peut avoir en sa possession un stupéfiant pour en faire le trafic.

(3) Quiconque enfreint le paragraphe (1) ou (2) est coupable d'un acte criminel et encourt l'emprisonnement à perpétuité.

. . .

8. Dans toutes poursuites pour une violation du paragraphe 4(2), si l'accusé n'avoue pas sa culpabilité, le procès doit s'instruire comme s'il s'agissait d'une poursuite pour une infraction prévue par l'article 3, et après que le poursuivant a terminé son exposé et qu'il a été fourni à l'accusé une occasion de présenter une réplique et une défense complètes, la cour doit statuer sur la question de savoir si l'accusé était ou non en possession du stupéfiant contrairement aux dispositions de l'article 3; si la cour constate que l'accusé n'était pas en possession du stupéfiant contrairement aux dispositions de l'article 3; elle doit l'acquitter, mais si elle constate qu'il était en possession du stupéfiant contrairement aux dispositions de l'article 3, il doit être fourni à l'accusé une occasion de démontrer qu'il n'était pas en possession du stupéfiant pour en faire le trafic, et, par la suite, il doit être fourni au poursuivant une occasion d'établir la preuve que l'accusé était en possession du stupéfiant pour en faire le trafic; si celui-ci démontre qu'il n'était pas en possession du stupéfiant pour en faire le trafic, il

convicted of an offence under section 3 and sentenced accordingly; and if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged and sentenced accordingly.

(Emphasis added.)

Canadian Charter of Rights and Freedoms

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.

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

II

Facts

The respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*. He elected trial by magistrate without a jury. At trial, the Crown adduced evidence to establish that Mr. Oakes was found in possession of eight one gram vials of *cannabis* resin in the form of hashish oil. Upon a further search conducted at the police station, $619.45 was located. Mr. Oakes told the police that he had bought ten vials of hashish oil for $150 for his own use, and that the $619.45 was from a workers' compensation cheque. He elected not to call evidence as to possession of the narcotic. Pursuant to the procedural provisions of s. 8 of the *Narcotic Control Act*, the trial judge proceeded to make a finding that it was beyond a reasonable doubt that Mr. Oakes was in possession of the narcotic.

doit être acquitté de l'infraction dont fait mention l'acte d'accusation, mais il doit être déclaré coupable d'une infraction aux termes de l'article 3 et condamné en conséquence; et si l'accusé ne démontre pas qu'il n'était pas en possession du stupéfiant pour en faire le trafic, il doit être déclaré coupable de l'infraction dont fait mention l'acte d'accusation et condamné en conséquence.

(C'est moi qui souligne.)

Charte canadienne des droits et libertés

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;

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

II

Les faits

L'intimé, David Edwin Oakes, a été accusé d'avoir eu illégalement en sa possession un stupéfiant pour en faire le trafic, contrairement au par. 4(2) de la *Loi sur les stupéfiants*. Il a choisi de subir son procès devant un magistrat siégeant sans jury. Au cours du procès, la poursuite a produit des éléments de preuve en vue d'établir que M. Oakes avait été trouvé en possession de huit fioles d'une capacité d'un gramme contenant de la résine de cannabis sous forme d'huile de haschisch. Une fouille effectuée au poste de police a permis de découvrir la somme de 619,45 $. Monsieur Oakes a dit à la police qu'il avait acheté au prix de 150 $ dix fioles d'huile de haschisch pour son propre usage et que les 619,45 $ provenaient d'un chèque d'indemnisation pour un accident de travail. Il a choisi de ne pas présenter de preuve relativement à la possession d'un stupéfiant. Conformément aux dispositions en matière de procédure de l'art. 8 de la *Loi sur les stupéfiants*, le juge du procès a conclu que, hors de tout doute raisonnable, M. Oakes était en possession du stupéfiant.

Following this finding, Mr. Oakes brought a motion to challenge the constitutional validity of s. 8 of the *Narcotic Control Act*, which he maintained imposes a burden on an accused to prove that he or she was not in possession for the purpose of trafficking. He argued that s. 8 violates the presumption of innocence contained in s. 11(*d*) of the *Charter*.

III

Judgments

(a) Ontario Provincial Court (*R. v. Oakes* (1982), 38 O.R. (2d) 598)

At trial, Walker Prov. Ct. J. borrowed the words of Laskin C.J. in *R. v. Shelley*, [1981] 2 S.C.R. 196, at p. 202, and found there was no rational or necessary connection between the fact proved, *i.e.*, possession of the drug, and the conclusion asked to be drawn, namely, possession for the purpose of trafficking. Walker Prov. Ct. J. held that, to the extent that s. 8 of the *Narcotic Control Act* requires this presumption and the resultant conviction, it is inoperative as a violation of the presumption of innocence contained in s. 11(*d*) of the *Charter*.

Walker Prov. Ct. J. added that the reverse onus in s. 8 would not be invalid if the Crown had adduced evidence of possession as well as evidence from which it could be inferred beyond a reasonable doubt that the possession was for the purpose of trafficking. If this were done, there would be a sufficient rational connection between the fact of possession and the presumed fact of trafficking.

(b) Ontario Court of Appeal (*R. v. Oakes* (1983), 145 D.L.R. (3d) 123)

Martin J.A., writing for a unanimous court, dismissed the appeal and held the reverse onus provision in s. 8 of the *Narcotic Control Act* unconstitutional.

Martin J.A. stated that, as a general rule, a reverse onus clause which places a burden on the

À la suite de cette conclusion, M. Oakes a présenté une requête en contestation de la constitutionnalité de l'art. 8 de la *Loi sur les stupéfiants*, qui, selon lui, impose à un accusé l'obligation de prouver qu'il n'était pas en possession d'un stupéfiant pour en faire le trafic et constitue de ce fait une violation de la présomption d'innocence énoncée à l'al. 11*d*) de la *Charte*.

III

Les jugements

a) Cour provinciale de l'Ontario (*R. v. Oakes* (1982), 38 O.R. (2d) 598)

Au procès, le juge Walker de la Cour provinciale a emprunté les termes utilisés par le juge en chef Laskin dans l'arrêt *R. c. Shelley*, [1981] 2 R.C.S. 196, à la p. 202, et a conclu qu'il n'y avait aucun lien rationnel ou nécessaire entre le fait prouvé, c.-à-d. la possession du stupéfiant, et la conclusion qu'on lui demandait de tirer, savoir qu'il s'agissait d'une possession à des fins de trafic. Le juge Walker a conclu que, dans la mesure où l'art. 8 de la *Loi sur les stupéfiants* requiert cette présomption et la déclaration de culpabilité qui en résulte, il va à l'encontre de la présomption d'innocence énoncée à l'al. 11*d*) de la *Charte* et est en conséquence inopérant.

Le juge Walker a ajouté que l'inversion de la charge de la preuve effectuée par l'art. 8 n'aurait pas été entachée d'invalidité si le ministère public avait produit une preuve de possession ainsi que des éléments de preuve permettant de conclure hors de tout doute raisonnable qu'il s'agissait d'une possession à des fins de trafic. Si cela était fait, il y aurait un lien rationnel suffisant entre le fait de la possession et le fait présumé, c.-à-d. le trafic.

b) Cour d'appel de l'Ontario (*R. v. Oakes* (1983), 145 D.L.R. (3d) 123)

La Cour d'appel, s'exprimant par l'intermédiaire du juge Martin, a rejeté à l'unanimité l'appel et déclaré inconstitutionnelle la disposition de l'art. 8 de la *Loi sur les stupéfiants* portant inversion de la charge de la preuve.

Le juge Martin a affirmé qu'en règle générale une disposition qui inverse la charge de la preuve

accused to disprove on a balance of probabilities an essential element of an offence contravenes the right to be presumed innocent. Nevertheless, he held that some reverse onus provisions may be constitutionally valid provided they constitute reasonable limitations on the right to be presumed innocent and are demonstrably justified in a free and democratic society.

To determine whether a particular reverse onus provision is legitimate, Martin J.A. outlined a two-pronged inquiry. First, it is necessary to pass a threshold test which he explained as follows, at p. 146:

> The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors, including such factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or by both criteria; (b) the difficulty of the prosecution making proof of the presumed fact, and (c) the relative ease with which the accused may prove or disprove the presumed fact. Manifestly, a reverse onus provision placing the burden of proof on the accused with respect to a fact which it is not rationally open to him to prove or disprove cannot be justified.

If the reverse onus provision meets these criteria, due regard having been given to Parliament's assessment of the need for the provision, a second test must then be satisfied. This second test was described by Martin J.A. as the "rational connection test". According to it, to be reasonable, the proven fact (*e.g.*, possession) must rationally tend to prove the presumed fact (*e.g.*, an intention to traffic). In other words, the proven fact must raise a probability that the presumed fact exists.

de manière à obliger l'accusé à prouver selon la prépondérance des probabilités l'inexistence d'un élément essentiel d'une infraction contrevient au droit d'être présumé innocent. Néanmoins, il a conclu que certaines dispositions portant inversion de la charge de la preuve peuvent être constitutionnelles pour peu qu'elles constituent des restrictions raisonnables au droit d'être présumé innocent et que la justification de ces restrictions puisse se démontrer dans le cadre d'une société libre et démocratique.

Le juge Martin a énoncé une question à deux volets qu'il faut se poser pour déterminer si, dans un cas donné, une disposition portant inversion de la charge de la preuve est légitime. Ainsi, il faut d'abord satisfaire à un critère préliminaire que le juge Martin explique de la façon suivante à la p. 146:

> [TRADUCTION] Pour décider de la légitimité d'une disposition particulière portant inversion de la charge de la preuve, il faut d'abord et avant tout se demander si cette disposition est justifiable en ce sens qu'il est raisonnable que le législateur impose à l'accusé la charge de la preuve relativement à un élément de l'infraction en cause. Pour répondre à cette question préliminaire il faut prendre en considération un certain nombre de facteurs dont: a) l'ampleur du mal à réprimer, qui peut être mesurée par la gravité du préjudice résultant de l'infraction ou par la fréquence de la perpétration de l'infraction, ou par les deux critères, b) la difficulté que peut éprouver la poursuite à établir le fait présumé, et c) la facilité relative avec laquelle l'accusé pourra prouver l'existence ou l'inexistence du fait présumé. Manifestement, une disposition imposant à l'accusé la charge de la preuve à l'égard d'un fait dont, logiquement, il n'est pas à même de prouver l'existence ou l'inexistence n'est guère justifiable.

Si, après qu'on a dûment tenu compte de la détermination par le législateur de la nécessité d'une telle disposition, la disposition portant inversion de la charge de la preuve répond à ces critères, elle doit alors satisfaire à un autre. Il s'agit de ce que le juge Martin a décrit comme le [TRADUCTION] «critère du lien rationnel». Suivant ce critère, pour être raisonnable, le fait prouvé (par ex., la possession) doit logiquement tendre à établir le fait présumé (par ex., l'intention de faire le trafic). En d'autres termes, le fait prouvé doit soulever la probabilité de l'existence du fait présumé.

In considering s. 8 of the *Narcotic Control Act*, Martin J.A. focused primarily on the second test at p. 147:

> I have reached the conclusion that s. 8 of the *Narcotic Control Act* is constitutionally invalid because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic) .... Mere possession of a small quantity of a narcotic drug does not support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic. Moreover, upon proof of possession, s. 8 casts upon the accused the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence.

Martin J.A. added that it is not for courts to attempt to rewrite s. 8 by applying it on a case by case basis. Furthermore, where a rational connection does exist between possession and the presumed intention to traffic, such as "where the possession of a narcotic drug is of such a nature as to be indicative of trafficking, the common sense of a jury can ordinarily be relied upon to arrive at a proper conclusion". There would not, therefore, be any need for a statutory presumption.

One final note should be made regarding Martin J.A.'s judgment. In assessing whether or not s. 8 was a reasonable limitation on the constitutional protection of the presumption of innocence, Martin J.A. combined the analysis of s. 11(*d*) with s. 1. He held that the requirements of s. 1, that a limitation be reasonable and demonstrably justified in a free and democratic society, provided the standard for interpreting the phrase "according to law" in s. 11(*d*).

IV

The Issues

The constitutional question in this appeal is stated as follows:

> Is s. 8 of the *Narcotic Control Act* inconsistent with s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and thus of no force and effect?

Dans son analyse de l'art. 8 de la *Loi sur les stupéfiants*, le juge Martin s'est arrêté principalement au second critère à la p. 147:

> [TRADUCTION] J'en suis venu à la conclusion que l'art. 8 de la *Loi sur les stupéfiants* est inconstitutionnel en raison de l'absence d'un lien rationnel entre le fait prouvé (la possession) et le fait présumé (l'intention de faire le trafic) ... La simple possession d'une faible quantité d'un stupéfiant ne permet pas de conclure à la possession à des fins de trafic ou encore ne tend même pas à prouver une intention de se livrer au trafic. En outre, du moment que la possession est prouvée, l'art. 8 impose à l'accusé la charge de prouver l'inexistence non pas de quelque élément formel de l'infraction mais de l'essence même de celle-ci.

Le juge Martin ajoute qu'il n'appartient pas aux tribunaux d'essayer de reformuler l'art. 8 en l'appliquant cas par cas. De plus, lorsqu'il existe un lien rationnel entre la possession et l'intention présumée de faire le trafic, comme [TRADUCTION] «dans le cas où la possession d'un stupéfiant est de nature à constituer une indication du trafic de celui-ci, on peut ordinairement compter sur le bon sens du jury pour que celui-ci tire la bonne conclusion». Aucune présomption légale ne serait alors nécessaire.

Une dernière observation s'impose relativement aux motifs du juge Martin. Dans son étude de la question de savoir si l'art. 8 constitue une restriction raisonnable de la protection constitutionnelle accordée à la présomption d'innocence, le juge Martin a rapproché l'al. 11*d*) de l'article premier. Il a conclu que l'exigence de l'article premier qu'une restriction soit raisonnable et que sa justification puisse se démontrer dans le cadre d'une société libre et démocratique constitue la norme applicable à l'interprétation de l'expression «conformément à la loi» que l'on trouve à l'al. 11*d*).

IV

Les questions en litige

La question constitutionnelle formulée dans le présent pourvoi est la suivante:

> L'article 8 de la *Loi sur les stupéfiants* est-il incompatible avec l'al. 11*d*) de la *Charte canadienne des droits et libertés* et, par conséquent, inopérant?

Two specific questions are raised by this general question: (1) does s. 8 of the *Narcotic Control Act* violate s. 11(*d*) of the *Charter*; and, (2) if it does, is s. 8 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s. 1 of the *Charter*? If the answer to (1) is affirmative and the answer to (2) negative, then the constitutional question must be answered in the affirmative.

V

Does s. 8 of the *Narcotic Control Act* Violate s. 11(*d*) of the *Charter*?

(a) The Meaning of s. 8

Before examining the presumption of innocence contained in s. 11(*d*) of the *Charter*, it is necessary to clarify the meaning of s. 8 of the *Narcotic Control Act*. The procedural steps contemplated by s. 8 were clearly outlined by Branca J.A. in *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235 (B.C.C.A.), at p. 247:

(A) The accused is charged with possession of a forbidden drug for the purpose of trafficking.

(B) The trial of the accused on this charge then proceeds as if it was a prosecution against the accused on a simple charge of possession of the forbidden drug ....

(C) When the Crown has adduced its evidence on the basis that the charge was a prosecution for simple possession, the accused is then given the statutory right or opportunity of making a full answer and defence to the charge of simple possession ....

(D) When this has been done the Court must make a finding as to whether the accused was in possession of narcotics contrary to s. 3 of the new Act. (Unlawful possession of a forbidden narcotic drug).

(E) Assuming that the Court so finds, it is then that an onus is placed upon the accused in the sense that an opportunity must be given to the accused of establishing that he was not in possession of a narcotic for the purpose of trafficking.

(F) When the accused has been given this opportunity the prosecutor may then establish that the possession of the accused was for the purpose of trafficking ....

Cette question générale soulève deux questions précises: (1) l'article 8 de la *Loi sur les stupéfiants* contrevient-il à l'al. 11*d*) de la *Charte*? et (2) dans l'affirmative, l'art. 8 constitue-t-il une limite raisonnable imposée par une règle de droit et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique, au sens de l'art. 1 de la *Charte*? Dans l'hypothèse d'une réponse affirmative à la première question et d'une réponse négative à la seconde, la question constitutionnelle doit alors recevoir une réponse affirmative.

V

L'article 8 de la *Loi sur les stupéfiants* contrevient-il à l'al. 11*d*) de la *Charte*?

a) Le sens de l'art. 8

Avant d'examiner la présomption d'innocence énoncée à l'al. 11*d*) de la *Charte*, il est nécessaire de préciser le sens de l'art. 8 de la *Loi sur les stupéfiants*. Dans l'arrêt *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235 (C.A.C.-B.), à la p. 247, le juge Branca expose clairement les étapes de la procédure prévue par l'art. 8:

[TRADUCTION] A) L'accusé est inculpé de possession d'un stupéfiant prohibé en vue d'en faire le trafic.

B) Le procès de l'accusé relativement à cette accusation est alors instruit comme s'il s'agissait d'une poursuite relativement à une simple accusation de possession du stupéfiant prohibé ...

C) Lorsque le ministère public a administré sa preuve comme s'il s'agissait d'une poursuite pour simple possession, la loi accorde à l'accusé le droit ou la possibilité de présenter une défense complète relativement à l'accusation de simple possession ...

D) Ceci fait, la cour doit statuer sur la question de savoir si l'accusé était en possession d'un stupéfiant contrairement à l'art. 3 de la nouvelle Loi. (Possession d'un stupéfiant prohibé).

E) Si la cour conclut à la possession, c'est alors à ce moment que la charge de la preuve est imposée à l'accusé en ce sens qu'on doit lui fournir l'occasion de démontrer qu'il n'était pas en possession du stupéfiant pour en faire le trafic.

F) Quand l'accusé a eu cette possibilité, la poursuite peut alors tenter d'établir que l'accusé était en possession du stupéfiant pour en faire le trafic ...

(G) It is then that the Court must find whether or not the accused has discharged the onus placed upon him under and by the said section.

(H) If the Court so finds, the accused must be acquitted of the offence as charged, namely, possession for the purpose of trafficking, but in that event the accused must be convicted of the simple charge of unlawful possession of a forbidden narcotic . . . .

(I) If the accused does not so establish he must then be convicted of the full offence as charged.

Mr. Justice Branca then added at pp. 247-48:

It is quite clear to me that under s. 8 of the new Act the trial must be divided into two phases. In the first phase the sole issue to be determined is whether or not the accused is guilty of simple possession of a narcotic. This issue is to be determined upon evidence relevant only to the issue of possession. In the second phase the question to be resolved is whether or not the possession charged is for the purpose of trafficking.

Against the backdrop of these procedural steps, we must consider the nature of the statutory presumption contained in s. 8 and the type of burden it places on an accused. The relevant portions of s. 8 read:

8. . . . if the court finds that the accused was in possession of the narcotic . . . he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking . . . if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged . . . .

In determining the meaning of these words, it is helpful to consider in a general sense the nature of presumptions. Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see *Cross on Evidence*, 5th ed., at pp. 122-23).

Basic fact presumptions can be further categorized into permissive and mandatory presumptions.

G) C'est alors que la cour doit décider si l'accusé s'est acquitté de l'obligation que lui impose ledit article.

H) Si la cour conclut par l'affirmative, l'accusé doit être acquitté de l'infraction imputée, savoir la possession en vue de faire le trafic, mais, dans ce cas-là, il doit être déclaré coupable de l'infraction de simple possession d'un stupéfiant prohibé . . .

I) Si l'accusé ne réussit pas à démontrer qu'il n'était pas en possession du stupéfiant pour en faire le trafic, il doit alors être reconnu coupable de l'infraction imputée.

Le juge Branca ajoute ensuite, aux pp. 247 et 248:

[TRADUCTION] Il est très clair dans mon esprit que l'art. 8 de la nouvelle Loi exige un procès en deux étapes. À la première étape, la seule question qu'il faut résoudre est de savoir si l'accusé est coupable de simple possession d'un stupéfiant. Cette question doit être tranchée en fonction des éléments de preuve qui se rapportent uniquement à la possession. À la seconde étape, la question à trancher est de savoir si la possession imputée était pour des fins de trafic.

Compte tenu de ces étapes de la procédure, nous devons étudier la nature de la présomption légale établie par l'art. 8 ainsi que le genre de charge qu'elle impose à un accusé. Voici les parties pertinentes de l'art. 8:

8. . . . si elle [la cour] constate qu'il était en possession du stupéfiant . . . il doit être fourni à l'accusé une occasion de démontrer qu'il n'était pas en possession du stupéfiant pour en faire le trafic . . . si l'accusé ne démontre pas qu'il n'était pas en possession du stupéfiant pour en faire le trafic, il doit être déclaré coupable de l'infraction dont fait mention l'acte d'accusation . . .

Pour déterminer le sens de ces mots, il est utile de procéder à un examen général de la nature des présomptions. Les présomptions peuvent être rangées dans deux catégories générales: les présomptions non fondées sur des faits établis et les présomptions fondées sur des faits établis. Une présomption non fondée sur un fait établi est simplement une conclusion qui doit être tirée tant qu'on n'a pas prouvé le contraire. Une présomption fondée sur un fait établi consiste en une conclusion qui repose sur la preuve de ce fait (voir *Cross on Evidence*, 5th ed., aux pp. 122 et 123).

Quant aux présomptions fondées sur des faits établis, elles peuvent créer une faculté ou être

A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

Finally, presumptions are often referred to as either presumptions of law or presumptions of fact. The latter entail "frequently recurring examples of circumstantial evidence" (*Cross on Evidence*, *supra*, at p. 124) while the former involve actual legal rules.

To return to s. 8 of the *Narcotic Control Act*, it is my view that, upon a finding beyond a reasonable doubt of possession of a narcotic, the accused has the legal burden of proving on a balance of probabilities that he or she was not in possession of the narcotic for the purpose of trafficking. Once the basic fact of possession is proven, a mandatory presumption of law arises against the accused that he or she had the intention to traffic. Moreover, the accused will be found guilty of the offence of trafficking unless he or she can rebut this presumption on a balance of probabilities. This interpretation of s. 8 is supported by the courts in a number of jurisdictions: *R. v. Carroll* (1983), 147 D.L.R. (3d) 92 (P.E.I.S.C. *in banco*); *R. v. Cook* (1983), 4 C.C.C. (3d) 419 (N.S.C.A.); *R. v. O'Day* (1983), 5 C.C.C. (3d) 227 (N.B.C.A.); *R. v. Landry* (1983), 7 C.C.C. (3d) 555 (Que. C.A.); *R. v. Stanger* (1983), 7 C.C.C. (3d) 337 (Alta. C.A.)

In some decisions it has been held that s. 8 of the *Narcotic Control Act* is constitutional because

impératives. Dans le cas d'une présomption créant une faculté, dès lors qu'il y a un fait établi, on est libre d'en déduire ou ne pas en déduire le fait présumé. Si, par contre, il s'agit d'une présomption impérative, cette déduction est obligatoire.

Une présomption peut aussi être réfutable ou irréfutable. Si elle est réfutable, il y a trois moyens possibles de combattre le fait présumé. Premièrement, l'accusé pourra avoir simplement à susciter un doute raisonnable quant à l'existence de ce fait. Deuxièmement, il pourra avoir la charge de produire une preuve suffisante pour mettre en doute l'exactitude du fait présumé. Troisièmement, il pourra avoir à s'acquitter d'une charge ultime ou d'une charge de persuasion qui l'oblige à prouver selon la prépondérance des probabilités l'inexistence du fait présumé.

Enfin, les présomptions sont souvent décrites comme étant soit des présomptions de droit, soit des présomptions de fait. Ces dernières comportent des [TRADUCTION] «exemples fréquents de preuve indirecte» (*Cross on Evidence*, précité, à la p. 124), alors que les premières comportent des règles de droit expresses.

Revenons à l'art. 8 de la *Loi sur les stupéfiants*. Selon moi, dès qu'on conclut hors de tout doute raisonnable que l'accusé était en possession d'un stupéfiant, celui-ci a la charge ultime de prouver selon la prépondérance des probabilités qu'il n'était pas en possession de ce stupéfiant pour en faire le trafic. Une fois prouvée, la possession fait naître à l'encontre de l'accusé la présomption de droit impérative qu'il avait l'intention de se livrer au trafic. De plus, l'accusé sera reconnu coupable de l'infraction de trafic, à moins qu'il ne puisse, par une preuve selon la prépondérance des probabilités, réfuter cette présomption. Les cours de plusieurs ressorts ont appuyé cette interprétation de l'art. 8: *R. v. Carroll* (1983), 147 D.L.R. (3d) 92 (C.S.Î.-P.-É. *in banco*); *R. v. Cook* (1983), 4 C.C.C. (3d) 419 (C.A.N.-É.); *R. v. O'Day* (1983), 5 C.C.C. (3d) 227 (C.A.N.-B.); *R. v. Landry*, (1983) 7 C.C.C. (3d) 555 (C.A. Qué.); *R. v. Stanger* (1983), 7 C.C.C. (3d) 337 (C.A. Alb.)

Dans certaines décisions, on a conclu à la constitutionnalité de l'art. 8 de la *Loi sur les stupéfiants*

it places only an evidentiary burden rather than a legal burden on the accused. The ultimate legal burden to prove guilt beyond a reasonable doubt remains with the Crown and the presumption of innocence is not offended. (*R. v. Therrien* (1982), 67 C.C.C. (2d) 31 (Ont. Co. Ct.); *R. v. Fraser* (1982), 138 D.L.R. (3d) 488 (Sask. Q.B.); *R. v. Kupczyniski*, (June 23, 1982, unreported, Ont. Co. Ct.))

This same approach was relied on in *R. v. Sharpe* (1961), 131 C.C.C. 75 (Ont. C.A.), a *Canadian Bill of Rights* decision on the presumption of innocence. In that case, a provision in the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, similar to s. 8 of the *Narcotic Control Act*, was interpreted as shifting merely the secondary burden of adducing evidence onto the accused. The primary onus remained with the Crown. In *R. v. Silk*, [1970] 3 C.C.C. (2d) 1 (B.C.C.A.), the British Columbia Court of Appeal held that s. 2(*f*) of the *Canadian Bill of Rights* had not been infringed because s. 33 of the *Food and Drugs Act*, (now R.S.C. 1970, c. F-27, s. 35) required only that an accused raise a reasonable doubt that the purpose of his or her possession was trafficking. This decision, however, was not followed in *R. v. Appleby*, [1972] S.C.R. 303, nor in *R. v. Erdman* (1971), 24 C.R.N.S. 216 (B.C.C.A.)

Those decisions which have held that only the secondary or evidentiary burden shifts are not persuasive with respect to the *Narcotic Control Act*. As Ritchie J. found in *R. v. Appleby*, *supra*, (though addressing a different statutory provision) the phrase "to establish" is the equivalent of "to prove". The legislature, by using the word "establish" in s. 8 of the *Narcotic Control Act*, intended to impose a legal burden on the accused. This is most apparent in the words "if the accused fails to establish that he was not in possession of the

parce qu'il impose à l'accusé une simple charge de présentation plutôt qu'une charge ultime. Le ministère public a toujours la charge ultime de prouver la culpabilité hors de tout doute raisonnable et il n'y a aucune atteinte à la présomption d'innocence. (*R. v. Therrien* (1982), 67 C.C.C. (2d) 31 (C. de comté Ont.); *R. v. Fraser* (1982), 138 D.L.R. (3d) 488 (B.R. Sask.); *R. v. Kupczyniski* (décision inédite en date du 23 juin 1982, C. de comté Ont.))

Ce même point de vue a été invoqué dans l'arrêt *R. v. Sharpe* (1961), 131 C.C.C. 75 (C.A. Ont.), où il était question de la présomption d'innocence, mais dans le contexte de la *Déclaration canadienne des droits*. Suivant l'interprétation qu'on a donnée dans cette affaire à une disposition de la *Loi sur l'opium et les drogues narcotiques*, S.R.C. 1952, chap. 201, cette disposition, qui était semblable à l'art. 8 de la *Loi sur les stupéfiants*, ne reportait sur l'accusé que la charge secondaire de produire des éléments de preuve. Quant à la charge principale, elle continuait d'incomber au ministère public. Dans l'arrêt *R. v. Silk*, [1970] 3 C.C.C. (2d) 1 (C.A.C.-B.), la Cour d'appel de la Colombie-Britannique a conclu qu'il n'y avait pas eu violation de l'al. 2*f*) de la *Déclaration canadienne des droits* parce que l'art. 33 de la *Loi des aliments et drogues* (l'actuel S.R.C. 1970, chap. F-27, art. 35) exigeait simplement d'un accusé qu'il fasse naître un doute raisonnable sur la question de savoir s'il s'agissait d'une possession à des fins de trafic. Toutefois, cet arrêt n'a été suivi ni dans l'arrêt *R. c. Appleby*, [1972] R.C.S. 303, ni dans l'arrêt *R. v. Erdman* (1971), 24 C.R.N.S. 216 (C.A.C.-B.)

Les décisions établissant que seule la charge secondaire ou la charge de présentation est déplacée n'ont aucune force persuasive pour ce qui est de la *Loi sur les stupéfiants*. Comme l'a conclu le juge Ritchie dans l'arrêt *R. c. Appleby*, précité, (quoique relativement à une disposition législative différente), le terme «établir» équivaut à «prouver». En employant le mot «démontrer» à l'art. 8 de la *Loi sur les stupéfiants*, le législateur a voulu imposer à l'accusé une charge ultime. C'est ce qui ressort on ne peut plus clairement de la phrase

narcotic for the purpose of trafficking, he shall be convicted of the offence as charged".

In the *Appleby* case, Ritchie J. also held that the accused is required to disprove the presumed fact according to the civil standard of proof, on a balance of probabilities. He rejected the criminal standard of beyond a reasonable doubt, relying, *inter alia*, upon the following passage from the House of Lords' decision in *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226, at p. 232:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being "disproved" there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

I conclude that s. 8 of the *Narcotic Control Act* contains a reverse onus provision imposing a legal burden on an accused to prove on a balance of probabilities that he or she was not in possession of a narcotic for the purpose of trafficking. It is therefore necessary to determine whether s. 8 of the *Narcotic Control Act* offends the right to be "presumed innocent until proven guilty" as guaranteed by s. 11(*d*) of the *Charter*.

suivante: «si l'accusé ne démontre pas qu'il n'était pas en possession du stupéfiant pour en faire le trafic, il doit être déclaré coupable de l'infraction dont fait mention l'acte d'accusation».

Dans l'arrêt *Appleby*, le juge Ritchie a conclu en outre que l'accusé doit prouver l'inexistence du fait présumé selon la norme de preuve en matière civile, savoir celle de la prépondérance des probabilités. Il a rejeté la norme d'une preuve hors de tout doute raisonnable applicable en matière criminelle, en se fondant notamment sur le passage suivant tiré de l'arrêt de la Chambre des lords *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226, à la p. 232:

> [TRADUCTION] En règle générale, dans des procédures criminelles, le défendeur n'a pas à prouver ou à réfuter quelque fait que ce soit: pour qu'il soit acquitté, il suffit que l'un des faits qui, s'il existait, constituerait l'infraction dont il est accusé, «ne soit pas prouvé». Mais il arrive exceptionnellement, comme en l'espèce, que la loi créant une infraction prévoie expressément que si d'autres faits sont prouvés, un fait précis, dont l'existence constitue un élément essentiel de l'infraction, sera présumé ou réputé exister «à moins que le contraire ne soit prouvé». En pareil cas, la conclusion que ce fait précis est «réfuté» entraîne un acquittement, alors que l'absence d'une telle conclusion entraîne une déclaration de culpabilité. Lorsque c'est là le résultat de la «réfutation» d'un fait, il ne peut y avoir, dans l'intérêt public, de motif d'exiger un degré exceptionnel de certitude tel qu'il lève tout doute raisonnable que ce fait n'existe pas. À notre avis, en pareil cas, la règle générale s'applique et il suffit que la cour considère, compte tenu de la preuve à sa disposition, que le fait n'existe probablement pas. Le critère est le même que celui qui s'applique dans les procédures civiles: celui de la prépondérance des probabilités.

Je conclus que l'art. 8 de la *Loi sur les stupéfiants* contient une disposition qui inverse la charge de la preuve en imposant à l'accusé la charge ultime de prouver selon la prépondérance des probabilités qu'il n'était pas en possession d'un stupéfiant pour en faire le trafic. Il est donc nécessaire d'établir si l'art. 8 de la *Loi sur les stupéfiants* porte atteinte au droit d'un inculpé d'être «présumé innocent tant qu'il n'est pas déclaré coupable», garanti par l'al. 11*d*) de la *Charte*.

(b) The Presumption of Innocence and s. 11(*d*) of the *Charter*

Section 11(*d*) of the *Charter* constitutionally entrenches the presumption of innocence as part of the supreme law of Canada. For ease of reference, I set out this provision again:

> **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.

To interpret the meaning of s. 11(*d*), it is important to adopt a purposive approach. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344:

> The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms . . . .

To identify the underlying purpose of the *Charter* right in question, therefore, it is important to begin by understanding the cardinal values it embodies.

The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(*d*) of the *Charter*, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter* (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to

b) La présomption d'innocence et l'al. 11*d*) de la *Charte*

L'alinéa 11*d*) de la *Charte* enchâsse la présomption d'innocence dans la Constitution qui est la loi suprême du Canada. Par souci de commodité, je reproduis de nouveau cette disposition:

> **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;

Il importe dans l'interprétation de l'al. 11*d*) de tenir compte de son objet. Comme l'a souligné cette Cour dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 344:

> Le sens d'un droit ou d'une liberté garantis par la *Charte* doit être vérifié au moyen d'une analyse de l'objet d'une telle garantie; en d'autres termes, ils doivent s'interpréter en fonction des intérêts qu'ils visent à protéger.
>
> À mon avis, il faut faire cette analyse et l'objet du droit ou de la liberté en question doit être déterminé en fonction de la nature et des objectifs plus larges de la *Charte* elle-même, des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers . . .

Par conséquent, pour identifier l'objet qui sous-tend le droit garanti par la *Charte* dont il est question en l'espèce, il est important de commencer par comprendre les valeurs fondamentales inhérentes à ce droit.

La présomption d'innocence est un principe consacré qui se trouve au cœur même du droit criminel. Bien qu'elle soit expressément garantie par l'al. 11*d*) de la *Charte*, la présomption d'innocence relève et fait partie intégrante de la garantie générale du droit à la vie, à la liberté et à la sécurité de la personne, contenue à l'art. 7 de la *Charte* (voir *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, le juge Lamer). La présomption d'innocence a pour effet de sauvegarder la liberté fondamentale et la dignité humaine de toute personne que l'État accuse d'une conduite criminelle. Un individu accusé d'avoir commis une infraction criminelle s'expose à de lourdes conséquences

social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

The presumption of innocence has enjoyed long-standing recognition at common law. In the leading case, *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (H.L.), Viscount Sankey wrote at pp. 481-82:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Subsequent Canadian cases have cited the *Woolmington* principle with approval (see, for example, *Manchuk v. The King*, [1938] S.C.R. 341, at p. 349; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at p. 1316).

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

sociales et personnelles, y compris la possibilité de privation de sa liberté physique, l'opprobre et l'ostracisme de la collectivité, ainsi que d'autres préjudices sociaux, psychologiques et économiques. Vu la gravité de ces conséquences, la présomption d'innocence revêt une importance capitale. Elle garantit qu'un accusé est innocent tant que l'État n'a pas prouvé sa culpabilité hors de tout doute raisonnable. Voilà qui est essentiel dans une société qui prône l'équité et la justice sociale. La présomption d'innocence confirme notre foi en l'humanité; elle est l'expression de notre croyance que, jusqu'à preuve contraire, les gens sont honnêtes et respectueux des lois.

La présomption d'innocence a depuis fort longtemps droit de cité en *common law*. Dans l'arrêt de principe *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (H.L.), le vicomte Sankey écrit aux pp. 481 et 482:

> [TRADUCTION] Dans toute la toile du droit criminel anglais se retrouve toujours un certain fil d'or, soit le devoir de la poursuite de prouver la culpabilité du prévenu, sous réserve de ce que j'ai déjà dit à propos de la défense excipant de l'aliénation mentale et sous réserve, également, de toute exception créée par la loi. Si, à l'issue des débats, la preuve produite, soit par la poursuite, soit par le prévenu, fait naître un doute raisonnable quant à savoir si ce dernier a tué la victime avec préméditation, la poursuite a échoué et le prévenu a droit à un acquittement. Peu importe la nature de l'accusation ou le lieu du procès, le principe obligeant la poursuite à prouver la culpabilité du prévenu est consacré dans la *common law* d'Angleterre et toute tentative d'y porter atteinte doit être repoussée.

Le principe posé dans l'arrêt *Woolmington* a par la suite été cité et approuvé dans des arrêts canadiens (voir, par exemple, *Manchuk v. The King*, [1938] R.C.S. 341, à la p. 349; *R. c. Ville de Sault Ste-Marie*, [1978] 2 R.C.S. 1299, à la p. 1316).

L'acceptation générale du principe de la présomption d'innocence ressort en outre de son inclusion dans les plus importants documents internationaux relatifs aux droits de la personne. Le paragraphe 11(I) de la *Déclaration universelle des droits de l'homme*, adoptée le 10 décembre 1948 par l'Assemblée générale des Nations Unies, dispose:

Article 11

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

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

Article 14

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

Canada acceded to this Covenant, and the Optional Protocol which sets up machinery for implementing the Covenant, on May 19, 1976. Both came into effect on August 19, 1976.

In light of the above, the right to be presumed innocent until proven guilty requires that s. 11(*d*) have, at a minimum, the following content. First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the State which must bear the burden of proof. As Lamer J. stated in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 357:

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

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

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

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

Article 11

I. Toute personne accusée d'un acte délictueux est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie au cours d'un procès public où toutes les garanties nécessaires à sa défense lui auront été assurées.

Le paragraphe 14(2) du *Pacte international relatif aux droits civils et politiques*, 1966, porte:

Article 14

2. Toute personne accusée d'une infraction pénale est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie.

Le Canada a adhéré à ce pacte ainsi qu'au Protocole facultatif prévoyant les modalités d'application du Pacte, le 19 mai 1976. Les deux sont entrés en vigueur le 19 août 1976.

Compte tenu de ce qui précède, le droit, prévu par l'al. 11*d*), d'être présumé innocent tant qu'on n'est pas déclaré coupable exige à tout le moins que, premièrement, la culpabilité soit établie hors de tout doute raisonnable et, deuxièmement, que ce soit à l'État qu'incombe la charge de la preuve. Comme l'affirme le juge Lamer dans l'arrêt *Dubois c. La Reine*, [1985] 2 R.C.S. 350, à la p. 357:

> L'alinéa 11*d*) impose à la poursuite le fardeau de démontrer la culpabilité de l'accusé hors de tout doute raisonnable ainsi que de présenter sa preuve contre l'accusé avant que celui-ci n'ait besoin de répondre, soit en témoignant soit en citant d'autres témoins.

Troisièmement, les poursuites criminelles doivent se dérouler d'une manière conforme aux procédures légales et à l'équité. L'importance de ces dernières ressort de la dernière partie de l'al. 11*d*) qui pose comme exigence que la culpabilité soit établie «conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable».

c) Jurisprudence relative aux dispositions portant inversion de la charge de la preuve et à la présomption d'innocence

Ayant étudié le sens général de la présomption d'innocence, je crois qu'il convient maintenant de passer brièvement en revue la jurisprudence canadienne et celle d'autres ressorts traitant des dispositions portant inversion de la charge de la preuve.

(i) The *Canadian Bill of Rights* Jurisprudence

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

> **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
>
> . . .
>
> (*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 independent and impartial tribunal . . . .

The wording of this section closely parallels that of s. 11(*d*). For this reason, one of the Crown's primary contentions is that the *Canadian Bill of Rights* jurisprudence should be determinative of the outcome of the present appeal.

The leading case decided under s. 2(*f*) of the *Canadian Bill of Rights* and relied on by the Crown, is *R. v. Appleby*, *supra*. In that case, the accused had challenged s. 224A(1)(*a*) (now s. 237(1)(*a*)) of the *Criminal Code*, R.S.C. 1970, c. C-34, which imposes a burden upon an accused to prove that he or she, though occupying the driver's seat, did not enter the vehicle for the purpose of setting it in motion and did not, therefore, have care and control. This Court rejected the arguments of the accused that s. 2(*f*) had been violated; it relied on the *Woolmington* case which held that the presumption of innocence was subject to "statutory exceptions". As Ritchie J. stated in his judgment for the majority at pp. 315-16:

> It seems to me, therefore, that if *Woolmington's* case is to be accepted, the words "presumed innocent until proved guilty according to law . . ." as they appear in

(i) Jurisprudence relative à la *Déclaration canadienne des droits*

L'alinéa 2*f*) de la *Déclaration canadienne des droits*, qui protège la présomption d'innocence, est ainsi rédigé:

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

Le texte de cette disposition se rapproche de celui de l'al. 11*d*). Pour cette raison, le ministère public avance parmi ses arguments principaux que ce pourvoi doit être tranché en fonction de la jurisprudence relative à la *Déclaration canadienne des droits*.

L'arrêt de principe portant sur l'al. 2*f*) de la *Déclaration canadienne des droits*, invoqué par le ministère public, est l'arrêt *R. c. Appleby*, précité. Dans cette affaire, l'accusé avait contesté la validité de l'al. 224A(1)*a*) (l'actuel al. 237(1)*a*)) du *Code criminel*, S.R.C. 1970, chap. C-34, qui impose à l'accusé la charge de prouver que, même s'il occupait la place du conducteur d'un véhicule à moteur, il n'était pas entré dans ce véhicule afin de le mettre en marche et que, par conséquent, il n'en n'avait ni la garde ni le contrôle. Cette Cour avait rejeté les arguments de l'accusé portant qu'il y avait eu violation de l'al. 2*f*); elle s'était alors fondée sur l'arrêt *Woolmington* qui établit qu'on peut par voie de disposition législative déroger à la présomption d'innocence. Comme l'a dit le juge Ritchie dans les motifs qu'il a rédigés au nom de la majorité, aux pp. 315 et 316:

> Par conséquent, il me semble que si l'on doit accepter l'affaire *Woolmington*, les termes «du droit à la présomption d'innocence jusqu'à ce que la preuve de sa

s. 2(*f*) of the *Bill of Rights*, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients.

In a concurring opinion, Laskin J. (as he then was) put forward an alternative test. He chose not to follow Ritchie J.'s approach of reading a statutory exception limitation into the phrase "according to law" in s. 2(*f*) of the *Canadian Bill of Rights*, and said at p. 317:

> I do not construe s. 2(*f*) as self-defeating because of the phrase "according to law" which appears therein. Hence, it would be offensive to s. 2(*f*) for a federal criminal enactment to place upon the accused the ultimate burden of establishing his innocence with respect to any element of the offence charged. The "right to be presumed innocent", of which s. 2(*f*) speaks, is, in popular terms, a way of expressing the fact that the Crown has the ultimate burden of establishing guilt; if there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused person must be acquitted. In a more refined sense, the presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit (after the Crown's evidence is in and as well any evidence tendered on behalf of the accused) of any reasonable doubt: see *Coffin* v. *U.S.* (1895), 156 U.S. 432 at 452.

Nevertheless, Laskin J. went on to hold that the presumption of innocence is not violated by "any statutory or non-statutory burden upon an accused to adduce evidence to neutralize, or counter on a balance of probabilities, the effect of evidence presented by the Crown" (p. 318). The test, according to Laskin J., is whether the legislative provision calls for a finding of guilt even though there is a reasonable doubt as to the culpability of the accused. This would seem to prohibit the imposition of any legal burden on the accused; however, Laskin J. upheld a statutory provision which would appear to have done precisely that.

In a subsequent case, *R. v. Shelley*, *supra*, involving a reverse onus provision regarding

culpabilité ait été établie en conformité de la loi . . . » à l'art. 2(*f*) de la *Déclaration des droits*, doivent être interprétés comme envisageant une loi qui reconnaît l'existence d'exceptions légales déplaçant le fardeau de la preuve en ce qui concerne un élément ou plus d'une infraction, lorsque certains faits précis ont été prouvés par la Couronne relativement à ces éléments.

Dans ses motifs concordants, le juge Laskin (alors juge puîné) a proposé un autre critère. En effet, à la différence du juge Ritchie, il a choisi de ne pas considérer comme une exception légale l'expression «en conformité de la loi» à l'al. 2*f*) de la *Déclaration canadienne des droits* et, à la p. 317, il a dit ce qui suit:

> Je ne considère pas que l'art. 2(*f*) s'annule lui-même à cause de l'expression «en conformité de la loi» qui y figure. Ainsi, une loi fédérale, en matière criminelle, qui imposerait à l'accusé l'obligation ultime de prouver son innocence relativement à tout élément de l'accusation portée contre lui, enfreindrait l'art. 2(*f*). Le «droit à la présomption d'innocence» dont parle l'art. 2(*f*) signifie, en termes populaires, que le fardeau ultime d'établir la culpabilité incombe au ministère public. Si, à la fin des plaidoiries, il existe un doute raisonnable relativement à tout élément de l'accusation, le prévenu doit être acquitté. Plus précisément, la présomption d'innocence donne au prévenu l'avantage initial du droit au silence et l'avantage ultime (après la présentation de la preuve du ministère public et de toute autre preuve pour le compte du prévenu) de tout doute raisonnable: voir *Coffin* v. *U.S.* (1895), 156 U.S. 432 à 452.

Néanmoins, le juge Laskin a ajouté qu'il n'y a pas de violation de la présomption d'innocence du fait «qu'un prévenu puisse avoir, en vertu d'une loi ou non, l'obligation de présenter une preuve pour neutraliser ou contrecarrer, par une balance des probabilités, l'effet de la preuve du ministère public» (à la p. 318). Selon le juge Laskin, le critère est de savoir si la disposition législative exige une déclaration de culpabilité même s'il subsiste un doute raisonnable quant à la culpabilité de l'accusé. Cela semblerait donc s'opposer à ce qu'une charge ultime soit imposée à l'accusé. Cependant, le juge Laskin a conclu à la validité d'une disposition législative qui paraît avoir eu précisément cet effet.

Par la suite, dans l'arrêt *R. c. Shelley*, précité, où il s'agissait d'une disposition qui inversait la

unlawful importation, Laskin C.J. discussed further the views he had articulated in *Appleby* at p. 200:

> This Court held in *R. v. Appleby* that a reverse onus provision, which goes no farther than to require an accused to offer proof on a balance of probabilities, does not necessarily violate the presumption of innocence under s. 2(*f*). It would, of course, be clearly incompatible with s. 2(*f*) for a statute to put upon an accused a reverse onus of proving a fact in issue beyond a reasonable doubt. In so far as the onus goes no farther than to require an accused to prove as essential fact upon a balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disprove, as the case may be. If it is one which an accused cannot reasonably be expected to prove, being beyond his knowledge or beyond what he may reasonably be expected to know, it amounts to a requirement that is impossible to meet.

In addition, Laskin C.J. sowed the seeds for the development of a "rational connection test" for determining the validity of a reverse onus provision when he stated at p. 202:

> It is evident to me in this case that there is on the record no rational or necessary connection between the fact proved, *i.e.* possession of goods of foreign origin, and the conclusion of unlawful importation which the accused under s. 248(1) must, to avoid conviction, disprove.

Although there are important lessons to be learned from the *Canadian Bill of Rights* jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the *Charter*. As this Court held in *R. v. Big M Drug Mart Ltd.*, *supra*, the *Charter*, as a constitutional document, is fundamentally different from the statutory *Canadian Bill of Rights*, which was interpreted as simply recognizing and declaring existing rights. (See also *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 *per* Wilson J.; *R. v. Therens*, [1985] 1 S.C.R. 613, *per* Le Dain J.) In rejecting the *Canadian Bill of Rights* religion cases as determinative of the meaning of freedom of religion under the

charge de la preuve en matière d'importation illégale, le juge en chef Laskin a développé davantage l'opinion qu'il avait exprimée dans l'arrêt *Appleby* (à la p. 200):

> Dans l'arrêt *R. c. Appleby*, cette Cour a décidé qu'une disposition qui prévoit le déplacement du fardeau de la preuve et qui n'exige rien de plus d'un accusé que la preuve selon la prépondérance des probabilités, ne viole pas nécessairement la présomption d'innocence de l'al. 2*f*). Bien sûr, il serait vraiment incompatible avec l'al. 2*f*) qu'une loi oblige un accusé à prouver hors de tout doute raisonnable un fait en litige. Tant que le fardeau n'exige pas d'un accusé plus que la preuve d'un fait essentiel selon la prépondérance des probabilités, il doit s'agir d'un fait essentiel que l'accusé est en mesure d'établir ou de réfuter selon le cas. S'il s'agit d'un fait que l'accusé ne peut raisonnablement être en mesure de prouver, soit qu'il l'ignore ou qu'il ne peut raisonnablement être en mesure de le connaître, cela équivaut à une exigence impossible à remplir.

De plus, le juge en chef Laskin a jeté les bases de l'élaboration d'un «critère du lien rationnel» applicable à la détermination de la validité d'une disposition portant inversion de la charge de la preuve. À la page 202, il tient les propos suivants:

> Il me paraît évident en l'espèce qu'il n'y a au dossier aucun lien rationnel ou nécessaire entre le fait prouvé, c.-à-d. la possession de marchandises d'origine étrangère, et la conclusion d'importation illégale que l'accusé doit réfuter en vertu du par. 248(1) pour ne pas être déclaré coupable.

Quoique la jurisprudence portant sur la *Déclaration canadienne des droits* soit très instructive, elle n'est nullement déterminante en ce qui concerne l'interprétation constitutionnelle de la *Charte*. Comme cette Cour l'a conclu dans l'arrêt *R. c. Big M Drug Mart Ltd.*, précité, la *Charte*, en tant que document constitutionnel, diffère fondamentalement du texte législatif qu'est la *Déclaration canadienne des droits*, lequel a été interprété comme ne faisant que reconnaître et déclarer l'existence de droits déjà existants. (Voir également *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177, le juge Wilson; *R. c. Therens*, [1985] 1 R.C.S. 613, le juge Le Dain.) En affirmant dans l'arrêt *Big M Drug Mart Ltd.* que les affaires en matière religieuse décidées sous le régime de la *Déclaration canadienne des droits* ne sauraient être déterminantes quant au sens qui

Charter in *R. v. Big M Drug Mart Ltd.*, the Court had occasion to say at pp. 343-44:

> I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*. For this reason, *Robertson and Rosetanni, supra*, cannot be determinative of the meaning of "freedom of conscience and religion" under the *Charter*. We must look, rather, to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada.

With this in mind, one cannot but question the appropriateness of reading into the phrase "according to law" in s. 11(*d*) of the *Charter* the statutory exceptions acknowledged in *Woolmington* and in *Appleby*. The *Woolmington* case was decided in the context of a legal system with no constitutionally entrenched human rights document. In Canada, we have tempered parliamentary supremacy by entrenching important rights and freedoms in the Constitution. Viscount Sankey's statutory exception proviso is clearly not applicable in this context and would subvert the very purpose of the entrenchment of the presumption of innocence in the *Charter*. I do not, therefore, feel constrained in this case by the interpretation of s. 2(*f*) of the *Canadian Bill of Rights* presented in the majority judgment in *Appleby*. Section 8 of the *Narcotic Control Act* is not rendered constitutionally valid simply by virtue of the fact that it is a statutory provision.

(ii) *Canadian Charter* Jurisprudence

In addition to the present case, there have been a number of other provincial appellate level judgments addressing the meaning of the presumption of innocence contained in s. 11(*d*). This jurisprudence provides a comprehensive and persuasive source of insight into the questions raised in this appeal. In particular, six appellate level courts, in addition to the Ontario Court of Appeal, have held

doit être donné à la liberté de religion garantie par la *Charte*, la Cour a dit, aux pp. 343 et 344:

> Je suis d'accord avec l'intimée que la *Charte* vise à établir une norme en fonction de laquelle les lois actuelles et futures seront appréciées. Donc, le sens du concept de la liberté de conscience et de religion ne doit pas être déterminé uniquement en fonction de la mesure dans laquelle les Canadiens jouissaient de ce droit avant la proclamation de la *Charte*. Pour cette raison, l'arrêt *Robertson and Rosetanni*, précité, ne peut être déterminant quant au sens qui doit être donné à la «liberté de conscience et de religion» garantie par la *Charte*. Il nous faut plutôt recourir aux principes distinctifs d'interprétation constitutionnelle applicables à la loi suprême du Canada.

Dans ce contexte, on ne peut que se demander s'il est approprié de voir dans l'expression «conformément à la loi» figurant à l'art. 11*d*) de la *Charte* les exceptions légales reconnues dans les arrêts *Woolmington* et *Appleby*. L'arrêt *Woolmington* est le produit d'un système juridique dans lequel les droits de la personne ne sont pas enchâssés dans un document constitutionnel. Au Canada, par contre, nous avons tempéré la primauté du Parlement par l'enchâssement de libertés et de droits importants dans la Constitution. La réserve des exceptions légales établie par le vicomte Sankey ne s'applique manifestement pas dans le contexte canadien, car elle irait à l'encontre de l'objet même de l'enchâssement de la présomption d'innocence dans la *Charte*. C'est pourquoi je ne me sens pas lié en l'espèce par l'interprétation qu'a donnée à l'al. 2*f*) de la *Déclaration canadienne des droits* la Cour à la majorité dans l'arrêt *Appleby*. L'article 8 de la *Loi sur les stupéfiants* n'est pas constitutionnel du seul fait qu'il s'agit d'une disposition législative.

(ii) Jurisprudence relative à la *Charte canadienne*

Outre l'espèce, il y a eu plusieurs autres arrêts de cours d'appel provinciales qui ont traité du sens de la présomption d'innocence énoncée à l'al. 11*d*). Ils constituent une jurisprudence détaillée et persuasive qui nous éclaire sur les questions soulevées dans le présent pourvoi. En particulier, outre la Cour d'appel de l'Ontario, six autres cours d'appel ont conclu que l'art. 8 de la *Loi sur les stupéfiants*

that s. 8 of the *Narcotic Control Act* violates the *Charter*: *R. v. Carroll*, *supra*; *R. v. Cook*, *supra*; *R. v. O'Day*, *supra*; *R. v. Stanger*, *supra*; *R. v. Landry*, *supra*; *R. v. Stock* (1983), 10 C.C.C. (3d) 319 (B.C.C.A.)

Following the decision of the Ontario Court of Appeal in the present case, the Prince Edward Island Supreme Court (*in banco*) rendered its decision in *R. v. Carroll*, *supra*. Writing for the majority, MacDonald J. held at p. 105:

> Unless a provision falls within s. 1 of the Charter, there cannot be a requirement that an accused must prove an essential positive element of the Crown's case other than by raising a reasonable doubt. The presumption of innocence cannot be said to exist if by shifting the persuasive burden the court is required to convict even if a reasonable doubt may be said to exist.

In a concurring judgment, Mitchell J. commented at pp. 107-08:

> Section 11(*d*) gives an accused person the right to be presumed innocent until proven guilty. It follows that if an accused is to be presumed innocent until proven guilty, he must not be convicted unless and until the Crown has proven each and all of the elements necessary to constitute the crime.

Applying these legal conclusions to s. 8 of the *Narcotic Control Act*, the Court held that s. 11(*d*) had been violated. As Mitchell J. stated at p. 108:

> Under s. 8 an accused is not presumed innocent until proven guilty. He is only presumed innocent until found in possession. Once the Crown proves the accused had possession of the narcotic, he is presumed to be guilty of an intention to traffic until he proves otherwise.

The Nova Scotia Supreme Court, Appellate Division, also concluded that s. 8 is an unconstitutional violation of the s. 11(*d*) presumption of innocence in its decision in *R. v. Cook*, *supra*. After reviewing *R. v. Oakes*, *supra*, and *R. v. Carroll*, *supra*, Hart J.A. concluded at pp. 435-36:

va à l'encontre de la *Charte*: *R. v. Carroll*, précité; *R. v. Cook*, précité; *R. v. O'Day*, précité; *R. v. Stanger*, précité; *R. v. Landry*, précité; *R. v. Stock* (1983), 10 C.C.C. (3d) 319 (C.A.C.-B.)

À la suite de l'arrêt rendu par la Cour d'appel de l'Ontario dans la présente affaire, la Cour suprême de l'Île-du-Prince-Édouard (*in banco*) a rendu l'arrêt *R. v. Carroll*, précité. Le juge MacDonald, qui a rédigé les motifs de la majorité, conclut, à la p. 105:

> [TRADUCTION] À moins qu'une disposition ne relève de l'art. 1 de la Charte, on ne peut exiger d'un accusé qu'il établisse un élément positif essentiel de la preuve du ministère public, si ce n'est en faisant naître un doute raisonnable. On ne peut pas dire que la présomption d'innocence existe si, en raison du déplacement de la charge de persuasion, la cour est tenue de rendre un verdict de culpabilité même si on peut dire qu'il existe un doute raisonnable.

Dans des motifs concordants, le juge Mitchell explique, aux pp. 107 et 108:

> [TRADUCTION] L'alinéa 11*d*) reconnaît à tout accusé le droit d'être présumé innocent tant qu'il n'est pas déclaré coupable. Il s'ensuit que, si un accusé doit être présumé innocent tant qu'il n'est pas déclaré coupable, aucun verdict de culpabilité ne doit être rendu, à moins que le ministère public n'ait établi chacun des éléments constitutifs du crime.

Appliquant ces conclusions de droit à l'art. 8 de la *Loi sur les stupéfiants*, la cour a conclu à la violation de l'al. 11*d*). Comme l'affirme le juge Mitchell, à la p. 108:

> [TRADUCTION] Sous le régime de l'art. 8, un accusé n'est pas présumé innocent tant qu'il n'est pas déclaré coupable. La présomption d'innocence ne joue que jusqu'au moment où l'on conclut qu'il était en possession d'un stupéfiant. Dès lors que le ministère public établit que l'accusé avait le stupéfiant en sa possession, il est, jusqu'à preuve contraire, présumé avoir eu l'intention de se livrer au trafic.

Dans l'arrêt *R. v. Cook*, précité, la Division d'appel de la Cour suprême de la Nouvelle-Écosse a elle aussi jugé inconstitutionnel l'art. 8 du fait qu'il porte atteinte à la présomption d'innocence énoncée à l'al. 11*d*). Après avoir examiné les arrêts *R. v. Oakes* et *R. v. Carroll*, précités, le juge Hart conclut, aux pp. 435 et 436:

Section 8 of the *Narcotic Control Act* is a piece of legislation that attempts to relieve the Crown of its normal burden of proof by use of what is known as a reverse onus. Different types of reverse onus have been known to the law and proof of a case with the aid of a reverse onus can in my opinion, fall into the wording of s. 11(*d*) of the *Charter* as being proof "according to law" .... I know of no justification, however, for holding that it would be "according to law" to allow use of a reverse onus clause which permitted the Crown the assistance of a provision which relieved it from calling any probative evidence to establish one of the essential elements of an offence.

[TRADUCTION] L'article 8 de la *Loi sur les stupéfiants* tente, par le recours à ce qu'il est convenu d'appeler une inversion de la charge de la preuve, de dégager le ministère public de son fardeau normal en matière de preuve. On a connu en droit différents types de dispositions portant inversion de la charge de la preuve et, selon moi, une preuve établie à l'aide d'une telle disposition peut être visée par le texte de l'al. 11*d*) de la *Charte*, comme ayant été faite «conformément à la loi» ... Toutefois, à ce que je sache, rien ne justifie la conclusion qu'il serait «conforme à la loi» d'autoriser le recours à une disposition portant inversion de la charge de la preuve qui permet au ministère public de s'aider d'une disposition qui le dispense de produire une preuve probante quelconque visant à établir l'un des éléments essentiels d'une infraction.

Although concurring in result, Jones J.A. maintained that the reasonableness test should be applied with respect to s. 1 and not with respect to the words "according to law" in s. 11(*d*).

Le juge Jones, quoique souscrivant à la conclusion de ses collègues, a soutenu que le critère du caractère raisonnable doit s'appliquer à l'égard de l'article premier et non pas à l'égard de l'expression «conformément à la loi» que l'on trouve à l'al. 11*d*).

The test of reasonableness should be available in considering the secondary question under s. 1 of the Charter. It is important that the burden of proof should be on the Crown to show that a statute which violates s. 11(*d*) of the Charter is demonstrably justified in a free and democratic society. (p. 439)

[TRADUCTION] On doit pouvoir recourir au critère du caractère raisonnable dans l'examen de la question secondaire soulevée par l'article premier de la Charte. Il importe que ce soit au ministère public qu'il incombe de prouver qu'une loi qui viole l'al. 11*d*) de la Charte est manifestement justifiée dans le cadre d'une société libre et démocratique. (p. 439)

In *R. v. O'Day*, *supra*, the New Brunswick Court of Appeal struck down s. 8 of the *Narcotic Control Act* and registered its agreement with the three earlier provincial appellate level courts.

Dans l'arrêt *R. v. O'Day*, précité, la Cour d'appel du Nouveau-Brunswick a déclaré inconstitutionnel l'art. 8 de la *Loi sur les stupéfiants* et a exprimé son approbation des trois arrêts antérieurs rendus par des cours d'appel provinciales.

The Alberta Court of Appeal in *R. v. Stanger*, *supra*, also found s. 8 unconstitutional; however, the court was not unanimous in this conclusion. On the meaning of s. 11(*d*), Stevenson J.A., writing for the majority, paraphrased Martin J.A.'s comment in *Oakes* and stated at p. 351 that the presumption of innocence meant "first, that an accused is innocent until proven guilty in accordance with established procedure, and secondly, that guilt must be proven beyond a reasonable doubt". Mr. Justice Stevenson also cited MacDonald J.'s comment in *Carroll* that the presumption of innocence is maintained "as long as the prosecution has the final burden of establishing

La Cour d'appel de l'Alberta, dans l'arrêt *R. v. Stanger*, précité, a également conclu à l'inconstitutionnalité de l'art. 8; cette conclusion n'a toutefois pas été unanime. En ce qui concerne le sens de l'al. 11*d*), le juge Stevenson, qui a rédigé les motifs de la majorité, a paraphrasé les observations faites par le juge Martin dans l'arrêt *Oakes*, disant à la p. 351 que la présomption d'innocence signifie [TRADUCTION] «en premier lieu, qu'un accusé est innocent tant qu'il n'est pas déclaré coupable conformément à la procédure établie et, en deuxième lieu, que la culpabilité doit être prouvée hors de tout doute raisonnable». De plus, le juge Stevenson a cité l'observation du juge MacDonald dans l'ar-

guilt, on any element of the offence charged, beyond a reasonable doubt" (*supra*, p. 98).

I should add that the majority, in *Stanger*, correctly rejected the applicability of the Privy Council decision in *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648. That case concerned constitutional provisions of Singapore which are significantly different from those of the *Charter*; in particular, they do not contain an explicit endorsement of the presumption of innocence. Moreover, the Privy Council did not read this principle into the general due process protections of the Constitution of Singapore.

In *R. v. Landry*, *supra*, the Quebec Court of Appeal invalidated s. 8 of the *Narcotic Control Act* and extended its conclusions to s. 2(*f*) of the *Canadian Bill of Rights*. As Malouf J.A. stated at p. 561:

> Both the *Bill of Rights* and the Charter recognize the right of an accused to be presumed innocent until proven guilty according to law. I cannot accept that such a basic and fundamental principle can be set aside by such a reverse onus provision.

Finally, in a very brief judgment, *R. v. Stock*, *supra*, the British Columbia Court of Appeal concurred with the Court of Appeal decisions reviewed above, endorsing in particular the Ontario Court of Appeal decision in *Oakes*. An earlier British Columbia Court of Appeal opinion, *Re Anson and The Queen* (1983), 146 D.L.R. (3d) 661 (B.C.C.A.), had dismissed an appeal from a ruling which had upheld the constitutionality of s. 8 of the *Narcotic Control Act*; however, the basis for the denial of the appeal was procedural. The court did not assess the constitutionality of s. 8 in relation to the presumption of innocence.

There have also been a number of cases in which the meaning of s. 11(*d*) has been considered in

rêt *Carroll*, précité, portant que la présomption d'innocence vaut [TRADUCTION] «tant que la poursuite a la charge ultime d'établir hors de tout doute raisonnable ... la culpabilité relativement à tout élément de l'infraction imputée» (précité, à la p. 98).

Je tiens à ajouter que c'est avec raison que, dans l'arrêt *Stanger*, la cour à la majorité a jugé inapplicable l'arrêt du Conseil privé *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648. Cette affaire concernait des dispositions de la Constitution de Singapour qui sont sensiblement différentes de celles de la *Charte*; en particulier, elles ne contiennent pas de reconnaissance explicite de la présomption d'innocence. De plus, le Conseil privé n'a pas estimé que ce principe était inhérent aux dispositions générales de la Constitution de Singapour garantissant le caractère équitable des procédures.

Dans l'arrêt *R. v. Landry*, précité, la Cour d'appel du Québec a déclaré invalide l'art. 8 de la *Loi sur les stupéfiants*. Les conclusions de la cour portaient en outre sur l'al. 2*f*) de la *Déclaration canadienne des droits*, le juge Malouf faisant remarquer, à la p. 561:

> [TRADUCTION] La *Déclaration des droits* et la Charte reconnaissent toutes deux à l'accusé le droit d'être présumé innocent tant qu'il n'est pas déclaré coupable conformément à la loi. Je ne puis admettre qu'un principe aussi élémentaire et fondamental puisse être écarté par une telle disposition portant inversion de la charge de la preuve.

Finalement, dans l'arrêt très bref *R. v. Stock*, précité, la Cour d'appel de la Colombie-Britannique s'est dite d'accord avec les arrêts de cours d'appel que nous venons d'examiner, approuvant en particulier l'arrêt *Oakes* de la Cour d'appel de l'Ontario. Dans l'arrêt antérieur *Re Anson and The Queen* (1983), 146 D.L.R. (3d) 661, la Cour d'appel de la Colombie-Britannique avait rejeté l'appel d'une décision qui avait jugé constitutionnel l'art. 8 de la *Loi sur les stupéfiants*. Cependant, ce rejet était fondé sur des motifs de procédure. La cour n'a pas examiné la constitutionnalité de l'art. 8 en fonction de la présomption d'innocence.

Il y a eu en outre plusieurs arrêts dans lesquels le sens de l'al. 11*d*) a été étudié en fonction

relation to other legislative provisions; see, for example, *R. v. Holmes* (1983), 41 O.R. (2d) 250 (Ont. C.A.); *R. v. Whyte* (1983), 10 C.C.C. (3d) 277 (B.C.C.A.), leave to appeal to S.C.C. granted; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. 539 (Ont. C.A.); *R. v. T.* (1985), 18 C.C.C. (3d) 125 (N.S.C.A.); *R. v. Kowalczuk* (1983), 5 C.C.C. (3d) 25 (Man. C.A.); *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34 (Man. C.A.); *Re Boyle and The Queen* (1983), 41 O.R. (2d) 713 (Ont. C.A.)

To summarize, the Canadian *Charter* jurisprudence on the presumption of innocence in s. 11(*d*) and reverse onus provisions appears to have solidly accorded a high degree of protection to the presumption of innocence. Any infringements of this right are permissible only when, in the words of s. 1 of the *Charter*, they are reasonable and demonstrably justified in a free and democratic society.

(iii) United States Jurisprudence

In the United States, protection of the presumption of innocence is not explicit. Rather, it has been read into the "due process" provisions of the *American Bill of Rights* contained in the Fifth and Fourteenth Amendments of the *Constitution of the United States of America*. An extensive review of the United States case law is provided in Martin J.A.'s judgment for the Ontario Court of Appeal. I will, therefore, merely highlight the major jurisprudential developments.

In *Tot v. United States*, 319 U.S. 463 (1943), Roberts J. outlined the following test at pp. 467-68:

> ... a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connnection between the two in common experience.

The comparative convenience of producing evidence was also acknowledged as a corollary test. The case involved a presumption to be drawn,

d'autres dispositions législatives; voir, par exemple, *R. v. Holmes* (1983), 41 O.R. (2d) 250 (C.A. Ont.); *R. v. Whyte* (1983), 10 C.C.C. (3d) 277 (C.A.C.-B.), autorisation de pourvoi devant la Cour suprême du Canada accordée; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. 539 (C.A. Ont.); *R. v. T.* (1985), 18 C.C.C. (3d) 125 (C.A.N.-É.); *R. v. Kowalczuk* (1983), 5 C.C.C. (3d) 25 (C.A. Man.); *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34 (C.A. Man.); *Re Boyle and The Queen* (1983), 41 O.R. (2d) 713 (C.A. Ont.)

En résumé, la jurisprudence canadienne relative à la présomption d'innocence énoncée à l'al. 11*d*) de la *Charte* et aux dispositions portant inversion de la charge de la preuve paraît avoir accordé un très haut degré de protection à la présomption d'innocence. Il ne peut y avoir atteinte à ce droit que, comme le dit l'article premier de la *Charte*, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

(iii) Jurisprudence américaine

Aux États-Unis, la présomption d'innocence n'est pas expressément protégée. Au contraire, on a considéré qu'elle découle implicitement des dispositions de l'*American Bill of Rights* relatives au «caractère équitable des procédures», que contiennent les Cinquième et Quatorzième amendements de la *Constitution of the United States of America*. On trouve, dans les motifs que le juge Martin a rédigés pour la Cour d'appel de l'Ontario, un examen approfondi de la jurisprudence américaine, dont je ne soulignerai en conséquence que les points saillants.

Dans la décision *Tot v. United States*, 319 U.S. 463 (1943), le juge Roberts formule le critère suivant, aux pp. 467 et 468:

> [TRADUCTION] ... une présomption légale ne saurait jouer s'il n'existe pas de lien rationnel entre le fait prouvé et le fait ultime présumé, si la conclusion à l'existence de l'un à partir de la preuve de l'autre est arbitraire parce que l'expérience générale ne démontre pas de lien entre ces deux faits.

De plus, on a reconnu comme critère accessoire la facilité relative avec laquelle des éléments de preuve peuvent être produits. Dans cette affaire, il

from the possession of firearms by a person convicted of a previous crime of violence, that the firearms were illegally obtained through interstate or foreign commerce. Of note was Roberts J.'s comment that even if a rational connection had been proved, the statutory presumption could not be sustained because of the prejudical reliance on a past conviction as part of the basic fact. The accused would be discredited in the eyes of the jury even before he attempted to disprove the presumed fact.

In *Leary v. United States*, 395 U.S. 6 (1969), Harlan J. articulated a more stringent test for invalidity at p. 36:

> ... a criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Harlan J. also noted that since the statutory presumption was invalid under the above test, "we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use" (footnote 64).

The United States Supreme Court did answer this question in *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979). It held that where a mandatory criminal presumption was imposed by statute, the State may not "rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt" (p. 167). A mere rational connection is insufficient. This case illustrates the high degree of constitutional protection accorded the principle that an accused must be found guilty beyond a reasonable doubt. The

s'agissait d'une présomption, fondée sur la possession d'armes à feu par une personne ayant déjà été déclarée coupable d'un crime violent, que ces armes à feu avaient été illégalement obtenues par le commerce international ou entre états. Soulignons ici que le juge Roberts a fait observer que, même si on avait prouvé l'existence d'un lien rationnel, la présomption légale ne pouvait s'appliquer parce que le fait établi sur lequel on se fondait comportait une déclaration de culpabilité antérieure, préjudiciable à l'accusé. Ce dernier serait donc discrédité aux yeux du jury avant même qu'il n'essaie de réfuter le fait présumé.

Dans la décision *Leary v. United States*, 395 U.S. 6 (1969), à la p. 36, le juge Harlan formule un critère plus sévère pour conclure à l'invalidité:

> [TRADUCTION] ... une présomption légale en matière criminelle doit être tenue pour «irrationnelle» ou «arbitraire» et, partant inconstitutionnelle, à moins qu'on ne puisse affirmer avec beaucoup de certitude que le fait présumé découle probablement du fait établi dont il est censé dépendre.

Le juge Harlan a fait remarquer en outre que, vu l'invalidité de la présomption légale selon le critère énoncé ci-dessus, [TRADUCTION] «nous n'avons pas à nous pencher sur la question de savoir si une présomption en matière criminelle qui répond à ce critère doit aussi satisfaire à la norme du «doute raisonnable», applicable dans les affaires criminelles, lorsque la preuve du crime imputé ou d'un élément essentiel de celui-ci dépend de l'application de cette présomption» (note 64).

La Cour suprême des États-Unis a répondu à cette question dans l'arrêt *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979). Elle a conclu que, lorsqu'une loi crée une présomption impérative en matière criminelle, l'État ne peut [TRADUCTION] «fonder sa preuve entièrement sur une présomption, à moins que le fait prouvé ne suffise pour justifier la conclusion que l'accusé est coupable hors de tout doute raisonnable» (à la p. 167). Un simple lien rationnel ne suffit pas. Cet arrêt démontre donc le haut degré de protection constitutionnelle accordée au principe selon lequel la culpabilité d'un accusé doit être établie hors de tout doute raisonnable. La raison d'être de ce principe a été bien exprimée par le juge Brennan

rationale for this is well stated by Brennan J. in *In Re Winship*, 397 U.S. 358 (1970), at pp. 363-64:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

(iv) *European Convention on Human Rights* Jurisprudence

As mentioned above, international developments in human rights law have afforded protection to the principle of the presumption of innocence. The jurisprudence on *The European Convention on Human Rights* includes a consideration of the legitimacy of reverse onus provisions. Section 6(2) of *The European Convention on Human Rights* reads:

Article 6

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

The meaning of s. 6(2) was clarified in the *Pfunders Case* (*Austria v. Italy*) (1963), 6 Yearbook E.C.H.R. 740, at p. 782 and p. 784:

This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the Prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgment they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt.

dans l'arrêt *In Re Winship*, 397 U.S. 358 (1970), aux pp. 363 et 364:

[TRADUCTION] Si l'exigence d'une preuve hors de tout doute raisonnable joue dans notre procédure criminelle un rôle si vital, il y a de très bonnes raisons à cela. Pour un accusé qui fait face à des poursuites criminelles, l'enjeu revêt une importance capitale, d'une part en raison de la privation de liberté que risque d'entraîner une déclaration de culpabilité et, d'autre part, à cause de l'opprobre qui en résulterait certainement. Par conséquent, une société qui attache de la valeur à la réputation et à la liberté de chaque citoyen doit se garder de condamner une personne pour la perpétration d'un crime lorsqu'il subsiste un doute raisonnable quant à sa culpabilité.

(iv) Jurisprudence portant sur la *Convention européenne des droits de l'homme*

Comme je l'ai déjà mentionné, le droit international dans le domaine des droits de la personne a évolué de manière à protéger le principe de la présomption d'innocence. La jurisprudence relative à la *Convention européenne des droits de l'homme* traite notamment de la légitimité des dispositions portant inversion de la charge de la preuve. Le paragraphe 6(2) de la *Convention européenne des droits de l'homme* est ainsi rédigé:

Article 6

2. Toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie.

Le sens du par. 6(2) a été élucidé dans l'*Affaire Pfunders* (*Autriche c. Italie*) (1963), 6 Annuaire C.E.D.H. 741, aux pp. 783 et 785:

Ce texte, aux termes duquel toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie, exige en premier lieu que les membres du tribunal, en remplissant leur fonction, ne partent pas de la conviction ou de la supposition que le prévenu a commis l'acte incriminé. Autrement dit, la charge de la preuve de la culpabilité incombe au Ministère public, et le doute profite à l'inculpé. De plus, les juges doivent permettre à ce dernier de leur fournir ses contre-preuves. Puis, au moment de prendre leur décision, ils ne doivent arriver à une condamnation que sur la base de preuves directes ou indirectes mais suffisamment fortes, aux yeux de la loi, pour établir la culpabilité de l'intéressé.

Although the Commission has endorsed the general importance of the requirement that the prosecution prove the accused's guilt beyond a reasonable doubt, it has acknowledged the permissibility of certain exceptions to this principle. For example, the Commission upheld a statutory reverse onus provision in which a man living with or habitually in the company of a prostitute is presumed to be knowingly living on the earnings of prostitution unless he proves otherwise (*X against the United Kingdom*, Appl'n. No. 5124/71, Collection of Decisions, E.C.H.R., 135). The Commission noted the importance of examining the substance and effect of a statutory reverse onus. It concluded, however, at p. 135:

> The statutory presumption in the present case is restrictively worded. . . . The presumption is neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible.

(See discussion in Francis Jacobs, *The European Convention on Human Rights* (Oxford: 1975), pp. 113-14.)

(d) Conclusion Regarding s. 11(*d*) of the *Charter* and s. 8 of the *Narcotic Control Act*

This review of the authorities lays the groundwork for formulating some general conclusions regarding reverse onus provisions and the presumption of innocence in s. 11(*d*). We can then proceed to apply these principles to the particulars of s. 8 of the *Narcotic Control Act*.

In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(*d*). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a

Bien que la Commission ait reconnu l'importance générale de l'exigence que la poursuite prouve la culpabilité de l'accusé hors de tout doute raisonnable, elle a reconnu aussi le caractère acceptable de certaines exceptions à ce principe. Par exemple, la Commission a conclu à la validité d'une disposition légale portant inversion de la charge de la preuve, disposition selon laquelle l'homme qui cohabite avec une prostituée ou qui est régulièrement en sa compagnie est présumé vivre sciemment de revenus tirés de la prostitution, à moins qu'il ne prouve le contraire (*X contre le Royaume-Uni*, demande n° 5124/71, Recueil des décisions, C.E.D.H. 135). La Commission a souligné l'importance d'examiner le contenu et l'effet d'une disposition législative portant inversion de la charge de la preuve. Elle conclut toutefois, à la p. 135:

> [TRADUCTION] La présomption légale en l'espèce est formulée de manière restrictive ... Cette présomption n'est ni irréfutable ni déraisonnable. Obliger la poursuite à obtenir une preuve directe que quelqu'un «vit de revenus immoraux» rendrait, dans la plupart des cas, sa tâche impossible.

(Voir l'analyse de Francis Jacobs, *The European Convention on Human Rights* (Oxford: 1975), aux pp. 113 et 114.)

d) Conclusion relative à l'al. 11*d*) de la *Charte* et à l'art. 8 de la *Loi sur les stupéfiants*

À partir de cet examen de la jurisprudence, nous sommes en mesure de formuler certaines conclusions générales sur les dispositions portant inversion de la charge de la preuve et sur la présomption d'innocence énoncée à l'al. 11*d*). Nous pourrons ensuite appliquer ces principes aux dispositions de l'art. 8 de la *Loi sur les stupéfiants*.

Je crois que, d'une manière générale, on doit conclure qu'une disposition qui oblige un accusé à démontrer selon la prépondérance des probabilités l'inexistence d'un fait présumé qui constitue un élément important de l'infraction en question, porte atteinte à la présomption d'innocence de l'al. 11*d*). S'il incombe à l'accusé de réfuter selon la prépondérance des probabilités un élément essentiel d'une infraction, une déclaration de culpabilité pourrait être prononcée en dépit de l'existence d'un doute raisonnable. Cela se présenterait si l'accusé

reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

The fact that the standard is only the civil one does not render a reverse onus clause constitutional. As Sir Rupert Cross commented in the *Rede Lectures*, "The Golden Thread of the English Criminal Law: The Burden of Proof", delivered in 1976 at the University of Toronto, at pp. 11-13:

> It is sometimes said that exceptions to the Woolmington rule are acceptable because, whenever the burden of proof on any issue in a criminal case is borne by the accused, he only has to satisfy the jury on the balance of probabilities, whereas on issues on which the Crown bears the burden of proof the jury must be satisfied beyond a reasonable doubt .... The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection to the existence of exceptions to the Woolmington rule as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt.

As we have seen, the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision has been elaborated in some of the cases discussed above and is now known as the "rational connection test". In the context of s. 11(*d*), however, the following question arises: if we apply the rational connection test to the consideration of whether s. 11(*d*) has been violated, are we adequately protecting the constitutional principle of the presumption of innocence? As Professors MacKay and Cromwell point out in their article "Oakes: A Bold Initiative Impeded by Old Ghosts" (1983), 32 C.R. (3d) 221, at p. 233:

> The rational connection test approves a provision that *forces* the trier to infer a fact that may be simply rationally connected to the proved fact. Why does it follow that such a provision does not offend the constitu-

produisait une preuve suffisante pour soulever un doute raisonnable quant à sa culpabilité, mais ne parvenait pas à convaincre le jury selon la prépondérance des probabilités que le fait présumé est inexact.

Ce n'est pas parce que la norme applicable est la norme de preuve en matière civile qu'une disposition portant inversion de la charge de la preuve est constitutionnelle. Comme l'a expliqué sir Rupert Cross dans «The Golden Thread of the English Criminal Law: The Burden of Proof», conférence donnée en 1976 à l'Université de Toronto dans le cadre des *Rede Lectures* (aux pp. 11 à 13):

> [TRADUCTION] D'aucuns prétendent que des exceptions à la règle posée dans l'arrêt *Woolmington* sont acceptables parce que, lorsque la charge de la preuve relativement à telle question dans une affaire criminelle incombe à l'accusé, celui-ci n'a à convaincre le jury que selon la prépondérance des probabilités, tandis que dans le cas des questions à l'égard desquelles la charge de la preuve incombe au ministère public, le jury doit être convaincu hors de tout doute raisonnable ... Bien que la norme de preuve soit moins sévère dans le cas de l'accusé qu'elle ne l'est dans le cas de la poursuite, je m'oppose tout de même à toute exception à la règle établie dans l'arrêt *Woolmington* parce que cela ne change rien au fait qu'un jury ou une formation de magistrats peut avoir à déclarer l'accusé coupable même s'ils ne sont pas du tout certains de sa culpabilité.

Rappelons ici que certains des arrêts étudiés précédemment ont établi qu'une disposition portant inversion de la charge de la preuve pourrait se justifier par l'existence d'un lien rationnel entre le fait établi et le fait présumé. Il s'agit de ce qu'il est convenu d'appeler maintenant le «critère du lien rationnel». Dans le contexte de l'al. 11*d*), toutefois, la question suivante se pose: si nous appliquons le critère du lien rationnel à la question de savoir s'il y a eu violation de l'al. 11*d*), accordons-nous alors une protection adéquate au principe constitutionnel de la présomption d'innocence? Comme le soulignent les professeurs MacKay et Cromwell dans leur article intitulé «Oakes: A Bold Initiative Impeded by Old Ghosts» (1983), 32 C.R. (3d) 221, à la p. 233:

> [TRADUCTION] Le critère du lien rationnel a pour effet de sanctionner une disposition qui *oblige* le juge à conclure à l'existence d'un fait qui peut n'avoir qu'un lien rationnel avec le fait établi. Pourquoi s'ensuit-il

tional right to be proved guilty beyond a reasonable doubt?

A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.

I should add that this questioning of the constitutionality of the "rational connection test" as a guide to interpreting s. 11(*d*) does not minimize its importance. The appropriate stage for invoking the rational connection test, however, is under s. 1 of the *Charter*. This consideration did not arise under the *Canadian Bill of Rights* because of the absence of an equivalent to s. 1. At the Court of Appeal level in the present case, Martin J.A. sought to combine the analysis of s. 11(*d*) and s. 1 to overcome the limitations of the *Canadian Bill of Rights* jurisprudence. To my mind, it is highly desirable to keep s. 1 and s. 11(*d*) analytically distinct. Separating the analysis into two components is consistent with the approach this Court has taken to the *Charter* to date (see *R. v. Big M Drug Mart Ltd.*, *supra*; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357).

To return to s. 8 of the *Narcotic Control Act*, I am in no doubt whatsoever that it violates s. 11(*d*) of the *Charter* by requiring the accused to prove on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. Mr. Oakes is compelled by s. 8 to prove he is not guilty of the offence of trafficking. He is thus denied his right to be presumed innocent and subjected to the potential penalty of life imprisonment unless he can rebut the presumption. This is radically and fundamentally inconsistent with the societal values of human dignity and liberty which

qu'une telle disposition ne porte pas atteinte au droit constitutionnel de voir sa culpabilité prouvée hors de tout doute raisonnable?

Un fait établi peut rationnellement tendre à prouver un fait présumé, sans pour autant en prouver l'existence hors de tout doute raisonnable. Un accusé pourrait donc être reconnu coupable malgré l'existence d'un doute raisonnable, ce qui irait à l'encontre de la présomption d'innocence.

Je m'empresse d'ajouter que cette mise en doute de la constitutionnalité du «critère du lien rationnel» comme guide d'interprétation de l'al. 11*d*) ne diminue en rien l'importance de ce critère. C'est toutefois dans le contexte de l'article premier de la *Charte* qu'il convient d'invoquer le critère du lien rationnel. Or, cette question ne s'est pas présentée sous le régime de la *Déclaration canadienne des droits* parce que celle-ci ne contient pas de disposition équivalant à l'article premier. En Cour d'appel en l'espèce, le juge Martin a cherché à combiner l'analyse de l'al. 11*d*) et celle de l'article premier en vue de surmonter les limites de la jurisprudence portant sur la *Déclaration canadienne des droits*. À mon sens, il est très souhaitable qu'à des fins d'analyse l'article premier et l'al. 11*d*) restent distincts. Ce partage de l'analyse en deux composantes est compatible avec la façon dont cette Cour a abordé la *Charte* jusqu'à présent (voir *R. c. Big M Drug Mart Ltd.*, précité; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357).

Revenons à l'art. 8 de la *Loi sur les stupéfiants*. Je n'ai pas le moindre doute que cet article viole l'al. 11*d*) de la *Charte* en exigeant de l'accusé qu'il établisse selon la prépondérance des probabilités qu'il n'était pas en possession du stupéfiant pour en faire le trafic. L'article 8 oblige M. Oakes à prouver qu'il n'est pas coupable de l'infraction de trafic. Il se voit ainsi refuser le droit d'être présumé innocent et court en même temps le risque de se voir infliger une peine d'emprisonnement à perpétuité, à moins qu'il ne réussisse à réfuter la présomption. Cela est radicalement et fondamentalement incompatible avec les valeurs sociales de la liberté et de la dignité humaine, que nous faisons nôtres, et va directement à l'encontre de la

we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(*d*). Let us turn now to s. 1 of the *Charter*.

V

Is s. 8 of the *Narcotic Control Act* a Reasonable and Demonstrably Justified Limit Pursuant to s. 1 of the *Charter*?

The Crown submits that even if s. 8 of the *Narcotic Control Act* violates s. 11(*d*) of the *Charter*, it can still be upheld as a reasonable limit under s. 1 which, as has been mentioned, provides:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The question whether the limit is "prescribed by law" is not contentious in the present case since s. 8 of the *Narcotic Control Act* is a duly enacted legislative provision. It is, however, necessary to determine if the limit on Mr. Oakes' right, as guaranteed by s. 11(*d*) of the *Charter*, is "reasonable" and "demonstrably justified in a free and democratic society" for the purpose of s. 1 of the *Charter*, and thereby saved from inconsistency with the Constitution.

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms—rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration, supra*, at p. 218: " . . . it is important to remember that the courts are conducting this inquiry in light of a

présomption d'innocence enchâssée à l'al. 11*d*). Passons maintenant à l'article premier de la *Charte*.

V

L'article 8 de la *Loi sur les stupéfiants* constitue-t-il une limite raisonnable dont la justification puisse se démontrer, au sens de l'article premier de la *Charte*?

Le ministère public fait valoir que même à supposer que l'art. 8 de la *Loi sur les stupéfiants* contrevienne à l'al. 11*d*) de la *Charte*, il peut tout de même être déclaré valide pour le motif qu'il constitue une restriction raisonnable au sens de l'article premier qui, rappelons-le, dispose:

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

La question de savoir s'il s'agit d'une restriction apportée «par une règle de droit» ne se pose pas en l'espèce puisque l'art. 8 de la *Loi sur les stupéfiants* est une disposition législative dûment adoptée. Il est toutefois nécessaire de déterminer si, dans le cas de M. Oakes, la restriction au droit garanti par l'al. 11*d*) de la *Charte* est «raisonnable» et si sa justification peut «se démontrer dans le cadre d'une société libre et démocratique» au sens de l'art. 1 de la *Charte*, de manière à être compatible avec la Constitution.

Il importe de souligner dès l'abord que l'article premier remplit deux fonctions: premièrement, il enchâsse dans la Constitution les droits et libertés énoncés dans les dispositions qui le suivent; et, deuxièmement, il établit explicitement les seuls critères justificatifs (à part ceux de l'art. 33 de la *Loi constitutionnelle de 1982*) auxquels doivent satisfaire les restrictions apportées à ces droits et libertés. En conséquence, tout examen fondé sur l'article premier doit partir de l'idée que la restriction attaquée porte atteinte à des droits et libertés garantis par la Constitution — des droits et des libertés qui font partie de la loi suprême du Canada. Comme le fait remarquer le juge Wilson dans l'arrêt *Singh c. Ministre de l'Emploi et de*

commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democrat-

l'Immigration, précité, à la p. 218: « ... il est important de se rappeler que les tribunaux effectuent cette enquête tout en veillant au respect des droits et libertés énoncés dans les autres articles de la *Charte*.»

Un second élément contextuel d'interprétation de l'article premier est fourni par l'expression «société libre et démocratique». L'inclusion de ces mots à titre de norme finale de justification de la restriction des droits et libertés rappelle aux tribunaux l'objet même de l'enchâssement de la *Charte* dans la Constitution: la société canadienne doit être libre et démocratique. Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer.

Toutefois, les droits et libertés garantis par la *Charte* ne sont pas absolus. Il peut être nécessaire de les restreindre lorsque leur exercice empêcherait d'atteindre des objectifs sociaux fondamentalement importants. C'est pourquoi l'article premier prévoit des critères de justification des limites imposées aux droits et libertés garantis par la *Charte*. Ces critères établissent une norme sévère en matière de justification, surtout lorsqu'on les rapproche des deux facteurs contextuels examinés précédemment, savoir la violation d'un droit ou d'une liberté garantis par la Constitution et les principes fondamentaux d'une société libre et démocratique.

La charge de prouver qu'une restriction apportée à un droit ou à une liberté garantis par la *Charte* est raisonnable et que sa justification peut

ic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, *supra*.

The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the *Charter* supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), at p. 385. As Lord Denning explained in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at p. 459:

> The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

se démontrer dans le cadre d'une société libre et démocratique incombe à la partie qui demande le maintien de cette restriction. Il ressort nettement du texte de l'article premier que les restrictions apportées aux droits et libertés énoncés dans la *Charte* constituent des exceptions à la garantie générale dont ceux-ci font l'objet. On présume que les droits et libertés sont garantis, à moins que la partie qui invoque l'article premier ne puisse satisfaire aux critères exceptionnels qui justifient leur restriction. C'est ce que confirme l'emploi de l'expression «puisse se démontrer» qui indique clairement qu'il appartient à la partie qui cherche à apporter la restriction de démontrer qu'elle est justifiée: *Hunter c. Southam Inc.*, précité.

La norme de preuve aux fins de l'article premier est celle qui s'applique en matière civile, savoir la preuve selon la prépondérance des probabilités. L'autre possibilité, la preuve hors de tout doute raisonnable qui s'applique en matière criminelle, imposerait selon moi une charge trop lourde à la partie qui cherche à apporter la restriction. Des concepts comme «le caractère raisonnable», «le caractère justifiable» et «une société libre et démocratique» ne se prêtent tout simplement pas à l'application d'une telle norme. Néanmoins, le critère de la prépondérance des probabilités doit être appliqué rigoureusement. En fait, l'expression «dont la justification puisse se démontrer», que l'on trouve à l'article premier de la *Charte*, étaye cette conclusion. La norme générale applicable en matière civile comporte différents degrés de probabilité qui varient en fonction de la nature de chaque espèce: voir Sopinka et Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), à la p. 385. Comme l'explique lord Denning dans *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), à la p. 459:

> [TRADUCTION] La preuve peut être faite selon la prépondérance des probabilités, mais cette norme peut comporter des degrés de probabilité. Ce degré dépend de l'objet du litige. Une cour civile, saisie d'une accusation de fraude, exigera naturellement un degré de probabilité plus élevé que celui qu'elle exigerait en examinant si la faute a été établie. Elle n'adopte pas une norme aussi sévère que le ferait une cour criminelle, même en examinant une accusation de nature criminelle, mais il reste qu'elle exige un degré de probabilité proportionné aux circonstances.

This passage was cited with approval in *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at p. 161. A similar approach was put forward by Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312, at pp. 331-32:

> I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences . . . .

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. See: *Law Society of Upper Canada v. Skapinker*, *supra*, at p. 384; *Singh v. Minister of Employment and Immigration*, *supra*, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substan-

Ce passage a été cité et approuvé dans l'arrêt *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] R.C.S. 154, à la p. 161. Un point de vue semblable a été exprimé par le juge Cartwright dans l'arrêt *Smith v. Smith*, [1952] 2 R.C.S. 312, aux pp. 331 et 332:

> [TRADUCTION] Je tiens toutefois à souligner que, dans toute action civile, pour pouvoir conclure sans risque à l'exactitude d'une question de fait qui doit être établie, le tribunal doit être convaincu d'une manière raisonnable qui dépendra de l'ensemble des circonstances à partir desquelles il formera son jugement, y compris la gravité des conséquences . . .

Compte tenu du fait que l'article premier est invoqué afin de justifier une violation des droits et libertés constitutionnels que la *Charte* vise à protéger, un degré très élevé de probabilité sera, pour reprendre l'expression de lord Denning, «proportionné aux circonstances». Lorsqu'une preuve est nécessaire pour établir les éléments constitutifs d'une analyse en vertu de l'article premier, ce qui est généralement le cas, elle doit être forte et persuasive et faire ressortir nettement à la cour les conséquences d'une décision d'imposer ou de ne pas imposer la restriction. Voir: *Law Society of Upper Canada c. Skapinker*, précité, à la p. 384; *Singh c. Ministre de l'Emploi et de l'Immigration*, précité, à la p. 217. La cour devra aussi connaître les autres moyens dont disposait le législateur, au moment de prendre sa décision, pour réaliser l'objectif en question. Je dois cependant ajouter qu'il peut arriver que certains éléments constitutifs d'une analyse en vertu de l'article premier soient manifestes ou évidents en soi.

Pour établir qu'une restriction est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique, il faut satisfaire à deux critères fondamentaux. En premier lieu, l'objectif que visent à servir les mesures qui apportent une restriction à un droit ou à une liberté garantis par la *Charte*, doit être «suffisamment important pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution»: *R. c. Big M Drug Mart Ltd.*, précité, à la p. 352. La norme doit être sévère afin que les objectifs peu importants ou contraires aux principes qui constituent l'essence même d'une société libre et démocratique ne bénéficient pas de la protection de

tial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and demo-

l'article premier. Il faut à tout le moins qu'un objectif se rapporte à des préoccupations urgentes et réelles dans une société libre et démocratique, pour qu'on puisse le qualifier de suffisamment important.

En deuxième lieu, dès qu'il est reconnu qu'un objectif est suffisamment important, la partie qui invoque l'article premier doit alors démontrer que les moyens choisis sont raisonnables et que leur justification peut se démontrer. Cela nécessite l'application d'«une sorte de critère de proportionnalité»: *R. c. Big M Drug Mart Ltd.*, précité, à la p. 352. Même si la nature du critère de proportionnalité pourra varier selon les circonstances, les tribunaux devront, dans chaque cas, soupeser les intérêts de la société et ceux de particuliers et de groupes. À mon avis, un critère de proportionnalité comporte trois éléments importants. Premièrement, les mesures adoptées doivent être soigneusement conçues pour atteindre l'objectif en question. Elles ne doivent être ni arbitraires, ni inéquitables, ni fondées sur des considérations irrationnelles. Bref, elles doivent avoir un lien rationnel avec l'objectif en question. Deuxièmement, même à supposer qu'il y ait un tel lien rationnel, le moyen choisi doit être de nature à porter «le moins possible» atteinte au droit ou à la liberté en question: *R. c. Big M Drug Mart Ltd.*, précité, à la p. 352. Troisièmement, il doit y avoir proportionnalité entre les effets des mesures restreignant un droit ou une liberté garantis par la *Charte* et l'objectif reconnu comme «suffisamment important».

Quant au troisième élément, il est évident que toute mesure attaquée en vertu de l'article premier aura pour effet général de porter atteinte à un droit ou à une liberté garantis par la *Charte*; d'où la nécessité du recours à l'article premier. L'analyse des effets ne doit toutefois pas s'arrêter là. La *Charte* garantit toute une gamme de droits et de libertés à l'égard desquels un nombre presque infini de situations peuvent se présenter. La gravité des restrictions apportées aux droits et libertés garantis par la *Charte* variera en fonction de la nature du droit ou de la liberté faisant l'objet d'une atteinte, de l'ampleur de l'atteinte et du degré d'incompatibilité des mesures restrictives avec les principes inhérents à une société libre et

cratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

Having outlined the general principles of a s. 1 inquiry, we must apply them to s. 8 of the *Narcotic Control Act*. Is the reverse onus provision in s. 8 a reasonable limit on the right to be presumed innocent until proven guilty beyond a reasonable doubt as can be demonstrably justified in a free and democratic society?

The starting point for formulating a response to this question is, as stated above, the nature of Parliament's interest or objective which accounts for the passage of s. 8 of the *Narcotic Control Act*. According to the Crown, s. 8 of the *Narcotic Control Act* is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers. In my opinion, Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing. The problem of drug trafficking has been increasing since the 1950's at which time there was already considerable concern. (See *Report of the Special Committee on Traffic in Narcotic Drugs*, Appendix to Debates of the Senate, Canada, Session 1955, pp. 690-700; see also *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa, 1973).) Throughout this period, numerous measures were adopted by free and democratic societies, at both the international and national levels.

At the international level, on June 23, 1953, the *Protocol for Limiting and Regulating the Cultiva-*

démocratique. Même si un objectif est suffisamment important et même si on a satisfait aux deux premiers éléments du critère de proportionnalité, il se peut encore qu'en raison de la gravité de ses effets préjudiciables sur des particuliers ou sur des groupes, la mesure ne soit pas justifiée par les objectifs qu'elle est destinée à servir. Plus les effets préjudiciables d'une mesure sont graves, plus l'objectif doit être important pour que la mesure soit raisonnable et que sa justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Ayant exposé les principes généraux qui régissent une analyse en vertu de l'article premier, nous devons maintenant les appliquer à l'art. 8 de la *Loi sur les stupéfiants*. La disposition portant inversion de la charge de la preuve qui figure à l'art. 8 apporte-t-elle au droit d'être présumé innocent tant que la culpabilité n'est pas prouvée hors de tout doute raisonnable, une restriction raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique?

Comme je l'ai déjà souligné, pour répondre à cette question, il faut commencer par préciser la nature de l'intérêt ou de l'objectif poursuivi par le législateur en adoptant l'art. 8 de la *Loi sur les stupéfiants*. Selon le ministère public, l'art. 8 de la *Loi sur les stupéfiants* vise à refréner le trafic des stupéfiants en facilitant l'obtention d'un verdict de culpabilité contre les trafiquants. À mon avis, le souci du législateur de réduire le trafic des stupéfiants peut être qualifié de réel et urgent. Le problème du trafic des stupéfiants n'a cessé de s'aggraver depuis les années cinquante, et déjà à cette époque ce phénomène suscitait beaucoup d'inquiétude. (Voir *Rapport du Comité spécial chargé d'enquêter sur le trafic des stupéfiants*, appendice aux Débats du Sénat du Canada, session 1955, aux pp. 736 à 747; voir aussi *Rapport final, Commission d'enquête sur l'usage des drogues à des fins non médicales* (Ottawa, 1973).) Pendant toute cette période, des sociétés libres et démocratiques ont adopté de nombreuses mesures tant sur le plan national que sur le plan international.

Sur le plan international, le *Protocole visant à limiter et à réglementer la culture du pavot, ainsi*

tion of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, to which Canada is a signatory, was adopted by the United Nations Opium Conference held in New York. The *Single Convention on Narcotic Drugs, 1961*, was acceded to in New York on March 30, 1961. This treaty was signed by Canada on March 30, 1961. It entered into force on December 13, 1964. As stated in the Preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind, . . . "

At the national level, statutory provisions have been enacted by numerous countries which, *inter alia*, attempt to deter drug trafficking by imposing criminal sanctions (see, for example, *Misuse of Drugs Act 1975*, 1975 (N.Z.), No. 116; *Misuse of Drugs Act 1971*, 1971 (U.K.), c. 38).

The objective of protecting our society from the grave ills associated with drug trafficking, is, in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1, to a large extent, self-evident. The first criterion of a s. 1 inquiry, therefore, has been satisfied by the Crown.

The next stage of inquiry is a consideration of the means chosen by Parliament to achieve its objective. The means must be reasonable and demonstrably justified in a free and democratic society. As outlined above, this proportionality test should begin with a consideration of the rationality of the provision: is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise, the reverse onus clause could give rise to unjustified and erroneous

que la production, le commerce international, le commerce de gros et l'emploi de l'opium, dont le Canada est signataire, a été adopté le 23 juin 1953 dans le cadre de la Conférence des Nations unies sur l'opium tenue à New York. La *Convention unique sur les stupéfiants de 1961* a été conclue à New York le 30 mars 1961. Signé par le Canada le même jour, ce traité est entré en vigueur le 13 décembre 1964. Comme on le dit dans le préambule, «la toxicomanie est un fléau pour l'individu et constitue un danger économique et social pour l'humanité . . .»

Sur le plan national, de nombreux pays ont adopté des dispositions législatives visant notamment, par l'imposition de sanctions pénales, à empêcher le trafic des stupéfiants (voir, par exemple, la *Misuse of Drugs Act 1975*, 1975 (N.Z.), nº 116; la *Misuse of Drugs Act 1971*, 1971 (U.K.), chap. 38).

L'objectif de protection de notre société contre les fléaux liés au trafic des stupéfiants est, selon moi, suffisamment important pour justifier dans certains cas l'atteinte à un droit ou à une liberté garantis par la Constitution. De plus, la gravité du trafic des stupéfiants fait qu'il va presque sans dire que sa répression constitue un objectif suffisamment important aux fins de l'article premier. Le ministère public a donc satisfait au premier critère applicable à une analyse en vertu de l'article premier.

L'étape suivante de l'analyse consiste à examiner le moyen choisi par le législateur pour atteindre son objectif. Ce moyen doit être raisonnable et sa justification doit pouvoir se démontrer dans le cadre d'une société libre et démocratique. Soulignons encore une fois que l'application de ce critère de proportionnalité doit commencer par un examen de la rationalité de la disposition: existe-t-il un lien rationnel entre la disposition de l'art. 8 portant inversion de la charge de la preuve et l'objectif consistant à refréner le trafic des stupéfiants? Cela nécessite tout au moins que l'art. 8 soit lui-même rationnel. Il doit exister un lien rationnel entre le fait établi de la possession et le fait présumé de la possession à des fins de trafic, sinon la disposition portant inversion de la charge de la preuve pourrait avoir pour conséquence que

convictions for drug trafficking of persons guilty only of possession of narcotics.

In my view, s. 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under s. 8 of the *Narcotic Control Act* is overinclusive and could lead to results in certain cases which would defy both rationality and fairness. In light of the seriousness of the offence in question, which carries with it the possibility of imprisonment for life, I am further convinced that the first component of the proportionality test has not been satisfied by the Crown.

Having concluded that s. 8 does not satisfy this first component of proportionality, it is unnecessary to consider the other two components.

VI

Conclusion

The Ontario Court of Appeal was correct in holding that s. 8 of the *Narcotic Control Act* violates the *Canadian Charter of Rights and Freedoms* and is therefore of no force or effect. Section 8 imposes a limit on the right guaranteed by s. 11(*d*) of the *Charter* which is not reasonable and is not demonstrably justified in a free and democratic society for the purpose of s. 1. Accordingly, the constitutional question is answered as follows:

Question:

Is s. 8 of the *Narcotic Control Act* inconsistent with s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and thus of no force and effect?

Answer: Yes.

I would, therefore, dismiss the appeal.

des personnes coupables de simple possession de stupéfiants soient erronément et sans justification déclarées coupables de trafic.

Selon moi, l'art. 8 ne satisfait pas au critère du lien rationnel. Comme l'a conclu le juge Martin de la Cour d'appel de l'Ontario, la possession d'une quantité infime ou négligeable de stupéfiants ne justifie pas une conclusion de trafic. En d'autres termes, il serait irrationnel de déduire qu'une personne avait l'intention de faire le trafic du seul fait qu'elle était en possession d'une petite quantité de stupéfiants. La présomption requise en vertu de l'art. 8 de la *Loi sur les stupéfiants* est trop large et est susceptible dans certains cas d'entraîner des résultats à la fois irrationnels et inéquitables. Compte tenu de la gravité de l'infraction en question, qui comporte la possibilité d'un emprisonnement à perpétuité, je suis d'autant plus persuadé que le ministère public n'a pas satisfait au premier élément du critère de proportionnalité.

Ayant conclu que l'art. 8 ne satisfait pas à ce premier élément de proportionnalité, il n'est pas nécessaire d'examiner les deux autres éléments.

VI

Conclusion

C'est à bon droit que la Cour d'appel de l'Ontario a conclu que l'art. 8 de la *Loi sur les stupéfiants* contrevient à la *Charte canadienne des droits et libertés* et qu'il est par conséquent inopérant. L'article 8 apporte au droit garanti par l'al. 11*d*) de la *Charte* une restriction qui n'est pas raisonnable et dont la justification ne peut se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier. Par conséquent, la question constitutionnelle reçoit la réponse suivante:

Question:

L'article 8 de la *Loi sur les stupéfiants* est-il incompatible avec l'al. 11*d*) de la *Charte canadienne des droits et libertés* et, par conséquent, inopérant?

Réponse: Oui.

Par conséquent, je suis d'avis de rejeter le pourvoi.

The reasons of Estey and McIntyre JJ. were delivered by

ESTEY J.—I would dismiss this appeal. I agree with the conclusions of the Chief Justice with reference to the relationship between s. 11(*d*) and s. 1 of the *Canadian Charter of Rights and Freedoms*. For the disposition of all other issues arising in this appeal, I would adopt the reasons given by Martin J.A. in the court below.

Appeal dismissed.

Solicitor for the appellant: Roger Tassé, Ottawa.

Solicitors for the respondent: Cockburn, Foster, Cudmore and Kitely, London.

Version française des motifs des juges Estey et McIntyre rendus par

LE JUGE ESTEY — Je suis d'avis de rejeter ce pourvoi. Je suis d'accord avec les conclusions du Juge en chef quant au lien entre l'al. 11*d*) et l'article premier de la *Charte canadienne des droits et libertés*. Pour ce qui est de statuer sur toutes les autres questions que soulève le présent pourvoi, je suis d'avis d'adopter les motifs du juge Martin de la Cour d'appel.

Pourvoi rejeté.

Procureur de l'appelante: Roger Tassé, Ottawa.

Procureurs de l'intimé: Cockburn, Foster, Cudmore and Kitely, London.

The Government of Saskatchewan, the Honourable Lorne J. McLaren, the Honourable Lorne H. Hepworth and his Honour Judge Robert Harvie Allan *Appellants*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of British Columbia and the Attorney General for Alberta *Interveners*

v.

The Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955,

The United Food and Commercial Workers International Union, Locals P-241-1, P-241-2, P-241-3, P-241-4 and P-241-6,

The Dairy and Produce Workers, Local 834, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 834,

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 395,

Maurice Hnidy, Doug Harold, Ron Orobko, Ron Bohn, Dean Schendel, John Kukurudza, Allan Goyer, Don Deck, Doug Leite, David Klassen, Reg Cox, Gordon Fairburn, Andy Stariuala, Lance Brownbridge *Respondents*

and

The Attorney General of Manitoba *Intervener*

INDEXED AS: RWDSU *v.* SASKATCHEWAN

File No.: 19430.

1985: October 8; 1987: April 9.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard*, Wilson, Le Dain and La Forest JJ.

* Chouinard J. took no part in the judgment.

Le gouvernement de la Saskatchewan, l'honorable Lorne J. McLaren, l'honorable Lorne H. Hepworth et monsieur le juge Robert Harvie Allan *Appelants*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général de la Colombie-Britannique et le procureur général de l'Alberta *Intervenants*

c.

Le Syndicat des détaillants, grossistes et magasins à rayons, sections locales 544, 496, 635 et 955,

Le Syndicat international des travailleurs unis de l'alimentation et du commerce, sections locales P-241-1, P-241-2, P-241-3, P-241-4 et P-241-6,

The Dairy and Produce Workers, section locale 834, affilié à l'International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, section locale 834,

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, section locale 395,

Maurice Hnidy, Doug Harold, Ron Orobko, Ron Bohn, Dean Schendel, John Kukurudza, Allan Goyer, Don Deck, Doug Leite, David Klassen, Reg Cox, Gordon Fairburn, Andy Stariuala, Lance Brownbridge *Intimés*

et

Le procureur général du Manitoba *Intervenant*

RÉPERTORIÉ: SDGMR *c.* SASKATCHEWAN

N° du greffe: 19430.

1985: 8 octobre; 1987: 9 avril.

Présents: Le juge en chef Dickson et les juges Beetz, McIntyre, Chouinard*, Wilson, Le Dain et La Forest.

* Le juge Chouinard n'a pas pris part au jugement.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Freedom of association — Provincial legislation temporarily prohibiting strikes and lock-outs in dairy industry — Legislation providing for arbitration — Whether provincial legislation violated s. 2(d) of the Charter — If so, whether such violation justifiable under s. 1 of the Charter — The Dairy Workers (Maintenance of Operations) Act, S.S. 1983-84, c. D-1.1.

Following unsuccessful contract talks between the respondent unions and the only major dairy businesses in Saskatchewan, the unions served strike notices on the dairies. Before the rotating strike could begin, the dairies served the unions with a series of lock-out notices covering all of their fluid milk plants. The provincial legislature responded to these developments by passing *The Dairy Workers (Maintenance of Operations) Act* which temporarily prohibited the dairy employees from striking and the dairies from locking out their employees. The Saskatchewan Court of Queen's Bench dismissed respondents' application for a declaration that the Act infringed the freedom of association guaranteed by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* but their appeal to the Court of Appeal was allowed. This appeal is to determine whether the Act violates s. 2(*d*) of the *Charter* and, if so, whether such violation can be justified under s. 1.

Held (Wilson J. dissenting): The appeal should be allowed.

Per Beetz, Le Dain and La Forest JJ.: For the reasons expressed by Le Dain J. in the *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, the guarantee of freedom of association in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* does not include a guarantee of the right to bargain collectively and the right to strike. Accordingly, *The Dairy Workers (Maintenance of Operations) Act* did not violate s. 2(*d*) of the *Charter*.

Per McIntyre J.: For the reasons I expressed in the *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, *The Dairy Workers (Maintenance of Operations) Act* did not violate freedom of association guaranteed in s. 2(*d*) of the *Charter* because freedom of association does not embody the right to strike.

Per Dickson C.J.: In the context of labour relations, the guarantee of freedom of association in s. 2(*d*) of the

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit constitutionnel — Charte des droits — Liberté d'association — Loi provinciale interdisant temporairement les grèves et les lock-out dans l'industrie laitière — Loi prescrivant le recours à l'arbitrage — La loi provinciale viole-t-elle l'art. 2d) de la Charte? — Dans l'affirmative, s'agit-il d'une violation justifiable en vertu de l'article premier de la Charte? — The Dairy Workers (Maintenance of Operations) Act, S.S. 1983-84, chap. D-1.1.

À la suite de négociations infructueuses entre les syndicats intimés et les seules entreprises laitières importantes de la Saskatchewan, les syndicats ont signifié des avis de grève aux laiteries. Avant que la grève tournante ne puisse commencer, les laiteries ont signifié aux syndicats une série d'avis de lock-out visant chacune de leurs usines de traitement du lait de consommation. La législature provinciale a réagi à ces événements en adoptant *The Dairy Workers (Maintenance of Operations) Act* qui interdisait temporairement aux employés d'usines laitières de faire la grève et aux laiteries de lock-outer leurs employés. La Cour du Banc de la Reine de la Saskatchewan a rejeté la requête des intimés visant à obtenir un jugement déclaratoire portant que la Loi enfreignait la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés*, mais leur appel devant la Cour d'appel a été accueilli. Le présent pourvoi vise à déterminer si la Loi viole l'al. 2*d*) de la *Charte* et, dans l'affirmative, si cette violation peut être justifiée en vertu de l'article premier.

Arrêt (le juge Wilson est dissidente): Le pourvoi est accueilli.

Les juges Beetz, Le Dain et La Forest: Pour les motifs exprimés par le juge Le Dain dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés* n'inclut aucune garantie des droits de négocier collectivement et de faire la grève. Par conséquent, *The Dairy Workers (Maintenance of Operations) Act* ne viole pas l'al. 2*d*) de la *Charte*.

Le juge McIntyre: Pour les motifs que j'ai exprimés dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, *The Dairy Workers (Maintenance of Operations) Act* ne porte pas atteinte à la liberté d'association garantie par l'al. 2*d*) de la *Charte* parce que cette liberté ne comprend pas le droit de faire la grève.

Le juge en chef Dickson: En matière de relations de travail, la liberté d'association garantie par l'al. 2*d*) de

Charter included the freedom to bargain collectively and to strike. Therefore, *The Dairy Workers (Maintenance of Operations) Act* violated s. 2(*d*) of the *Charter* to the extent that it interfered with the employees' freedom to engage in strike activity that would have been lawful in the absence of the Act.

The Act was justifiable under s. 1 of the *Charter*. A legislature is entitled to abrogate the freedom of employees to strike if the effect of a strike or lock-out would be especially injurious to the economic interests of third parties, provided that the legislature substituted a fair arbitration scheme to resolve the dispute. The rationale for such an abrogation is that third parties who do not participate in a particular collective bargaining process ought not to be unduly harmed when the bargaining fails to produce a settlement. Economic harm to a third party will not always suffice, however, to justify, under s. 1, legislation abrogating the right to strike. In an interdependent economy, it is inevitable that a work stoppage in one industry will entail detrimental economic consequences for at least some individuals in other industries. In order for the legislation to be saved under s. 1, the objective advanced to justify the legislation must relate to a "pressing and substantial concern". Moreover, the legislative objective must be weighed against the deleterious effects of the measures which limit the enjoyment of the *Charter* right. In view of these principles established in *Oakes*, the relevant question to be answered in making such a determination is whether the potential for economic harm to third parties during a work stoppage is so massive and immediate and so focussed in its intensity as to justify the limitation of a constitutionally guaranteed freedom in respect of those employees.

In the case at bar, the legislative objective of avoiding serious harm to dairy farmers, in light of the unique nature of the dairy industry, constituted a satisfactory justification for the abrogation of the freedom of the dairy plant workers to strike. The evidence adduced indicated that the strike and the lock-out would entail a virtually total closure of milk processing facilities in Saskatchewan. These facilities provided the sole outlet for dairy farmers and their closure would pose a serious threat to the farmers in that they would be forced to dump their product. The dairy farmers could not stop production and could not store the milk for more than three days. These effects would persist whether the work stoppage was of a short or long duration. Not only were the threatened economic losses large in absolute terms

la *Charte* comprend la liberté de négocier collectivement et de faire la grève. Par conséquent, *The Dairy Workers (Maintenance of Operations) Act* enfreint l'al. 2*d*) de la *Charte* dans la mesure où elle porte atteinte à la liberté des employés de faire une grève qui, n'eût été la Loi, aurait été légale.

La Loi est justifiable en vertu de l'article premier de la *Charte*. Le législateur est autorisé à supprimer la liberté de grève d'employés chaque fois qu'une grève ou un lock-out nuirait particulièrement aux intérêts économiques de tierces personnes, pourvu qu'il substitue à ces moyens de pression un régime équitable d'arbitrage permettant de régler le différend. La raison d'être d'une telle suppression est que les tiers qui ne participent pas à un processus donné de négociation collective ne devraient pas avoir à subir de préjudice indu lorsque les négociations n'aboutissent pas à un accord. Toutefois, le préjudice économique subi par un tiers ne sera pas toujours suffisant pour justifier, en vertu de l'article premier, une loi supprimant le droit de grève. Dans une économie interdépendante, il est inévitable qu'un arrêt de travail dans un secteur donné aura des conséquences économiques fâcheuses, pour certaines personnes du moins, dans d'autres secteurs. Pour que la loi en question puisse être sauvegardée en vertu de l'article premier, il faut que l'objectif proposé pour la justifier se rapporte à une «préoccupation urgente et réelle». Il faut en outre soupeser l'objectif de la loi en question et les effets préjudiciables des mesures qui limitent la jouissance du droit garanti par la *Charte*. Compte tenu de ces principes établis dans l'arrêt *Oakes*, la question à laquelle il faut répondre dans cette détermination est de savoir si le préjudice économique que des tiers risquent de subir pendant un arrêt de travail est considérable, immédiat et concentré dans ses effets au point de justifier, dans le cas de ces salariés, la restriction d'une liberté garantie par la Constitution.

En l'espèce, compte tenu du caractère unique de l'industrie laitière, l'objectif du législateur d'éviter que les producteurs laitiers ne subissent un préjudice grave constitue un motif suffisant pour justifier la suppression de la liberté de grève des travailleurs d'usines laitières. D'après la preuve, la grève et le lock-out entraîneraient la fermeture quasi totale des installations de traitement du lait en Saskatchewan. Ces installations représentaient le seul débouché des producteurs laitiers et leur fermeture constituerait une grave menace pour ces derniers en ce sens qu'ils seraient obligés de jeter leur produit. Les producteurs laitiers ne pouvaient pas arrêter la production ni ne pouvaient entreposer le lait pendant plus de trois jours. Ces effets subsisteraient peu importe que l'arrêt de travail soit de courte ou de longue

but they were to be borne in their full intensity by the province's 800 dairy farmers. The economic harm threatened by a total work stoppage in the dairy processing industry was so immediate, of such a high degree and of such an intense focus as to fall well within the ambit of the legislature's discretion to substitute a fair and efficient arbitration scheme for the dairy processing employees' freedom to strike.

The compulsory arbitration scheme enacted in the Act met the criteria of proportionality for such a scheme. The Act applied only to the workers in the dairy industry; it provided for a neutral arbitrator; either party could ultimately compel the other to submit to arbitration without interference from the government; and the scope of arbitration was not legislatively restricted. Accordingly, the Act satisfied the requirements of s. 1 of the *Charter* and embodied a reasonable limit on freedom of association.

Per Wilson J. (dissenting): *The Dairy Workers (Maintenance of Operations) Act* could not be saved under s. 1. The prevention of economic harm to a particular sector is not *per se* a government objective of sufficient importance to justify the limitation on the freedom of association guaranteed by s. 2(*d*). Economic regulation is an important government function in today's society but, if it is to be done at the expense of our fundamental freedoms, then it must be done in response to a serious threat to the well-being of the body politic or a substantial segment of it. The evidence adduced in this case fell far short of establishing economic harm to the dairy workers and the public which is in that category.

There is, however, a point at which government interference with the collective bargaining process is justified. To determine under s. 1 of the *Charter* when that point has been reached, the government must satisfy the court that as a minimum the damage to the dairy industry as a consequence of the work stoppage would be considerably greater than that which would flow in the ordinary course of things from a work stoppage of reasonable duration. Industry and the public accept a certain amount of damage and inconvenience as the price of maintaining free negotiation in the work place. Such damage and inconvenience cannot therefore constitute the "pressing and substantial concern" held by this Court in *Oakes* to justify government intervention. There has to be more to it than that. There is no basis of solid fact in this case on which to make a judgment as to

durée. Non seulement les pertes économiques qui risquaient de se produire étaient-elles considérables au sens absolu, mais c'étaient les 800 producteurs laitiers de la province qui devraient en supporter tout le poids. Le préjudice économique que risquait d'occasionner un arrêt total du travail dans l'industrie du traitement du lait était à ce point immédiat, considérable et concentré dans ses effets qu'il relevait clairement du pouvoir discrétionnaire qu'a le législateur de substituer un régime d'arbitrage juste et efficace à la liberté de grève des employés d'usines de traitement du lait.

Le régime d'arbitrage obligatoire établi par la Loi satisfait aux critères de proportionnalité applicables à un tel régime. La Loi n'est applicable qu'aux travailleurs de l'industrie laitière; elle prévoit le recours à un arbitre neutre; une partie peut en définitive obliger l'autre à aller en arbitrage sans intervention gouvernementale; de plus, la Loi n'apporte aucune restriction à la portée de l'arbitrage. Par conséquent, la Loi remplit les exigences de l'article premier de la *Charte* et la restriction qu'elle apporte à la liberté d'association est raisonnable.

Le juge Wilson (dissidente): L'article premier ne permet pas de sauvegarder *The Dairy Workers (Maintenance of Operations) Act*. La prévention d'un préjudice économique pour un secteur particulier ne constitue pas en soi un objectif gouvernemental suffisamment important pour justifier la restriction de la liberté d'association garantie par l'al. 2*d*). La réglementation en matière économique est une importante fonction gouvernementale dans la société d'aujourd'hui mais, si elle doit être accomplie aux dépens de nos libertés fondamentales, elle doit alors faire suite à une menace grave au bien-être de l'État ou d'une partie importante de celui-ci. La preuve soumise en l'espèce n'établit pas que les producteurs laitiers et le public subiront un préjudice économique qui s'inscrit dans cette catégorie.

Il y a toutefois un point où l'ingérence gouvernementale dans le processus de négociation collective est justifiée. Pour que la cour puisse déterminer en vertu de l'article premier de la *Charte* à quel moment ce point a été atteint, le gouvernement doit la convaincre au moins que le préjudice que subirait l'industrie laitière par suite de l'arrêt de travail serait sensiblement plus grave que celui qui résulterait dans le cours ordinaire d'un arrêt de travail d'une durée raisonnable. L'industrie et le public acceptent un certain niveau de préjudices et d'inconvénients comme prix à payer pour conserver la liberté de négociation dans le milieu de travail. Par conséquent, ces préjudices et inconvénients ne peuvent constituer la «préoccupation urgente et réelle» qui, selon ce que la Cour a jugé dans l'arrêt *Oakes*, est nécessaire pour justifier l'intervention du gouvernement. Il doit y avoir

whether the government's intervention was reasonable or not. The government has thus failed to discharge its onus and the infringement of respondents' freedom of association accordingly was not demonstrably justified.

Assuming that the objective of protecting the economic interests of dairy farmers was of sufficient importance to justify overriding the workers' right to strike, the means chosen were not closely tailored to the objective so as to ensure the least possible infringement of the right. The government should not automatically respond with a total strike ban and the institution of compulsory arbitration. In the complex area of economic harm, the tailoring need not be exact but tailoring there must be. Here, the government did not establish that it had to impose such measure. On the contrary, the evidence adduced seemed to indicate that it could have tailored its legislative response in this case by instituting a partial ban on both strike and lock-out. This would have attained its objective while at the same time meeting the proportionality test enunciated in *Oakes*.

The second government objective supporting the limitation on the freedom under s. 2(*d*) was that the dairy workers provided an essential service—the delivery of an important food product to the consumers—and that the cessation of such delivery might threaten the health of part of the population. There was no evidence to support this allegation. No threat to the health of Saskatchewan consumers was therefore established.

Cases Cited

By Le Dain J.

Applied: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

By McIntyre J.

Applied: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

By Dickson C.J.

Referred to: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580*

plus que cela. Il n'y a en l'espèce aucune base factuelle solide qui permette de se prononcer sur la question de savoir si l'intervention du gouvernement était raisonnable ou non. Il s'ensuit que le gouvernement ne s'est pas acquitté de son obligation et qu'il n'a donc pas démontré que la violation de la liberté d'association des intimés était justifiée.

À supposer que l'objectif de la protection des intérêts économiques des producteurs laitiers soit suffisamment important pour justifier la suppression du droit de grève des travailleurs, les moyens choisis n'étaient pas directement adaptés à cet objectif de manière à assurer que l'on porterait le moins possible atteinte à ce droit. Le gouvernement ne devrait pas répondre automatiquement par une interdiction totale de faire grève et par l'imposition de l'arbitrage obligatoire. Dans le domaine complexe du préjudice économique, l'«adaptation» est obligatoire quoiqu'elle n'ait pas à être parfaite. En l'espèce, le gouvernement n'a pas démontré qu'il se devait d'imposer une telle mesure. Au contraire, il semble ressortir de la preuve que le gouvernement aurait pu adapter sa réponse législative en l'espèce en décrétant une interdiction partielle à la fois de faire la grève et d'imposer un lock-out. Cela lui aurait permis d'atteindre son objectif tout en satisfaisant au critère de proportionnalité énoncé dans l'arrêt *Oakes*.

Le second objectif invoqué par le gouvernement à l'appui de la restriction à la liberté que prévoit l'al. 2*d*), porte que les travailleurs de l'industrie laitière fournissent un service essentiel, soit la livraison aux consommateurs d'un produit alimentaire important, et que l'arrêt de cette livraison pourrait mettre en danger la santé d'une partie de la population. Aucun élément de preuve n'a été présenté à l'appui de cet argument. Par conséquent, on n'a établi l'existence d'aucune menace à la santé des consommateurs de la Saskatchewan.

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Citée par le juge Le Dain

Arrêt appliqué: *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313.

Citée par le juge McIntyre

Arrêt appliqué: *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313.

Citée par le juge en chef Dickson

Arrêts mentionnés: *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local*

(1984), 10 D.L.R. (4th) 198, aff'd on a different issue, [1986] 2 S.C.R. 573.

By Wilson J. (dissenting)

PSAC v. Canada, [1987] 1 S.C.R. 424; *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Ares v. Venner*, [1970] S.C.R. 608; *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

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580 (1984), 10 D.L.R. (4th) 198, conf. sur un point différent, [1986] 2 R.C.S. 573.

Citée par le juge Wilson (dissidente)

AFPC c. Canada, [1987] 1 R.C.S. 424; *Renvoi: Loi anti-inflation*, [1976] 2 R.C.S. 373; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Re Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *Ares c. Venner*, [1970] R.C.S. 608; *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313.

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POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (1985), 19 D.L.R. (4th) 609, [1985] 5 W.W.R. 97, 39 Sask. R. 193, 85 CLLC ¶ 14,054, qui a accueilli l'appel interjeté par les intimés contre un jugement de la Cour du Banc de la Reine (1984), 12 D.L.R. (4th) 10, [1984] 4 W.W.R. 717, 33 Sask. R. 219, 84 CLLC ¶ 14,061, 10 C.R.R. 1. Pourvoi accueilli, le juge Wilson est dissidente.

Robert G. Richards and *B. G. Welsh*, for the appellants.

George Taylor, Q.C., for the respondents.

Eric Bowie, Q.C., for the intervener the Attorney General of Canada.

John Cavarzan, Q.C., for the intervener the Attorney General for Ontario.

Joseph J. Arvay, for the intervener the Attorney General of British Columbia.

Brian R. Burrows, for the intervener the Attorney General for Alberta.

Valerie J. Matthews Lemieux and *W. Glenn McFetridge*, for the intervener the Attorney General of Manitoba.

The following are the reasons delivered by

THE CHIEF JUSTICE—This appeal raises the question whether *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, or any part thereof, violates the guarantee of freedom of association under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* and, if so, whether such violation can be justified under s. 1.

I

Facts

The individual respondents are employees of the only major dairy businesses in Saskatchewan, Palm Dairies Limited ("Palm") and Dairy Producers Co-operative Limited ("Co-op"). The respondent unions represent all of the employees—except those excluded from membership in any bargaining unit—in eleven of the only twelve fluid milk plants operating in the province.

In March of 1984, contract talks were conducted between Palm and Co-op and the respondent unions. No progress was made towards an agreement. On March 31, 1984, Local P-241-2 of the respondent United Food and Commercial Workers International Union served notice on Palm that strike action would commence on April 8, 1984, at Palm's Saskatoon plant. The Dairy and Produce

Robert G. Richards et *B. G. Welsh*, pour les appelants.

George Taylor, c.r., pour les intimés.

Eric Bowie, c.r., pour l'intervenant le procureur général du Canada.

John Cavarzan, c.r., pour l'intervenant le procureur général de l'Ontario.

Joseph J. Arvay, pour l'intervenant le procureur général de la Colombie-Britannique.

Brian R. Burrows, pour l'intervenant le procureur général de l'Alberta.

Valerie J. Matthews Lemieux et *W. Glenn McFetridge*, pour l'intervenant le procureur général du Manitoba.

Version française des motifs rendus par

LE JUGE EN CHEF—Ce pourvoi soulève la question de savoir si *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, chap. D-1.1, ou une partie quelconque de cette loi, viole la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés* et, dans l'affirmative, si cette violation peut être justifiée en vertu de l'article premier.

I

Les faits

Les particuliers intimés sont des employés de Palm Dairies Limited («Palm») et de Dairy Producers Co-operative Limited («Co-op»), les seules entreprises laitières importantes de la Saskatchewan. Les syndicats intimés représentent tous les employés (sauf ceux qui, par voie d'exclusion, ne peuvent appartenir à aucune unité de négociation) de onze des douze usines de traitement du lait de consommation que compte la province.

En mars 1984, des négociations ont eu lieu entre Palm et Co-op d'une part et les syndicats intimés d'autre part. On n'a fait aucun progrès vers la signature d'une convention collective. Le 31 mars 1984, la section locale P-241-2 du Syndicat international des travailleurs unis de l'alimentation et du commerce, l'un des intimés, a avisé Palm qu'une grève serait déclenchée le 8 avril 1984 à son

Workers, Local 834, notified Co-op on March 31 that strike action would begin on April 8 at the Co-op Regina plant. However, this notice was withdrawn on April 6 when Local 834 instead notified Palm of strike action beginning on April 9 at Palm's Regina plant. It appears from the evidence that what was intended by the unions was some form of partial or rotating strike. These intentions were defeated by the employers, who, on April 1, served the unions with a series of lock-out notices covering all of the eleven Co-op and Palm fluid milk plants and taking effect on April 8.

On April 9 the legislature of Saskatchewan responded to these developments by enacting *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, which came into force immediately. It had the temporary effect of prohibiting the dairy employees from striking and prohibiting a lock-out by their employers.

The respondents applied to the Saskatchewan Court of Queen's Bench for a declaration that the Act infringed freedom of association and was thereby of no force and effect. A number of affidavits were filed on behalf of the respondents containing the following opinion as to the result that would have obtained if the employers had not locked out the employees:

(a) Approximately 85% of the capacity of the dairy industry in Saskatchewan would have continued to function and provide services and commodities to dairy farmers and to the consumers of dairy products;

(b) The pick-up of milk from dairy farmers in Saskatchewan for use in the dairy industry would have continued at full capacity; and

(c) The total quantity of milk and milk products previously available to consumers in Saskatchewan could have continued to be available because Dairy Producers has sufficient capacity to make up for any shortfall consequent on Palm's not operating.

Attached to the affidavits, however, were the lock-out notices of the employers indicating that the employers would not co-operate with the partial

usine de Saskatoon. Le 31 mars, la section locale 834 de Dairy and Produce Workers a informé Co-op qu'une grève serait déclenchée le 8 avril à son usine de Regina. Ce dernier avis de grève a toutefois été retiré le 6 avril quand la section locale 834 a plutôt notifié à Palm son intention d'entreprendre une grève le 9 avril à son usine de Regina. Il ressort de la preuve que ce qu'envisageaient les syndicats était une forme de grève partielle ou tournante. Les employeurs ont mis fin à ces intentions lorsqu'ils ont, le 1er avril, signifié aux syndicats une série d'avis de lock-out visant chacune des onze usines de traitement du lait de consommation de Co-op et de Palm. Ces lock-out devaient entrer en vigueur le 8 avril.

Le 9 avril, la législature de la Saskatchewan a réagi à ces événements en adoptant *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, chap. D-1.1, qui est entrée en vigueur immédiatement. Elle avait pour effet d'interdire temporairement toute grève par les employés des usines laitières et tout lock-out par leurs employeurs.

Les intimés ont demandé à la Cour du Banc de la Reine de la Saskatchewan un jugement déclaratoire portant que la Loi violait la liberté d'association et était, par conséquent, inopérante. Un certain nombre d'affidavits, déposés pour le compte des intimés, contiennent l'opinion suivante quant à ce qui se serait produit si les employeurs n'avaient pas lock-outé les employés:

[TRADUCTION]

a) L'industrie laitière de la Saskatchewan aurait continué à fonctionner et à fournir services et denrées aux producteurs laitiers et aux consommateurs de produits laitiers dans une proportion d'environ 85 pour 100 de son rendement normal;

b) la collecte, auprès des producteurs laitiers de la Saskatchewan, du lait destiné à être utilisé dans l'industrie laitière aurait continué comme avant; et

c) la même quantité totale de lait et de produits laitiers aurait pu continuer à être offerte aux consommateurs de la Saskatchewan parce que Dairy Producers est en mesure de compenser tout manque résultant de la fermeture de Palm.

Toutefois, étaient joints aux affidavits les avis de lock-out des employeurs, qui révélaient que ces derniers n'avaient pas l'intention de prêter leur

strike planned by the unions. The respondents also submitted several newspaper articles as exhibits attached to an affidavit. The Attorney General for Saskatchewan adduced no evidence.

The Chambers judge, Sirois J. dismissed the application: (1984), 12 D.L.R. (4th) 10. An appeal was taken to the Saskatchewan Court of Appeal and the appeal was allowed, Brownridge J.A. dissenting: (1985), 19 D.L.R. (4th) 609. On appeal to this Court, the Attorneys General of Canada, Ontario, British Columbia and Alberta intervened on behalf of the appellants. The Attorney General of Manitoba intervened on behalf of the respondents.

II

The Constitutional Questions

The Constitutional questions read as follows:

1. Does *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, or any part thereof, infringe or deny freedom of association guaranteed in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?
2. If *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, or any part thereof, does infringe or deny freedom of association guaranteed in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*, is the Act, or such part, justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

III

Relevant Legislation

1. *The Charter*

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

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

concours à la grève partielle projetée par les syndicats. Les intimés ont également produit plusieurs coupures de journaux comme pièces annexées à un affidavit. Quant au procureur général de la Saskatchewan, il n'a présenté aucune preuve.

Le juge Sirois, siégeant en chambre, a rejeté la demande: (1984), 12 D.L.R. (4th) 10. L'appel interjeté devant la Cour d'appel de la Saskatchewan a été accueilli, mais avec dissidence de la part du juge Brownridge: (1985), 19 D.L.R. (4th) 609. En cette Cour, le procureur général du Canada et ceux de l'Ontario, de la Colombie-Britannique et de l'Alberta sont intervenus en faveur des appelants. Le procureur général du Manitoba est intervenu en faveur des intimés.

II

Les questions constitutionnelles

Les questions constitutionnelles sont ainsi formulées:

1. *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, chap. D-1.1, ou une partie quelconque de cette loi, constitue-t-elle une violation ou une négation de la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés*?
2. Si *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, chap. D-1.1, ou une partie quelconque de cette loi, constitue une violation ou une négation de la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés*, la Loi, ou cette partie de la Loi, est-elle justifiée en vertu de l'article premier de la *Charte canadienne des droits et libertés* et, par conséquent, compatible avec la *Loi constitutionnelle de 1982*?

III

Les dispositions législatives pertinentes

1. *La Charte*

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

2. Chacun a les libertés fondamentales suivantes:

a) liberté de conscience et de religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association. [Emphasis added.]

2. *The Dairy Workers (Maintenance of Operations) Act*

2 ...

(f) "work stoppage" means a strike, lock-out, work slow down or a refusal or failure to perform the usual duties of employment.

3 Immediately upon the coming into force of this Act:

(a) the employees shall resume the duties of their employment with the employer; and

(b) the employer shall permit its employees to resume their employment;

in accordance with the terms and conditions of the last collective bargaining agreement.

. . .

6 Notwithstanding any other Act or law or any provision of the last collective bargaining agreement to the contrary, the term of that agreement is extended to include the period commencing on April 1, 1984, and ending on the day on which a new or amended collective bargaining agreement is concluded in accordance with this Act and the terms and conditions of the last collective bargaining agreement remain in effect between the employer and the union for that period.

7 During the period for which the last collective bargaining agreement is extended in accordance with section 6:

(a) the employer shall not declare or cause a work stoppage,

(b) no officer or representative of the union shall declare, authorize or direct a work stoppage of any employee against the employer; and

(c) no employee shall participate in a work stoppage against the employer.

8 Where, 15 days after the coming into force of this Act, a new or amended collective bargaining agreement has not been concluded between the employer and the union, the employer and the union shall submit to final and binding arbitration in accordance with this Act.

. . .

12 (1) Every person who contravenes this Act is guilty of an offence and liable on summary conviction:

(a) in the case of an offence committed by the employer or the union or by a person acting on behalf

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

c) liberté de réunion pacifique;

d) liberté d'association. [C'est moi qui souligne.]

2. *The Dairy Workers (Maintenance of Operations) Act*

[TRADUCTION] 2 ...

f) «arrêt de travail» signifie une grève, un lock-out, un ralentissement de travail ou le refus ou l'omission de remplir les fonctions habituelles d'un emploi.

3 Dès l'entrée en vigueur de la présente loi:

a) les employés reprendront leurs fonctions chez l'employeur; et

b) l'employeur permettra à ses employés de reprendre leurs fonctions;

conformément aux modalités énoncées dans leur dernière convention collective.

. . .

6 Nonobstant ce que peut prévoir toute autre loi ou toute disposition contraire de la dernière convention collective, celle-ci est prorogée à partir du 1er avril 1984 jusqu'au jour de la signature conformément à la présente loi d'une nouvelle convention collective ou d'une convention modifiée, et les modalités énoncées dans la dernière convention collective demeurent applicables à l'employeur et au syndicat pendant cette période.

7 Pendant la durée de la prorogation de la dernière convention collective conformément à l'article 6:

a) l'employeur ne déclarera ni ne provoquera un arrêt de travail;

b) aucun dirigeant ni aucun représentant du syndicat ne déclarera, n'autorisera ni n'ordonnera un arrêt de travail dirigé par un employé contre un employeur; et

c) aucun employé ne participera à un arrêt de travail dirigé contre un employeur.

8 Si, dans les 15 jours suivant l'entrée en vigueur de la présente loi, une nouvelle convention collective ou une convention modifiée n'intervient pas entre l'employeur et le syndicat, ceux-ci se soumettront à l'arbitrage exécutoire et sans appel conformément à la présente loi.

. . .

12 (1) Quiconque contrevient à la présente loi est coupable d'une infraction et est passible, sur déclaration sommaire de culpabilité:

a) dans le cas d'une infraction commise par l'employeur ou le syndicat ou par une personne agissant

of the employer or the union, to a fine of not more than $1,000 and, in the case of a continuing offence, to a further fine of $200 for each day or part of a day during which the offence continues;

(b) in the case of an offence committed by any person other than one described in clause (a), to a fine of not more than $100 and in the case of a continuing offence, to a further fine of $25 for each day or part of a day during which the offence continues.

pour le compte de l'employeur ou du syndicat, d'une amende ne dépassant pas 1 000 $ et, s'il s'agit d'une infraction continue, d'une amende supplémentaire de 200 $ pour chaque journée ou partie de journée pendant laquelle la perpétration de l'infraction se poursuit;

b) dans le cas d'une infraction commise par une personne autre que celles décrites à l'alinéa a), d'une amende ne dépassant pas 100 $ et, s'il s'agit d'une infraction continue, d'une amende supplémentaire de 25 $ pour chaque journée ou partie de journée pendant laquelle la perpétration de l'infraction se poursuit.

IV

Judgments

1. *Court of Queen's Bench*

Sirois J. referred to the opinion expressed in the union affidavits that the dairy industry would have continued 85 per cent unimpeded if a lock-out had not occurred as "purely speculative". He held that irreconcilable differences between labour and management, involving an imminent threat of a strike and lock-out and consequential harm to dairy farmers and the public, justified the enactment of the impugned legislation.

In his view, it was unnecessary to resort to s. 1 of the *Charter* since the legislation did not violate s. 2(*d*). A democracy by its very nature imposes restrictions on freedom through majority rule and "The courts must in this sense respect the duly enacted legislation, which must be looked upon as the expressed intention of the majority of the people" (p. 24). He concluded that the right to strike is not a fundamental freedom but exists within a statutory framework designed to ensure peace and order in labour relations.

Sirois J. continued by pointing out that even if the Act did violate s. 2(*d*) of the *Charter*, the legislation was saved by s. 1. The impasse between the two sides had to be resolved for the welfare and greater common good of the citizens of the

IV

Les jugements

1. *Cour du Banc de la Reine*

Le juge Sirois a qualifié de [TRADUCTION] «purement spéculative» l'opinion exprimée dans les affidavits déposés par les syndicats, selon laquelle l'industrie laitière aurait continué de fonctionner dans une proportion de 85 pour 100 de son rendement normal s'il n'y avait pas eu de lock-out. Il a conclu que des points de divergence inconciliables entre les travailleurs et les employeurs, qui comportaient une menace imminente de grève et de lock-out au préjudice des producteurs laitiers et du public, justifiaient l'adoption de la loi en cause.

Selon lui, il n'était pas nécessaire de recourir à l'article premier de la *Charte* puisque la Loi ne violait pas l'al. 2*d*). Une démocratie, de par sa nature même, impose des restrictions à la liberté en vertu de la règle de la majorité et [TRADUCTION] «Dans ce sens, les tribunaux sont tenus de respecter toute loi dûment adoptée, qui doit être considérée comme l'expression de la volonté de la majorité des gens» (p. 24). Il a conclu que le droit de grève n'est pas une liberté fondamentale, mais qu'il existe dans un cadre législatif conçu pour assurer la paix et l'ordre dans les relations de travail.

Le juge Sirois a poursuivi en soulignant que même si la Loi enfreignait l'al. 2*d*) de la *Charte*, elle était sauvegardée en vertu de l'article premier. L'impasse entre les deux parties devait être réglée au mieux des intérêts des citoyens de la province.

province. The government was, therefore, justified in enacting the legislation.

2. *Court of Appeal*

The appeal was allowed by the majority.

(i) Bayda C.J.S.

Bayda C.J.S. held that every freedom has an inherent limit; a freedom without an inherent limit would lead to an absurdity, for a freedom of everyone to do everything is a freedom to do nothing. The limitations on freedom of association in s. 2(*d*) of the *Charter* are, according to Bayda C.J.S., as follows: 1) individuals are free to perform in association without governmental interference only those acts that they are free to perform alone; 2) where an act by definition is incapable of individual performance, an individual is free to perform the act in association provided the mental component of the act is not to inflict harm.

According to the Chief Justice, those cases which have held that freedom of association only covers the act of combining and not activities in pursuit of the combination's purposes should not be followed. "*To be* in association means *to act* in association, for, it is metaphysically impossible for a human being to exist in a state of inanimateness, or in a state of no movement, or as it were, in a state of mere beingness" (p. 615). Freedom of association must, therefore, mean freedom to act as well as to be in association.

A strike is a concerted refusal to work and is, therefore, association. An individual may refuse to work. It follows, according to Bayda C.J.S. that the act of refusal to work by employees acting in concert is permissible. Since there was, in his view, some force to the contention that a strike by its nature was an act incapable of performance by an individual, the Chief Justice considered whether strike activity fell into the second class of inherently prohibited acts. He concluded that it did not. The dominant mental element of a strike was to compel an employer to agree to terms and conditions of employment, not to inflict injury. Thus,

Le gouvernement a donc eu raison d'adopter la Loi en question.

2. *Cour d'appel*

La Cour d'appel à la majorité a accueilli l'appel.

(i) Le juge en chef Bayda de la Saskatchewan

Le juge en chef Bayda a conclu que chaque liberté comporte en soi des limites et qu'une liberté sans limites inhérentes mènerait à l'absurdité, car la liberté de chacun de faire quoi que ce soit constitue en réalité une liberté de ne rien faire du tout. D'après le juge en chef Bayda, l'al. 2*d*) de la *Charte* impose à la liberté d'association les restrictions suivantes: 1) les gens ne sont libres d'accomplir collectivement, sans intervention gouvernementale, que les actes qu'ils sont libres d'accomplir seuls; 2) dans le cas d'un acte non susceptible par définition d'être accompli par un seul individu, les individus ont la liberté de s'associer pour l'accomplir pourvu qu'il n'ait pas pour but de causer un préjudice.

Selon le Juge en chef, la jurisprudence qui établit que la liberté d'association vise seulement l'acte qui consiste à s'associer et non pas les activités exercées conformément aux objets de l'association, ne doit pas être suivie. [TRADUCTION] «*Être* associé signifie *agir* de concert, car il est métaphysiquement impossible qu'un être humain existe dans un état inanimé, ou dans un état d'inertie ou, pour ainsi dire, dans un état de simple existence» (p. 615). La liberté d'association doit donc s'entendre aussi bien de la liberté d'agir de concert que de celle d'être associé.

Une grève est un refus concerté de travailler et constitue donc une association. Un individu peut refuser de travailler. Il s'ensuit, selon le juge en chef Bayda, qu'il est permis à des employés agissant de concert d'accomplir l'acte qui consiste à refuser de travailler. Puisque, à son avis, ce n'était pas sans raison qu'on a soutenu qu'une grève est, de par sa nature même, un acte non susceptible d'accomplissement par un seul individu, le Juge en chef a examiné si une grève se situe dans la seconde catégorie, celle des actes intrinsèquement interdits. Il a conclu que non. Le but principal d'une grève est de forcer un employeur à en venir à

legislation which prohibits strikes is in violation of s. 2(*d*).

Accordingly, Bayda C.J.S. turned to s. 1 to determine whether the legislation was justifiable as a reasonable limit on the freedom of association of the respondents (at pp. 627-28):

> The exiguous circumstances disclosed in the affidavits leave to conjecture and speculation the economic and many other relevant circumstances of the appellants [respondents] who presumably would be detrimentally affected by the imposition of any limit. Apart from some inadmissible information contained in newspaper clippings (wrongly relied upon by the chambers judge as evidence) attached to one of the affidavits, the affidavits taken in their entirety say virtually nothing about the circumstances of the two companies, or of the producers of the milk, or of the consumers, all of whom presumably would be detrimentally affected if no limit were imposed. A number of the deponents stated an opinion that the proposed rotating strikes by the unions would not have deprived consumers of milk and would not have resulted in the producers being unable to market their milk. There was some information to support that opinion; there was no evidence to contradict or undermine it. In the end, I am compelled to say that there was not sufficient material before the chambers judge to enable him to engage in the balancing process he needed to engage in to arrive at a reasoned decision upon the reasonableness of the limit. Had the proper circumstances been disclosed to him, he may indeed have arrived at a reasoned decision that the limit was reasonable. On the other hand, he may not have. In other words, the impugned legislation may be reasonable but we have no way of knowing that. [Emphasis added.]

Thus, the onus under s. 1 of the *Charter* was not satisfied. Bayda C.J.S. concluded that the Act was of no force and effect under s. 52(1) of the *Constitution Act, 1982* and the respondents were entitled to a declaration under s. 24(1) of the *Charter*.

(ii) Cameron J.A. (concurring in result)

According to Cameron J.A. the objects of a trade union include the improvement of working

une entente quant aux conditions de travail et non pas de causer un préjudice. Ainsi, toute loi qui interdit le recours à la grève enfreint l'al. 2*d*).

En conséquence, le juge en chef Bayda a eu recours à l'article premier en vue de déterminer si la Loi était justifiable à titre de limite raisonnable imposée à la liberté d'association des intimés (aux pp. 627 et 628):

> [TRADUCTION] Vu le peu de détails fournis par les affidavits, on en est réduit aux conjectures quant à la situation économique des appelants [intimés], qui subiraient vraisemblablement un préjudice si des restrictions étaient imposées, et quant à un grand nombre d'autres aspects pertinents de leur situation. Mis à part quelques renseignements inadmissibles contenus dans des coupures de journaux (que le juge en chambre a erronément considérées comme des éléments de preuve) annexées à l'un des affidavits, les affidavits dans l'ensemble n'apportent presque aucune précision concernant la situation des deux sociétés, des producteurs laitiers ou encore des consommateurs qui subiraient tous probablement un préjudice si aucune restriction n'était imposée. Un certain nombre de déposants ont exprimé l'opinion que les grèves tournantes envisagées par les syndicats n'auraient pas eu pour effet de priver de lait les consommateurs ni n'auraient mis les producteurs dans l'impossibilité d'écouler leur lait. Il y avait des données à l'appui de ce point de vue et il n'y avait aucun élément de preuve qui le contredisait ou l'affaiblissait. En définitive, je ne puis que conclure à l'absence de données suffisantes pour permettre au juge en chambre de se lancer dans le processus d'évaluation nécessaire pour aboutir à une décision raisonnée sur le caractère raisonnable de la restriction. Si on lui avait révélé les circonstances pertinentes, il aurait pu en effet arriver à une décision raisonnée que la restriction était raisonnable. Par ailleurs, il aurait pu ne pas le faire. En d'autres termes, il se peut que la loi attaquée soit raisonnable, mais nous n'avons aucun moyen de le savoir. [C'est moi qui souligne.]

Il s'ensuit qu'on n'a pas satisfait à l'exigence posée par l'article premier de la *Charte*. Le juge en chef Bayda a conclu que la Loi était inopérante en vertu du par. 52(1) de la *Loi constitutionnelle de 1982* et que les intimés avaient droit à un jugement déclaratoire en vertu du par. 24(1) de la *Charte*.

(ii) Le juge Cameron (souscrivant au dispositif)

Selon le juge Cameron, un syndicat a notamment pour objet d'améliorer les conditions de tra-

conditions and the financial welfare of its members, while the means of achieving those objects include collective bargaining, and, when that fails, the collective refusal to work. The *Charter* does not explicitly guarantee these objects in the sense of ensuring their attainment, but this does not bear upon the determination of the scope of freedom to associate.

In his view, some of the means by which a trade union pursues its objectives are constitutionally protected while others are not. The two primary ones of expression and assembly are the subject of express guarantee, but that is not to say that only those means which are themselves expressly guaranteed by the *Charter* are immune from legislative interference. Others are surely protected by necessary implication.

Cameron J.A. observed that the freedom to bargain collectively, of which the right to withdraw services is an integral aspect, lies at the very centre of the existence of an association of workers. To remove their freedom to withhold their labour would be to sterilize their association. Cameron J.A. reviewed the jurisprudence and concluded that (at p. 645):

> ... while the decided cases weigh in favour of the exclusion of "the right to strike" from the constitutional freedom of association, the emerging framework of principle governing *Charter* interpretation rather points to its inclusion, especially if we are to be faithful to the call to give these rights and freedoms a "*generous* interpretation ... suitable to give to individuals the *full measure*" of them.

Accordingly, the dairy workers in this case had a constitutionally protected freedom to withhold their services. There was nothing standing in the way of their doing so, except the impugned legislation, which, by denying them their freedom to withhold their work, abridged their s. 2(*d*) freedom of association.

Concerning s. 1 of the *Charter*, Cameron J.A. agreed with Bayda C.J.S. that the evidence adduced was insufficient. The newspaper articles, in his view, were not a source of information which

vail de ses membres et de veiller à leur bien-être financier, alors que les moyens d'atteindre ces objets comprennent la négociation collective et, en cas d'échec, le refus collectif de travailler. La *Charte* ne garantit pas explicitement lesdits objets au sens d'en assurer la réalisation, mais cela n'est nullement déterminant en ce qui concerne l'étendue de la liberté d'association.

À son avis, certains des moyens par lesquels un syndicat poursuit ses objectifs sont protégés par la Constitution alors que d'autres ne le sont pas. Les deux moyens principaux, savoir l'expression et la réunion, font l'objet d'une garantie expresse, mais cela ne veut pas dire que seuls les moyens qui sont eux-mêmes expressément garantis par la *Charte* échappent à toute intervention de la part du législateur. Il en est sûrement d'autres qui sont protégés par voie de déduction nécessaire.

Le juge Cameron fait remarquer que la liberté de négocier collectivement, dont le droit de cesser de fournir ses services fait partie intégrante et se situe au cœur même de l'existence d'une association de travailleurs. Les dépouiller de la liberté de refuser de travailler reviendrait à rendre stérile leur association. Ayant passé en revue la jurisprudence, le juge Cameron tire la conclusion suivante (à la p. 645):

> [TRADUCTION] ... bien que la jurisprudence tende nettement à exclure «le droit de grève» de la liberté d'association garantie par la Constitution, l'ensemble des principes qui commence à se dégager relativement à l'interprétation de la *Charte* semble plutôt réclamer son inclusion, surtout si nous voulons écouter l'appel visant à donner à ces droits et libertés une «interprétation *généreuse* [...] propre à permettre aux particuliers [d'en] bénéficier *pleinement*».

Il s'ensuit que les travailleurs de l'industrie laitière dans la présente affaire jouissaient de la liberté, garantie par la Constitution, de cesser de fournir leurs services. Rien ne les empêchait de le faire, si ce n'est la loi attaquée qui, en leur interdisant de refuser de travailler, portait atteinte à la liberté d'association que leur garantit l'al. 2*d*).

En ce qui concerne l'article premier de la *Charte*, le juge Cameron s'est dit d'accord avec le juge en chef Bayda quant à l'insuffisance des preuves produites. Selon lui, les coupures de jour-

could form the basis for judicial decision-making. Cameron J.A. dealt with the arguments of the Government of Saskatchewan as follows (at p. 651):

> The government contended that the dairy industry was an "essential industry" and that milk and dairy products, "because of their tremendous importance to health, (were) essential commodities". But even if that were so, there was no evidence to show that milk would necessarily be unavailable to Saskatchewan residents if the work stoppage had occurred. Nor was there any evidence to establish, as the government also contended, that the "continued viability of the dairy industry in this province" was at stake. Indeed the evidence of the unions suggested that 85% of the capacity of the industry would have remained unaffected by the rotational strikes which were proposed.
>
> The government also contended that the situation posed "serious economic problems for many Saskatchewan farmers". While that was very likely so, evidence of the extent of this might have been helpful, as perhaps it might have been useful to establish the degree to which this was caused by the actions of the employers, the biggest of which was a producer's co-operative, as well as by the employees. [Emphasis added.]

Cameron J.A. therefore held that the appeal should be allowed and the employees should be granted a declaration that the Act was of no force or effect.

(iii) Brownridge J.A. (dissenting)

According to Brownridge J.A., on numerous occasions it has been held that legislation which restricted or abolished the right of union members to strike did not, for this reason alone, infringe the guaranteed freedom of association. In this regard, he agreed with the majority opinion in *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), 10 D.L.R. (4th) 198 (B.C.C.A.), appealed to this Court on a different issue, [1986] 2 S.C.R. 573, in which it was found that freedom of association did not include protection of the pursuit of the purposes for which the association exists. Since Brownridge J.A. did not find any violation of s. 2(*d*), he did not feel it was necessary to consider s. 1 of the *Charter*,

naux ne constituaient pas une source de renseignements sur lesquels pouvait se fonder une décision judiciaire. Aux arguments avancés par le gouvernement de la Saskatchewan, le juge Cameron a répondu (à la p. 651):

> [TRADUCTION] Le gouvernement a fait valoir que l'industrie laitière est une «industrie essentielle» et que le lait et les produits laitiers «(sont) des denrées essentielles en raison de leur grande importance pour la santé». Mais même à supposer que cela soit vrai, il n'y a aucune preuve que les résidents de la Saskatchewan auraient nécessairement été dans l'impossibilité de se procurer du lait si l'arrêt de travail s'était produit. De plus, aucune preuve n'a été produite à l'appui d'un autre argument du gouvernement, savoir que c'est la «viabilité même de l'industrie laitière dans cette province» qui est en jeu. En fait, il ressort de la preuve soumise par les syndicats que 85 pour 100 du rendement de l'industrie n'aurait pas été touché par les grèves tournantes projetées.
>
> Le gouvernement a également soutenu que la situation posait «de graves problèmes économiques à un bon nombre de producteurs de la Saskatchewan». Quoique cela fût fort probable, il aurait pu être utile de produire des éléments de preuve établissant jusqu'à quel point c'était le cas, car cela aurait peut-être permis d'établir dans quelle mesure cette situation découlait des actes des employeurs dont le plus important était une coopérative de producteurs, et dans quelle mesure elle était imputable aux employés. [C'est moi qui souligne.]

Le juge Cameron a donc conclu qu'il y avait lieu d'accueillir l'appel et de rendre en faveur des employés un jugement déclaratoire portant que la Loi était inopérante.

(iii) Le juge Brownridge (dissident)

Selon le juge Brownridge, on a jugé à maintes reprises que ce n'est pas simplement parce qu'un texte législatif restreint ou abolit le droit des syndiqués de faire la grève qu'il porte atteinte à la liberté d'association garantie par la *Charte*. À ce propos, il a partagé l'opinion exprimée par la cour à la majorité dans l'arrêt *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), 10 D.L.R. (4th) 198 (C.A.C.-B.), qui a fait l'objet d'un pourvoi devant cette Cour relativement à une question différente, [1986] 2 R.C.S. 573, et dans lequel on a conclu que la liberté d'association ne protégeait pas la poursuite des objectifs d'une association. Étant donné sa conclusion qu'il n'y avait pas eu de

although he indicated that in any event he agreed with Sirois J. on that issue.

V

Section 2(*d*) of the *Charter* and *The Dairy Workers (Maintenance of Operations) Act*

In the *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (hereinafter *Alberta Labour Reference*) released concurrently, I interpreted the guarantee of freedom of association in s. 2(*d*) of the *Charter* as including protection of the freedom to bargain collectively and to strike. In the present appeal, *The Dairy Workers (Maintenance of Operations) Act* abrogates the freedom of workers to strike. It compels workers to "resume the duties of their employment" (s. 3(a)); it extends the terms of the former collective bargaining agreement (s. 6); it forbids the employee from participating in a work stoppage during this period of extension (s. 7(c)); and it requires submission to final and binding arbitration if a new or amended collective bargaining agreement has not been concluded between the employer and the union within 15 days of the coming into force of the Act (s. 8).

For the reasons which I set out in the *Alberta Labour Reference*, I am of the opinion that *The Dairy Workers (Maintenance of Operations) Act* violates s. 2(*d*) of the *Charter* to the extent that it interferes with the freedom of the employees to engage in strike activity that would have been lawful in the absence of the Act. It is therefore necessary to turn to s. 1 of the *Charter*.

VI

Section 1

The general principles under which a s. 1 inquiry is to be conducted are stated in *R. v. Oakes*, [1986] 1 S.C.R. 103. The inquiry involves two steps: 1) assessing the importance of the objective underlying the impugned law and 2) assessing the

violation de l'al. 2*d*), le juge Brownridge n'a pas cru nécessaire d'étudier l'article premier de la *Charte*, bien qu'il ait souligné qu'en tout état de cause il souscrivait à l'avis du juge Sirois sur ce point.

V

L'alinéa 2*d*) de la *Charte* et *The Dairy Workers (Maintenance of Operations) Act*

Dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (ci-après le *Renvoi relatif aux relations de travail en Alberta*), dont les motifs sont prononcés en même temps que le présent arrêt, j'ai interprété la liberté d'association garantie par l'al. 2*d*) de la *Charte* comme comprenant la protection de la liberté de négocier collectivement et de faire la grève. Dans la présente affaire, *The Dairy Workers (Maintenance of Operations) Act* abolit la liberté de grève de certains travailleurs. Elle oblige ces derniers à «reprendr[e] leurs fonctions» (al. 3a)); elle proroge l'ancienne convention collective (art. 6), elle interdit aux employés de participer à un arrêt de travail pendant la durée de cette prorogation (al. 7c)), et elle impose le recours à l'arbitrage exécutoire et sans appel si une nouvelle convention collective ou une convention modifiée n'intervient pas entre l'employeur et le syndicat dans les 15 jours suivant l'entrée en vigueur de la Loi (art. 8).

Pour les raisons que j'ai exposées dans le *Renvoi relatif aux relations de travail en Alberta*, j'estime que *The Dairy Workers (Maintenance of Operations) Act* enfreint l'al. 2*d*) de la *Charte* dans la mesure où elle porte atteinte à la liberté des employés en question de se livrer à une grève qui, n'eût été de la Loi, aurait été légale. Il est donc nécessaire de se reporter à l'article premier de la *Charte*.

VI

L'article premier

Les principes généraux qui doivent régir une analyse en vertu de l'article premier sont énoncés dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. L'analyse se déroule en deux étapes qui consistent 1) à établir l'importance de l'objectif qui sous-tend

proportionality of the means employed to achieve the purpose pursued. The onus of proving the constituent elements of a s. 1 analysis is on the party seeking to justify the limit.

Two purposes or objectives have been advanced to justify the Act. First, it is said that because of the peculiar characteristics of the dairy industry a shut-down of processing facilities would have serious adverse consequences for the dairy industry, especially for dairy farmers. Second, it is argued that milk is an important food product, an essential commodity, and continuity of supply to consumers must be preserved.

In the *Alberta Labour Reference*, I accepted the "essential services" justification for the substitution of an adequate scheme of compulsory arbitration for the freedom to strike. The legislature is entitled to limit the freedom of employees to strike if the effect of a strike would be to deprive the public of essential services. The rationale for such a limitation is that members of the public who do not participate in a particular collective bargaining process ought not to be unduly harmed when the bargaining fails to produce a settlement. In my view, such a rationale also applies when the harm to third parties is economic in nature. Although, as I indicated in the *Alberta Labour Reference*, the right to bargain collectively and therefore the right to strike involve more than purely economic interests of workers, it cannot be doubted that economic concerns play an important role in a great many industrial disputes. It would be strange, indeed, if our society were to give constitutional protection for the freedom of employees to advance economic, as well as non-economic, interests by striking, while insisting that the state remain idle and indifferent to the infliction on others of serious economic harm. To require the legislature to be blind to the economic harm which may ensue from work stoppages would be to freeze into the constitution a particular system of industrial relations. Although, as yet, it would appear that Canadian legislatures have not discovered an alternative mode of industrial dispute resolution which is as

la loi attaquée, et 2) à déterminer si les moyens employés pour atteindre cet objectif sont proportionnés à celui-ci. La charge d'établir les éléments constitutifs d'une analyse en vertu de l'article premier incombe à la partie qui cherche à justifier la restriction.

On prétend que la loi en cause se justifie par deux buts ou objectifs. En premier lieu, on dit qu'en raison des particularités de l'industrie laitière, la fermeture des installations de traitement nuirait gravement à cette industrie et surtout aux producteurs laitiers. En deuxième lieu, on fait valoir que le lait est un aliment important, une denrée essentielle, et qu'il faut en conséquence assurer aux consommateurs un approvisionnement continu.

Dans le *Renvoi relatif aux relations de travail en Alberta*, j'ai accepté l'argument des «services essentiels» pour justifier la substitution d'un régime convenable d'arbitrage obligatoire à la liberté de grève. Le législateur est autorisé à restreindre la liberté de grève d'employés chaque fois qu'une grève aurait pour effet de priver le public de services essentiels. La raison d'être d'une telle restriction est que les membres du public qui ne participent pas à un processus donné de négociation collective ne devraient pas avoir à subir de préjudice indu lorsque les négociations n'aboutissent pas à un accord. À mon avis, cette même raison d'être s'applique aussi lorsque le préjudice subi par des tiers est de nature économique. Quoique, comme je l'ai souligné dans le *Renvoi relatif aux relations de travail en Alberta*, le droit de négocier collectivement et, partant, celui de faire la grève, ne mette pas en jeu que des intérêts purement économiques des travailleurs, il ne fait pas de doute que des préoccupations d'ordre économique jouent un rôle important dans un bon nombre de conflits de travail. En fait, il serait étrange que notre société accorde une protection constitutionnelle à la liberté des salariés de recourir à la grève pour promouvoir leurs intérêts économiques et autres, et tienne en même temps à ce que l'État reste inactif et indifférent devant le préjudice économique grave causé à autrui. Exiger que le législateur ferme les yeux sur le préjudice économique qui peut résulter d'arrêts de travail

sensitive to the associational interests of employees as the traditional strike/lock-out mechanism, it is not inconceivable that, some day, a system with fewer injurious incidental effects will be developed. In the meantime, in my view, legislatures are justified in abrogating the right to strike and substituting a fair arbitration scheme, in circumstances when a strike or lock-out would be especially injurious to the economic interests of third parties. As Professor Adell stated:

> We are not deterred, nor should we be, by any claim that the right to strike is sacrosanct and ought never to be restricted. Limiting the right to strike when its social cost is considered too high may well be a legitimate legislative choice.

(Bernard Adell, "Establishing a Collective Employee Voice in the Workplace: How Can the Obstacles be Lowered?" in *Essays in Labour Relations Law* (1986), at p. 18.)

I do not mean to suggest that any economic harm to a third party will suffice to justify the abrogation of the right to strike. In an interdependent economy it is inevitable that a work stoppage in one industry will entail detrimental economic consequences for at least some individuals in other industries. The objective advanced to justify legislation which infringes a *Charter*-protected right or freedom must relate to a "pressing and substantial concern" in order for the legislation to be saved under s. 1: *Oakes*, *supra*, at pp. 138-39. Moreover, the third element of the s. 1 proportionality requirement propounded in *Oakes* calls for a weighing of the legislative objective against the deleterious effects of the measures which limit the enjoyment of the *Charter* right or freedom. These principles suggest that the relevant question, therefore, is whether the potential for economic harm to third parties during a work stoppage is so massive and immediate and so focussed in its intensity as to justify the limitation

reviendrait à consacrer dans la Constitution un régime particulier de relations de travail. Même si, jusqu'à maintenant, les législateurs canadiens ne semblent pas avoir découvert un autre mode de règlement des conflits de travail qui tienne aussi bien compte des intérêts collectifs des salariés que le mécanisme traditionnel de la grève et du lock-out, il n'est pas inconcevable qu'un jour on saura mettre au point un régime comportant moins d'effets secondaires préjudiciables. D'ici là, j'estime que les législateurs ont raison de supprimer le droit de grève et de lui substituer un régime d'arbitrage équitable dans les cas où une grève ou un lock-out serait particulièrement préjudiciable aux intérêts économiques de tierces personnes. Comme le fait remarquer le professeur Adell:

> [TRADUCTION] On ne recule pas et on ne doit pas reculer devant la prétention que le droit de grève est sacro-saint et qu'il ne devrait jamais être restreint. La restriction du droit de grève lorsque son coût social est jugé trop élevé peut fort bien constituer un choix valable de la part du législateur.

(Bernard Adell, «Establishing a Collective Employee Voice in the Workplace: How Can the Obstacles be Lowered?» dans *Essays in Labour Relations Law* (1986), à la p. 18.)

Je ne veux pas laisser entendre par là que n'importe quel préjudice économique subi par un tiers suffira pour justifier la suppression du droit de grève. Dans une économie interdépendante, il est inévitable qu'un arrêt de travail dans un secteur donné aura des conséquences économiques fâcheuses, pour certaines personnes du moins, dans d'autres secteurs. L'objectif proposé pour justifier un texte législatif qui porte atteinte à un droit ou à une liberté garantis par la *Charte* doit se rapporter à une «préoccupation urgente et réelle» pour que le texte en question soit sauvegardé en vertu de l'article premier: *Oakes*, précité, à la p. 139. De plus, le troisième élément de l'exigence de proportionnalité posée dans l'arrêt *Oakes* à l'égard de l'article premier oblige à soupeser l'objectif de la loi en question et les effets préjudiciables des mesures qui limitent la jouissance d'un droit ou d'une liberté garantis par la *Charte*. Il ressort de ces principes que la question pertinente est donc la suivante: Le préjudice économique que des tiers

of a constitutionally guaranteed freedom in respect of those employees.

I now turn to an application of the above principles to the facts of the present appeal. At the outset, I wish to make it clear that I am treating the present case as one involving harm to a third party, namely, dairy farmers, rather than as a case involving harm to one of the parties to the industrial dispute. The fact that one of the employers was a co-operative company owned at least in part by at least some dairy farmers does not, in my view, dictate a contrary approach. A co-operative company is a separate legal entity and its directors are entitled to pursue a labour relations strategy which does not conform to the wishes of individual members. To pierce the corporate veil in respect of a widely-held corporation would be most unfair to individual members of the co-operative, to say nothing of non-member dairy farmers.

The only evidence before the Court is contained in the affidavits filed on behalf of the respondent unions and in the newspaper articles attached as exhibits to one of those affidavits. With great respect for the contrary opinions of Bayda C.J.S. and Cameron J.A., I am unable to see why the newspaper articles should be held to be inadmissible or unhelpful in the peculiar circumstances of this case. The newspaper reports were, I reiterate, filed on behalf of the respondents, undoubtedly with a view to providing the factual context for the *Charter* argument. The appellants were apparently satisfied that the newspaper reports provided an adequate factual foundation for its s. 1 justification: in any event, the Government of Saskatchewan adduced no further evidence. There is nothing on the record to indicate that either party disputed the admissibility of the articles before the Chambers judge. Except to the extent that there exists conflicting material in the newspaper reports, the reports constitute an evidentiary foundation accepted by both parties. It is unnecessary in this appeal to consider whether newspaper

risquent de subir pendant un arrêt de travail est-il considérable, immédiat et concentré dans ses effets au point de justifier, dans le cas de ces salariés, la restriction d'une liberté garantie par la Constitution?

Appliquons maintenant aux faits du présent pourvoi les principes que je viens d'énoncer. Je tiens à préciser dès le départ que je procède en l'espèce comme s'il s'agissait d'un cas de préjudice causé à des tiers, savoir les producteurs laitiers, plutôt que d'un cas de préjudice subi par l'une des parties au conflit de travail. À mon avis, ce n'est pas parce que l'un des employeurs est une coopérative appartenant, du moins en partie, à des producteurs laitiers qu'il faut adopter une démarche différente. Une coopérative est une entité juridique distincte et il est loisible à ses administrateurs d'adopter en matière de relations de travail une stratégie qui ne traduit pas la volonté de membres individuels. Or, il serait des plus injuste pour les membres individuels de la coopérative, sans parler des producteurs laitiers non membres, que de faire abstraction de la personnalité morale dans le cas d'une société à grand nombre d'actionnaires.

Les seuls éléments de preuve dont dispose la Cour sont contenus dans les affidavits produits pour le compte des syndicats intimés et dans les coupures de journaux annexées comme pièces à l'un de ces affidavits. Avec égards pour les opinions contraires exprimées par le juge en chef Bayda et le juge Cameron, je suis incapable de voir pourquoi les coupures de journaux devraient être jugées inadmissibles ou d'aucune utilité dans les circonstances particulières de la présente affaire. Les reportages en question, je le répète, ont été produits pour le compte des intimés, dans le but sans doute de fournir un contexte factuel à l'argument fondé sur la *Charte*. Les appelants étaient apparemment convaincus que ces reportages constituaient un fondement factuel suffisant pour une justification au sens de l'article premier. Quoi qu'il en soit, le gouvernement de la Saskatchewan n'a présenté aucun autre élément de preuve. D'après ce qui ressort du dossier, ni l'une ni l'autre partie n'a contesté devant le juge en chambre l'admissibilité des coupures de journaux. Sauf dans la mesure où ils se contredisent, ces reportages constituent un

articles tendered into evidence by one party and objected to by the other would generally be admissible for the purposes of s. 1.

The uncontroverted facts contained in the newspaper reports include the following:

1. The only Saskatchewan dairies not directly involved in the strike or lock-out were an independent dairy in Estevan and a Co-op cheese processing plant in Swift Current.

2. 1.3 million pounds of milk, worth about $250,000, was produced daily by Saskatchewan's 50,000 dairy cows on 800 dairy farms.

3. Co-op employs all the bulk tanker drivers who pick up milk from dairy farmers in Saskatchewan.

4. Milk is normally picked up from dairy farmers every second day. It cannot be stored on the farm for more than three days.

In addition to their factual content, the newspaper reports vividly convey the enormity of the waste that would have resulted from an interruption of milk pick-up and processing. The President of the dairy farmers' advocacy organization, the Saskatchewan Milk Producers' Association, was interviewed by one of the newspaper reporters:

In an interview, York said dairy producers would have to dump all their milk after three days if a dairy strike or lockout lasts that long.

. . .

"After three days we'd have to dump the whole works and start from scratch. You couldn't just dump half a load," he said.

York said a strike or lockout of even two days could be very harmful to the average dairy producer, as out of the 800 dairy farmers in Saskatchewan about 550 have loans and high annual or monthly payments.

(Saskatoon Star-Phoenix, Thursday, April 5, 1984)

fondement probatoire accepté par les deux parties. Il n'est pas nécessaire en l'espèce d'examiner si des coupures de journaux produites en preuve par une partie, auxquelles s'oppose l'autre partie, seraient généralement admissibles aux fins de l'article premier.

Les faits suivants qui se dégagent des coupures de journaux ne font l'objet d'aucune contestation:

1. À l'exception seulement d'une laiterie indépendante à Estevan et d'une fromagerie de Co-op à Swift Current, toutes les laiteries de la Saskatchewan étaient directement touchées par la grève ou le lock-out.

2. En Saskatchewan, 50 000 vaches laitières sur 800 fermes laitières produisaient quotidiennement 1,3 millions de livres de lait dont la valeur s'élevait à environ 250 000 $.

3. Tous les chauffeurs de camions-citernes qui font la collecte de lait auprès des producteurs laitiers de la Saskatchewan sont les employés de Co-op.

4. La collecte de lait auprès des producteurs laitiers s'effectue normalement tous les deux jours. Le lait ne peut pas être entreposé sur la ferme pendant plus de trois jours.

Outre leur contenu factuel, les reportages révèlent très clairement l'énormité du gaspillage qui aurait résulté d'une interruption de la collecte et du traitement du lait. Le président de l'organisme de défense des intérêts des producteurs laitiers, la Saskatchewan Milk Producers' Association, a été interviewé par un journaliste:

[TRADUCTION] Dans une interview, York a affirmé que les producteurs laitiers se verraient dans l'obligation de jeter tout leur lait après trois jours si une grève ou un lock-out touchant les laiteries durait aussi longtemps.

. . .

«Au bout de trois jours, nous serions obligés de jeter le tout et de repartir à zéro. On ne peut pas simplement vider la moitié d'un réservoir», a-t-il dit.

Selon York, même une grève ou un lock-out qui ne durerait que deux jours pourrait nuire gravement au producteur laitier moyen car, sur 800 producteurs en Saskatchewan, environ 550 ont contracté des emprunts et doivent effectuer des versements mensuels ou annuels élevés.

(Saskatoon Star-Phoenix, le jeudi 5 avril 1984)

Another dairy farmer was interviewed on the day the back-to-work legislation was enacted:

Burney, who is also a director of the Saskatchewan Milk Producers Association, said neither the company or the union have considered the farmer during negotiations.

"Farmers began dumping milk Sunday and they will continue to dump until the trucks start picking up milk again tomorrow", Burney said.

(Saskatoon Star-Phoenix, Monday, April 9, 1984)

These effects would persist whether the work stoppage was of a short or long duration. Not only were the threatened economic losses large in absolute terms, but the losses could not be distributed over a large population—they were to be borne in their full intensity by the Province's 800 dairy farmers. Many of these farmers were in a vulnerable financial position on account of their debt loads, as noted above, and on account of their inability to cease milk production. In my view, the economic harm threatened by a total work stoppage in the dairy processing industry was so immediate, of such a high degree and of such an intense focus as to fall well within the ambit of discretion of the Saskatchewan legislature to substitute a fair and efficient arbitration scheme for the dairy processing employees' freedom to strike. I might add that what perhaps exacerbates the economic harm to dairy farmers and distinguishes it from the routine economic harm experienced by any supplier to a producer in the throes of a work stoppage is the combination of three unusual features: (i) the producer in this case was the sole outlet for the suppliers' only product; (ii) the product in question was highly perishable; and (iii) because of the biological imperatives of the cow, the supplier could not mitigate losses by ceasing production.

Un autre producteur laitier a été interviewé le jour de l'adoption de la loi ordonnant le retour au travail:

[TRADUCTION] Burney, qui est également un directeur de la Saskatchewan Milk Producers' Association, a soutenu que ni la société ni le syndicat n'ont songé aux producteurs au cours des négociations.

«Les producteurs ont commencé à jeter leur lait dimanche et cela se poursuivra jusqu'à ce que la collecte reprenne demain», de dire Burney.

(Saskatoon Star-Phoenix, le lundi 9 avril 1984)

Ces effets subsisteraient peu importe que l'arrêt de travail soit de courte ou de longue durée. Non seulement les pertes économiques qui risquaient de se produire étaient-elles considérables au sens absolu, mais elles ne pouvaient pas être réparties sur une grande population—c'étaient les 800 producteurs laitiers de la province qui devraient en supporter tout le poids. Un bon nombre de ces producteurs étaient financièrement vulnérables en raison de leur endettement, comme je l'ai fait remarquer précédemment, et également en raison de leur incapacité d'arrêter la production de lait. À mon avis, le préjudice économique que risquait d'occasionner un arrêt total du travail dans l'industrie du traitement du lait était à ce point immédiat, considérable et concentré dans ses effets qu'il relevait clairement du pouvoir discrétionnaire qu'a le législateur de la Saskatchewan de substituer un régime d'arbitrage juste et efficace à la liberté de grève des employés d'usines de traitement du lait. Je pourrais ajouter que ce qui vient peut-être aggraver le préjudice économique subi par les producteurs laitiers et ce qui permet de le distinguer d'avec le préjudice économique ordinaire que subit n'importe quel fournisseur d'un producteur qui se trouve sous le coup d'un arrêt de travail est la combinaison de trois facteurs inhabituels: (i) le producteur en l'espèce était le seul débouché pour l'unique produit des fournisseurs; (ii) le produit en question est extrêmement périssable; et (iii) en raison des impératifs de la vache sur le plan biologique, les fournisseurs ne pouvaient pas atténuer leurs pertes en arrêtant la production.

The affidavits of the respondents were addressed to the effects which would have ensued if there had been no lock-out by the employer, but only a partial strike or a series of rotating strikes by the employees. It is claimed that the industry could have functioned at 85 per cent of normal capacity and that milk would have been collected from the farmers.

It is submitted that the appropriateness of any limitation upon the right to strike must be measured against the effects, not of the employer lock-out, but of the proposed partial strike. This argument, however, ignores the fact that the legislature was faced with the reality of a total lock-out. For the reasons given earlier, in such circumstances the legislature was justified in requiring the parties to submit their differences to binding arbitration and in ordering the parties back to work. Moreover, implicit in the respondents' argument is the assumption that the right to strike is in no way related to the employer's ability to lock out employees. To assess the validity of this assumption, it is necessary to consider the manner in which the constitutional freedom to strike interacts with the statutory regulation of labour relations.

In my reasons in the *Alberta Labour Reference*, I indicated that the very detailed legislative scheme of industrial relations that has been developed over several decades may be relevant to the assessment of constitutional questions pertaining to strike activity. In the *Alberta Labour Reference* the issue was not whether particular aspects of this standard statutory scheme were unconstitutional, but rather, when and in what circumstances that statutory paradigm could be done away with entirely in particular industries and replaced with an alternative mechanism. The present case was argued along similar lines. In addressing this issue, it would be inappropriate for the courts to venture into an assessment of the constitutional validity of the standard industrial relations paradigm which was not directly impugned. In short, until and unless a direct challenge is mounted against *The Trade Union Act*, R.S.S. 1978, c. T-17, that enact-

Les affidavits des intimés traitent de ce qui serait arrivé s'il y avait eu non pas un lock-out par l'employeur, mais simplement une grève partielle ou une série de grèves tournantes par les employés. On soutient que l'industrie aurait pu fonctionner alors dans une proportion de 85 pour 100 de son rendement normal et que la collecte du lait auprès des producteurs aurait été effectuée.

On fait valoir que le caractère approprié de toute restriction du droit de grève doit être évalué en fonction des effets, non pas du lock-out décrété par l'employeur, mais du projet de grève partielle. Toutefois, cet argument ne tient pas compte du fait que la législature faisait face à la réalité d'un lock-out total. Pour les motifs donnés antérieurement, la législature était justifiée, dans ces circonstances, de demander aux parties de soumettre leurs divergences à l'arbitrage exécutoire et d'ordonner leur retour au travail. De plus, cet argument des intimés laisse supposer implicitement que le droit de grève n'a aucun rapport avec la capacité de l'employeur de lock-outer ses employés. Pour décider du bien-fondé de cette hypothèse, il faut examiner la manière dont la liberté constitutionnelle de faire la grève interagit avec la réglementation législative des relations du travail.

Dans les motifs que j'ai rédigés dans le *Renvoi relatif aux relations de travail en Alberta*, j'ai indiqué qu'il peut y avoir lieu, dans l'examen de questions constitutionnelles qui ont trait à la grève, de tenir compte de la législation très détaillée en matière de relations de travail qui a été mise au point au cours de plusieurs décennies. Dans le *Renvoi relatif aux relations de travail en Alberta*, la question était non pas de savoir si des aspects particuliers de cet ensemble législatif normal étaient inconstitutionnels, mais plutôt de savoir quand et dans quelles circonstances ce paradigme législatif pouvait être écarté entièrement dans des secteurs donnés et remplacé par un autre mécanisme. La présente cause a été plaidée d'une manière semblable. Il ne siérait guère que les tribunaux, en abordant cette question, s'aventurent dans une évaluation de la constitutionnalité du paradigme normal des relations de travail qui n'a pas été attaqué directement. Bref, tant que *The Trade Union Act*, R.S.S. 1978, chap. T-17, n'aura

ment, with its various restrictions on the employees' ability to strike, is presumptively valid.

Under *The Trade Union Act*, as under similar legislation in the other Canadian jurisdictions, the statutory right of employees to strike is subject to a countervailing statutory right of employers to lock out their employees, as long as certain conditions are fulfilled. *The Trade Union Act*, s. 34 provides:

> **34.**—(1) Notwithstanding anything contained in any collective bargaining agreement heretofore entered into or, except as otherwise specifically provided therein, hereafter entered into, where either party to such agreement gives or has given notice in writing pursuant to subsection (4) of section 33 to negotiate a revision of the agreement, the employees in respect of whom the agreement applies and the employer of such employees may, after this section comes into force and after the expiry of the term of operation provided in the agreement, commence to strike or commence a lock-out, as the case may require. [Emphasis added.]

The underlying premise of industrial relations reflected in *The Trade Union Act* is that the threat of a strike or lock-out with its potentially disastrous loss of income to employee and employer alike will motivate the parties to reach a consensual solution either before a work stoppage occurs or within a reasonable time thereafter. Whether or not the legislature has fairly or evenly balanced the relative bargaining power of the parties is not the subject of the present appeal. It suffices to note that a particular balance of power is reflected in the rights and obligations delineated in *The Trade Union Act*, and that employer lock-outs are permitted in the factual circumstances of this case. Since, under the unchallenged general labour law of the Province, the employer is entitled to lock out its employees in circumstances when employees are entitled to strike, it follows that the deleterious effects of permitting a strike must be taken to include the effects which flow from permitting an employer lock-out. In the present case, the effect was a virtually total closure of milk processing facilities in Saskatchewan.

pas été attaquée directement, cette loi, avec les diverses restrictions qu'elle impose à la capacité des salariés de faire la grève, doit être présumée valide.

Suivant *The Trade Union Act* et les lois analogues des autres ressorts canadiens, le droit de grève reconnu aux salariés par la loi est assujetti au droit compensatoire des employeurs, également reconnu par la loi, de lock-outer leurs employés pourvu que soient remplies certaines conditions. L'article 34 de *The Trade Union Act* est ainsi conçu:

> [TRADUCTION] **34.**—(1) Nonobstant ce que peut prévoir toute convention collective intervenue avant ou, sauf disposition contraire de ladite convention, après, l'entrée en vigueur de la présente loi, lorsque l'une ou l'autre partie à la convention donne ou a donné, conformément au paragraphe 33(4), des avis écrits de son intention de négocier la révision de la convention, les employés visés par la convention et leur employeur peuvent, après l'entrée en vigueur de la présente disposition et après la date d'expiration fixée par la convention, déclencher une grève ou imposer un lock-out, selon le cas. [C'est moi qui souligne.]

Selon la prémisse fondamentale en matière de relations de travail qui se dégage de *The Trade Union Act*, la menace d'une grève ou d'un lock-out, avec la possibilité d'une perte désastreuse de revenus aussi bien pour l'employé que pour l'employeur, motive les parties à en venir à un consensus soit avant qu'il n'y ait arrêt de travail, soit dans un délai raisonnable après un tel arrêt. Il ne s'agit pas en l'espèce de savoir si le législateur a établi un équilibre juste ou égal entre les pouvoirs de négociation relatifs des parties. Il suffit de faire remarquer que les droits et obligations énoncés dans *The Trade Union Act* reflètent un certain équilibre des pouvoirs et que, compte tenu des faits de la présente affaire, il est loisible aux employeurs d'imposer des lock-out. Puisque le droit général du travail en vigueur dans la province, qui est d'ailleurs incontesté, autorise un employeur à lock-outer ses employés dans des cas où ces derniers sont en droit de faire la grève, il s'ensuit que l'on doit compter parmi les effets nocifs de l'autorisation d'une grève ceux qui découlent de l'autorisation d'un lock-out par un employeur. En l'espèce, l'effet a été la fermeture quasi totale des installations de traitement du lait en Saskatchewan.

For the above reasons, I am persuaded that the legislative objective of avoiding serious harm to dairy farmers, in light of the unique nature of the dairy industry, constituted a satisfactory justification for the abrogation of the freedom of dairy plant workers to strike. It is therefore unnecessary to consider the second objective advanced by the government, namely the maintenance of continuity of supply to consumers of an essential commodity. In any event, there was no evidence regarding the possibility of importing milk from neighbouring provinces.

The compulsory arbitration scheme enacted in *The Dairy Workers (Maintenance of Operations) Act* meets the criteria of proportionality for such a scheme which I described in the *Alberta Labour Reference*. The Act applies only to the workers in the dairy industry; it provides for a neutral arbitrator; either party may ultimately compel the other to submit to arbitration without interference from the government; and the scope of arbitration has not been legislatively restricted. Accordingly, *The Dairy Workers (Maintenance of Operations) Act* embodies a reasonable limit on freedom of association.

VII

Conclusion

The constitutional questions are answered as follows:

1. Does *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, or any part thereof, infringe or deny freedom of association guaranteed in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes. *The Dairy Workers (Maintenance of Operations) Act* infringes and denies freedom of association as guaranteed in s. 2(*d*) of the *Charter* to the extent it prohibits collective withdrawal of services.

2. If *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, or any part thereof, does infringe or deny free-

Pour les motifs que je viens d'exposer, je suis convaincu que, compte tenu du caractère unique de l'industrie laitière, l'objectif du législateur d'éviter que les producteurs laitiers ne subissent un préjudice grave constitue un motif suffisant pour justifier la suppression de la liberté de grève des travailleurs d'usines laitières. Il n'est donc pas nécessaire d'étudier le second objectif invoqué par le gouvernement, qui est d'assurer aux consommateurs un approvisionnement continu en une denrée essentielle. En tout état de cause, aucune preuve n'a été produite relativement à la possibilité d'importer du lait des provinces voisines.

Le régime d'arbitrage obligatoire établi par *The Dairy Workers (Maintenance of Operations) Act* satisfait aux critères de proportionnalité applicables à un tel régime, que j'ai décrits dans le *Renvoi relatif aux relations de travail en Alberta*. La Loi n'est applicable qu'aux travailleurs de l'industrie laitière; elle prévoit le recours à un arbitre neutre; une partie peut en définitive obliger l'autre à aller en arbitrage sans intervention gouvernementale; de plus, la Loi n'apporte aucune restriction à la portée de l'arbitrage. Par conséquent, la restriction apportée à la liberté d'association par *The Dairy Workers (Maintenance of Operations) Act* est raisonnable.

VII

Conclusion

Les questions constitutionnelles reçoivent les réponses suivantes:

1. *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, chap. D-1.1, ou une partie quelconque de cette loi, constitue-t-elle une violation ou une négation de la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Réponse: Oui. *The Dairy Workers (Maintenance of Operations) Act* porte atteinte à la liberté d'association garantie par l'al. 2*d*) de la *Charte* dans la mesure où elle interdit la cessation collective de la prestation de services.

2. Si *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, chap. D-1.1, ou une partie quelconque de cette loi, consti-

dom of association guaranteed in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*, is the Act, or such part, justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: Yes. The Act is justified by s. 1 of the *Charter* and is therefore not inconsistent with the *Constitution Act, 1982*.

The appeal should be allowed without costs.

The judgment of Beetz, Le Dain and La Forest JJ. was delivered by

LE DAIN J.—For the reasons I expressed in the *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, I am of the opinion that the guarantee of freedom of association in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* does not include a guarantee of the right to bargain collectively and the right to strike. I would accordingly allow the appeal and answer the constitutional questions in the manner proposed by McIntyre J.

The following are the reasons delivered by

MCINTYRE J.—I have read the reasons for judgment prepared in this appeal by the Chief Justice and those prepared by Wilson J. The Chief Justice has set out the facts, the legislative provisions involved, the issues which arise in the case and adequate summaries of the judgments in the courts below. With all due respect for the views of my colleagues, I have reached different conclusions.

For the reasons which I gave in the *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (judgment delivered concurrently), I have reached the conclusion that the *Canadian Charter of Rights and Freedoms* does not give constitutional protection to a right to strike. I would therefore allow the appeal and it is,

tue une violation ou une négation de la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés*, la Loi, ou cette partie de la Loi, est-elle justifiée en vertu de l'article premier de la *Charte canadienne des droits et libertés* et, par conséquent, compatible avec la *Loi constitutionnelle de 1982*?

Réponse: Oui. La Loi est justifiée en vertu de l'article premier de la *Charte* et est, par conséquent, compatible avec la *Loi constitutionnelle de 1982*.

Le pourvoi est accueilli sans adjudication de dépens.

Version française du jugement des juges Beetz, Le Dain et La Forest rendu par

LE JUGE LE DAIN—Pour les motifs que j'ai exprimés dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, je suis d'avis que la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés* n'inclut aucune garantie des droits de négocier collectivement et de faire la grève. Par conséquent, je suis d'avis d'accueillir le pourvoi et de répondre aux questions constitutionnelles de la manière proposée par le juge McIntyre.

Version française des motifs rendus par

LE JUGE MCINTYRE—J'ai lu les motifs de jugement rédigés en l'espèce par le Juge en chef et par le juge Wilson respectivement. Le Juge en chef a énoncé les faits, les dispositions législatives en cause, les questions soulevées en l'espèce et a résumé de manière adéquate les jugements des tribunaux d'instance inférieure. Malgré tout le respect que j'ai pour le point de vue de mes collègues, je suis arrivé à des conclusions différentes.

Pour les motifs que j'ai donnés dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (dont les motifs sont prononcés en même temps que le présent arrêt), je suis arrivé à la conclusion que la *Charte canadienne des droits et libertés* n'accorde pas une protection constitutionnelle au droit de faire la

of course, unnecessary for me to consider s. 1 of the *Charter*.

I would answer the constitutional questions, as follows:

1. Does *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, or any part thereof, infringe or deny freedom of association guaranteed in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: *The Dairy Workers (Maintenance of Operations) Act* does not violate freedom of association guaranteed in s. 2(*d*) of the *Charter* because freedom of association does not embody the right to strike.

2. If *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, or any part thereof, does infringe or deny freedom of association guaranteed in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*, is the Act, or such part, justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: Given my answer to the first question, I need not consider this second question.

The following are the reasons delivered by

WILSON J. (dissenting)—I agree with Chief Justice Dickson for the reasons given by him that *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1, violates s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*. However, I cannot agree that this legislation is saved by s. 1 of the *Charter*.

The Government of Saskatchewan advanced two objectives to justify the Act. First, it submitted that because of the peculiar nature of the dairy industry a shut-down of processing facilities would have serious adverse consequences for the industry, especially for dairy farmers. Second, the govern-

grève. Je suis par conséquent d'avis d'accueillir le pourvoi et, évidemment, il ne m'est pas nécessaire d'examiner l'article premier de la *Charte*.

Je suis d'avis de répondre aux questions constitutionnelles de la manière suivante:

1. *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, chap. D-1.1, ou une partie quelconque de cette loi, constitue-t-elle une violation ou une négation de la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Réponse: *The Dairy Workers (Maintenance of Operations) Act* ne viole pas la liberté d'association garantie par l'al. 2*d*) de la *Charte* parce que la liberté d'association ne comprend pas le droit de faire la grève.

2. Si *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, chap. D-1.1, ou une partie quelconque de cette loi, constitue une violation ou une négation de la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés*, la Loi, ou cette partie de la Loi, est-elle justifiée en vertu de l'article premier de la *Charte canadienne des droits et libertés* et, par conséquent, compatible avec la *Loi constitutionnelle de 1982*?

Réponse: Compte tenu de ma réponse à la première question, je n'ai pas à répondre à cette seconde question.

Version française des motifs rendus par

LE JUGE WILSON (dissidente)—Pour les mêmes raisons que donne le juge en chef Dickson, je suis d'accord avec lui pour dire que *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, chap. D-1.1, viole l'al. 2*d*) de la *Charte canadienne des droits et libertés*. Toutefois, je ne puis convenir que l'article premier de la *Charte* permet de sauvegarder cette loi.

Le gouvernement de la Saskatchewan a énoncé deux objectifs pour justifier la Loi. En premier lieu, on dit qu'en raison de la nature particulière de l'industrie laitière, la fermeture des installations de traitement nuirait gravement à l'industrie et surtout aux producteurs laitiers. En deuxième lieu,

ment submitted that milk is an essential commodity and that the continuity of supply to consumers must be preserved for health reasons.

The first objective advanced by the government is the prevention of economic harm to dairy farmers. In the *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (judgment released concurrently herewith), Dickson C.J. concluded that the fact that employees were providing "essential services" justified the substitution of an adequate scheme of compulsory arbitration for the freedom to strike. He adopted the definition of an "essential service" reflected in decisions of the Freedom of Association Committee of the International Labour Office (p. 375). These decisions have consistently defined an essential service as a service "whose interruption would endanger the life, personal safety or health of the whole or part of the population" (*Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O.*, 3rd ed. Geneva, International Labour Office, 1985). The Chief Justice appears now to be engrafting a substantial extension on to that definition. He is sanctioning in this case the abrogation of the freedom to strike when the economic interests of a particular group are threatened. The implications of this for the collective bargaining process are extremely far-reaching since some measure of damage to the economic interests of the parties and the public is an inevitable concomitant every work stoppage. Indeed, the effectiveness of this negotiating tool depends upon it.

Considerable discussion has taken place in Canada and elsewhere as to the circumstances in which it is appropriate for government to interfere with the standard industrial relations paradigm by prohibiting strike action. This paradigm which prevails in statutes in all Canadian jurisdictions is based on a belief in free negotiation between buyers and sellers of labour and in the strike as the indispensable catalyst that makes the system work. Free negotiation is valued because it enables workers to participate in establishing their own working

le gouvernement fait valoir que le lait est une denrée essentielle et que, pour des raisons de santé, il faut assurer aux consommateurs un approvisionnement continu.

Le premier objectif énoncé par le gouvernement est d'empêcher que les producteurs laitiers ne subissent un préjudice financier. Dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (dont les motifs sont prononcés en même temps que le présent arrêt), le juge en chef Dickson a conclu que le fait que des employés assuraient des «services essentiels» justifiait la substitution d'un régime adéquat d'arbitrage obligatoire à la liberté de grève. Il a adopté la définition d'un «service essentiel» qui ressort des décisions du Comité de la liberté syndicale du Bureau international du Travail (p. 375). Ces décisions définissent de manière uniforme un service essentiel comme un service «dont l'interruption pourrait mettre en péril la vie, la sécurité ou la santé de la personne dans une partie ou dans la totalité de la population» (*La liberté syndicale: Recueil de décisions et de principes du Comité de la liberté syndicale du Conseil d'administration du B.I.T.*, 3e éd., Genève, Bureau international du Travail, 1985). Le Juge en chef paraît maintenant élargir sensiblement cette définition. Il approuve en l'espèce l'abrogation de la liberté de grève lorsque les intérêts économiques d'un groupe particulier sont menacés. Cela a, sur le processus de négociation collective, des répercussions qui vont extrêmement loin étant donné que tout arrêt de travail cause inévitablement un certain préjudice aux intérêts économiques des parties et du public. En fait, l'efficacité de cet outil de négociation en dépend.

De nombreuses discussions ont porté, au Canada et ailleurs, sur les circonstances dans lesquelles il convient que le gouvernement modifie le paradigme normal des relations de travail en interdisant la grève. Ce paradigme qui prévaut dans les lois de tous les ressorts canadiens est fondé sur la croyance dans la liberté de négociation entre les employés et les employeurs et dans la grève comme catalyseur indispensable qui permet au système de fonctionner. La libre négociation est prisée parce qu'elle permet aux travailleurs de participer à

conditions. It is an exercise in self-government and enhances the dignity of the worker as a person.

Past discussion as to when government should intervene to prohibit strikes has always focussed on the question of when it is best for government to intervene not on the question of when it is constitutional for government to do so. Section 2(*d*) of the *Charter* now gives constitutional protection to freedom of association and I agree with the Chief Justice that freedom of association in the context of industrial relations embraces the freedom to bargain collectively and that the strike, as an essential feature of effective collective bargaining, is also encompassed by that freedom. I cannot conclude, however, that the prevention of economic harm to a particular sector is *per se* a government objective of sufficient importance to justify the abrogation of the freedom guaranteed by s. 2(*d*).

I do not doubt that economic regulation is an important government function in today's society but, if it is to be done at the expense of our fundamental freedoms, then it must, in my view, be done in response to a serious threat to the well-being of the body politic or a substantial segment of it. The Chief Justice found this to be the case in *PSAC v. Canada*, [1987] 1 S.C.R. 424 (judgment released concurrently herewith), where the government's avowed objective was to fight inflation. Inflation is an economic problem that affects all the citizens of Canada and can, if uncontrolled, spark a national crisis or emergency: see *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373. The evidence adduced in this case, in my view, falls far short of establishing economic harm to the dairy workers and the public which is in that category.

Between the two extremes of those who think that government should intervene in any labour dispute which harms the public or a segment of it and those firmly committed to the proposition that

l'établissement de leurs propres conditions de travail. Il s'agit d'un exercice d'autonomie qui rehausse la dignité du travailleur en tant que personne.

Les discussions antérieures portant sur le moment où le gouvernement devrait intervenir pour interdire les grèves ont toujours été axées sur la question de savoir quand valait-il mieux que le gouvernement intervienne et non sur la question de savoir quand le gouvernement pouvait constitutionnellement le faire. L'alinéa 2*d*) de la *Charte* accorde maintenant une protection constitutionnelle à la liberté d'association et je suis d'accord avec le Juge en chef pour dire que la liberté d'association dans le contexte des relations de travail comprend la liberté de négocier collectivement et que la grève, à titre de caractéristique essentielle d'une négociation collective efficace, est également englobée par cette liberté. Toutefois, je ne puis conclure que la prévention d'un préjudice économique pour un secteur particulier constitue en soi un objectif gouvernemental suffisamment important pour justifier l'abrogation de la liberté garantie par l'al. 2*d*).

Je ne doute pas que la réglementation en matière économique est une importante fonction gouvernementale dans la société d'aujourd'hui, mais, si elle doit être accomplie aux dépens de nos libertés fondamentales, elle doit alors, à mon avis, faire suite à une menace grave au bien-être de l'État ou d'une partie importante de celui-ci. Le Juge en chef a conclu que c'était le cas dans l'arrêt *AFPC c. Canada*, [1987] 1 R.C.S. 424 (rendu en même temps que le présent arrêt), où l'objectif avoué du gouvernement était de combattre l'inflation. L'inflation est un problème économique qui touche tous les citoyens du Canada et qui peut, s'il n'est pas contrôlé, déclencher une crise ou un état d'urgence nationale: voir *Renvoi: Loi anti-inflation*, [1976] 2 R.C.S. 373. À mon avis, la preuve soumise en l'espèce n'établit pas que les producteurs laitiers et le public subiront un préjudice économique qui s'inscrit dans cette catégorie.

Entre les deux extrêmes que représentent, d'une part, ceux qui pensent que le gouvernement devrait intervenir dans tout conflit de travail qui porte préjudice au public ou à une partie de celui-ci et,

any government intrusion on free collective bargaining is an intolerable violation of the fundamental human rights of the parties to the dispute (see the *Woods Task Force Report on Canadian Industrial Relations* (1968), at p. 130) are those who reluctantly acknowledge the right of government to intervene in work stoppages which pose a threat to life or health or result in the withdrawal of essential public services. Legislatures in Canada have frequently intervened to prevent strikes in "essential services". Essential services initially comprised such things as public utilities, transportation and communications but the legislative definitions have gradually expanded to cover firefighters and police and more recently the media, teachers and some classes of public employees.

What conclusion are we to draw from this progressive expansion of the concept of "essential services"? Is this the route through which increasing government intervention in labour disputes is to be justified, namely that more and more goods and services are to be designated "essential"? Or is there some other way in which the degree to which the public is affected by a particular labour dispute can be measured? Professor Arthurs says the public interest in a dispute cannot be measured in purely quantitative terms; it may affect the way of life of those affected by it and have qualitative aspects as well: H. W. Arthurs: "Public Interest Labor Disputes in Canada: A Legislative Perspective" (1967), 17 *Buffalo L. Rev.* 39, at p. 48. Nor can the degree of public interest be inferred from the fact that government has in fact intervened because each government intervention would then be used as a precedent to justify further intervention resulting in "an amoeba-like tendency of public interest disputes to reproduce themselves" (p. 52). Professor Arthurs provides no answer to this difficult question; he appears to accept government regulation of labour management relations as politically inevitable: H. W. Arthurs: "Free Collective Bargaining in a Regulated Society" published in *The Direction of Labour Policy in*

d'autre part, ceux qui sont fermement d'avis que toute ingérence gouvernementale en matière de libre négociation collective constitue une violation intolérable des droits fondamentaux que possèdent, en tant que personnes, les parties au litige (voir le *Rapport de l'Équipe spécialisée en relations de travail* (1968), le rapport Woods aux pp. 143 et 144), il y a ceux qui reconnaissent à contrecœur que le gouvernement a le droit d'intervenir dans le cas d'arrêts de travail qui constituent une menace à la vie ou à la santé ou qui entraînent la cessation de la prestation de services publics essentiels. Les assemblées législatives au Canada sont souvent intervenues pour empêcher les grèves dans les «services essentiels». Au départ, les services essentiels comprenaient des choses comme les services publics, les transports et les communications, mais les définitions dans les lois ont progressivement évolué de manière à viser les pompiers et la police et plus récemment les médias, les enseignants et certaines catégories de fonctionnaires.

Quelle conclusion devons-nous tirer de cet élargissement progressif du concept des «services essentiels»? Est-ce là la manière de justifier une intervention gouvernementale accrue dans les conflits de travail, savoir que de plus en plus de biens et services doivent être désignés comme étant «essentiels»? Y a-t-il plutôt une autre manière de mesurer l'effet d'un conflit de travail particulier sur le public? Le professeur Arthurs affirme que l'intérêt public dans un conflit ne peut être mesuré de manière purement quantitative; il peut avoir un effet sur le mode de vie de ceux qu'il touche et comporter également des aspects qualitatifs: H. W. Arthurs: «Public Interest Labor Disputes in Canada: A Legislative Perspective» (1967), 17 *Buffalo L. Rev.* 39, à la p. 48. Le degré d'intérêt public ne peut pas non plus se déduire du fait que le gouvernement est effectivement intervenu parce que chaque intervention gouvernementale serait alors utilisée comme un précédent pour justifier une autre intervention, ce qui entraînerait une [TRADUCTION] «tendance des conflits d'intérêt public à se multiplier» (p. 52). Le professeur Arthurs ne répond pas à cette question épineuse; il semble accepter que la réglementation des relations de travail par le gouvernement est politiquement inévitable: H. W. Arthurs: «Free Collective

Canada (McGill University Industrial Relations Centre, 1977), at p. 110. More and more inroads will be made into the concept of free collective bargaining, he says, and "we will stop paying lip service to the pristine ideal of labour and management autonomy" and "explicitly acknowledge the pre-eminence of public over private values in the industrial sector" (p. 112).

The difficulty with this critique, it seems to me, is that it fails to recognize that public and private interests are not being pitted against each other. What are being pitted against each other are two different kinds of public interest, the public interest in the continuation of services and the public interest in the freedom of workers to associate and act collectively. Whether Professor Arthur's gloomy prediction on the fate of collective bargaining in Canada absent the *Charter* is sound or not, the public interest in freedom of association is now a constitutionally protected value. The question, however, remains—and s. 1 of the *Charter* demands an answer—when is the public interest in the continuation of services so detrimentally affected by the collective bargaining process that its suspension is reasonable and justified in a free and democratic society? I say the continuation of services advisedly because it has not, in my opinion, been established that the provision of milk is an "essential" service in the same sense as hospitals, fire-fighters, police and the like are providing essential services. Certainly it is not an essential service within the definition adopted by the Chief Justice from the decisions of the Freedom of Association Committee of the I.L.O. I believe, therefore, that the answer is not to be found in the designation of more and more services as "essential".

The onus is, of course, on government to justify the suspension of the collective bargaining process under s. 1. As was noted in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 138:

Bargaining in a Regulated Society» publié dans *The Direction of Labour Policy in Canada* (McGill University Industrial Relations Centre, 1977), à la p. 110. Il dit qu'on empiétera de plus en plus sur le concept de la libre négociation collective et [TRADUCTION] «nous cesserons de rendre hommage pour la forme à l'idéal parfait de l'autonomie des salariés et du patronat» et [TRADUCTION] «nous reconnaîtrons explicitement la prééminence des valeurs publiques sur les valeurs privées dans le secteur industriel» (p. 112).

Il me semble que le problème que soulève cette critique est qu'elle ne reconnaît pas que les intérêts publics et privés ne sont pas en opposition. Ce sont deux genres différents d'intérêts publics qui sont opposés l'un à l'autre: l'intérêt public à ce que les services essentiels soient maintenus et l'intérêt public à ce que les travailleurs soient libres de s'associer et d'agir collectivement. Peu importe que soit fondée ou non la sombre prédiction du professeur Arthurs quant au sort de la négociation collective au Canada abstraction faite de la *Charte*, l'intérêt public à ce qu'il y ait liberté d'association constitue maintenant une valeur garantie par la Constitution. Toutefois, comme l'exige l'article premier de la *Charte*, il reste à répondre à la question de savoir quand le processus de négociation collective cause-t-il à l'intérêt public à ce que des services soient maintenus un préjudice suffisant pour que sa suspension soit raisonnable et justifiée dans le cadre d'une société libre et démocratique? C'est à dessein que j'ai parlé du maintien de services parce que, à mon avis, on n'a pas établi que l'approvisionnement en lait constitue un «service essentiel» dans le même sens que les hôpitaux, les pompiers, la police, et ainsi de suite, assurent des services essentiels. Il ne s'agit certainement pas d'un service essentiel au sens de la définition adoptée par le Juge en chef en s'inspirant des décisions du Comité de la liberté syndicale du B.I.T. Je suis donc d'avis que la réponse ne se trouve pas dans la désignation d'un nombre accru de services comme étant «essentiels».

Évidemment, il incombe au gouvernement de justifier la suspension du processus de négociation collective en vertu de l'article premier. Comme il a été souligné dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, à la p. 138:

Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

The government called no evidence. The only evidence before the Court was introduced by the respondents. It consisted of affidavits sworn by union representatives and some newspaper clippings. Bayda C.J.S. of the Saskatchewan Court of Appeal held the newspaper clippings inadmissible. As to the affidavits he said:

> ... the affidavits taken in their entirety say virtually nothing about the circumstances of the two companies, or of the producers of the milk, or of the consumers, all of whom presumably would be detrimentally affected if no limit were imposed.

(*Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609, at p. 628.)

He concluded that there was not enough material before the Court to enable it to engage in the balancing process required to arrive at a decision on the reasonableness or otherwise of the limit.

Cameron J.A. agreed with Bayda C.J.S. that the government had failed to discharge its evidentiary burden under s. 1 of the *Charter*. He found that it had introduced no evidence to establish that the provision of milk was an "essential" service, that it would necessarily be unavailable to Saskatchewan residents if the work stoppage occurred, or that the "continued viability of the dairy industry in the province" was at stake.

On the subject of the newspaper clippings Cameron J.A. had this to say (at p. 649):

> This information was gleaned from the newspaper clippings which, as might be expected, contained a rich variety of comment and opinion, some of it conflicting, much of it colourful, and all of it devoted to the public advocacy of one side or another during the height of the conflict. One "spokesman" was reported to have said that, in the event of a work stoppage, milk "will flood in

Lorsqu'une preuve est nécessaire pour établir les éléments constitutifs d'une analyse en vertu de l'article premier, ce qui est généralement le cas, elle doit être forte et persuasive et faire ressortir nettement à la cour les conséquences d'une décision d'imposer ou de ne pas imposer la restriction.

Le gouvernement n'a présenté aucun élément de preuve. La seule preuve dont dispose la Cour a été présentée, par les intimés. Elle est constituée d'affidavits de représentants syndicaux et de certaines coupures de journaux. Le juge en chef Bayda de la Cour d'appel de la Saskatchewan a jugé inadmissibles les coupures de journaux et a affirmé ceci au sujet des affidavits:

> [TRADUCTION] ... les affidavits dans l'ensemble n'apportent presque aucune précision concernant la situation des deux sociétés, des producteurs laitiers ou encore des consommateurs qui subiraient tous probablement un préjudice si aucune restriction n'était imposée.

(*Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609, à la p. 628.)

Il a conclu que la cour n'avait pas suffisamment de données pour être en mesure de procéder à l'évaluation nécessaire pour aboutir à une décision sur le caractère raisonnable ou non de la restriction.

Le juge Cameron a convenu avec le juge en chef Bayda que le gouvernement ne s'était pas acquitté de la charge de la preuve qui lui incombait en vertu de l'article premier de la *Charte*. Il a conclu qu'il n'avait présenté aucun élément de preuve démontrant que l'approvisionnement en lait était un service «essentiel», que les résidents de la Saskatchewan en seraient nécessairement privés s'il survenait un arrêt de travail ou que la [TRADUCTION] «viabilité même de l'industrie laitière dans la province» était en jeu.

Voici ce que le juge Cameron a dit au sujet des coupures de journaux (à la p. 649):

> [TRADUCTION] Ces renseignements ont été tirés de coupures de journaux qui, comme on pourrait s'y attendre, contiennent un grand nombre d'observations et d'opinions dont certaines sont contradictoires et beaucoup sont imagées, et qui ont toutes été consacrées à la défense du public d'un côté ou de l'autre alors que le conflit était à son apogée. On rapporte qu'un «porte-

from Manitoba and Alberta as it always has"; others were quoted as having said producers would have to "dump their milk" by the thousands of gallons. Management representatives accused the unions of taking "a completely unrealistic position" in view of the 33 million dollar indebtedness of the companies, while the unions described the negotiations as a "farce, mickey mouse", especially since the companies were enjoying "windfall profits". All of this is the common fare of newspapers, and, while it may serve to permit the public, for its purposes, to make reasonably informed assessments of current events, it cannot, with respect, form the basis for judicial decision-making.

parole» a affirmé que s'il survient un arrêt de travail, le lait «coulera en provenance du Manitoba et de l'Alberta comme cela a toujours été le cas»; d'autres auraient dit que les producteurs seraient obligés de «jeter leur lait» par milliers de gallons. Les représentants de la direction ont accusé les syndicats d'adopter «une position complètement irréaliste» compte tenu de la dette de 33 millions de dollars des compagnies, alors que les syndicats ont décrit les négociations comme étant «une farce, une fumisterie», vu particulièrement que les sociétés réalisaient des «profits tombés du ciel». Cela est fréquent dans les journaux et, bien que cela puisse permettre au public, pour ses fins, d'évaluer d'une manière raisonnablement éclairée les événements qui se produisent, cela ne peut, avec égards, constituer le fondement d'une décision judiciaire.

While I doubt the soundness of Bayda C.J.S.'s finding that the newspaper clippings were wholly inadmissible, I certainly agree with Cameron J.A. as to their probative value. Indeed, it is because of their inherent frailties as hearsay evidence that newspaper clippings are not admissible in civil or criminal proceedings in England or in this country. I recognize, however, that a greater degree of latitude is appropriate for the purpose of establishing legislative facts in constitutional cases: see *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714. But the Court was quick to point out in that case that it was speaking only of "material not inherently unreliable" (p. 723). With respect, I think that is precisely what we have here and, even if some form of estoppel operates against the respondents because they were the ones who introduced the newspaper clippings into evidence, I do not believe that that can affect their weight as opposed to their admissibility.

Bien que je doute de la justesse de la conclusion du juge en chef Bayda portant que les coupures de journaux étaient entièrement inadmissibles, je partage certainement l'avis du juge Cameron en ce qui concerne leur valeur probante. En fait, c'est à cause de leur faiblesse inhérente à titre de preuve par ouï-dire que les coupures de journaux ne sont pas admissibles dans les instances civiles ou criminelles en Angleterre ou ici. Toutefois, je reconnais qu'une plus grande latitude est appropriée pour établir les faits législatifs dans les affaires constitutionnelles: voir *Re Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714. Toutefois la Cour s'est empressée de souligner dans cet arrêt qu'elle ne parlait que des documents «qui ne sont pas douteux en soi» (p. 723). Avec égards, je crois que c'est précisément le cas en l'espèce et, même si une certaine forme d'irrecevabilité joue contre les intimés parce que ce sont eux qui ont soumis en preuve les coupures de journaux, je ne crois pas que cela puisse avoir un effet sur leur valeur probante par rapport à leur admissibilité.

Certainly, the newspaper clippings here do not meet Wigmore's test for an exception to the hearsay rule, namely 1) unavailability of the witnesses themselves to testify under oath and be cross-examined and 2) probable trustworthiness of their statements. This test was expressly adopted by this Court in *Ares v. Venner*, [1970] S.C.R. 608, at p. 620. The individuals whose statements are quoted in the clippings could easily have been called to the stand to give their evidence and be cross-examined on it. Instead, a weaker form of proof, newspaper

Il est bien évident que les coupures de journaux en l'espèce ne satisfont pas au critère de Wigmore pour qu'on puisse faire exception à la règle du ouï-dire, savoir 1) la non-disponibilité des témoins eux-mêmes pour déposer sous serment et être contre-interrogés et 2) la véracité probable de leurs déclarations. Ce critère a été expressément adopté par cette Cour dans l'arrêt *Ares c. Venner*, [1970] R.C.S. 608, à la p. 620. Les personnes dont les déclarations sont citées dans les coupures auraient facilement pu être appelées à témoigner et à être

clippings, was substituted. The Chief Justice quotes the President of the Saskatchewan Milk Producers' Association for the fact that huge quantities of milk would have to be dumped if the work stoppage lasted more than three days. The figure of a $250,000 per day loss to dairy farmers, which the Chief Justice accepts, comes from one Gunnar Pedersen, General Manager of Regina's Dairy Producers Co-operative Ltd. I do not believe that the statements of these and other interviewees meet Wigmore's test of trustworthiness. They were obviously using the media to try to persuade the public and the legislature of the justness of their cause. Their statements are completely self-serving. They are, moreover, offset by the equally self-serving excerpts from the interviewees on the other side of the debate who denied that dumping on that scale would take place or that the supply of milk to residents would be halted. According to them milk would simply be imported from the adjoining provinces as it had been in the past.

As Lord Reid said in *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273, a contempt of court case, at p. 300:

> Responsible "mass media" will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow, and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly.

I think Cameron J.A. summed up very neatly the probative value of the newspaper clippings in the passage already quoted from his reasons.

Given, however, that there is a point at which government interference with the collective bargaining process is justified, how does the Court determine under s. 1 of the *Charter* when that point has been reached? It seems to me that the government must satisfy the court that as a mini-

contre-interrogées à ce sujet. On a plutôt remplacé leurs témoignages par une forme de preuve plus faible, savoir les coupures de journaux. Le Juge en chef cite le président de la Saskatchewan Milk Producers' Association quant au fait que d'énormes quantités de lait devraient être jetées si l'arrêt de travail durait plus de trois jours. Le chiffre de 250 000 $ par jour à titre de pertes que subiraient les producteurs laitiers, que le Juge en chef accepte, est donné par un nommé Gunnar Pedersen, directeur général de la Dairy Producers Co-operative Ltd. de Regina. Je ne crois pas que leurs déclarations et celles d'autres personnes interviewées satisfont au critère de véracité établi par Wigmore. De toute évidence, elles se sont servies des médias pour tenter de persuader le public et l'assemblée législative de la justesse de leur cause. Leurs déclarations ne servent que leurs propres fins. De plus, elles sont contrebalancées par des extraits qui servent également les propres fins des personnes interviewées pour la partie adverse qui ont nié qu'il y aurait un déversement de cette importance ou qu'on cesserait d'approvisionner en lait les résidents. Selon eux, le lait serait simplement importé des provinces voisines comme cela s'était fait par le passé.

Comme lord Reid l'a affirmé dans *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273, une affaire d'outrage au tribunal, à la p. 300:

> [TRADUCTION] Les «masse-médias» responsables feront de leur mieux pour être justes, mais il y en aura qui tenteront d'influencer le public par des mauvais renseignements ou de manière insouciante ou partiale. Si on amène les gens à croire qu'il est facile de découvrir la vérité, il pourrait en résulter un manque de respect envers les voies de droit et, si l'on permet aux masse-médias de porter des jugements, les personnes impopulaires et les causes impopulaires s'en porteront très mal.

Je crois que le juge Cameron a très bien résumé la valeur probante des coupures de journaux dans le passage déjà cité de ses motifs.

Toutefois, étant donné qu'il y a un point où l'ingérence gouvernementale dans le processus de négociation collective est justifiée, comment la Cour détermine-t-elle, en vertu de l'article premier de la *Charte*, à quel moment ce point a été atteint? Selon moi, le gouvernement doit convaincre la cour

mum the damage to the dairy industry as a consequence of the work stoppage would be considerably greater than that which would flow in the ordinary course of things from a work stoppage of reasonable duration. Industry and the public accept a certain amount of damage and inconvenience as the price of maintaining free negotiation in the work place. Such damage and inconvenience cannot therefore constitute the "pressing and substantial concern" which the Court held in *Oakes* was required in order to justify government intervention. Otherwise every work stoppage would give rise to a "pressing and substantial concern" and government intervention would be the rule rather than the exception. There has to be more to it than that.

The Chief Justice suggests that the test should be the extent of the economic harm likely to be suffered by third parties as a result of the work stoppage and he characterizes the dairy farmers as third parties for purposes of the test. I am not convinced that the dairy farmers can properly be considered third parties for this purpose. The respondents were employees of Palm Dairies Ltd. and the Dairy Producers Co-operative Ltd. The former owned two plants; the latter owned nine. The Dairy Producers Co-operative Ltd., as the name suggests, was owned by dairy farmers. I have difficulty in appreciating how the owners of a corporation involved in the strike as a principal can be viewed as innocent third parties for purposes of assessing the harm suffered by such parties. The Chief Justice expresses the view that government can more easily justify intervening to protect third parties under s. 1 than intervening to protect principal parties. This may as a general proposition be correct but why should the government be able to justify more easily the protection of owners of the corporation than the corporation itself? I think the flaw is in characterizing the dairy farmers as third parties.

The Chief Justice further suggests that in assessing the extent of the harm to third parties the relevant questions are how massive the harm is

au moins que le préjudice que subirait l'industrie laitière par suite de l'arrêt de travail serait sensiblement plus grave que celui qui résulterait dans le cours ordinaire d'un arrêt de travail d'une durée raisonnable. L'industrie et le public acceptent un certain niveau de préjudices et d'inconvénients comme prix à payer pour conserver la liberté de négociation dans le milieu de travail. Par conséquent, ces préjudices et inconvénients ne peuvent constituer la «préoccupation urgente et réelle» qui, selon ce que la Cour a jugé dans l'arrêt *Oakes*, est nécessaire pour justifier l'intervention du gouvernement. Autrement, tout arrêt de travail engendrerait une «préoccupation urgente et réelle» et l'intervention gouvernementale serait la règle plutôt que l'exception. Il doit y avoir plus que cela.

Le Juge en chef laisse entendre que le critère applicable devrait être l'étendue du préjudice économique que subiront vraisemblablement les tiers par suite de l'arrêt de travail et il qualifie les producteurs laitiers de tiers pour les fins de ce critère. Je ne suis pas convaincue que l'on puisse à bon droit considérer les producteurs laitiers comme des tiers à cette fin. Les intimés étaient des employés de Palm Dairies Ltd. et de la Dairy Producers Co-operative Ltd. La première possédait deux usines et l'autre, neuf. La Dairy Producers Co-operative Ltd., comme son nom l'indique, était la propriété de producteurs laitiers. Il m'est difficile de voir comment les propriétaires d'une société mêlée à la grève comme partie principale peuvent être considérés comme des tiers innocents pour ce qui est d'évaluer le préjudice subi par ces parties. Le Juge en chef se dit d'avis qu'il est plus facile pour le gouvernement de justifier une intervention destinée à protéger les tiers en vertu de l'article premier qu'une intervention visant à protéger les parties principales. Cela peut être exact comme proposition générale, mais pourquoi le gouvernement devrait-il être en mesure de justifier plus facilement la protection des propriétaires de la société plutôt que celle de la société elle-même? J'estime que le problème réside dans la qualification des producteurs laitiers comme étant des tiers.

De plus, le Juge en chef laisse entendre que, dans l'évaluation de l'étendue du préjudice subi par les tiers, les questions pertinentes consistent à

and how focussed in its intensity. Those questions can, in my opinion, only be answered on the basis of evidence adduced in the case. They cannot be answered in the abstract. But, in my view, they become relevant only when the primary threshold of damage which is the inevitable concomitant of the work stoppage has been crossed. The government must stay its hand in order to give the process an opportunity to work. It must, in other words, distinguish between the permissible degree of harm which is the price of the system and the impermissible degree when that price becomes inordinately high.

As Bayda C.J.S. pointed out, we simply do not have a basis of solid fact in this case on which to make a judgment as to whether the government's intervention was reasonable or not. The government has simply failed to discharge its onus under s. 1 and the infringement of the respondents' freedom of association under s. 2(*d*) of the *Charter* has accordingly not been demonstrably justified.

Even, however, if I am wrong in that and the government has established that its objective in protecting the economic interests of dairy farmers was sufficiently compelling to justify overriding the workers' right to strike, the government, in my view, has failed to show that the means employed by it were closely tailored to the objective so as to ensure the least possible infringement of the right. The government, in its legislation, forbade any lock-out or strike action. It provided for compulsory arbitration. The government, in my view, should not automatically respond with a total strike ban and the institution of compulsory arbitration. In some cases, a partial strike ban will achieve the government objective of preventing harm that in the Chief Justice's words is "massive, immediate and focussed" or in my words "would be considerably greater than that which would flow in the ordinary course of things from a work stoppage of reasonable duration". In the complex area of economic harm the tailoring need not be exact but tailoring there must be. There may be cases, of course, where the government in order to prevent

déterminer la gravité du préjudice subi et la mesure dans laquelle ses effets sont concentrés. À mon avis, on ne peut répondre à ces questions qu'en fonction de la preuve produite en l'espèce. Il n'est pas possible d'y répondre dans l'abstrait. J'estime toutefois qu'elles ne deviennent pertinentes qu'une fois franchi le stade primaire du préjudice qui découle inévitablement de l'arrêt de travail. Le gouvernement doit se retenir d'agir afin de donner au processus une chance de fonctionner. En d'autres termes, il doit faire la distinction entre le degré de préjudice acceptable qui est le prix du système à payer et le degré inacceptable qui se présente lorsque ce prix à payer devient excessif.

Comme le juge en chef Bayda l'a souligné, nous n'avons tout simplement pas, en l'espèce, de base factuelle solide qui nous permette de nous prononcer sur la question de savoir si l'intervention du gouvernement était raisonnable ou non. Le gouvernement ne s'est tout simplement pas acquitté de l'obligation que lui impose l'article premier, et n'a donc pas démontré que la violation de la liberté d'association des intimés visée à l'al. 2*d*) de la *Charte* était justifiée.

Toutefois, même à supposer que j'aie tort sur ce point et que le gouvernement a établi que l'objectif qu'il poursuivait en protégeant les intérêts économiques des producteurs laitiers était suffisamment impérieux pour justifier la suppression du droit de grève des travailleurs, j'estime que le gouvernement n'a pas démontré que les moyens auxquels il a eu recours étaient directement adaptés à cet objectif de manière à assurer que l'on porterait le moins possible atteinte à ce droit. Par la loi qu'il a adoptée, le gouvernement a interdit tout lock-out ou toute grève. Il a prescrit l'arbitrage obligatoire. À mon avis, le gouvernement ne devrait pas répondre automatiquement par une interdiction totale de faire grève et par l'imposition de l'arbitrage obligatoire. Dans certains cas, une interdiction partielle de faire grève permettra de réaliser l'objectif du gouvernement d'empêcher que ne soit causé un préjudice qui, pour reprendre les termes du Juge en chef, est «considérable, immédiat et concentré» ou qui, selon mes propres termes, «serait sensiblement plus grave que celui qui résulterait dans le cours ordinaire d'un arrêt de travail

grave economic harm would have to limit the right to strike to a point where it would be rendered ineffective. In such a case, the government could and indeed would have a constitutional duty to institute compulsory arbitration. In this case, the government has not established that it had to institute a total strike ban and compulsory arbitration. The affidavits of the respondents indicate that they felt they would have an effective strike weapon if they were allowed to engage in a series of rotating strikes that would have allowed the industry to continue functioning at 85 per cent of normal capacity. The government has not contended that such a partial strike would have had unacceptable costs to dairy farmers. I do not see why an employer's total lock-out in response to a proposed partial strike should relieve the government of its duty to tailor its legislative response. If it does, the employer has readily at hand the means to escalate the economic harm to third parties so as to warrant a total strike ban in all cases. It seems to me that if the Saskatchewan Government wished to maintain an even hand between employer and employees, it could have tailored its legislative response in this case by instituting a partial ban on both strike and lock-out. This would have attained its objective while at the same time meeting the proportionality test enunciated in *Oakes*.

d'une durée raisonnable.» Dans le domaine complexe du préjudice économique, l'«adaptation» est obligatoire quoiqu'elle n'ait pas à être parfaite. Il va de soi qu'il peut y avoir des cas où, pour prévenir un grave préjudice économique, le gouvernement devrait limiter le droit de grève au point de le rendre inefficace. Le cas échéant, le gouvernement pourrait et, en fait, devrait en vertu de la Constitution imposer l'arbitrage obligatoire. En l'espèce, le gouvernement n'a pas démontré qu'il se devait de prescrire une interdiction totale de grève et l'arbitrage obligatoire. Il ressort des affidavits des intimés que ceux-ci ont considéré qu'ils disposeraient d'une arme efficace s'il leur était permis d'entreprendre une série de grèves tournantes qui permettraient à l'industrie de continuer de fonctionner dans une proportion de 85 pour 100 de son rendement normal. Le gouvernement n'a pas soutenu qu'une telle grève partielle aurait occasionné des coûts inacceptables aux producteurs laitiers. Je ne vois pas pourquoi l'imposition d'un lock-out total par l'employeur, suite à un projet de grève partielle, devrait dégager le gouvernement de son obligation d'adapter sa réponse législative. Le cas échéant, l'employeur dispose facilement des moyens pour intensifier le préjudice économique causé aux tiers de manière à justifier une interdiction totale dans tous les cas. Il me semble que si le gouvernement de la Saskatchewan avait voulu maintenir l'égalité entre employeur et employés, il aurait pu adapter sa réponse législative en l'espèce en décrétant une interdiction partielle à la fois de faire la grève et d'imposer un lock-out. Cela lui aurait permis d'atteindre son objectif tout en satisfaisant au critère de proportionnalité énoncé dans l'arrêt *Oakes*.

The second objective advanced by the government in support of the limitation on the freedom under s. 2(*d*) is that the dairy workers provide an essential service, the delivery of an important food product to the consumer, and that the cessation of such delivery might threaten the health of part of the population. There is no evidence to support this allegation. Milk is undoubtedly an important food product but there may be other food products which are an adequate substitute. We simply do not know. Further, as Cameron J.A. of the Saskatchewan Court of Appeal observed, there is no

Le second objectif invoqué par le gouvernement à l'appui de la restriction de la liberté que prévoit l'al. 2*d*), porte que les travailleurs de l'industrie laitière fournissent un service essentiel, soit la livraison aux consommateurs d'un produit alimentaire important, et que l'arrêt de cette livraison pourrait mettre en danger la santé d'une partie de la population. Aucun élément de preuve n'a été présenté à l'appui de cet argument. Le lait est sans aucun doute un produit alimentaire important, mais il peut exister d'autres produits alimentaires pour le remplacer adéquatement. Nous ne le

evidence that milk would not be imported from outside the province to supply the Saskatchewan consumer: *Re Retail, Wholesale & Department Store Union, supra*, at p. 651. No threat to the health of Saskatchewan consumers has therefore been established.

I would dismiss the appeal with costs. I agree with the Chief Justice's answer to the first constitutional question. I would answer the second constitutional question in the negative.

Appeal allowed, WILSON J. *dissenting*.

Solicitor for the appellants: James P. Taylor, Regina.

Solicitors for the respondents: Mitchell Taylor Romanow Ching, Saskatoon.

Solicitor for the intervener the Attorney General of Canada: Roger Tassé, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: Archie Campbell, Toronto.

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

Solicitors for the intervener the Attorney General for Alberta: McLennan Ross, Edmonton.

Solicitor for the intervener the Attorney General of Manitoba: Tanner Elton, Winnipeg.

savons tout simplement pas. En outre, comme le juge Cameron de la Cour d'appel de la Saskatchewan l'a fait remarquer, il n'y aucun élément de preuve démontrant que le lait ne serait pas importé de l'extérieur de la province pour approvisionner les consommateurs de la Saskatchewan: *Re Retail, Wholesale & Department Store Union*, précité, à la p. 651. Par conséquent, on n'a établi l'existence d'aucune menace à la santé des consommateurs de la Saskatchewan.

Je suis d'avis de rejeter le pourvoi avec dépens. Je fais mienne la réponse du Juge en chef à la première question constitutionnelle. Je suis d'avis de répondre par la négative à la seconde question constitutionnelle.

Pourvoi accueilli, le juge WILSON *dissidente.*

Procureur des appelants: James P. Taylor, Regina.

Procureurs des intimés: Mitchell Taylor Romanow Ching, Saskatoon.

Procureur de l'intervenant le procureur général du Canada: Roger Tassé, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario: Archie Campbell, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le ministère du Procureur général, Victoria.

Procureurs de l'intervenant le procureur général de l'Alberta: McLennan Ross, Edmonton.

Procureur de l'intervenant le procureur général du Manitoba: Tanner Elton, Winnipeg.

Law Society of Alberta

Code of Conduct

February 20, 2020

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Introduction

The Law Society of Alberta participated with the Federation of Law Societies of Canada in the development of a Model Code of Conduct from 2004 to 2010. The Professional Responsibility Committee and the Benchers then undertook a thorough review to ensure that the Model Code was current and complied with Alberta law and practice. Alberta lawyers will find the format and paragraph numbering new. At the same time, the content preserves much of the commentary, cross referencing and legal referencing characteristic of the former Code of Professional Conduct that served so well as a practical guide to lawyer conduct.

The practice of law continues to evolve. That is mainly why the Law Society has adopted the Code of Conduct set out in the following pages. Interprovincial lawyer mobility, anticipated in 1995, has arrived as a reality and allows lawyers to practice in every province and territory in the country. National and regional law firms are prevalent and international firms are emerging. The establishment of uniform national ethical standards is also important to the tradition of a strong independent bar. These factors all favor the establishment of national standards governing lawyer conduct.

The Alberta Code of Professional Conduct was introduced in 1995. The drafters intended to provide Alberta lawyers with practical guidance about the rules governing ethical conduct and clear direction when exercising professional judgment about them. They succeeded admirably. The following Preface is retained from the 1995 Alberta Code because it expresses the timeless nature of lawyers' professional obligations in the unambiguous language characteristic of the whole document.

Preface

Lawyers have traditionally played a vital role in the protection and advancement of individual rights and liberties in a democratic society. Fulfillment of this role requires an understanding and appreciation by lawyers of their relationship to society and the legal system. By defining and clarifying expectations and standards of behaviour that will be applied to lawyers, the Code of Conduct is intended to serve a practical as well as a motivational function.

Two fundamental principles underlie this Code and are implicit throughout its provisions. First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach. While the Law Society is empowered by statute to declare any conduct deserving of sanction, whether or not it is related to a lawyer's practice, personal behaviour is unlikely to be disciplined unless it is dishonourable or otherwise indicates an unsuitability to practise law. However, regardless of the possibility of formal sanction, a lawyer should observe the highest standards of conduct on both a personal and professional level so as to retain the trust, respect and confidence of colleagues and members of the public.

The legal profession is largely self-governing and is therefore impressed with special responsibilities. For example, its rules and regulations must be cast in the public interest, and its members have an obligation to seek observance of those rules on an individual and collective basis. However, the rules and regulations of the Law Society cannot exhaustively cover all situations that may confront a lawyer, who may find it necessary to also consider legislation relating to lawyers, other legislation, or general moral principles in determining an appropriate course of action.

Disciplinary assessment of a lawyer's conduct will be based on all facts and circumstances as they existed at the time of the conduct, including the willfulness and seriousness of the conduct, the existence of previous violations and any mitigating factors.

A member of the Law Society remains subject to this Code no matter where the member practises law. If a lawyer becomes a member of the bar of another jurisdiction in addition to that of Alberta, and there is an inconsistency or conflict between the rules of conduct of the two jurisdictions in a given instance, the rules of the jurisdiction in which the lawyer is practising in that matter will normally prevail. However, the Law Society continues to have jurisdiction over the lawyer. Disciplinary proceedings by another governing body may form the basis for proceedings in Alberta.

The willingness and determination of the profession to achieve widespread compliance with this Code is a more powerful and fundamental enforcement mechanism than the imposition of sanctions by the Law Society. A lawyer must therefore be vigilant with respect to the lawyer's own behaviour as well as that of colleagues. However, it is inconsistent with the spirit of this Code to use any of its provisions as an instrument of harassment or as a procedural weapon in the absence of a genuine concern respecting the interests of a client, the profession or the public.

Chapter 1 – Interpretation and Definitions

1.1 Definitions

1.1-1 In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" includes a client of a lawyer's firm, whether or not the lawyer handles the client's work, and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law;

Commentary

[1] A lawyer-client relationship is often established without formality. For example, an express retainer or remuneration is not required for a lawyer-client relationship to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a lawyer-client relationship. For example, a lawyer may meet with a prospective client in circumstances that give rise to a duty of confidentiality, and, even though no lawyer-client relationship is ever actually established, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer's own interest to carefully manage the establishment of a lawyer-client relationship.

"conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person;

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate letter recording the consent;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

"law firm" includes one or more lawyers practising:

- **(a) in a sole proprietorship;**
- **(b) in a partnership;**
- **(c) as a clinic operated by Legal Aid Alberta;**
- **(d) in a government, a Crown corporation or any other public body; or**
- **(e) in a corporation or other organization;**
- **(f) from the same premises, while expressly or impliedly holding themselves out to be practising law together and indicating a commonality of practice through physical layout of office space, firm name, letterhead, signage and business cards, reception and telephone-answering services, or the sharing of office systems and support staff;**
- **(g) from the same premises and indicating that their practices are independent.**

"lawyer" means an active member of the Society, an inactive member of the Society, a suspended member of the Society, a student-at-law and a lawyer entitled to practise law in another jurisdiction who is entitled to practise law in Alberta. A reference to "lawyer" includes the lawyer's firm and each firm member except where expressly stated otherwise or excluded by the context;

"limited scope retainer" means an agreement for the provision of legal services for part, but not all, of a client's legal matter;

"Society" means the Law Society of Alberta;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures.

Chapter 2 – Standards of the Legal Profession

2.1 Integrity

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary

[1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

[2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

[3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

[4] Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

2.1-2 A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

Commentary

[1] Collectively, lawyers are encouraged to enhance the profession through activities such as:

(a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

(c) filling elected and volunteer positions with the Society;

(d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and

(e) acting as directors, officers and members of non-profit or charitable organizations.

Chapter 3 – Relationships to Clients

3.1 Competence

Definitions

3.1-1 In this rule

"competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:

- **(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;**
- **(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;**
- **(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:**
  - **(i) legal research;**
  - **(ii) analysis;**
  - **(iii) application of the law to the relevant facts;**
  - **(iv) writing and drafting;**
  - **(v) negotiation;**
  - **(vi) alternative dispute resolution;**
  - **(vii) advocacy; and**
  - **(viii) problem solving;**
- **(d) communicating with the client at all relevant stages of a matter in a timely and effective manner;**
- **(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;**
- **(f) applying intellectual capacity, judgment and deliberation to all functions;**
- **(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;**

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and

responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in Rule 3.3.

[6] The required level of technological competence will depend on whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:

(a) the lawyer's or law firm's practice areas;

(b) the geographic locations of the lawyer's or firm's practice; and

(c) the requirements of clients.

[7] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[8] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

(a) decline to act;

(b) make reasonable efforts to assist the client to obtain competent legal representation from another lawyer;

(c) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or

(d) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

[9] The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[10] Lawyers owe clients a duty of competence, regardless of whether the retainer is a full service or a limited scope retainer. When a lawyer considers whether to provide legal services under a limited scope retainer, the lawyer must consider whether the limitation is reasonable in the circumstances. For example, some matters may be too complex to offer legal services pursuant to a limited scope retainer. (See Rule 3.2-2).

[11] A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments

with many qualifications. A lawyer should only express his or her legal opinion when it is genuinely held.

[12] A lawyer should be wary of providing unreasonable or over-confident assurances to the client, especially when the lawyer's employment or retainer may depend upon advising in a particular way.

[13] In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

[14] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

[15] The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

[16] The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[17] A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

Incompetence, Negligence and Mistakes

[18] This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

3.2 Quality of Service

Quality of Service

3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

Commentary

[1] This rule should be read and applied in conjunction with Rule 3.1 regarding competence.

[2] A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation. An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

[3] A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions. A lawyer must use reasonable efforts to ensure that the client comprehends the lawyer's advice and recommendations.

[4] A lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client, so that the client can make an informed choice about his or her options, such as whether to retain new counsel.

Examples of expected practices

[5] The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

(a) keeping a client reasonably informed;

(b) answering reasonable requests from a client for information;

(c) responding to a client's telephone calls and emails;

(d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;

(e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;

(f) answering, within a reasonable time, any communication that requires a reply;

(g) ensuring that work is done in a timely manner so that its value to the client is maintained;

(h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;

(i) maintaining office staff, facilities and equipment adequate to the lawyer's practice;

(j) informing a client of a proposal of settlement, and explaining the proposal properly;

(k) providing a client with complete and accurate relevant information about a matter;

(l) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;

(m) avoiding the use of intoxicants or drugs that interfere with or prejudice the lawyer's services to the client;

(n) being civil.

[6] A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer should be prompt in handling a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent the client reasonably expects.

Limited Scope Retainers

3.2-2 Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

Commentary

[1] The scope of the service to be provided should be discussed with the client, and the client's acknowledgement and understanding of the risks and limitations of the retainer should be confirmed in writing. The lawyer should clearly identify the tasks for which the lawyer and the client are each responsible. The lawyer should advise the client about related legal issues which fall outside the scope of the limited scope retainer, and advise the client of the consequences of limiting the scope of the retainer, to allow the client to have enough information on which to base a decision to limit or expand the retainer.

[2] A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting in a way that suggests that the lawyer is providing full services to the client. Modifications to the scope of the limited scope retainer, or the obligations of the client and lawyer, should be confirmed in writing. The lawyer should also consider advising the client when the lawyer's retainer has ended.

[3] Where the limited services being provided include an appearance before a tribunal a lawyer must be careful not to mislead the tribunal as to the scope of the retainer. Lawyers should consider whether disclosure of the limited nature of the retainer is required by the rules of practice governing a particular tribunal or other circumstances.

[4] In Alberta, Rule 2.27 of the Rules of Court requires lawyers to inform the court if the lawyer is retained for a limited or particular purpose.

[5] When one party is receiving legal services pursuant to a limited scope retainer, the lawyers representing all the parties in the matter should consider how communications from opposing counsel in a matter should be managed. (See Rule 7.2-9).

[6] This rule does not apply to situations in which a lawyer is providing summary advice or to initial consultations that may result in the client retaining the lawyer.

[7] Summary advice may include advice received in a brief consultation on a telephone hotline or from duty counsel, for example, or may otherwise be advice which is received during the provision of short-term legal services, described in Rule 3.4-15.

Honesty and Candour

3.2-3 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

Commentary

[1] A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any, that might influence whether the client selects or continues to retain the lawyer.

[2] A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

[3] Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's

perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

Client Instructions

3.2-4 A lawyer must obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer.

Commentary

[1] Assuming that there are no practical exigencies requiring a lawyer to act for a client without prior consultation, the lawyer must consider before each decision in a matter whether and to what extent the client should be consulted or informed. Even an apparently routine step that clearly falls within the lawyer's authority may warrant prior consultation, depending on circumstances such as a particular client's desire to be involved in the day to day conduct of a matter.

[2] A lawyer has an ethical obligation to put all settlement offers to the client and to obtain specific instructions with regard to making or accepting settlement offers on a client's behalf (see Rule 3.2-1). In addition, certain decisions in litigation, such as how a criminal defendant will plead, whether a client will testify, whether to waive a jury trial and whether to appeal, require prior discussion with the client. As to other, less fundamental decisions, if there is any doubt in the lawyer's mind as to whether the client should be consulted, it is most prudent to do so.

[3] If a client persistently refuses or fails to provide instructions, the lawyer is entitled to withdraw (see Rule 3.7-2). If, however, the failure to provide instructions is due to the client's disappearance or incapacity, the lawyer has additional duties to attend to before withdrawal is justified (see Rules 3.2-5 and 3.2-15 and accompanying commentaries).

[4] When acting for a corporation, on an in house basis or otherwise, a lawyer may encounter difficulty in identifying who within the corporation has authority to give instructions and receive advice on the client's behalf. In this regard, see Rule 3.2-9 and related commentary.

3.2-5 When a lawyer is unable to obtain instructions from a client because the client cannot be located, the lawyer must make reasonable efforts to locate the client.

Commentary

[1] Circumstances dictating the extent of a lawyer's efforts to locate a missing client include the facts giving rise to the inability to contact the client and importance of the issue on which instructions are sought. A wilful disappearance may mandate a less strenuous attempt at location, while the potential loss of a significant right or remedy will require greater efforts. In the latter case, the lawyer should take such steps as are reasonably necessary and in accordance with the lawyer's implied

authority to preserve the right or remedy in the meantime. Once a matter moves beyond the implied authority of the lawyer and all attempts to locate the client have been unsuccessful, the lawyer may be compelled to withdraw since a representation may not be continued in the absence of proper instructions.

3.2-6 When receiving instructions from a third party on behalf of a client, a lawyer must ensure that the instructions accurately reflect the wishes of the client.

Commentary

[1] It is not inherently improper for a lawyer to accept instructions on a client's behalf from someone other than the client. For example, a client may be indisposed or unavailable and therefore unable to provide instructions directly, or a lawyer may be retained at the suggestion of another advisor, such as an accountant, with the result that at least the initial contact is made by the advisor on the client's behalf.

{2] In these circumstances a lawyer must verify that the instructions are accurate and were given freely and voluntarily by a client having the capacity to do so. The lawyer's freedom of access to the client must be unrestricted. In certain situations it may be appropriate for the lawyer to insist on meeting alone with the client (see also Rule 3.2-1 and related commentary).

[3] From time to time a lawyer is retained and paid by one party but requested to prepare a document for execution by another party. While on a technical analysis the instructing party may be the client, the facts may indicate a relationship with the other party as well that carries with it certain duties on the part of the lawyer, such as the duty to make direct contact with the other party to confirm the instructions. If, for example, a lawyer has been asked to prepare a power of attorney or a will for a relative of the person providing instructions, the possibility of coercion or undue influence requires that steps be taken to protect the interests of the relative. If that person's wishes cannot be satisfactorily verified, it is improper for the lawyer to carry out the instructions.

[4] **Accepting payment from a third party –** A lawyer may be paid by one person, such as an insurance company or union, while being retained to act for another person, such as an insured individual or union member, who has standing to provide instructions directly to the lawyer. In this situation, the lawyer must clarify through discussions with both parties at the outset of the representation whether the lawyer will be acting for both parties, or only for the person instructing the lawyer.

[5] If both parties are to be represented by the lawyer in the relevant matter, then the conflict of interest rules will apply, regarding multiple representations. Briefly, the lawyer must make an independent judgment whether acting for both is in the parties' best interests; both parties must consent to the terms of the arrangement after full disclosure; and the lawyer will not be permitted to keep material information confidential from either party. In the event that a dispute develops, the

lawyer will be compelled to cease acting altogether unless, at the time the dispute arises, both parties consent to the lawyer's continuing to represent one of them.

[6] In some circumstances, the person responsible for payment may agree that the other person will be considered the sole client of the lawyer in that matter if (for example) the first party is paying the other's legal fees through courtesy or philanthropy or pursuant to a prepaid legal services plan. In this event, the lawyer should be satisfied that the financially responsible party understands the significance of the characterization of the other party as the sole client and, in particular, that the financially responsible party will have no right to request or receive confidential information regarding the matter.

[7] Some prepaid legal services plans do not offer subscribers a choice of counsel. A lawyer participating in such a plan must explain to the client the implications of this lack of choice at the first available opportunity (See also Rule 3.6-11 regarding prepaid legal services plans).

Language Rights

3.2-7 A lawyer should advise a client of the client's language rights, where applicable, including the right to proceed in the official language of the client's choice.

3.2-8 Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer should not undertake the matter unless the lawyer is competent to provide the required services in that language or arranges for the assistance of an interpreter.

Commentary

[1] The lawyer should be aware of relevant statutory and constitutional law relating to language rights including the Canadian Charter of Rights and Freedoms, s.19(1) and Part XVII of the Criminal Code regarding language rights in courts established by Parliament and in criminal proceedings. This may not include provincial superior courts or courts of appeal. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages. In Alberta, for example, the Languages Act and Regulation provide guidance on the use of French and English. *The Rules of Court* also provide information on translation in court proceedings.

[2] When a lawyer considers whether to provide the required services in the official language chosen by the client, the lawyer should carefully consider whether it is possible to render those services in a competent manner as required by Rule 3.1-2 and related commentary.

When the Client is an Organization

3.2-9 Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

Commentary

[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

[2] In addition to acting for the organization, a lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (Rule 3.4).

Encouraging Compromise or Settlement

3.2-10 A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

Commentary

[1] Determining whether settlement or compromise is a realistic alternative requires objective evaluation and the application of a lawyer's professional judgment and experience to the circumstances of the case. The client must then be advised of the advantages and drawbacks of settlement versus litigation. Due to the uncertainty, delay and expense inherent in the litigation process, it is often in the client's interests that a matter be settled. On the other hand, because a lawyer's role is that of advocate rather than adjudicator, going to trial is justified if the client so instructs and the matter is meritorious (see Rule 5.1-2(b)). A lawyer should not press settlement for personal reasons such as an overloaded calendar, lack of preparation, reluctance to face judge or opposing counsel in a courtroom setting, or possible financial benefit due to the terms of a fee agreement.

Threatening Criminal or Regulatory Proceedings

3.2-11 A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

(a) to initiate or proceed with a criminal or quasi-criminal charge; or

(b) to make a complaint to a regulatory authority.

Commentary

[1] It is an abuse of the court or regulatory authority's process to threaten to make or advance a complaint in order to secure the satisfaction of a private grievance. Even if a client has a legitimate entitlement to be paid money, threats to take criminal or quasi-criminal action are not appropriate.

[2] It is not improper, however, to notify the appropriate authority of criminal or quasi-criminal activities while also taking steps through the civil system. Nor is it improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Society. The impropriety stems from threatening to use, or actually using, criminal or quasi-criminal proceedings to gain a civil advantage.

Inducement for Withdrawal of Criminal or Regulatory Proceedings

3.2-12 A lawyer must not:

(a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;

(b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter such discussions; or

(c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the

Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

Commentary

[1] "Regulatory authority" includes professional and other regulatory bodies.

[2] A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a proposed resolution involves valuable consideration being exchanged in return for influencing the Crown or the regulatory authority not to proceed with a charge or to seek a reduced sentence or penalty, the lawyer for the accused must obtain the consent of the Crown or the regulatory authority prior to discussing such proposal with the complainant or potential complainant. Similarly, lawyers advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or the regulatory authority.

[3] A lawyer cannot provide an assurance that the settlement of a related civil matter will result in the withdrawal of criminal or quasi-criminal charges, absent the consent of the Crown or the regulatory authority.

[4] When the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused. If the complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

Fraud by Client or Others

3.2-13 A lawyer must never:

(a) assist in or encourage any fraud, crime, or illegal conduct,

(b) do or omit to do anything that assists in or encourages any fraud, crime, or illegal conduct by a client or others, or

(c) instruct a client or others on how to violate the law and avoid punishment.

Commentary

[1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client or others engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

[3] If a lawyer has suspicions or doubts about whether he or she might be assisting a client or others in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client or others and, in the case of the client, about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

[4] This rule does not apply to conduct the legality of which is supportable by a reasonable and good faith argument. A bona fide test case is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

[5] This rule is not intended to prevent a lawyer from fully explaining the options available to a client, including the consequences of various means of proceeding, or from representing after the fact a client accused of wrongful conduct. However, a lawyer may not act in furtherance of a client's improper objective. An example would be assisting a client to implement a transaction that is clearly a fraudulent preference. Nor may a lawyer purport to set forth alternatives without making a direct recommendation if the lawyer's silence would be construed as an indirect endorsement of an illegal action.

[6] The mere provision of legal information must be distinguished from rendering legal advice or providing active assistance to a client. If a lawyer is reasonably satisfied on a balance of probabilities that the result of advice or assistance will be to involve the lawyer in a criminal or fraudulent act, then the advice or assistance should not be given. In contrast, merely providing legal information that could be used to commit a crime or fraud is not improper since everyone has a right to know and understand the law. Indeed, a lawyer has a positive obligation to provide such information or ensure that alternative competent legal advice is available to the client. Only if there is reason to believe beyond a reasonable doubt, based on familiarity with the client or information received from other reliable sources, that a client intends to use legal information to commit a crime should a lawyer decline to provide the information sought.

Fraud when Client an Organization

3.2-14 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act fraudulently, criminally or illegally, must do the following, in addition to his or her obligations under Rule 3.2-13:

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct is or would be fraudulent, criminal or illegal and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to stop the conduct, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct is or would be fraudulent, criminal or illegal and should be stopped; and

(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the unlawful conduct, withdraw from acting in the matter in accordance with Rule 3.7.

Commentary

[1] The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. This rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (Rule 3.3).

[2] This rule speaks of conduct that is fraudulent, criminal or illegal. Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.

[3] In considering his or her responsibilities under this section, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

[4] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in an unlawful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the unlawful conduct is not abandoned or stopped, the lawyer must report the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the unlawful conduct, the lawyer must withdraw from acting in the particular matter in accordance with Rule 3.7. In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

[5] This rule recognizes that lawyers as the legal advisors to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organization's and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable and consistent with the organization's responsibilities to its constituents and to the public.

Clients with Diminished Capacity

3.2-15 When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal

representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See commentary under Rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

3.3 Confidentiality

Confidential Information

3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

(a) expressly or impliedly authorized by the client;

(b) required by law or a court to do so;

(c) required to deliver the information to the Society; or

(d) otherwise permitted by this rule.

Commentary

[1] A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

[2] This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

[3] A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

[4] A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter (See Rule 3.4 Conflicts).

[5] Generally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been:

(a) retained by a person about a particular matter; or

(b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.

[6] A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure. When acting for more than one party in the same matter, a lawyer must disclose to all such parties any material confidential information acquired by the lawyer in the course of the representation and relating to the matter in question. While multiple representation is generally discouraged, there are circumstances in which it is in the best interests of the parties involved (see Rule 3.4, Conflicts). A lawyer will be precluded, however, from receiving material information in connection with the matter from one client and treating it as confidential in respect of the others. This aspect of the representation must be disclosed to the clients in advance so that their consent is an informed one.

[7] When lawyers share space, the risk of advertent or inadvertent disclosure of confidential information is significant even if the lawyers involved exert efforts to insulate their respective practices. Consequently, the definition of "law firm" includes lawyers practising law from the same premises but otherwise practising law independently of one another. To comply with Rule 3.4 regarding Conflicts, lawyers in space-sharing arrangements must share certain confidential client information with each other. For example, it will be necessary to know the identities of clients of the other lawyers to determine when conflicts exist. When a conflict check shows that a person against whom one of the lawyers wishes to act was previously represented by another of the lawyers, those lawyers may need to discuss the nature of any confidential information possessed by the previous lawyer. Accordingly, the implied consent to disclosure of information referred to in Rule 3.3-1 extends to all lawyers practising in such an arrangement.

[8] A lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shoptalk among lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened. Although the rule may not apply to facts that are public knowledge, a lawyer should guard against participating in or commenting on speculation concerning clients' affairs or business.

[9] In some situations, the authority of the client to disclose may be inferred. For example, in court proceedings some disclosure may be necessary in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to administrative staff and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, students and other lawyers engaged under contract with the lawyer or with the firm of the lawyer the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

[10] The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief the person lacks capacity, the potential harm to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

[11] A lawyer may have an obligation to disclose information under Rule 5.5-2 or 5.5-3. If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.

Use of Confidential Information

3.3-2 A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.

Commentary

[1] See Rule 3.4, Conflicts. The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information.

[2] There is generally an obligation to disclose to a client all information that must be disclosed to enable the lawyer to properly carry out the representation. A lawyer must decline to act in a matter, therefore, or must withdraw from an existing representation if all of the following circumstances are present:

(a) the lawyer is in possession of confidential information of a current or former client that is material to that matter or representation;

(b) the current or former client will not consent to disclosure of the information to the other client or potential client; and

(c) it is impossible to properly carry out the representation or prospective representation without making such disclosure or, alternatively, the client or potential client in that matter is unwilling to accept legal advice based on the information without actually being privy to the information and therefore insists on disclosure.

Under these circumstances, the lawyer is unable to act in the best interests of that client and cannot represent or continue to represent the client.

Future Harm / Public Safety Exception

3.3-3 A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that an identifiable person or group is in imminent danger of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

Commentary

[1] Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. In some very exceptional situations identified in this rule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

[2] Serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

[3] In assessing whether disclosure of confidential information is justified to prevent substantial harm, a lawyer should consider a number of factors, including:

(a) the seriousness of the potential injury to others if the prospective harm occurs;

(b) the likelihood that it will occur and its imminence;

(c) the apparent absence of any other feasible way to prevent the potential injury; and

(d) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

[4] How and when disclosure should be made under this rule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact the Society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

[5] If confidential information is disclosed under Rule 3.3-3, the lawyer should prepare a written note as soon as possible, which should include:

(a) the date and time of the communication in which the disclosure is made;

(b) the grounds in support of the lawyer's decision to communicate the information, including the harm intended to be prevented, the identity of the person who prompted communication of the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

Disclosure of Confidential Information by Lawyers

3.3-4 If it is alleged that a lawyer or the lawyer's associates or employees:

(a) have committed a criminal offence involving a client's affairs;

(b) are civilly liable with respect to a matter involving a client's affairs;

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer;

the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.

3.3-5 A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.

3.3-6 A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.

3.3-7 A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from a lawyer's proposed transfer to a new law firm, or from a proposed law firm merger or acquisition, but only if disclosure does not otherwise prejudice the client.

Commentary

[1] Lawyers in different firms may need to disclose limited client information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. (see Rules 3.4-6 to 3.4-11.)

[2] Disclosure of client information would only be made once substantive discussions regarding the new relationship have occurred. The exchange of information needs to be done in a manner consistent with the requirement to protect client confidentiality and privilege and to avoid any prejudice to the client. It ordinarily would include no more than the names of the persons and entities involved in a matter. Depending on the circumstances, it may include a brief summary of the general issues involved, and information about whether the representation has come to an end.

[3] The disclosure should be made to as few lawyers at the new law firm as possible, ideally to one lawyer of the new firm, such as a designated conflicts lawyer. The information should always be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

[4] As the disclosure is made on the basis that it is solely for the use of checking conflicts where lawyers are transferring between firms and for establishing reasonable measures to protect confidential client information, the new law firm should agree with the transferring lawyer that it will:

(a) limit access to the disclosed information;

(b) not use the information for any purpose other than detecting and resolving conflicts; and

(c) return, destroy, or store in a secure and confidential manner the information provided once appropriate measures are established to protect client confidentiality.

[5] Lawyers must be sensitive to the disclosure of information which may prejudice the client. For example:

- a corporate client may be seeking advice on a corporate takeover that has not been publicly announced;
- a person may consult a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse;
- a person may consult a lawyer about a criminal investigation that has not led to charges being laid.

3.4 Conflicts

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

[1] A conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. A substantial risk is one that is significant and, while not certain or probable, is more than a mere possibility. A client's interests may be prejudiced unless the lawyer's advice, judgment and action on the client's behalf are free from conflicts of interest.

[2] A lawyer must examine whether a conflict of interest exists not only from the inception of the retainer but throughout its duration, as new circumstances or information may establish or reveal a conflict of interest.

[3] The disqualification of a lawyer may mean the disqualification of all lawyers in the law firm, due to the definition of "law firm" and "lawyer" in this Code. The definition of a law firm also includes practitioners who practise with other lawyers in space-sharing or other arrangements.

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[4] Lawyers' duties to former clients are primarily concerned with protecting confidential information. Duties to current clients are more extensive, and are based on a broad fiduciary duty, which prevails regardless of whether there is a risk of disclosure of confidential information.

[5] The lawyer-client relationship is a fiduciary relationship. Lawyers accordingly owe a duty of loyalty to current clients, which includes the following:

- the duty not to disclose confidential information;
- the duty to avoid conflicting interests;
- the duty of commitment to the client's cause; and
- the duty of candour with a client on matters relevant to the retainer.

The Role of the Court and Law Societies

[6] These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by a law society even where a court may decline to order disqualification as a remedy.

Consent and Disclosure

[7] Except for representing opposing parties in a dispute (see Rule 3.4-2), these rules allow a lawyer to continue to act in a matter even when in a conflict of interest, if the clients consent. The lawyer must also be satisfied that the lawyer is able to proceed without a material and adverse effect on the client.

[8] As defined in these rules, “consent” means fully informed and voluntary consent after disclosure. Disclosure may be made orally or in writing, and the consent should be confirmed in writing.

[9] “Disclosure” means full and fair disclosure of all information relevant to a person’s decision, in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. A lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that a conflict of interest could adversely affect the client interests. This would include the lawyer's relations to the parties and any interest in connection with the matter.

[10] This rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest. In some cases, however, the lawyer should recommend such advice, especially if the client is vulnerable or not sophisticated.

Express Consent

[11] Express consent is required in the case of conflicts involving multiple retainers, former clients, and transferring lawyers, and in the case of lawyers’ personal interests or relationships coming into conflict with the interests of clients. Disclosure is an essential requirement to obtaining a client’s consent. The lawyer must inform the client about all matters relevant to evaluating the conflict. Where it is not possible to provide the client with disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

Implied Consent

[12] In cases involving the simultaneous representation of current clients, consent may either be express or implied. Implied consent is applicable in only exceptional cases. It may be appropriate to imply consent when acting for government agencies, chartered banks and other entities that might be considered sophisticated and frequent consumers of legal services from a variety of law firms. The matters must be unrelated, and the lawyer must not possess confidential information from one client that could affect the other client.

[13] The nature of the client is not a sufficient basis upon which to imply consent. The terms of the retainer, the relationship between the lawyer and client, and the unrelated matters involved must be considered. There must be a reasonable basis upon which a lawyer may objectively conclude that the client commonly accepts that its lawyers may act against it.

[14] Where legal services are either highly specialized or are scarce, consent to act for another current client may be implied, depending on the circumstances.

Advance Consent

[15] Consent may be obtained in advance of a conflict of interest arising, provided the consent is sufficiently comprehensive to contemplate the subsequent conflict, and there has been no change of circumstances that would render the initial consent invalid. The client must be able to understand the risks and consequences of providing the advance consent.

[16] While not required, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide advance consent. Advance consent must be recorded in writing or contained in the retainer agreement.

Disputes

3.4-2 A lawyer must not represent opposing parties in a dispute.

Commentary

[1] The existence of a dispute precludes joint representation, not only because it is impossible to properly advocate more than one side of a matter, but because the administration of justice would be brought into disrepute.

[2] It is sometimes difficult to determine whether a dispute exists. While a litigation matter qualifies as a dispute from the outset, parties who appear to have differing interests or who disagree are not necessarily engaged in a dispute. The parties may wish to resolve the disagreement by consent, in which case a lawyer may be requested to act as a facilitator in providing information for their consideration. At some point, however, a conflict or potential conflict may develop into a dispute. At that time, the lawyer would be compelled by Rule 3.4-1 to cease acting for more than one party and perhaps to withdraw altogether.

[3] In determining whether a dispute exists, a lawyer should have regard for the following factors:

- the degree of hostility, aggression and "posturing";
- the importance of the matters not yet resolved;
- the intransigence of one or more of the parties; and
- whether one or more of the parties wishes the lawyer to assume the role of advocate for that party's position.

[4] If clients have consented to a joint retainer, a lawyer is not necessarily precluded from advising clients on non-contentious matters, even if a dispute has arisen between them. When in doubt, a lawyer should cease acting.

Mediation or Arbitration

[5] This rule does not prevent a lawyer from mediating or arbitrating a dispute between clients or former clients where:

(a) the parties consent;

(b) it is in the parties' best interests that the lawyer act as mediator or arbitrator; and

(c) the parties acknowledge that the lawyer will not be representing either party and that no confidentiality will apply to material information in the lawyer's possession.

Current Clients

3.4-3 A lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client, even if the matters are unrelated, unless both clients consent.

Commentary

[1] This rule mirrors the bright line rule articulated by the Supreme Court of Canada.

[2] The lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. For example, one client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests.

[3] A client is a current client if the lawyer is currently acting for the client, and may be a current client despite there being no matters on which the lawyer is currently acting. In determining whether a client is a current client, notwithstanding that the lawyer has no current files, the lawyer must take into consideration all the circumstances of the lawyer-client relationship, including, where relevant:

- the duration of the relationship;
- the terms of the past retainer or retainers;
- the length of time since the last representation was completed or the last representation assigned; and
- whether the client uses other lawyers for the same type of work.

[4] When determining if one client's legal interests are directly adverse to the immediate legal interests of another current client, a lawyer must consider the following factors:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;

- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

[5] The bright line rule cannot be used to support tactical abuses. For example, it is inappropriate for a lawyer to raise a conflict of interest in order to disqualify an opposing lawyer for an improper purpose, or to inconvenience an opposing client.

[6] This rule will not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. In exceptional cases, a client's consent that a lawyer may act against it may be implied. (See commentary to Rule 3.4-1)

[7] A lawyer's duty of candour requires that a lawyer inform a client about any factors relevant to the lawyer's ability to provide effective representation. If the lawyer is accepting a retainer that requires the lawyer to act against an existing client, the lawyer should disclose this information to the client even if the lawyer believes there is no conflict of interest.

[8] A lawyer's duty of commitment to the client's cause prevents the lawyer from summarily and unexpectedly dropping that client to circumvent conflict of interest rules. The client may legitimately feel betrayed if the lawyer ceases to act for the client in order to avoid a conflict of interest with another more lucrative or attractive client.

Concurrent Clients

3.4-4 (a) An individual lawyer or a law firm may act for concurrent clients with competing business or economic interests, provided that the lawyer or law firm treats information received from each client as confidential and does not disclose it to other clients;

(b) Where concurrent clients wish to retain a law firm in respect of the same business opportunity, the law firm must:

(i) disclose that it is acting for other business competitors and the risks associated with concurrent representation;

(ii) provide the client with the opportunity to seek independent legal advice;

(iii) ensure that each client is represented by different lawyers in the law firm;

(iv) implement measures to protect confidential information;

(v) withdraw from the representation of all clients in the event a dispute arises that cannot be resolved, in relation to the subject matter of the concurrent representation.

Commentary

[1] Concurrent retainers are distinct from joint retainers, which are the subject of Rule 3.4-5. For the purposes of these rules, concurrent retainers arise when a lawyer or firm simultaneously represents different clients in separate matters. There is no sharing of confidential information, and the concurrent clients are not associated. In contrast, joint representation involves simultaneous representation of multiple clients in the same matter, and involves sharing of confidential information and shared instructions from the clients.

[2] Conflict of interest rules do not preclude law firms and individual lawyers from concurrently representing different clients who are economic or business competitors and whose legal interests are not directly adverse. Lawyers are obliged at all times to ensure that they maintain confidentiality regarding the information of each client. Competing commercial interests of clients will not present a conflict when they do not impair a lawyer's ability to properly represent the legal interests of each client. Whether or not a real risk of impairment exists will be a question of fact.

[3] In a litigation practice, competing commercial interests become relevant when there is a legal dispute between clients, in which case Rules 3.4-2 and 3.4-3 will apply.

[4] In corporate and commercial practice, a conflict of interest will arise when commercial competitors simultaneously seek to retain the same lawyer or law firm with regard to the same corporate or business opportunity. Where the subject matter of each independent retainer is the same, the same lawyer may not act for each concurrent client. A law firm may, however, represent concurrent clients in this situation if each client is represented by different lawyers and the existence of concurrent retainers is disclosed to the clients. Lawyers are not required to disclose the identities of other concurrent clients. Reasonable measures will be required to protect confidential client information and the details of the implementation of the measures should be disclosed to the clients (See commentary to Rule 3.4-10).

[5] Concurrent clients must be fully informed of the risks and understand that, if a dispute arises between them which cannot be resolved, the lawyers must withdraw, resulting in potential additional costs. Clients should be given the opportunity to seek independent legal advice regarding the advisability of the concurrent retainer, and whether the concurrent representation is in the best interests of the clients. The law firm should assess whether there is a real risk that the firm will not be able to properly represent the legal interests of each client.

Joint Retainers

3.4-5 Before a lawyer acts for more than one client in the same matter, the lawyer must:

(a) obtain the consent of the clients following disclosure of the advantages and disadvantages of a joint retainer;

(b) ensure the joint retainer is in the best interests of each client;

(c) advise each client that no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(d) advise each client that, if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Identifying Conflicts

[1] A joint retainer must be approached by a lawyer with caution, particularly in situations involving conflicting interests, rather than a potential conflict. It will generally be more difficult for a lawyer to justify acting in a situation involving actual conflicting interests. In each case, the lawyer must assess the likelihood of being able to demonstrate that each client received representation equal to that which would have been rendered by independent counsel.

[2] A lawyer should examine whether a conflict of interest exists, not only from the outset, but also throughout the duration of a retainer, because new circumstances or information may establish or reveal a conflict of interest.

[3] In appropriate circumstances, lawyers may act for clients who have conflicting interests or have a potential conflict. Clients may have conflicting interests where they have differing interests but there is no actual dispute. Examples include vendor and purchaser, mortgagor and mortgagee (see special notes below), insured and insurer, estranged spouses, and lessor and lessee.

[4] A potential conflict exists when clients are aligned in interest and there is no dispute among them in fact, but the relationship or circumstances are such that there is a possibility of differences developing. Examples are co-plaintiffs; co-defendants; co-insured; co-accused; shareholders entering into a unanimous shareholder agreement; spouses granting a mortgage to secure a loan; common guarantors; beneficiaries under a will; and a trustee in bankruptcy or court appointed receiver/manager and the secured creditor who had the trustee or receiver/manager appointed. This list is not exhaustive.

Assessing When the Joint Representation is in the Best Interests of the Parties

[5] Many lawyers prefer not to act for more than one party in a transaction. From the client's perspective, however, this preference may interfere with the right to choose counsel and may appear to generate unwarranted costs, hostility and complexity. In addition, another lawyer having the requisite expertise or experience may not be readily available, especially in smaller communities. Situations will therefore arise in which it is clearly in the best interests of the parties that a lawyer represents more than one of them in the same matter.

[6] In determining whether it is in the best interests of the parties that a lawyer act for more than one party where there is no dispute but where there is a conflict or potential conflict, the lawyer must consider all relevant factors, including but not limited to:

- the complexity of the matter;
- whether there are terms yet to be negotiated and the complexity and contentiousness of those terms;
- whether considerable extra cost, delay, hostility or inconvenience would result from using more than one lawyer;
- the availability of another lawyer of comparable skill;
- the degree to which the lawyer is familiar with the parties' affairs;
- the probability that the conflict or potential conflict will ripen into a dispute due to the respective positions or personalities of the parties, the history of their relationship or other factors;
- the likely effect of a dispute on the parties;
- whether it may be inferred from the relative positions or circumstances of the parties (such as a long-standing previous relationship of one party with the lawyer) that the lawyer would be motivated to favour the interests of one party over another; and
- the ability of the parties to make informed, independent decisions.

[7] The requirement that the joint representation be in the clients' best interests will not be fulfilled unless the lawyer has made an independent evaluation and has concluded that this is the case. It is insufficient to rely on the clients' assessment in this regard.

[8] Although the parties to a particular matter may expressly request joint representation, there are circumstances in which a lawyer may not agree. Even if all the parties consent, a lawyer should avoid acting for more than one client when it is likely that a dispute between them will arise or that their interests, rights or obligations will diverge as the matter progresses. For example, it is not advisable to represent opposing arm's-length parties in complex commercial transactions involving unique, heavily negotiated terms. In these situations, the risks of retaining a single lawyer outweigh the advantages.

[9] If a lawyer proposes to act for a corporation and one or more of its shareholders, directors, managers, officers or employees, the lawyer must be satisfied that the dual representation is a true

reflection of the will and desire of the corporation as a separate entity. Having met all preliminary requirements, a lawyer acting in a conflict or potential conflict situation must represent each party's interests to the fullest extent. The fact of joint representation will not provide a justification for failing to fulfill the duties and responsibilities owed by the lawyer to each client.

Informed Consent to Joint Representation

[10] If a lawyer determines that joint representation is permissible, then the consent of the parties must be obtained. Consent will be valid only if the lawyer has provided disclosure of the advantages and disadvantages of, first, retaining one lawyer and, second, retaining independent counsel for each party. Disclosure must include the fact that no material information received in connection with the matter from one party can be treated as confidential so far as any of the other parties is concerned. In addition, the lawyer must stipulate that, if a dispute develops, the lawyer will be compelled to cease acting altogether unless, at the time the dispute develops, all parties consent to the lawyer continuing to represent one of them. Advance consent may be ineffective since the party granting the consent may not at that time be in possession of all relevant information (see commentary to Rule 3.4-1). Lawyers must disclose any relationships with the parties and any interest in or connection with the matter, if applicable.

[11] While it is not mandatory that either disclosure or consent in connection with joint representation be in writing, the lawyer will have the onus of establishing that disclosure was provided and that consent was granted. Therefore, it is advisable to document the communication between the lawyer and client and to obtain written confirmation from the client.

[12] Rule 3.4-5 does not require that a lawyer advise the client to obtain independent legal advice about a conflicting interest. In some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend independent legal advice. If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter, the lawyer should advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Joint Representation of Lenders and Borrowers

[13] In appropriate circumstances, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction. Consent must be obtained from both clients at the outset of the retainer.

[14] When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, before the advance or release of the mortgage or loan funds, all information that is material to the transaction. What is material is to be determined objectively. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

[15] A lender’s acknowledgement of, and consent to, the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction, such as mortgage loan instructions, and the consent is generally acknowledged by a lender when the lawyer is requested by it to act.

Joint Retainer for Drafting Wills

[16] A lawyer who receives instructions from spouses or domestic partners (including, in Alberta, adult interdependent partners) to prepare one or more wills for them based on their shared understanding of what is to be in each will should comply with this rule. It is important for the lawyer to ensure that the spouses or domestic partners understand the consequences of giving conflicting instructions during the course of the joint retainer for the preparation of the wills, and that any information or instructions provided to counsel by one client will be shared with the other spouse or domestic partner.

[17] If subsequently only one spouse or domestic partner communicates new instructions, such as instructions to change or revoke a will:

a) the subsequent communication must be treated as a request for a new retainer and not as part of the joint retainer;

b) in accordance with Rule 3.3, the lawyer is obliged to hold all information related to the subsequent communication in strict confidence and not disclose it to the other spouse or domestic partner;

c) the lawyer has a duty to decline the new retainer, unless:

(i) the spouses or domestic partners have annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or domestic partner has died; or

(iii) the other spouse or domestic partner has been informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

Single Client in Multiple Roles

[18] Special considerations apply when a lawyer is representing one client acting in two possibly conflicting roles. For example, a lawyer acting for an estate when the executor is also a beneficiary must be sensitive to divergence of the obligations and interests of the executor in those two capacities. Such divergence could occur if the executor is a surviving spouse who is the beneficiary of only part of the estate. The individual may wish to apply to the court to receive a greater share of the estate. This course of action is, however, contrary to the interests of other beneficiaries and inconsistent with the neutral role of executor. The lawyer would accordingly be obliged to refer the executor elsewhere with respect to the application for relief which the individual is pursuing in a personal capacity.

Acting Against Former Clients

3.4-6 Unless the former client consents, a lawyer must not act against a former client:

(a) in the same matter,

(b) in any related matter, or

(c) except as provided by Rule 3.4-7, in any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] This rule protects clients from the misuse of confidential information and prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client. A new matter is wholly unrelated if no confidential information from the prior retainer is relevant to the new matter and the new matter will not undermine the work done by the lawyer for the client in the prior retainer.

[2] A person who has consulted a lawyer in the lawyer's professional capacity may be considered a former client for the purposes of this rule even though the lawyer did not agree to represent that person or did not render an account to that person (see commentary below regarding "Prospective Client").

Confidential Information

[3] "Confidential information" means all information concerning a client's business, interests and affairs acquired in the course of the lawyer-client relationship. A lawyer's knowledge of personal characteristics or corporate policies that are notably unusual or unique to a client may bar an adverse representation if such knowledge could potentially be used to the client's disadvantage. For example, a lawyer might know that a former client will not under any circumstances proceed to trial or appear as a witness. However, a lawyer's awareness that a client has a characteristic common to many people (such as a general aversion to testifying) or a fairly typical corporate policy (such as a propensity to settle rather than proceed to litigation) will not generally preclude the lawyer from acting against that client.

[4] A lawyer's duty not to use confidential information to the disadvantage of a former client continues indefinitely. However, the passage of time may mitigate the effect of a lawyer's possession of particular confidential information, and may permit the lawyer to act against a former client when the information no longer has the potential to prejudice the former client.

Prospective Client

[5] A prospective client is a person who discloses confidential information to a lawyer for the purpose of retaining the lawyer. A lawyer must maintain the confidentiality of information received from a prospective client.

[6] Before performing a conflict check, a lawyer should endeavour not to receive more information than is necessary to carry out the conflict check. As soon as a conflict becomes evident the lawyer must decline the representation and refuse to receive further information, unless the conflict is resolved by the consent of the existing client and the prospective client or the approval of a tribunal. If the lawyer declines the representation, the information disclosed by the prospective client, including the fact that the client approached the firm, must not be disclosed to those who may act against the prospective client. The firm may act or continue to act contrary to the interests of the prospective client in relation to the proposed retainer if the lawyer takes adequate steps to ensure that:

(a) the confidential information is not disclosed to other firm members representing clients adverse to the prospective client, and

(b) firm members who have the confidential information will not be involved in any retainer that is related to the matter for which the prospective client sought to retain the firm.

[7] The adequacy of the measures taken to prevent disclosure of the information will depend on the circumstances of the case, and may include destroying, sealing or returning to the prospective client notes and correspondence and deleting or password protecting computer files on which any such information may be recorded.

3.4-7 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's law firm ("the other lawyer") may act in the new matter against the former client if:

(a) the former client consents to the other lawyer acting; or

(b) the law firm establishes that it is in the interests of justice that the other lawyer act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy and timing of the measures taken to ensure that there has been, and will be, no disclosure of the former client's confidential information to any other member or employee of the law firm, or any person whose services the lawyer or law firm has retained in the new matter;

(ii) the extent of prejudice to any party;

(iii) the good faith of the parties; and

(iv) the availability of suitable alternative counsel.

Commentary

[1] The guidelines at the end of the commentary in Rule 3.4-10 regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the cases where, having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or associate to act against the former client.

Conflicts from Transfer Between Law Firms

3.4-8 Rules 3.4-9 and 3.4-10 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

- **(a) the new law firm represents a client in a matter that is the same as, or related to, a matter in which the former law firm represents or represented its client ("former client");**
- **(b) the interests of those clients in that matter conflict.**

3.4-9 If the transferring lawyer possesses relevant confidential information respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease representation of its client in that matter unless:

- **(a) the former client consents to the new law firm's continued representation of its client; or**
- **(b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including:**
  - **(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur;**
  - **(ii) the extent of prejudice to any party;**
  - **(iii) the good faith of the parties; and**
  - **(iv) the availability of suitable alternative counsel.**

3.4-10 If the transferring lawyer does not possess relevant confidential information that could prejudice the former client, the transferring lawyer must not, unless the former client consents:

(a) participate in the new law firm's representation of its client in the relevant matter or disclose any confidential information respecting the former client; or

(b) discuss with any member of the new law firm the new law firm's representation of its client or the former law firm's representation of the former client, except as permitted by Rule 3.3-7.

Commentary

[1] The purpose of the rules regarding transferring lawyers is to deal with actual knowledge. Imputed knowledge may not give rise to disqualification if the law firm can demonstrate compliance with these rules and the implementation of effective ethical screens.

[2] In these rules, "client" bears the same meaning as in Chapter 1, and includes anyone to whom a lawyer owes a duty of confidentiality, even if no lawyer-client relationship exists between them.

[3] "Confidential information" means information concerning a client's business, interests and affairs which is not generally known to the public and which has been acquired in the course of the lawyer-client relationship.

[4] A "matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular matter.

[5] The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

Lawyers and Support Staff

[6] This rule is intended to regulate lawyers and students-at-law who transfer between law firms. There is also a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidential information of clients of the lawyer's firm and confidential information of clients of other law firms in which the person has worked.

Government Employees and In-house Counsel

[7] The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law Firms with Multiple Offices

[8] This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm and a legal aid program with many community law offices. It is easier to create more effective ethical screens when the law firm's offices are remote from one another or are managed independently. The law firm should disclose the reasonable measures taken to ensure protection of confidential information when seeking the former client's consent.

Other Matters

[9] When a new law firm considers hiring a lawyer from another law firm, the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose confidential information.

[10] If the new law firm applies to a tribunal under Rule 3.4-9 for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of Rule 3.4-9(b).

Reasonable Measures to Ensure Non-disclosure of Confidential Information

[11] The new law firm should implement reasonable measures to ensure that no disclosure of the former client's confidential information will be made to any member of the new law firm:

(a) when the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) when the new law firm is not certain whether the transferring lawyer actually possesses such confidential information.

[12] It is not possible to offer a set of "reasonable measures" that will suffice in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken.

[13] In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be a factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to prevent the disclosure of confidential information. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

[14] The following guidelines are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

1. The transferring lawyer should have no involvement in the new law firm's representation of its client.
2. The transferring lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the transferring lawyer.
4. The current matter should be discussed only within the limited group that is working on the matter.
5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
6. No member of the new law firm should show the transferring lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to prevent the disclosure of confidential information should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the firm's policy.
9. If the former client, or a lawyer representing the former client, requests further information regarding the protection of confidential information, the former client should be advised of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information. An appropriate response may include the provision of an affidavit or statutory declaration, confirming that the transferring lawyer possesses no confidential information or, alternatively, that a transferring lawyer possessing actual confidential information has not disclosed the former client's confidential information to other members of the new firm.
10. The transferring lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.
11. The transferring lawyer should use associates and support staff different from those working on the current matter.

12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Merged Firms

3.4-11 When two or more firms have been representing different parties in a matter and the firms merge during the course of the matter, the following rules apply:

(a) If the matter constitutes a dispute, the merged firm must not continue acting for opposing parties to the dispute.

(b) If the matter constitutes a potential or actual conflicting interest, the merged firm may continue acting for more than one party only in compliance with Rule 3.4-5.

(c) Whether the matter constitutes a dispute or a potential or actual conflicting interest, the merged firm may continue acting for one of the parties only if all parties consent.

Commentary

[1] A merger is distinguishable from lawyer movement between firms because knowledge of confidential information will be imputed to the merged firm when two or more firms merge. It may be impossible for the merged firm to represent more than one client in a matter. In evaluating the best interests of the clients, the firm should consider additional factors such as the stage of the matter at the time of merger. If the matter has not progressed very far and it would not be unduly prejudicial or costly for the clients to obtain other counsel, the merged firm may be wise to refer all parties to other firms.

[2] If, however, the firm wishes to send one or more clients elsewhere while continuing to act for another of the clients (whether the matter constitutes a dispute, or a potential or actual conflict), all parties must consent.

Conflict with Lawyer's Own Interests

3.4-12 A lawyer must not act when there is a conflict of interest between lawyer and client, unless the client consents and it is in the client's best interests that the lawyer act.

Commentary

[1] If a lawyer's own loyalty, interest, or belief would impair the lawyer's ability to carry out a representation, the lawyer may not act. If the conflicting interest of the lawyer does not impair the lawyer's objectivity, the lawyer should nonetheless decline to act unless the representation is in the client's best interests. In making this judgment, the lawyer must evaluate all relevant factors. It is insufficient to rely on the client's assessment. The client must consent to the representation after disclosure by the lawyer of the nature of the conflicting interest and the advantages of independent representation. The lawyer has the onus to establish disclosure to and consent from the client. It is therefore advisable that these matters be confirmed in writing.

[2] In addition, a lawyer's professional objectivity in a matter may be threatened or destroyed by circumstances personal to the lawyer. A conflict may arise due to a family or other close relationship, an outside activity, or a strong belief or viewpoint. Another example is a mental state created or exacerbated by a particular representation, such as feelings of enmity towards a colleague acting for an opposing party. A lawyer's objectivity may also be affected when the lawyer unduly favours the client's position, since the result may be overly optimistic advice or an unrealistic recommendation.

[3] In all of these circumstances, a lawyer must recognize when it is not in the client's best interests to be represented by the lawyer.

Doing Business with a Client

3.4-13 A lawyer must not enter into a transaction with a client who does not have independent legal representation unless the transaction is fair and reasonable to the client and the client consents to the transaction.

Commentary

[1] This rule applies to any transaction with a client, including:

(a) lending or borrowing money (see related commentary below);

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift (see related commentary below);

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

General Principles

[2] The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client is permitted. When entering a transaction with a client who does not otherwise have independent legal representation, the lawyer faces a potential conflict whether acting only on his own behalf or on behalf of both himself and the client in relation to the transaction.

[3] Independent legal representation is distinguishable from independent legal advice. Independent legal representation is a retainer in which the client has a separate lawyer acting for the client in the transaction. Independent legal advice is a retainer in which the client does not wish to have full independent legal representation but receives advice about the legal aspects of the transaction and its advisability.

[4] When the client does not have separate independent legal representation in the transaction, the lawyer has the onus of demonstrating that:

- the transaction was fair and reasonable to the client;
- the transaction was not disadvantageous to the client;
- the client was fully informed;
- the client consented to the transaction; and
- the client had independent legal advice, or was not disadvantaged by its absence.

[5] For the purposes of this rule and commentary, the reference to a "lawyer" includes an associate or partner of the lawyer, related persons (as defined below), and a trust or estate in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity.

[6] In this rule, "related persons" means individuals connected to the lawyer by a blood relationship, marriage or common-law partnership or adoption, and includes a corporation owned or controlled directly or indirectly by the lawyer, or other related persons as described, either individually or in combination with one another.

[7] A conflict may also arise if a related person transacts business with the lawyer's client. There is no conflict, however, if the client is entering a transaction with a publicly traded corporation or entity in which the lawyer has an interest.

[8] The lawyer must act in good faith and make full disclosure to the client of material facts relevant to the transaction. The lawyer must also disclose and explain the nature of any actual or potential conflict of interest to the client. If the lawyer does not choose to make disclosure of material facts or a conflict of interest, or cannot do so without breaching confidentiality, the lawyer must not proceed with the transaction.

[9] The client must be advised of the advantages of retaining independent counsel. The nature of the matter may require that the client have independent legal representation. At a minimum, the lawyer must recommend that the client seek independent legal advice. If the client elects to waive independent legal advice, the lawyer must still make an independent assessment of whether he or she is able to proceed, considering the nature of the transaction. All discussions with the client should be clearly documented and confirmed in writing.

Payment of Fees

[10] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflict of interest.

[11] Where a client proposes to pay for legal services by transferring an interest in a corporation, property, investment or other enterprise, the lawyer must, at a minimum, recommend that the client receive independent legal advice.

[12] See also “Gifts and Bequests”, below, regarding fees paid to lawyers for the administration of an estate.

Lending and Borrowing

[13] A lawyer must not borrow money from a client unless:

- the client is a lending institution whose business includes lending money to members of the public, or
- the client is a related person and the lawyer is able to discharge the onus of proving that the client’s interests were fully protected by independent legal advice.

[14] If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must disclose and explain the nature of the conflicting interest to the client, recommend that the client receive independent legal representation, and obtain the client’s consent.

[15] A lawyer must not personally guarantee, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender unless:

- the lender is providing funds solely for the lawyer or a related person,
- the transaction is for the benefit of a non-profit or charitable institution, and the lawyer is a member or supporter of such institution, either individually or together with others, or
- the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and the lawyer has otherwise complied with these rules.

Gifts and Bequests

[16] A "transaction" includes the acceptance of a gift or bequest. A lawyer is not entitled to make a profit from clients other than through fair professional remuneration. If a gift or bequest from a client appears to be unearned or disproportionately substantial, it is prima facie not "fair and reasonable" to the client as required by this rule and a presumption of undue influence is raised. A

lawyer must refuse to accept a gift that is other than nominal unless the client has received independent legal advice.

[17] A lawyer may prepare an instrument giving the lawyer or another firm member a gift or benefit from a client, including a testamentary gift, where the client is a family member of the lawyer or another firm member. A lawyer must otherwise refuse to draft an instrument effecting a gift or bequest to the lawyer or any related person or entity.

[18] A lawyer may draft a client's will to include a clause directing that the executor retain the lawyer's services in the administration of the client's estate, but only if the client expressly instructs the lawyer to do so. Express instructions from the client are also required if the will contains a clause dealing with the lawyer's fees, whether the lawyer is acting as executor, the estate's lawyer, or both.

Compassionate Loans – Alberta

[19] Lawyers sometimes find themselves in situations where their clients have claims but are in dire financial circumstances and request a loan (which for these purposes includes a cash advance on prospective recovery) from the lawyer, with little or no prospect of repayment other than from the proceeds of the case. Because of the inequality of the bargaining positions of the lawyer and the client in these situations, and the inevitable appearance that the lawyer is taking advantage of the client, a lawyer must not make a loan to such a client other than on a no-interest, no-charges basis; however, it may be appropriate for a lawyer to make a compassionate loan to such a client, to be repaid out of the proceeds of the case or otherwise. A compassionate loan is one made for the purpose of relieving the client's personal or financial distress and which carries no interest or other charges, reflecting the fact that the loan is intended as a compassionate gesture and not as a commercial transaction.

[20] A lawyer must not make a compassionate loan if, as a result of the lawyer's expectation of recovering fees, disbursements, and the loan from the proceeds of the case, the lawyer has a financial interest in the case that is so disproportionate that the lawyer's objectivity will be impaired. After making a compassionate loan, a lawyer's objectivity or judgment may be adversely affected by a reassessment of the case. In that event, the lawyer must cease to act.

[21] This commentary applies to the conduct of a lawyer personally or that of related persons, including any arrangement pursuant to which the lawyer benefits directly or indirectly, such as, for example, a referral by a lawyer to a lender who is a member of the lawyer's immediate family or a lender controlled by a member of the lawyer's immediate family.

Conflicts Arising from Relationships with Others

3.4-14 A lawyer must not personally represent a party to a dispute when a family member is acting for an opposing party and, unless all parties consent, a lawyer must not personally represent a party to a matter when a family member is representing another party to the matter and those parties are in a conflict or potential conflict situation.

Commentary

[1] If a relationship exists that does not, pursuant to this rule, prevent a lawyer from acting in a matter but where doing so may raise a reasonable apprehension of impropriety, the lawyer must disclose the relationship to the client (see also Rule 5.1-3 - avoidance of apprehension of bias when appearing before a tribunal).

[2] For the purposes of this rule, "family member" means the spouse, child, sibling, parent, grandchild or grandparent of a lawyer, and any person who is a member of the lawyer's household.

[3] This rule applies only to the lawyer having the relationship in question and not to other members of the lawyer's firm.

[4] A close familial relationship is inconsistent with the adversarial nature of legal representation in a dispute. In contrast, the absence of a dispute may permit related lawyers to act provided that the lawyer's objectivity is not impaired. If, however, the situation constitutes a conflict or potential conflict, the consent of all parties must be obtained.

[5] A lawyer may have a close relationship with a person not qualifying as a family member. That relationship may nonetheless be relevant to a particular representation. For example, a lawyer may be married to the secretary of opposing counsel; lawyers acting on opposing sides of a matter may be cousins or close friends; or opposing counsel may be a member of a small firm in which the lawyer's spouse practises. In these and similar situations, the relationship must be disclosed to the client.

Pro Bono Service – Alberta

3.4-15 (a) A lawyer engaged in the provision of short-term legal services through a non-profit legal services provider, without any expectation that the lawyer will provide continuing representation in the matter:

(i) May provide legal services, unless the lawyer is aware that the clients' interests are directly adverse to the immediate interests of another current client of the individual lawyer, the lawyer's firm or the non-profit legal services provider; and

(ii) May provide legal services, unless the lawyer is aware that the lawyer or the lawyer's firm may be disqualified from acting due to the possession of confidential information which could be used to the disadvantage of a current or former client of the lawyer, the lawyer's firm, or the non-profit legal services provider.

(b) In the event a lawyer provides short-term legal services through a non-profit legal services provider, other lawyers within the lawyer's firm or providing services through the non-profit legal services provider may undertake or continue the representation of other clients with interests adverse to the client being represented for a short-term or limited purpose, provided that adequate screening measures are taken to prevent disclosure or involvement by the lawyer providing short-term legal services.

Commentary

[1] This rule provides guidance in managing conflicts of interest for lawyers volunteering in a pro bono setting. Improving access to justice is an important goal of the legal profession. Lawyers have a duty to facilitate access to justice: Rule 4.1-1. Also, lawyers have a duty to participate in pro bono activities: Rule 2.1-2. This objective should be balanced with all other factors in determining whether a lawyer should be disqualified from a representation because of a conflict of interest.

[2] For the purposes of this rule, the term "non-profit legal services provider" means volunteer pro bono and non-profit legal services organizations, including Legal Aid Alberta. These non-profit legal services providers have established programs through which lawyers provide short-term legal services.

[3] "Short-term legal services" means advice or representation of a summary nature provided by a lawyer to a pro bono client under the auspices of a non-profit organization with the expectation by the lawyer and the pro bono client that the lawyer will not provide continuing representation in the matter. It is in the interests of the public, the legal profession and the judicial system that lawyers be available to individuals through these organizations. Although a lawyer-client relationship is established in such a limited consultation, there is no expectation that the lawyer's representation of the pro bono client will continue beyond it. Such programs or services are normally offered in circumstances which make it difficult to systematically identify conflicts of interest, despite the best efforts and existing practices of non-profit legal services organizations. Further, the limited nature of the legal services being provided significantly reduces the risk of conflicts of interest with other matters being handled by the consulting lawyer's firm.

[4] Accordingly, the rule requires compliance with the usual rules which govern conflicts of interest only if the consulting lawyer has actual knowledge that he or she may be disqualified as the result of a potential or actual conflict. Such a conflict may involve a lawyer's relationship between an existing or former client and the consulting lawyer, the lawyer's firm or the non-profit legal services provider. In most cases, it is expected that the existence of a potential conflict will be identified through the conflict identification processes employed by non-profit legal services organizations or by the individual lawyer who may identify a conflict before or at the time of meeting with the pro bono client receiving the short-term legal services.

[5] The personal disqualification of a lawyer providing legal services through a non-profit legal services provider shall not be imputed to other participating lawyers. If, however, the lawyer intends to represent the pro bono client on an ongoing basis after commencing the short-term limited retainer, the other rules governing conflicts of interest will apply.

[6] The confidentiality of information obtained by a lawyer providing short-term legal services pursuant to this rule must be maintained. If not, a lawyer's firm, or other lawyers providing services under the auspices of the non-profit legal services provider, will not be able to act for other clients where there is a conflict with the pro bono client. Without restricting the scope of screening measures which may be appropriate, the following are examples of some measures which may be taken to ensure confidentiality:

- The lawyer who provided the short-term legal services shall have no involvement in the representation of another client whose interests conflict with those of the pro bono client, and shall not have any discussions with the lawyers representing the other client.
- Discussions involving the relevant matter should take place only with the limited group of firm members working on the other client's matter.
- The relevant files may be specifically identified and physically segregated and access to them limited only to those working on the file or who require access for specifically identified or approved reasons.
- It would also be advisable to issue a written memo to all lawyers and support staff, explaining the measures which have been undertaken.
- See Rule 3.4-10, paragraph 14, guidelines for screening, for additional suggestions.

[7] Provided this rule has been complied with, the lawyer providing short-term legal services does not require consent of the pro bono client or another client whose interests are in conflict with the pro bono client. However, if the lawyer is or becomes aware of a conflict, then it may not be waived by consent. In that case, the lawyer shall not provide short-term legal services.

[8] When offering short-term legal services, lawyers should also assess whether the pro bono client may require additional legal services, beyond a limited consultation. In the event that such additional services are required or advisable, the lawyer should explain the limited nature of the consultation and encourage or assist the pro bono client to seek further legal assistance.

3.5 Preservation of Clients' Property

Preservation of Clients' Property

3.5-1 (a) In this rule, "property" includes a client's money, securities as defined in the Alberta Securities Act, original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.

(b) A lawyer must:

(i) observe all relevant rules and law, including the duties of a professional fiduciary, about the preservation of a client's property entrusted to a lawyer; and

(ii) care for a client's property as a careful and prudent owner would when dealing with like property.

Commentary

[1] The duties concerning safekeeping, preserving, and accounting for clients' money and other property are set out in the Rules of the Law Society, Rules 119-119.46.

[2] These duties are closely related to those regarding confidential information. A lawyer is responsible for maintaining the safety and confidentiality of the files of the client in the possession of the lawyer and should take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information. A lawyer should keep the client's papers and other property out of sight as well as out of reach of those not entitled to see them.

[3] Subject to any rights of lien, the lawyer should promptly return a client's property to the client on request or at the conclusion of the lawyer's retainer.

[4] If the lawyer withdraws from representing a client, the lawyer is required to comply with Rule 3.7 (Withdrawal from Representation).

Notification of Receipt of Property

3.5-2 A lawyer must promptly notify a client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

Identifying Clients' Property

3.5-3 A lawyer must clearly label and identify clients' property and place it in safekeeping distinguishable from the lawyer's own property.

3.5-4 A lawyer must maintain such records as necessary to identify clients' property that is in the lawyer's custody.

Accounting and Delivery

3.5-5 A lawyer must account promptly for clients' property that is in the lawyer's custody and deliver it to the order of the client on request or, if appropriate, at the conclusion of the retainer.

Commentary

[1] Money held in trust by a lawyer to the credit of a client may not be applied to fees incurred by the client unless an account has been rendered to the client. This rule permits the use of trust money held to the credit of a client to pay an outstanding account not only in the matter in respect of which the trust money was received, but in any previous matter handled by the lawyer for the same client. This rule is not, however, intended to be an exhaustive statement of the considerations that apply to the payment of a lawyer's account from trust. The handling of trust money generally is governed by the Rules of the Law Society. Those Rules must also be complied with in the application of trust money to fees earned by a lawyer.

3.5-6 If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction.

Commentary

[1] A lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with such relevant constitutional and statutory provisions as those found in the *Income Tax Act* (Canada), the *Charter* and the *Criminal Code*.

[2] The duties of a lawyer with respect to the handling of client property that is evidence of a crime are complex and may impose additional duties beyond those described in this rule (See Rule 5.1-10 and Commentary).

3.6 Fees and Disbursements

Reasonable Fees and Disbursements

3.6-1 A lawyer must not charge or accept a fee or disbursement, including interest or other charges, unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary

[1] What is a fair and reasonable fee depends on such factors as:

(a) the time and effort required and spent;

(b) the difficulty of the matter and the importance of the matter to the client;

(c) whether special skill or service has been required and provided;

(d) the results obtained;

(e) fees authorized by statute or regulation;

(f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;

(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;

(h) any relevant agreement between the lawyer and the client;

(i) the experience and ability of the lawyer;

(j) any estimate or range of fees given by the lawyer; and

(k) the client's prior consent to the fee.

[2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, extra fees, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

[4] A lawyer should be ready to explain the basis of the fees and disbursement charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

Contingent Fees and Contingent Fee Agreements

3.6-2 Subject to Rule 3.6-1, a lawyer may enter into a written agreement in accordance with governing legislation that provides that the lawyer's fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer's services are to be provided.

Commentary

[1] In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it and the amount of the expected recovery. Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client in accordance with the Alberta Rules of Court, Rule 10.7. The test is whether the fee, in all of the circumstances, is fair and reasonable.

[2] Although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in Rule 3.7, special circumstances apply when the retainer is pursuant to a contingency agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in Rule 3.7-5 (Obligatory Withdrawal) unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur.

Statement of Account

3.6-3 In a statement of an account delivered to a client, a lawyer must clearly and separately detail the amounts charged as fees and disbursements.

Commentary

[1] The two main categories of charges on a statement of account are fees and disbursements. A lawyer may charge as disbursements only those amounts that have been paid or are required to

be paid to a third party by the lawyer on a client's behalf. However, a subcategory entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements, provided that the client has agreed to such costs.

[2] Subject to any special agreement with the client, a final account should be rendered within a reasonable time after completion of the services.

[3] See the Alberta Rules of Court, Rule 10.2, respecting the content of lawyers' accounts.

[4] Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client. See the Commentary to Rule 3.6-2 respecting contingency matters.

Joint Retainer

3.6-4 If a lawyer acts for two or more clients in the same matter, the lawyer must divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees and Referral Fees

3.6-5 If there is consent from the client, fees for a matter may be divided between lawyers who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

3.6-6 If a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter, and the referral was not made because of a conflict of interest, the referring lawyer may accept, and the other lawyer may pay, a referral fee, provided that:

(a) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(b) the client is informed and consents.

3.6-7 A lawyer must not:

(a) in connection with the referral of clients, directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person who is not a lawyer.

Commentary

[1] This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this rule does not prohibit a lawyer from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice; or

(d) occasionally entertaining potential referral sources by purchasing meals, providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

[2] Lawyers may pay non-lawyers for direct and reasonable advertising costs (including a lawyer referral service), and are also allowed to compensate employees and other persons for general marketing and public relations services, whether by salary, profit sharing, bonus or otherwise, provided the compensation is not directly related to a specific client matter.

Exception for Multi-discipline Practices and Inter-jurisdictional Law Firms

3.6-8 Rule 3.6-7 does not apply to:

(a) multi-discipline practices of lawyer and non-lawyer partners if the partnership agreement provides for the sharing of fees, cash flows or profits among the members of the firm; and

(b) sharing of fees, cash flows or profits by lawyers who are members of an interjurisdictional law firm.

Commentary

[1] An affiliation is different from a multi-disciplinary practice established in accordance with the rules, regulations or by-laws under the governing legislation, or an interjurisdictional law firm, however structured. An affiliation is subject to Rule 3.6-7. In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

Payment and Appropriation of Funds

3.6-9 A lawyer must not appropriate any client funds held in trust or otherwise under the lawyer's control for or on account of fees, except as permitted by the governing legislation.

Commentary

[1] The rule is not intended to be an exhaustive statement of the considerations that apply to payment of a lawyer's account from trust. The handling of trust money is generally governed by the Rules of the Law Society.

[2] Refusing to reimburse any portion of advance fees for work that has not been carried out when the contract of professional services with the client has terminated is a breach of the obligation to act with integrity.

3.6-10 If the amount of fees or disbursements charged by a lawyer is reduced on a review or assessment, the lawyer must repay the money to the client as soon as is practicable.

Prepaid Legal Services Plan

3.6-11 A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

(a) the scope of work to be undertaken by the lawyer under the plan; and

(b) the extent to which a fee or disbursement will be payable by the client to the lawyer.

3.7 Withdrawal from Representation

Withdrawal from Representation

3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds.

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or the Rules of Court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See Rule 3.7-6, Manner of Withdrawal.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

Optional Withdrawal

3.7-2 If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by the client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the

client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non-payment of Fees

3.7-3 If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Commentary

[1] When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial. Also see the commentary to Rule 3.7-4.

Withdrawal from Criminal Proceedings

3.7-4 If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any money received on account of fees and disbursements;

(c) notifies Crown counsel that the lawyer is no longer acting; and

(d) complies with the applicable Rules of Court.

Commentary

[1] In Alberta, when a lawyer seeks to withdraw in criminal proceedings the usual practice is to apply for leave in open court.

[2] A lawyer who has withdrawn, or intends to withdraw, because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn. If the court requests that the lawyer provide reasons for withdrawal, then the lawyer may indicate that there are "ethical reasons" or an inability to obtain proper instructions, making the least possible disclosure of privileged information. In certain circumstances, the court may refuse to allow a lawyer to withdraw for non-payment of fees.

Obligatory Withdrawal

3.7-5 A lawyer must withdraw if:

(a) discharged by a client;

(b) a client persists in instructing the lawyer to act contrary to professional ethics; or

(c) the lawyer is not competent to continue to handle a matter.

Manner of Withdrawal

3.7-6 When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

3.7-7 On discharge or withdrawal, a lawyer must:

(a) notify the client in writing, stating:

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable Rules of Court.

Commentary

[1] If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.

[2] If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement on the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter. Material prejudice is more than mere inconvenience to the client. A lawyer should not enforce a solicitor's lien for non-payment if the client is prepared to enter into an arrangement that reasonably assures the lawyer of payment in due course. When a matter is being transferred to other counsel, the transferring lawyer may request that the receiving lawyer undertake to pay an outstanding account from the money ultimately

recovered by that lawyer. Where the matter in question is subject to a contingency agreement, the lawyers may agree to divide the contingent fee on the basis of an apportionment of total effort required to effect recovery.

[3] The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

[4] Co-operation with the successor lawyer will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

[5] Subject to Rule 3.4 (Conflicts of Interest) and Rule 3.3 (Confidentiality), a lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor lawyer or lawyers and should seek to avoid any unseemly rivalry, whether real or apparent.

Duty of Successor Lawyer

3.7-8 Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

Commentary

[1] It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps toward settling or securing any outstanding account of the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged. But, if a trial or hearing is in progress or imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

Leaving a Law Firm

3.7-9 When a lawyer leaves a law firm, the lawyer and the law firm must:

(a) ensure that clients who have current matters for which the departing lawyer has conduct or substantial involvement are given reasonable notice that the lawyer is departing and are advised of their options for retaining counsel; and

(b) take reasonable steps to obtain the instructions of each affected client as to who they will retain.

Commentary

[1] When a lawyer leaves a firm to practise elsewhere, it may result in the termination of the lawyer-client relationship between that lawyer and a client.

[2] The departing lawyer should provide reasonable notice of the lawyer's departure to the firm, in advance of any notice of the departure to clients.

[3] The client's interests are paramount. Clients must be free to decide whom to retain as counsel, without undue influence or pressure by the lawyer or the firm. The client should be provided with sufficient information to make an informed decision about whether to (a) continue with the departing lawyer, (b) remain with the firm, or (c) retain new counsel.

[4] The lawyer and the law firm should cooperate to identify the clients who should receive notice of the lawyer's departure and to agree on the contents of a neutrally-worded letter which provides notice of the departure and sets forth the three available options listed in paragraph [3]. The firm should provide notice of the lawyer's departure to the affected clients, which include those who have current matters for which the departing lawyer has conduct or in which the departing lawyer has had substantial involvement. In the absence of agreement, either the departing lawyer and the law firm may provide the notification. In some cases, the departure of the lawyer may be relevant to the handling of a client's file. The firm may have an obligation to notify the client of the lawyer's departure, even if the firm and departing lawyer agree that the client will not be provided with a letter in which the client is asked to choose one of the three options above,

[5] If a client contacts a law firm to request a departed lawyer's contact information, the law firm should provide the professional contact information where reasonably possible. The firm and the departing lawyer should agree that clients may be contacted by the other party, where appropriate. Should a client actively seek advice or information, the response of the lawyer contacted must be professional, neutral in tone, and consistent with the client's best interests.

[6] Where a client chooses to remain with the departing lawyer, the instructions referred to in the rule should include written authorizations for the transfer of files and client property. The lawyer and firm must come to a mutually acceptable arrangement respecting work in progress and disbursements outstanding on files that are to be transferred with the lawyer. In all cases, the situation should be managed in a way that minimizes expense and avoids prejudice to the client.

[7] When a client chooses to remain with the firm, the firm should consider whether it is reasonable in the circumstances to charge the client for time expended by another firm member to become familiar with the file.

[8] The principles outlined in this rule and commentary will apply to the dissolution of a law firm. When a law firm is dissolved, it usually results in the termination of the lawyer-client relationship between a particular client and one or more of the lawyers in the firm. The client should be notified of the dissolution and provided with sufficient information to decide who to retain as counsel. The lawyers who are no longer retained by the client should try to minimize expense and avoid prejudice to the client.

[9] See also rules 3.7-6 to 3.7-8 and related commentary regarding enforcement of a solicitor's lien and the duties of former and successor counsel.

[10] Rule 3.7-9 does not apply to a lawyer leaving (a) a government, a Crown corporation or any other public body or (b) a corporation or other organization for which the lawyer is employed as in house counsel.

Chapter 4 – Marketing of Legal Services

4.1 Making Legal Services Available

Making Legal Services Available

4.1-1 A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 4.1-2, may offer legal services to a prospective client by any means.

Commentary

[1] A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programs of public information, education or advice concerning legal matters.

[2] As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

[3] A lawyer who knows or has reasonable grounds to believe that a client is entitled to Legal Aid should advise the client of the right to apply for Legal Aid, unless the circumstances indicate that the client has waived or does not need such assistance.

Right to Decline Representation

[4] A lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another lawyer, the assistance should be given willingly and, except where a referral fee is permitted by Rule 3.6-6, without charge.

Restrictions

4.1-2 In offering legal services, a lawyer must not use means that:

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or

(d) otherwise bring the profession or the administration of justice into disrepute.

Commentary

[1] A person who is vulnerable or who has suffered a traumatic experience and has not recovered may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable, exploitive or other means that bring the profession or the administration of justice into disrepute.

4.1-3 A lawyer must not advertise that the lawyer will make loans to clients, whether such loans are characterized as loans or cash advances with respect to claims.

Commentary

[1] This rule applies to the conduct of a lawyer personally or in relation to entities either related to or controlled by a lawyer.

4.2 Marketing

Marketing of Professional Services

4.2-1 A lawyer may market professional services, provided that the marketing is:

(a) demonstrably true, accurate and verifiable;

(b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;

(c) in the best interests of the public and consistent with a high standard of professionalism.

Commentary

[1] Examples of marketing that may contravene this rule include:

(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to other lawyers;

(c) raising expectations unjustifiably;

(d) suggesting or implying the lawyer is aggressive;

(e) disparaging or demeaning other persons, groups, organizations or institutions;

(f) taking advantage of a vulnerable person or group; and

(g) using testimonials or endorsements that contain emotional appeals.

Advertising of Fees

4.2-2 A lawyer may advertise fees charged for legal services provided that:

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

4.3 Advertising Nature of Practice

4.3-1 A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

Commentary

[1] Lawyers' advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

[2] A lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. A claim that a lawyer is a specialist or expert, or specializes in an area of law, implies that the lawyer has met some objective standard or criteria of expertise, presumably established or recognized by a Law Society. In the absence of Law Society recognition or a certification process, an assertion by a lawyer that the lawyer is a specialist or expert is misleading and improper.

[3] If a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm that makes reference to the status of a firm member as a specialist or expert, in media circulated concurrently in the Province of Alberta and the certifying jurisdiction, does not offend this rule if the certifying authority or organization is identified.

[4] A lawyer may advertise areas of practice, including preferred areas of practice or a restriction to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

4.4 Firm Names

4.4-1 Law firms are permitted to use trade names, initials, logos, symbols, or the names of individuals or their professional corporations, provided that they are not misleading or confusing, and are otherwise consistent with these rules.

Commentary

[1] Firm names must accurately represent the firm and the work carried out by firm members. A firm name may consist of:

(a) the names of one or more individual lawyers;

(b) the names of one or more professional corporations;

(c) the names of existing or former partners or associates;

(d) a trade name; or

(e) any combination of (a), (b), (c) and (d).

[2] The firm must be able to: (a) demonstrate sufficient connection or relationship with the name(s) included, and (b) use such qualifying words as necessary to ensure that a potential consumer of the firm's services understands it is a law firm and is not engaged in some other business. A law firm name must not include the name of any individual or other entity not entitled to practise law in Canada or any other jurisdiction. The firm name may include the name(s) of individuals currently or formerly entitled to practice law in Canada and in jurisdictions other than Canada. If using a trade name, the name should include such phrases as “Law”, “Law Firm”, “Lawyer”, or “Barristers and Solicitors”, so that it is clear that the activity of the firm is the practice of law.

[3] The inclusion in a firm name of a person or entity not currently licensed or eligible to deliver legal services in Alberta, or a person who is no longer alive, does not constitute a representation that the named person or entity is available in the firm to deliver legal services.

[4] A trade name must be carefully selected to avoid any misconception on the part of the public. For example, "University Legal Clinic" would be unacceptable because it implies a connection with another institution. A geographical trade name is improper if it leads a reasonable person to erroneously conclude that the law office is a public agency, or is the only law office available in that area or locality, or if the name misleads the public in another respect. A trade name which includes a reference to the lawyer’s area(s) of practice is allowed, as long as it is not misleading or confusing.

[5] The name of a firm member who has become a judge may continue to be in the firm name (but not in the listing of names on the letterhead); however, no firm member may appear before that judge so long as the judge's name forms part of the firm name. This prohibition is necessary to preserve the appearance of justice and propriety (see Rule 5.1-3 and related commentary).

[6] The use by a sole practitioner of the phrase "and Company" or "and Associates" after the lawyer's surname is misleading.

Limited liability partnership

[7] A limited liability partnership, in addition to complying with the name regulations under the Partnership Act (Alberta), must ensure that any trade name used by the partnership clearly indicates the limited liability status of its partners.

Names listed on letterhead

[8] Names listed on letterhead must accurately represent the status of the individual(s) named. For example:

(a) the status of an inactive or former member must be clearly indicated;

(b) the names of extraprovincial lawyers associated with the firm must be so described, together with the jurisdictions in which they are authorized to practice;

(c) the position or status of persons who are not lawyers (such as office manager, in house accountants, students at law and patent and trade mark agents) employed by the firm, must be clearly stated.

[9] The status of a person whose name appears in the firm name only and is not listed on the letterhead does not require specification.

Chapter 5 – Relationship to the Administration of Justice

5.1 The Lawyer as Advocate

Advocacy

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

[1] In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

[2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

[3] The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.

[4] In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.

[5] A lawyer should refrain from expressing the lawyer's personal opinions on the facts in evidence of a client's case to a court or tribunal.

[6] A lawyer must not communicate with a tribunal respecting a matter unless the other parties to the matter, or their counsel, are present or have had reasonable prior notice, or unless the circumstances are exceptional and are disclosed fully and completely to the court.

[7] When a lawyer is required by law to notify one or more parties of a step taken or to be taken in a matter, the lawyer must notify all parties to the matter. Although certain steps appear to involve

only certain parties and not others, the interests of one or more of the other parties may be affected in a manner not immediately evident.

[8] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled. This situation creates an obligation on the lawyer present to prevent a manifestly unjust result by disclosing all material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

[9] The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

[10] In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

Duty as Defence Counsel

[11] When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

[12] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

5.1-2 When acting as an advocate, a lawyer must not:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by

malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) take any step in the representation of a client that is clearly without merit;

(c) unreasonably delay the process of the tribunal;

(d) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

(e) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(f) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(g) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(h) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(i) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

(j) introduce or otherwise bring to the tribunal's attention facts or evidence that the lawyer knows to be inadmissible;

(k) make suggestions to a witness recklessly or knowing them to be false;

(l) permit or participate in a payment or other benefit to a witness in excess of reasonable compensation;

(m) counsel a witness to give evidence that is untruthful or misleading;

(n) deliberately refrain from informing a tribunal of any relevant adverse authority that the lawyer considers to be directly on point and that has not been mentioned by another party;

(o) improperly dissuade a witness from communicating with other parties or from giving evidence, or advise a witness to be absent;

(p) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;

(q) discuss the testimony of a witness with a person excluded by the tribunal during such testimony;

(r) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;

(s) needlessly abuse, hector or harass a witness;

(t) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal or quasi-criminal charge or complaint to a regulatory authority or by offering to seek or to procure the withdrawal of a criminal or quasi-criminal charge or complaint to a regulatory authority;

(u) needlessly inconvenience a witness; or

(v) appear before a court or tribunal while under the influence of alcohol or a drug or when it may be reasonably foreseen that the lawyer will be unable for any reason to provide competent services.

Commentary

[1] In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

[2] **Relevant adverse authority:** A decision is relevant where it refers to any point of law on which the case in question might turn. Relevance does not include cases that have merely some resemblance to the case before the court on the facts; it "means cases which decide a point of law" on which the current case depends. With respect to the lawyer's obligation to discover the relevant law, the duty does not extend to searching out unreported cases. The lawyer does have an obligation to bring to the court's attention cases of which the lawyer has knowledge and, as well, the lawyer cannot discharge this duty by not bothering to determine whether there is a relevant authority.

Lawyers are not obliged to bring forward facts that the other side has omitted to bring to the court's attention. They are not obliged to make the other side's case. They are, simply, obliged to make sure that the court has before it all relevant legal authority, whether helpful or not.

[3] A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, when the complainant or potential complainant is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. If the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

[4] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also Rules 3.2-11 to 3.2-12 and accompanying commentary.

[5] When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

5.1-3 Except with the consent of all parties, a lawyer must not appear before a judge or a tribunal when the lawyer's past or present relationship with the judge or the tribunal would create a reasonable apprehension of bias.

Commentary

[1] The term "lawyer" is used in the sense of the individual lawyer. Most relationships contemplated by the Rule are sufficiently personal that others in the lawyer's firm should not be tainted by association. On the other hand, circumstances are conceivable in which it would be unwise for a partner or associate of the lawyer having the relationship to appear before the judge or tribunal in question.

[2] Impartiality is an essential element of judicial proceedings, from a substantive viewpoint and also in terms of society's perception of the justice system. Accordingly, lawyers have an ethical obligation to contribute to the fact and appearance of impartiality.

[3] The first aspect of the Rule is the relationship between a lawyer and an individual judge. The Rule clearly prohibits a lawyer from appearing before a judge who is a relative or with whom the lawyer has a business relationship. Other close or intimate relationships may also bar a lawyer from appearing, depending on the circumstances.

[4] With respect to a judge who was formerly with the lawyer's firm, the propriety of such an appearance will be governed by factors such as the length of time the judge has been on the bench and the nature and import of the judicial proceeding.

[5] A second aspect of the Rule is the relationship between a lawyer and the tribunal. Relationships that may create a reasonable apprehension of bias include the following:

(a) A firm member may be a member of a tribunal, council or other official body. While the lawyer is generally prevented from appearing before the body itself, it is normally permissible to appear before a committee of the body if the firm member is not a member of that committee.

(b) A lawyer may at one time have had an association with a court, tribunal, council or other official body, as an employee or in the role of judge or adjudicator. The lawyer's subsequent appearance before the body as counsel may be improper because of actual or perceived collegiality with the current adjudicators, or because of a suspected "reverse bias" that could operate to the detriment of the lawyer's client. The passage of time will in most cases mitigate these considerations, two years being a standard benchmark. Other factors may also be present that are not mitigated by the passage of time. Whether there is an apprehension of bias in a particular case must therefore be determined by reference to all relevant circumstances.

[6] In some instances, the other parties to a matter may consent to a lawyer's appearance before a judge or tribunal despite a past or present relationship, or the lawyer may have concluded on a consideration of all relevant factors that such an appearance is not improper. Nonetheless, an appropriately impartial atmosphere must be maintained during the proceeding, which will not be the case if the lawyer displays undue familiarity in discussions or dealings with the judge or tribunal.

Duty as Prosecutor

5.1-4 When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

[1] When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. To the extent required by law and accepted practice, the prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Disclosure of Error or Omission

5.1-5 (a) A lawyer must not mislead a tribunal nor assist a client or witness to do so.

(b) Upon becoming aware that a tribunal is under a misapprehension as a result of submissions made by the lawyer or evidence given by the lawyer's client or witness, a lawyer must, subject to Rule 3.3 (Confidentiality), immediately correct the misapprehension.

Commentary

[1] If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to Rule 3.7 (Withdrawal from Representation), withdraw or seek leave to do so.

[2] It is an obvious contravention of the rule for an advocate to lie to a tribunal. The rule applies as well, however, to an indirect misrepresentation. For example, a lawyer may not respond to a question from a tribunal in a technically correct manner that creates a deliberately misleading impression.

[3] On the other hand, a lawyer is not required to inform a tribunal of facts that should have been brought forth by opposing counsel. If it becomes apparent that the tribunal is uninformed or misinformed on a factual matter through no fault of the lawyer or the lawyer's client or witness, a lawyer is justified in remaining silent.

[4] A lawyer has a duty to correct a misapprehension arising from an honest mistake on the part of counsel or from perjury by the lawyer's client or witness. It may be a sufficient discharge of this duty to merely advise the tribunal not to rely on the impugned information.

[5] The principle applies not only to statements that were untrue at the time they were made, but to those that were true when made but have subsequently become inaccurate due to a change in circumstance. For example, it may have been represented that a personal injury plaintiff is permanently disabled. If, prior to judgment, the plaintiff's condition undergoes material improvement, the lawyer must, subject to confidentiality, convey this information to the court.

[6] Even if a matter has been judicially determined, the discovery of an error that may reasonably be viewed as having materially affected the outcome may oblige a lawyer to advise opposing counsel of the error. This may be the case notwithstanding that the appeal period has expired, since another remedy may be available to redress the mistake in whole or in part.

[7] Briefly, if correction of the misrepresentation requires disclosure of confidential information, the lawyer must seek the client's consent to such disclosure. If the client withholds consent, the lawyer is obliged to withdraw.

Courtesy

5.1-6 A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

Commentary

[1] Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct.

Undertakings

5.1-7 A lawyer must strictly and scrupulously fulfil any undertakings given and honour any trust conditions accepted in the course of litigation.

Commentary

[1] A lawyer should also be guided by the provisions of Rule 7.2-14 (Undertakings and Trust Conditions).

Agreement on Guilty Plea

5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

- **(a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;**
- **(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;**
- **(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and**
- **(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.**

Commentary

[1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

Handling Evidence

5.1-9 A lawyer must not counsel or participate in:

(a) the obtaining of evidence or information by illegal means;

(b) the falsification of evidence; or

(c) the destruction of property having potential evidentiary value or the alteration of property so as to affect its evidentiary value.

Commentary

[1] Lawyers must uphold the law and refrain from conduct that might weaken respect for the law or interfere with its fair administration. A lawyer must therefore seek to maintain the integrity of evidence and its availability through appropriate procedures to opposing parties.

[2] Paragraph (a) of Rule 5.1-9 prohibits a lawyer's involvement in the obtaining of evidence or information in a civil or criminal matter by means that are contrary to law, including the Charter of Rights and Freedoms and the Criminal Code.

[3] The word "property" in paragraph (c) includes electronic information. Paragraph (c) is not intended to interfere with the testing of evidence as contemplated by the Rules of Court.

Incriminating Physical Evidence

5.1-10 A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, "evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is wholly exculpatory, and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. A lawyer in possession of incriminating physical evidence should carefully consider his or her options. These options include, as soon as reasonably possible:

(a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;

(b) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence. A lawyer cannot merely continue to keep possession of the incriminating physical evidence.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer's advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or any alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

5.2 The Lawyer as Witness

Submission of Evidence

5.2-1 A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the Rules of Court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary

[1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

Appeals

5.2-2 A lawyer who is a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted.

5.3 Interviewing Witnesses

Interviewing Witnesses

5.3-1 A lawyer may seek information from any potential witness, provided that:

(a) before doing so, the lawyer discloses the lawyer's interest in the matter;

(b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and

(c) the lawyer observes rules 7.2-8 through 7.2-11 on communicating with represented parties.

Commentary

[1] There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding must be free to impart it voluntarily and in the absence of improper influence. The rule does not, however, prevent a lawyer from responding in the negative if a witness specifically asks if it is mandatory to talk to opposing parties.

[2] A lawyer may advise a witness to refrain from providing relevant information to an opposing party if the witness is:

(a) The lawyer's client. It is not only permissible but expected that a lawyer will not allow a client to discuss the merits of a case with an opponent except in the presence or with the consent of the lawyer.

(b) A witness having a close connection and identification of interests with the client. A witness such as a spouse or child of the client may be so closely connected with the client that it would be contrary to that person's legitimate interests to discuss the case with opposing parties. It is also possible that the witness may be the client's agent for the purposes of instructing and consulting with counsel and the agent's discussions with counsel may be privileged. In these circumstances, it is permissible to advise the witness against engaging in such discussions.

(c) The client's expert witness. As an expert witness usually receives confidential information of the client, it would be inappropriate for that witness to communicate freely with all parties. In addition, an expert's report will likely be privileged as part of the solicitor's brief. With respect to an expert, such as an attending doctor, who can be characterized as both an ordinary and an expert witness, opposing counsel is entitled to question the witness on matters not subject to privilege. Such questioning should be conducted only on notice to the lawyer concerned due to the risk of improper disclosure, intentional or otherwise. A lawyer must be aware of the legal and procedural rules of the relevant jurisdiction which govern contact with expert witnesses, including the application of litigation and solicitor-

client privilege. There may also be different limitations on the ability to contact an expert depending on the area of practice.

5.4 Communication with Witnesses Giving Evidence

Communication with Witnesses Giving Evidence

5.4-1 A lawyer must not influence a witness or potential witness to give evidence that is false, misleading or evasive.

5.4-2 A lawyer involved in a proceeding must not obstruct an examination or cross-examination in any manner.

Commentary

General Principles

[1] The ethical duty against improperly influencing a witness or a potential witness applies at all stages of a proceeding, including while preparing a witness to give evidence or to make a statement, and during testimony under oath or affirmation. It also applies to the preparation of sworn written evidence and "will say" statements for use in any proceeding. The role of an advocate is to assist the witness in bringing forth the evidence in a manner that ensures fair and accurate comprehension by the tribunal and opposing parties.

[2] A lawyer may prepare a witness, for questioning and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

Communicating with Witnesses Under Oath or Affirmation

[3] During any witness testimony under oath or affirmation, a lawyer should not engage in conduct designed to improperly influence the witness' evidence.

[4] The ability of a lawyer to communicate with a witness at a specific stage of a proceeding will be influenced by the practice, procedures or directions of the relevant tribunal, and may be modified by agreement of counsel with the approval of the tribunal. Lawyers should become familiar with the rules and practices of the relevant tribunal governing communication with witnesses during examination-in-chief and cross-examination, and prior to or during re-examination.

[6] A lawyer may communicate with a witness during examination-in-chief. However, there may be local exceptions to this practice.

[7] It is generally accepted that a lawyer is not permitted to communicate with the witness during cross-examination except with leave of the tribunal or with the agreement of counsel. The opportunity to conduct a full-ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses.

There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objections to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

[8] A lawyer should seek approval from the tribunal before speaking with a witness after cross-examination and before re-examination.

Questioning and Other Examinations

[9] Rule 5.4 also applies to questioning, including all examinations under oath or affirmation that are not before a tribunal. Lawyers should scrupulously avoid any attempts to influence witness testimony, particularly as the tribunal is unable to directly monitor compliance. This rule is not intended to prevent discussions or consultations that are necessary to fulfil undertakings given during such examinations.

5.5 Relations with Jurors

Communications before Trial

5.5-1 When acting as an advocate before the trial of a case, a lawyer must not communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel for that trial.

Commentary

[1] A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the prospective juror or with any member of the prospective juror's family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

[2] A lawyer should be aware of the provisions of the *Jury Act* (Alberta), setting out that certain communications by or with jurors and potential jurors may amount to contempt of court.

Disclosure of Information

5.5-2 Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate must disclose to them any information of which the lawyer is aware that a juror or prospective juror:

- **(a) has or may have an interest, direct or indirect, in the outcome of the case;**
- **(b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant; or**
- **(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness.**

5.5-3 A lawyer must promptly disclose to the court any information that the lawyer reasonably believes discloses improper conduct by a member of a jury panel or by a juror.

Communication during Trial

5.5-4 Except as permitted by law, a lawyer acting as an advocate must not communicate with or cause another to communicate with any member of the jury during a trial of the case.

5.5-5 A lawyer who is not connected with a case before the court must not communicate with or cause another to communicate with any member of the jury about the case.

5.5-6 A lawyer must not have any discussion after trial with a member of the jury about its deliberations.

Commentary

[1] The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of his or her family.

5.6 The Lawyer and the Administration of Justice

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

[1] The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

[3] **Criticizing Tribunals –** Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

[4] A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

5.6-2 A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest.

Commentary

[1] The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

5.7 Lawyers and Mediators

Role of Mediator

5.7-1 A lawyer who acts as a mediator must, at the outset of the mediation, ensure that the parties to it understand fully that:

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary

[1] In acting as a mediator, generally a lawyer should not give legal advice, as opposed to legal information, to the parties during the mediation process. This does not preclude the mediator from giving direction on the consequences if the mediation fails.

[2] Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of Rule 3.4 (Conflicts) and its commentaries and the common law authorities.

[3] If the parties have not already done so, a lawyer-mediator generally should suggest that they seek the advice of separate counsel before and during the mediation process, and encourage them to do so.

[4] If, in the mediation process, the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

Chapter 6 – Relationship to Students, Employees, and Others

6.1 Supervision

Direct Supervision Required

6.1-1 A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

Commentary

[1] A lawyer may permit a non-lawyer to act only under the supervision of a lawyer, so long as the lawyer maintains a direct relationship with the client. The extent of supervision will depend on the type of legal matter, including the degree of standardization and repetitiveness of the matter, and the experience of the non-lawyer generally and with regard to the matter in question. The burden rests on the lawyer to educate a non-lawyer concerning the duties that the lawyer assigns to the non-lawyer and then to supervise the manner in which such duties are carried out. A lawyer should review the non-lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion.

[2] A lawyer who practises alone or operates a branch or part time office should ensure that

(a) all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work; and

(b) no unauthorized persons give legal advice, whether in the lawyer's name or otherwise.

[3] If a non-lawyer has received specialized training or education and is competent to do independent work under the general supervision of a lawyer, a lawyer may delegate work to the non-lawyer.

Application

6.1-2 In this rule, a non-lawyer does not include a student-at-law.

Delegation

6.1-3 A lawyer must not permit a non-lawyer to:

(a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;

(b) give legal advice;

(c) exercise judgment in giving or accepting undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

(d) act finally without reference to the lawyer in matters involving professional legal judgment;

(e) be held out as a lawyer;

(f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above, in a supporting role to the lawyer appearing in such proceedings or authorized by law or the Rules of Court;

(g) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer;

(h) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;

(i) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

(j) sign correspondence containing a legal opinion;

(k) sign correspondence, unless

- **(i) it is of a routine administrative nature,**
- **(ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,**
- **(iii) the fact the person is a non-lawyer is disclosed, and**

(iv) the capacity in which the person signs the correspondence is indicated;

(l) forward to a client or third party any documents, other than routine, standard form documents, except with the lawyer's knowledge and direction;

(m) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or

(n) set fees.

Commentary

[1] A lawyer is responsible for any undertaking given or accepted and any trust condition accepted by a non-lawyer acting under his or her supervision.

[2] A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers or public officials or with the public generally, whether within or outside the offices of the law firm of employment.

[3] In all matters using a system for the electronic submission or registration of documents, whether or not the system contains the electronic signature of the lawyer, a lawyer who approves the electronic registration of documents by a non-lawyer is responsible for the content of any document.

Suspended or Disbarred Lawyers

6.1-4 Without the express approval of the lawyer's governing body, a lawyer must not retain, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction, has been disbarred, struck off the rolls, suspended, undertaken not to practise or who has been involved in disciplinary action and been permitted to resign and has not been reinstated or readmitted.

Commentary

[1] Lawyers should also refer to the Alberta Legal Profession Act regarding the employment of suspended or disbarred lawyers.

Electronic Registration of Documents

6.1-5 A lawyer who has personalized encrypted electronic access to any system for the electronic submission or registration of documents must not

(a) permit others, including a non-lawyer employee, to use such access; or

(b) disclose his or her password or access phrase or number to others.

6.1-6 When a non-lawyer employed by a lawyer has personalized encrypted electronic access to any system for the electronic submission or registration of documents or electronic searching of private or confidential information, the lawyer must ensure that the non-lawyer does not

(a) permit others to use such access; or

(b) disclose his or her password or access phrase or number to others.

Commentary

[1] The implementation of systems for the electronic submission or registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized password, access phrase or number.

[2] When it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has such access, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the system.

6.2 Students

Recruitment and Engagement Procedures

6.2-1 A lawyer must observe any procedures of the Society about the recruitment and engagement of articling or law students.

Duties of Principal

6.2-2 A lawyer acting as a principal to a student must provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

Commentary

[1] A principal or supervising lawyer is responsible for the actions of students acting under his or her direction. In Alberta, articling students are subject to the authority of the Society and bound by all of the provisions of the Code and the Rules of the Law Society. Consequently, they are subject to discipline by the Society for breaches and misconduct.

Duties of Articling Student

6.2-3 An articling student must act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

6.3 Harassment and Discrimination

6.3-1 The principles of human rights laws and related case law apply to the interpretation of this rule.

6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.

6.3-3 A lawyer must not sexually harass any person.

6.3-4 A lawyer must not engage in any other form of harassment of any person.

6.3-5 A lawyer must not discriminate against any person.

Commentary

[1] A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

Chapter 7 – Relationship to the Society and Other Lawyers

7.1 Responsibility to The Society and The Profession Generally

Communications from the Society

7.1-1 A lawyer must reply promptly and completely to any communication from the Society.

Meeting Financial Obligations

7.1-2 A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

Commentary

[1] In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one.

[2] When a lawyer retains a consultant, expert or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

[3] If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

Duty to Report

7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

(a) the misappropriation or misapplication of trust money;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer's practice;

(d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer;

(e) conduct that raises a substantial question about a lawyer's capacity to provide professional services; and

(f) any situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

[1] Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (for example, through another lawyer). In all cases, the report must be made without malice or ulterior motive.

[2] Nothing in this rule is meant to interfere with the lawyer-client relationship.

[3] Instances of conduct described in this rule can arise from a variety of causes, including addictions or physical, mental or emotional conditions or disorders. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible.

[4] The Society supports the ASSIST Program in Alberta and similar agencies in their commitment to the provision of counselling on a confidential basis. Therefore, a lawyer who is making a bona fide effort to have another lawyer seek help for such problems is not required to report to the Society non-criminal conduct of that lawyer that would otherwise have to be reported under the rule. However, the lawyer must advise the Society if there are reasonable grounds to believe that the other lawyer is encouraging or will engage in conduct that is criminal or is likely to harm any person or of any other conduct under the rule if the lawyer refuses or fails to seek help.

Encouraging Client to Report Misconduct

7.1-4 A lawyer must encourage a client who has a claim or complaint of serious misconduct against a lawyer to report the facts to the Society as soon as reasonably practicable.

Commentary

[1] In determining whether the matter involves “serious misconduct”, refer to Rule 7.1-3 and the related commentary.

7.2 Responsibility to Lawyers and Others

Courtesy and Good Faith

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

[1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

[2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

[3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

[4] A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

7.2-2 A lawyer must not lie to or mislead another lawyer.

Commentary

[1] This rule expresses an obvious aspect of integrity and a fundamental principle. In no situation, including negotiation, is a lawyer entitled to deliberately mislead a colleague. When a lawyer (in response to a question, for example) is prevented by rules of confidentiality from actively disclosing the truth, a falsehood is not justified. The lawyer has other alternatives, such as declining to answer. If this approach would in itself be misleading, the lawyer must seek the client's consent to such disclosure of confidential information as is necessary to prevent the other lawyer from being misled. The concept of "misleading" includes creating a misconception through oral or written statements, other communications, actions or conduct, failure to act, or silence (See Rule 7.2-5, Correcting Misinformation).

7.2-3 A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.

Commentary

[1] This rule is directed at sharp practice. It becomes operative when two elements are present: an obvious mistake by opposing counsel, and a benefit flowing from that mistake to which the lawyer's client is clearly not entitled.

[2] A clerical or arithmetical error is an example of an obvious mistake. However, an act or omission by another lawyer that appears questionable but that may have involved a conscious exercise of judgment is not a mistake of the kind contemplated by this rule. For example, an opponent's acceptance of an apparently unfavourable contract or settlement offer, or the failure of a Crown prosecutor to raise the criminal record of an accused, may have been the result of careful consideration, including factors of which the lawyer is not aware.

[3] A client has no legal entitlement to a benefit created solely through error. Consequently, it is improper for a lawyer to knowingly proceed on the basis of an incorrect statement of adjustments or a transfer that misdescribes the property intended to be bought and sold. The benefit that would be obtained by the client is unwarranted and without independent legal support.

[4] On the other hand, a defendant in a lawsuit has a legal right to insist that proceedings be brought within a certain period of time. Accordingly, while the missing of a limitation date by plaintiff's counsel may be an obvious mistake, the defendant's lawyer does not violate this rule by allowing the limitation period to expire.

7.2-4 A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.

Correcting Misinformation

7.2-5 If a lawyer becomes aware during the course of a representation that:

- **(a) the lawyer has inadvertently misled an opposing party, or**
- **(b) the client, or someone allied with the client or the client's matter, has misled an opposing party, intentionally or otherwise, or**
- **(c) the lawyer or the client, or someone allied with the client or the client's matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate,**

then, subject to confidentiality, the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.

Commentary

"Subject to confidentiality" (see Rule 3.3, Confidentiality)

[1] Briefly, if correction of the misrepresentation requires disclosure of confidential information, the lawyer must seek the client's consent to such disclosure. If the client withholds consent, the lawyer is obliged to withdraw. The terminology used in this rule is to be broadly interpreted. A lawyer may have provided technically accurate information that is rendered misleading by the withholding of other information; in such a case, there is an obligation to correct the situation. In paragraph (c), the concept of an inaccurate representation is not limited to a misrepresentation that would be actionable at law.

[2] See Rule 5.1-5, in respect of correcting misinformation in advocacy settings.

Communications

7.2-6 A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

7.2-7 A lawyer must answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer must be punctual in fulfilling all commitments.

7.2-8 Subject to Rules 7.2-9 and 7.2-10, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

(a) approach, communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

7.2-9 Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

7.2-10 A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by another lawyer with respect to that matter.

Commentary

[1] Rule 7.2-8 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by a lawyer concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. Lawyers should be careful about email communications. For example, if a lawyer copies the client with an email sent to the opposing lawyer, then a response using "Reply to All" may result in an unintended communication by the opposing lawyer with the client. This rule does not prevent parties to a matter from communicating directly with each other.

[2] The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise when there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other lawyer by ignoring the obvious.

[3] Where notice as described in Rule 7.2-9 has been provided to a lawyer for an opposing party, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer.

[4] Rule 7.2-10 deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary, consult the first lawyer unless the client instructs otherwise.

[5] In appropriate circumstances, a lawyer must assist the client in obtaining a second opinion if requested by a client. The lawyer providing the initial advice should respond in a cooperative and positive manner. For example, sufficient information must be provided to the other lawyer upon request to render the second opinion an informed one. A lawyer is not obliged to assist in obtaining a second opinion when the client is attempting to coerce the formulation of a favourable opinion or is acting unreasonably in another respect. However, the obligation to be cooperative and to review objectively and in good faith any second opinion obtained is unaffected.

7.2-11 A lawyer retained to act on a matter involving a corporate or other organization represented by a lawyer must not approach an officer or employee of the organization:

(a) who has the authority to bind the organization;

(b) who supervises, directs or regularly consults with the organization's lawyer; or

(c) whose own interests are directly at stake in the representation,

in respect of that matter, unless the lawyer representing the organization consents or the contact is otherwise authorized or required by law.

Commentary

[1] This rule applies to corporations and other organizations. "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies and sole proprietorships. This rule prohibits a lawyer representing another person or entity from communicating about the matter in question with persons likely involved in the decision-making process for a corporation or other organization. If an agent or employee of the organization is represented in the matter by a lawyer, the consent of that lawyer to the communication will be sufficient for purposes of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

[2] A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of Rule 3.4 (Conflicts). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of Rule 3.4 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

7.2-12 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

(a) advise the unrepresented person to obtain independent legal representation;

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and

(c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

Commentary

[1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

[2] When dealing in a professional capacity with a non-lawyer representing another person, or with a person not represented by counsel, a lawyer has the same general duties of honesty, courtesy and good faith that are owed to professional colleagues.

[3] The reference in this rule to unrepresented party is not intended to include professional advisors or persons having special qualifications who are retained for the purposes of negotiation, such as insurance adjusters and bank managers.

[4] The lengths to which a lawyer must go in ensuring a party's understanding of these matters will depend on all relevant factors, including the party's sophistication and relationship to the lawyer's client and the nature of the matter.

Inadvertent Communications

7.2-13 A lawyer who comes into possession of a privileged communication of an opposing party must not make use of it and must immediately advise the opposing lawyer or opposing party.

Commentary

[1] Lawyers may receive privileged communications from opposing counsel or parties through inadvertence. On occasion, lawyers receive privileged communications of opposing parties as the result of the impropriety of their own clients or from third party informants.

[2] Immediately upon realizing that the communication is a privileged communication of another party, the lawyer shall not continue to read the communication and must bring it to the attention of opposing counsel, then return or destroy it, without copies having been made. Knowledge that a communication is not intended for the lawyer receiving it will be imputed if, under the circumstances, it would have been unreasonable for the lawyer to come to any other conclusion.

[3] A lawyer who innocently reads all or a portion of a privileged communication before becoming aware of its nature must advise opposing counsel of the lawyer’s possession of the communication and the extent to which the communication has been reviewed.

[4] In the event there is a genuine dispute over the nature of the communication, it shall be permissible for the receiving lawyer to secure the communication, pending resolution of the dispute. The issue of whether or to what extent the communication may be copied or its contents disclosed or used must be resolved by agreement or by the court. In the meantime, it is improper to use the communication or disclose its contents in any manner.

[5] This rule does not otherwise address the legal duties of a lawyer who has inadvertently or inappropriately received privileged communications or the remedies available to the party who seeks to assert privilege over the communication.

Undertakings and Trust Conditions

7.2-14 A lawyer must not give an undertaking that cannot be fulfilled and must fulfil every undertaking given and honour every trust condition once accepted.

Commentary

[1] Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.

[2] Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Use of the trust property constitutes acceptance and an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.

[3] The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.

[4] If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

[5] Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them.

[6] Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or a corporation or other organization, but great caution should be exercised in so doing

since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.

[7] A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with these rules.

7.3 Outside Interests and The Practice Of Law

Maintaining Professional Integrity and Judgment

7.3-1 A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.

Commentary

[1] A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client.

[2] When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

[3] Whether the activity in question is entirely unrelated to the practice of law or overlaps with the practice to some extent, the profession through the Society must maintain an interest in its nature and the manner in which it is conducted. While the Society's primary concern is with conduct that calls into question a lawyer's suitability to practise law or that reflects poorly on the profession, lawyers should aspire to the highest standards of behaviour at all times and not just when acting as lawyers. Membership in a professional body is often considered evidence of good character in itself. Consequently, society's expectations of lawyers will be high, and the behaviour of an individual lawyer may affect generally held opinions of the profession and the legal system.

7.3-2 A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary

[1] The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.

[2] When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the

profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

7.4 The Lawyer in Public Office

Standard of Conduct

7.4-1 A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

Commentary

[1] The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards.

[2] Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.

[3] Lawyers holding public office are also subject to the provisions of Rule 3.4 (Conflicts) when they apply.

7.5 Public Appearances and Public Statements

Communication with the Public

7.5-1 Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary

[1] Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals. Dealings with news media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.

[2] A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and authorized within the scope of the retainer.

[3] Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.

[4] Given the variety of cases that can arise in the legal system, particularly in civil, criminal and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances arise in which the lawyer should have no contact with news media, but there are other cases in which the lawyer should contact the news media to properly serve the client.

[5] Lawyers are often involved in non-legal activities involving contact with the media to publicize such matters as fund-raising, expansion of hospitals or universities and programs of public institutions or political organizations. They sometimes act as spokespersons for organizations that, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for lawyers to play in view of the obvious contribution that it makes to the community.

[6] Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

[7] Lawyers should be aware that, when they make a public appearance or give a statement, they ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used or under what headline it may appear.

Interference with Right to Fair Trial or Hearing

7.5-2 A lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary

[1] A lawyer having any contact with the media is subject to the sub judice rule and should be aware of it. The rule is designed to ensure the fairness of the trial process to the parties involved. It may amount to contempt of court to publish a statement before or during a trial which may tend to prejudice a fair trial.

[2] Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

7.6 Preventing Unauthorized Practice

Preventing Unauthorized Practice

7.6-1 A lawyer must assist in preventing the unauthorized practice of law.

Commentary

[1] Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, from regulation and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of confidentiality, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include mandatory professional liability insurance, the assessment of lawyers' bills, regulation of the handling of trust money and the maintenance of compensation funds.

[2] See, generally, the *Legal Profession Act of Alberta*, sections 102 – 111.

7.7 Errors and Omissions

Informing Client of Errors or Omission

7.7-1 When, in connection with a matter for which a lawyer is responsible, a lawyer discovers a material error or omission that is or may be damaging to the client regardless of whether it is capable of rectification, the lawyer must:

(a) promptly inform the client of the error or omission;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Commentary

[1] A lawyer has an ethical and fiduciary duty to disclose a material error or omission to a client. The duty to inform clients of material errors or omissions is separate and distinct from the duty to report all claims and potential claims to the insurer. For example, while a lawyer is contractually required to report to the insurer any circumstance that could reasonably be expected to give rise to a claim, however unmeritorious, the ethical duty to inform a client of an error arises when the error is material and likely to affect the client's interests.

[2] When a lawyer becomes aware of an error or omission that may affect a client's interests, the lawyer must be candid and inform the client of the relevant facts which gave rise to the error or omission. This duty arises whether or not the error is capable of rectification. The lawyer should not make any statements about the lawyer's own negligence or admit liability, as an admission of liability may cause the insurer to deny insurance coverage.

[3] A lawyer should recommend that a client seek independent advice regarding the nature of the error, whether the error is capable of rectification and whether the client may have any remedies against the lawyer.

[4] If the mistake has created a problem for the client, the lawyer must advise the client to consider retaining other counsel. There may be circumstances when, at the client's request and in consultation with the insurer, it is appropriate for the lawyer to continue acting. The lawyer should recommend that the client seek independent advice before the lawyer continues to represent the client.

Notice of Claim

7.7-2 A lawyer must give prompt notice to an insurer or other indemnitor of any circumstance that may give rise to a claim so that the client's protection from that source will not be prejudiced.

Commentary

[1] In Alberta, under the lawyer's compulsory professional liability insurance policy, a lawyer is contractually required to give written notice to the insurer as soon as practicable after the lawyer becomes aware of any actual or alleged error, or of any circumstances that could reasonably be expected to give rise to a claim. The duty to report arises even if the claim does not appear to have merit.

[2] The duty to notify the insurer of a potential claim is also an ethical duty which is imposed on the lawyer to protect clients, as the failure to report a claim may prejudice coverage. In addition, a lawyer should not attempt to take corrective action without notifying or consulting the insurer, and should not admit negligence or liability for damages. The insurer may deny coverage if the lawyer takes steps which prejudice the insurer's ability to successfully engage repair counsel or to otherwise defend the lawyer.

COURT FILE NO.	2203-04046
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPLICANTS	**C.M, LITIGATION GUARDIAN FOR A.B., S.A., LITIGATION GUARDIAN FOR F.S. C.H., LITIGATION GUARDIAN FOR G.H., A.B. LITIGATION GUARDIAN FOR J.K., R.L., LITIGATION GUARDIAN FOR L.M., and ALBERTA FEDERATION OF LABOUR**
RESPONDENT	**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA**
DOCUMENT	**AMENDED AMENDED CERTIFIED RECORD OF PROCEEDINGS**

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED DIGITALLY
2203 04046
Jul 12, 2022
3:34 PM
CLERK OF THE COURT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLENNAN ROSS LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Gary Zimmermann Telephone: 780.482.9208 Fax: 780.733.9709 Email: gary.zimmermann@mross.com File No.: 20220908

1. Please find attached:

   (a) The decision or written record of the act that is the subject of the originating application for judicial review;

      i. The Record of Decision – CMOH Order 08-2022 ("**Decision**").

   (b) The reasons given for the decision or act;

      i. Unable to provide for reasons given in paragraph 2 below.

   (c) The document starting the proceeding;

      i. Unable to provide for reasons given in paragraph 2 below.

   (d) The evidence and exhibits filed with us; and

      i. Unable to provide for reasons given in paragraph 2 below.

   (e) Anything else in our possession relevant to the decision or act, namely

      i. See attached Schedule "A".

2. The following are parts of the notice to obtain record of proceedings that cannot be fully complied with and the reasons why:

Paragraph 1(b): The reasons given for the decision or act.	No reasons were given because the exercise of the authority to make a CMOH Order is a delegated legislative function given to medical officers of health, which includes the CMOH, under the Public Health Act.
Paragraph 1(c): The document starting the proceeding.	There is no such document. There is no commencement document that initiates a proceeding that results in the issuance of a CMOH Order. There is in fact no proceeding. Rather, section 29(2.1) of the *Public Health Act* sets out the conditions that must exist in order for the medical officer of health (which includes the CMOH) to take further action.
Paragraph 1(d): The evidence and exhibits filed.	None exist because the process does not allow for it. Although Dr. Hinshaw and her staff, along with staff from Health's Emergency Operations Centre, continually monitor and evaluate emerging scientific data regarding COVID-19 in Alberta, across Canada as well as around the globe to help inform policy options for CMOH Orders, evidence and exhibits are not filed with the CMOH as part of the decision-making process.
Paragraph 1(e): Power-Point presentation to Executive Council with information regarding the ongoing COVID-19 Pandemic.	^ Pursuant to the July 4, 2022 Decision of the Honourable Justice G.S Dunlop ordering disclosure, the Power-Point presentation has been filed with this Amended Amended Certified Record of Proceedings.
Paragraph 1(e): The Official Record of Decision consisting of Cabinet meeting minutes arising from the February 8, 2022 meeting where ongoing public health orders were discussed and considered.	^ Pursuant to the July 4, 2022 Decision of the Honourable Justice G.S Dunlop ordering disclosure, the Official Record of Decision has been filed with this Amended Amended Certified Record of Proceedings.
Paragraph 1(e)	As noted, Dr. Hinshaw and her staff, along with staff from Health's Emergency Operations Centre, continually monitor and evaluate emerging scientific data regarding COVID-19 in Alberta, across Canada as well as around the globe to help inform policy options for CMOH Orders. It is not possible to reconstruct every record that may have been reviewed prior to the Decision being made. However, Dr. Hinshaw and her staff have made best efforts to identify and provide the documents and information that were most critical and directly relevant to the Decision.

3. I certify that I have attached all records as required by Rule 3.19(1).

Name of person who certifies this record: Dr. Deena Hinshaw

Position: Alberta's Chief Medical Officer of Health

Signature: 

Schedule "A"

Tab	Date	Description
1	As of January 31, 2022	Jurisdictional scan of masking requirements in other Canadian provinces and territories as well as other countries
2	February 2022	Guidance for Schools (K-12) and School Buses
3	January 10, 2022	CMOH Order 02-2022
4	February 2, 2022	CMOH Order 04-2022
5	February 7, 2022	Alberta COVID-19 Immunization Program Report (Information as of February 7, 2022)
6	February 7, 2022	Memo from Premier's Office Staff to Premier Kenney Re: Student Masking in School. Copy provided to Dr. Hinshaw.
7	February 7, 2022	COVID-19 – COVID and Schools.
8	February 7, 2022	Email from Scott Fulmer to Dr. Hinshaw and others Re: School Masking Evidence Summary.
9	February 8, 2022	COVID-19 Situation Update – Epidemiology and Surveillance.
10	February 8, 2022	Documents from Alberta Health Internal Dashboard – COVID-19 in Alberta, Analytics and Performance Reporting Branch, Epidemiology and Surveillance Unit. Analytics and Performance Reporting Branch, Epidemiology and Surveillance Unit, 2022-February-08 12:01
11	March 2, 2022	Briefing Note – Advice to Honourable Jason Copping, Minister of Health – COVID-19 Measures in Schools – for information (plus attachments – COVID-19 Measures in Schools Alberta Data and COVID-19 Measures in Schools Literature).
12	May 31, 2022	Appendix 1 - summarizing context of COVID-19 and evidence relevant to masking in schools at the time of the decision.
13	February 8, 2022	Power-Point presentation to Executive Council with information regarding the ongoing COVID-19 Pandemic.
14	February 8, 2022	The Official Record of Decision consisting of Cabinet meeting minutes arising from the February 8, 2022 meeting where ongoing public health orders were discussed and considered.

Alberta Health

Office of the Chief Medical Officer of Health
10025 Jasper Avenue NW
PO Box 1360, Stn. Main
Edmonton, Alberta T5J 2N3
Canada

RECORD OF DECISION – CMOH Order 08-2022

Re: 2022 COVID-19 Response – Step 1 Easing Measures

Whereas I, Dr. Deena Hinshaw, Chief Medical Officer of Health (CMOH) have initiated an investigation into the existence of COVID-19 within the Province of Alberta.

Whereas the investigation has confirmed that COVID-19 is present in Alberta and constitutes a public health emergency as a novel or highly infectious agent that poses a significant risk to public health.

Whereas under section 29(2.1) of the *Public Health Act* (the Act), I have the authority by order to prohibit a person from attending a location for any period and subject to any conditions that I consider appropriate, where I have determined that the person engaging in that activity could transmit an infectious agent. I also have the authority to take whatever other steps that are, in my opinion, necessary in order to lessen the impact of the public health emergency.

Whereas more Albertans are now eligible for COVID-19 vaccination including five to eleven year olds and more Albertans are eligible for COVID-19 booster vaccinations.

Whereas rapid testing for COVID-19 is widely available.

Whereas having determined that certain measures are necessary to protect Albertans from exposure to COVID-19 and to prevent the spread of COVID-19, I hereby make the following order:

Table of Contents

Part 1 – Application

1.1 This Order applies throughout the province of Alberta.

1.2 Unless otherwise stated herein, this Order comes into force on February 8, 2022 at 11:59 p.m..

1.3 If a section of this Order is inconsistent or in conflict with a provision in Record of Decision – CMOH Order 02-2022, CMOH Order 06-2022 or CMOH Order 07-2022, the sections in those Orders prevail to the extent of the inconsistency or conflict.

1.4 This Order rescinds Record of Decision - CMOH Order 54-2021 and Record of Decision - CMOH Order 55-2021.

Part 2 – Definitions

2.1 In this Order, the following terms have the following meanings:

(a) "adult" means a person who has attained the age of eighteen years.

(b) "authorizing health professional" means one of the following regulated members under the *Health Professions Act* who holds a practice permit:

i. nurse practitioners;

ii. physicians;

iii. psychologists.

(c) "child care program" means any of the following:

i. a facility-based program providing day care, out of school care or preschool care;

ii. a family day home program;

iii. a group family child care program;

iv. an innovative child care program.

(d) "Class A, B or C liquor licence" has the same meaning given to it under the *Gaming,*

Liquor and Cannabis Regulation, under the *Gaming, Liquor and Cannabis Act*.

(e) "cohort", as the context of this Order requires, means:

i. for a person who resides on their own, one or two other persons with whom the person who resides on their own regularly interacts with during the period of this Order;

ii. for a household, the persons who regularly reside at the home of that household;

iii. for a school, the group of students and staff who primarily remain together for the purposes of instruction as a COVID-19 safety strategy.

(f) "commercial vehicle" means a vehicle operated on a highway by or on behalf of a person for the purpose of providing transportation, but does not include a private passenger vehicle.

(g) "day care" has the same meaning given to it in the *Early Learning and Child Care Regulation*.

(h) "face mask" means a medical or non-medical mask or other face covering that covers a person's nose, mouth and chin.

(i) "facility-based program" has the same meaning given to it in the *Early Learning and Child Care Act*.

(j) "Facility Licence" has the same meaning given to it in the *Gaming, Liquor and Cannabis Regulation*, under the *Gaming, Liquor and Cannabis Act*.

(k) "family day home program" has the same meaning given to it in the *Early Learning and Child Care Act*.

(l) "farming or ranching operation" means the primary production of eggs, milk, grain, seeds, fruit, vegetables, honey, livestock, diversified livestock animals within the meaning of the *Livestock Industry Diversification Act*, poultry or bees, an operation that produces cultured fish within the meaning of the *Fisheries (Alberta) Act*, and any other primary agricultural operation specified in the regulations, but does not include the operation of a greenhouse, mushroom farm, nursery or sod farm.

(m) "fitness activity" means a physical activity that occurs at a gym, fitness studio, dance studio, rink, ski hill, pool, hot tub or sauna, arena or recreation centre and includes dance classes, bobsled, pole dancing, rowing, spin, yoga, boxing, boot camp, Pilates and other activities of a similar nature.

(n) "food-serving business or entity" means a restaurant, café, bar, pub or similar business or entity.

(o) "Gaming Licence" has the same meaning given to it in the *Gaming, Liquor and Cannabis Regulation*, under the *Gaming, Liquor and Cannabis Act*.

(p) "gaming terminal" means a computer, video device or machine that is used, or could be used, to play a lottery scheme as defined in the *Criminal Code* (Canada) where, on

insertion of money or a token or on payment of any consideration a person may receive or be entitled to receive money, either directly from the computer, video device or machine or in another manner.

(q) "group family child care program" has the same meaning given to it in the former *Child Care Licensing Regulation.*

(r) "health condition" means the following mental or physical limitations:

i. sensory processing disorders;

ii. developmental delays;

iii. mental illnesses including: anxiety disorders; psychotic disorders; dissociative identity disorder; and depressive disorders;

iv. facial trauma or recent oral maxillofacial surgery;

v. contact dermatitis or allergic reactions to face mask components; or

vi. clinically significant acute respiratory distress.

(s) "highway" means any thoroughfare, street, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge, causeway, trestleway or other place or any part of any of them, whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage or parking of vehicles and includes:

i. a sidewalk, including a boulevard adjacent to the sidewalk;

ii. if a ditch lies adjacent to and parallel with the roadway, the ditch; and

iii. if a highway right of way is contained between fences or between a fence and one side of the roadway, all the land between the fences, or all the land between the fence and the edge of the roadway, as the case may be,

but does not include a place declared by regulation not to be a highway.

(t) "innovative child care program" has the same meaning given to it in the former *Child Care Licensing Regulation.*

(u) "interactive activities" means the following activities engaged in by a person:

i. dancing;

ii. billiards;

iii. arcades;

iv. photo booths;

v. darts;

vi. other substantially similar multi-person or interactive activities, but for greater certainty, does not include a live performance activity observed by a person or gaming terminals where the person who games at the gaming terminal is masked and stationary.

(v) "masking directive or guidance" means, as the context of this Order requires, either:

i. a directive or guidance document made by a regional health authority, or a

contracted service provider of a regional health authority, which sets out directions or guidance respecting the use of face masks in facilities or settings operated by the regional health authority or the contracted service provider; or

ii. a directive or guidance document made by Alberta Health and posted on the Government of Alberta website.

(w) "medical exception letter" means written confirmation provided to a person by an authorizing health professional which verifies that the person has a health condition that prevents the person from wearing a face mask while attending an indoor public place and

i. clearly sets out the information required by section 3.6 of this Order; and

ii. is valid for a period of one year from the date on which it is made.

(x) "out of school care" has the same meaning given to it in the *Early Learning and Child Care Regulation.*

(y) "performance activity" means singing, playing a musical instrument, dancing, acting or other activities of a similar nature and includes, but is not limited to, a rehearsal, concert, theatre, dance, choral, festival, musical and symphony events but excludes:

i. congregational singing or dancing;

ii. singing or dancing in a nightclub;

iii. singing along or dancing at a concert; or

iv. any substantially similar activity.

(z) "person who resides on their own" means a person living on their own or a person living on their own who has one or more youth living with them and under their care.

(aa) "physical activity" means a fitness activity or sport activity.

(bb) "post-secondary institution" means:

i. a public or private post-secondary institution operating under the *Post-Secondary Learning Act;* and

ii. private colleges which are those institutions that have been accredited by Alberta's Ministry of Advanced Education;

iii. private faith-based institutions that have been accredited either by Alberta's Ministry of Advanced Education or the Association for Biblical Higher Education or the Association of Theological schools;

iv. Maskwacis Cultural College;

v. Old Sun Community College;

vi. Red Crow Community College;

vii. University nuhelot'ine thaiyots'i nistameyimakanak Blue Quills; and

viii. Yellowhead Tribal College.

and includes the physical location or place where the post-secondary institution provides a structured learning environment through which a program of study is offered.

(cc) "preschool care", has the same meaning given to it in the *Early Learning and Child Care Regulation.*

(dd) "private place" means a private place as defined under the *Public Health Act.*

(ee) "private social gathering" means any type of private social function or gathering at which a group of persons come together and move freely around to associate, mix or interact with each other for social purposes rather than remaining seated or stationary for the duration of the function or gathering, but does not include a cohort consisting of persons referred to in section 2.1(e) of this Order or persons referred to in section 5.3 of this Order.

(ff) "public place" has the same meaning given to it in the *Public Health Act*, and for greater certainty does not include a rental accommodation used solely for the purposes of a private residence.

(gg) "recreational activity" means any structured or organized activity or program where the purpose of the activity or program is intended to develop a skill, including but not limited to, Girl Guides, Scouts, arts and crafts, pottery or other substantially similar activities.

(hh) "school" has the same meaning given to it in the *Education Act.*

(ii) "school building" has the same meaning given to it in the *Education Act.*

(jj) "Special Event Licence" has the same meaning given to it under *Gaming, Liquor and Cannabis Regulation*, under the *Gaming, Liquor and Cannabis Act.*

(kk) "sport activity" means sports training, practices, events, games, scrimmages, competitions, gameplay, league play, and other activities of a similar nature.

(ll) "stadium seating" means the designated space in an indoor arena, movie theatre or other similar indoor settings where a person sits to observe a physical activity, performance activity or recreational activity.

(mm) "staff member" means any person who is employed by, or provides services under a contract with, an operator of a school.

(nn) "student" has the same meaning given to it in the *Education Act.*

(oo) "visitor" means any person who attends a school, but who is not a student or staff member.

(pp) "youth" means a person who has not attained eighteen years of age.

Part 3 – Masking

A. Indoor masking requirements

3.1 Except as set out in this Order and subject to Part 10, a person must wear a face mask at all times while attending an indoor public place.

3.2 For greater certainty, indoor public places include, but are not limited to:

(a) a school building;

(b) commercial vehicles transporting the driver and one or more other persons who are not members of that person's household, or if the person is a person living alone, then the person's cohort;

(c) the common areas of a day camp or overnight camp; and

(d) all indoor spaces under the control of a business or entity, including all areas where the public or employees of the business or entity may attend.

3.3 For greater certainty, except as otherwise set out in this Order:

(a) face masks must be worn at a wedding ceremony or funeral service that is held in an indoor public place; and

(b) a person must comply with all masking directives or guidance while attending at a facility operated by a regional health authority under the *Regional Health Authorities Act* or a facility operated by a contracted service provider of a regional health authority.

B. General exceptions to indoor masking

3.4 Despite this Part of this Order, a person is not required to wear a face mask at all times while attending an indoor public place if the person is:

(a) a youth under two years of age;

(b) effective February 13, 2022 at 11:59 p.m., a youth under thirteen years of age;

(c) effective February 13, 2022 at 11:59 p.m., a student enrolled in kindergarten through grade 12 while attending at a school and participating in curriculum related or extracurricular school activities;

(d) a youth or adult participating in an indoor performance activity in circumstances where it is not possible for the youth or adult to wear a face mask while participating in the indoor performance activity;

(e) a youth or adult participating in an indoor physical activity;

(f) a person marrying another person during a wedding ceremony, and the persons in their wedding party;

(g) unable to place, use or remove a face mask without assistance;

(h) seated at a table while consuming food or drink or, if standing at a standing table while consuming food or drink, as long as the person remains at the standing table at all times while consuming the food or drink;

(i) consuming food or drink while remaining seated where there is no table, including in stadium seating, at table games or a gaming terminal;

(j) providing or receiving care or assistance where a face mask would hinder that caregiving or assistance;

(k) alone at a workstation and separated by at least two metres distance from all other persons;

(l) the subject of a workplace hazard assessment in which it is determined that the person's safety will be at risk if the person wears a face mask while working;

(m) separated from every other person by a physical barrier that prevents droplet transmission;

(n) a person who needs to temporarily remove their face mask while in the public place for the purposes of:

i. receiving a service that requires the temporary removal of their face mask;
ii. an emergency or medical purpose, or
iii. establishing their identity.

C. Exceptions for health conditions

3.5 Despite this Part of this Order, a person who is unable to wear a face mask due to a health condition as determined by an authorizing health professional is excepted from wearing a face mask while attending an indoor public place.

3.6 For the purposes of section 3.5, the health condition must be verified by a medical exception letter that includes the following:

(a) the name of the person to whom the exception applies;

(b) the name, phone number, email address, professional registration number, and signature of the authorizing health professional; and

(c) the date on which the written confirmation was provided.

3.7 For greater certainty, although the medical exception letter must verify that a health condition applies, the medical exception letter must not include specific information about the health condition.

D. Exception for child care programs

3.8 Despite this Part of this Order, a youth attending at a child care program is not required to wear a face mask except in accordance with any masking directive or guidance made by Alberta Health and posted on the Government of Alberta website.

E. Exceptions for farming or ranching operations

3.9 Despite this Part of this Order, a person does not need to wear a face mask while working at a farming or ranching operation, unless the person is interacting with a member of the public.

Part 4 – Work from one's private residence

4.1 An employer must require a worker to work from the worker's own private residence unless the employer determines that the worker's physical presence is required at the workplace to effectively operate the workplace.

Part 5 – Private Residences

5.1 Subject to sections 5.3 and 5.4 of this Order, a person who resides in a private residence must not permit a person who does not normally reside in that residence to enter or remain in the residence.

5.2 Section 5.1 of this Order does not prevent a person from entering the private residence of another person for any of the following purposes:

(a) to provide health care, personal care or housekeeping services;

(b) for a visit between a child and a parent or guardian who does not normally reside with that child;

(c) to receive or provide child care;

(d) to provide tutoring or other educational instruction related to a program of study;

(e) to perform construction, renovations, repairs or maintenance;

(f) to deliver items;

(g) to provide real estate or moving services;

(h) to provide social or protective services;

(i) to respond to an emergency;

(j) to provide counselling services;

(k) to provide or receive personal or wellness services;

(l) to provide physical activity or performance instruction; or

(m) to undertake a municipal property assessment.

5.3 A maximum of ten persons may visit at each other's private residences.

5.4 For greater certainty, the maximum number of persons set out in section 5.3 does not include youth when the youth is attending with their parent or guardian.

Part 6 – Private social gatherings

6.1 All persons are prohibited from attending a private social gathering at an outdoor public or private place when there are more than twenty persons in attendance, unless the private social gathering is for the purpose of a wedding ceremony, wedding reception, funeral service, or funeral reception.

A. Private social gatherings for protests

6.2 Despite this Part of this Order, a person may attend at an outdoor public place to exercise their right to peacefully demonstrate for a protest or political purpose without limit to the number of persons in attendance if the person:

(a) remains outdoors except where necessary to use the washroom;

(b) wears a face mask at all times;

(c) maintains a minimum physical distance of two metres from any other person in attendance, except where:

i. either the person or the other person is, or both persons are, eleven years of age or younger; and

ii. both persons are members of the same household;

(d) does not offer food or beverages to any other person in attendance, regardless of whether the food or beverage is provided for sale or not; and

(e) immediately disperses in a coordinated fashion at the conclusion of the gathering, while at all times adhering to the requirements in this section.

6.3 For greater certainty, a protest or political purpose as described in section 6.2 means for the purpose of expressing a position on a matter of public interest.

Part 7 – Capacity restrictions

7.1 An operator of a business or entity with a total operational occupant load, as determined in accordance with the Alberta Fire Code and the fire authority having jurisdiction, of:

(a) 1,000 or more persons, must limit the number of members of the public that may attend the location where the business or entity is operating to a maximum of fifty percent capacity;

(b) 500 to 999 persons, must limit the number of members of the public that may attend the location where the business or entity is operating to a maximum of 500 persons; and

(a) up to 499 persons, must limit the number of members of the public that may attend the location to the total operational occupant load.

7.2 Despite this Part of this Order, a business or entity operating exclusively outdoors, excepting washrooms, is not subject to any capacity limits.

7.3 Despite this Part of this Order, a post-secondary institution's physical location or place is not subject to any capacity limits when the location or place is being used for educational purposes.

7.4 Despite this Part of this Order, a place of worship is not subject to any capacity limits.

Part 8 – Food and Beverage Service, Operating Hours and Interactive Activities

8.1 An operator of a food-serving business or entity must:

(a) limit the number of persons seated at the same table to a maximum of ten persons; and

(b) require persons to remain seated at their assigned table while consuming food or drink or, if standing, at their assigned standing table while consuming food or drink, and must prohibit persons mingling with persons at a different seated or standing table.

8.2 An operator of a business or entity or an event with a Special Event Licence is prohibited from allowing persons to participate in interactive activities at the business or entity or event.

8.3 For greater certainty, section 8.2 does not apply to a business or entity that provides interactive activities provided:

(a) the primary purpose of the business or entity is to provide interactive activities;

(b) any food and beverage service is physically separated from where interactive activities are offered;

(c) the interactive activities do not include dancing;

(d) where the business or entity has a Class A, B, or C liquor licence or a Special Event Licence, the business or entity does not serve liquor after 11 p.m.;

(e) where the business or entity has a Class A or C liquor licence or a Special Event Licence, the business or entity must close the premises by 12:30 a.m.; and

(f) where the business or entity has a Class B liquor licence, the business or entity must end liquor consumption by 12:30 a.m..

8.4 Despite sections 8.2 and 8.3, an event that is specifically for the purposes of a wedding reception may permit dancing but must restrict any other interactive activities at the event.

8.5 An operator of a food-serving business or entity with a Class A or C liquor licence, including but not limited to a food-serving business or entity, legion or private club, is prohibited from serving liquor after 11 p.m. and must close the business or entity by 12:30 a.m..

8.6 An operator of a food-serving business or entity with a Gaming Licence or Facility Licence or a Class B liquor licence, including but not limited to a bowling alley, casino, bingo hall, pool hall or indoor recreation entertainment center, is prohibited from serving liquor after 11 p.m. and must end liquor consumption by 12:30 a.m..

8.7 An operator of a food-serving business or entity who holds a Special Event Licence is prohibited from serving liquor after 11 p.m. and must close the premises by 12:30 a.m..

8.8 For greater certainty, an operator of a food-serving business or entity may, subject to applicable laws, provide food or beverages, including liquor, by take-out, delivery or drive-thru at any time.

Part 9 – Youth activities

9.1 A parent or guardian of a youth must screen a youth for symptoms of COVID-19 prior to the youth participating in indoor youth activities in accordance with the COVID-19, Alberta Health Daily Checklist (for children under the age of eighteen).

Part 10 – Schools

A. Physical distancing in schools

10.1 An operator of a school must assign each youth enrolled in kindergarten to grade six to a cohort as in accordance with the guidance on the Government of Alberta website.

10.2 Students, staff and visitors at a school building must maintain a physical distance of two metres from any other person who is not a member of their cohort as referenced in section 2.1(e) in accordance with the guidance on the Government of Alberta website.

10.3 Despite this Part and in accordance with the guidance on the Government of Alberta website, students and staff at a school building are not required to maintain two metres physical distance if doing so inhibits the guidance or instruction being provided or where it is not possible to maintain two metres physical distance.

B. Masking requirements in schools

10.4 An adult who is not a student attending kindergarten through grade 12 must wear a face mask while attending at a school building.

10.5 An operator of a school must ensure that an adult referred to in section 10.4 wears a face mask while attending at a school building.

C. Exceptions to masking in schools

10.6 Section 10.7 expires February 13, 2022 at 11:59 p.m.

10.7 Despite Part 3 and this Part of this Order, students, staff or visitors are not required to wear a face mask at all times while attending at a school building if the student, staff or visitor:

(a) is unable to place, use or remove a face mask without assistance;

(b) is unable to wear a face mask due to a health condition;

(c) is consuming food or drink in a designated area;

(d) is engaging in a physical activity;

(e) is seated at a desk or table

i. within a classroom or place where the instruction, course or program of study is taking place, and

ii. where the desks, tables and chairs are arranged in a manner

(A) to prevent persons who are seated from facing each other, and
(B) to allow the greatest possible distance between seated persons;

(f) is providing or receiving care or assistance where a non-medical face mask would hinder that caregiving or assistance; or

(g) is separated from every other person by a physical barrier.

10.8 Section 10.9 is effective February 14, 2022 at 12:01 a.m..

10.9 Despite Part 3, an adult who is not a student attending kindergarten through grade 12 is not required to wear a face mask at all times while attending at a school building if the adult:

(a) is unable to place, use or remove a face mask without assistance;

(b) is unable to wear a face mask due to a health condition;

(c) is consuming food or drink in a designated area;

(d) is providing or receiving care or assistance where a non-medical face mask would hinder that caregiving or assistance; or

(e) is separated from every other person by a physical barrier.

10.10 An operator of a school must use its best efforts to ensure that any adult referred to in section 10.9 who is not required to wear a face mask:

(a) as permitted by section 10.9(a) or (b) of this Order maintains a minimum of two metres distance from every other person;

(b) as permitted by section 10.9(c) of this Order maintains a minimum of two metres distance from every other person, if the designated area is not within a classroom or place where the instruction, course or program of study is taking place.

D. School buses

10.11 Part D expires February 13, 2022 at 11:59 p.m.

10.12 Subject to Part 3 of this Order, an operator of a school must ensure that the following persons wear a face mask while being transported on a school bus:

(a) all students attending kindergarten through grade 12;

(b) all staff members;

(c) all visitors.

10.13 For greater certainty, section 10.12(b) applies in respect of any person who transports students attending kindergarten through grade 12 on a school bus to a school, regardless of whether that person is a staff member.

10.14 All students attending kindergarten through grade 12, staff members and visitors must wear a face mask that covers their mouth and nose while being transported on a school bus, unless the student, staff member or visitor:

(a) is unable to place, use or remove a face mask without assistance;

(b) is unable to wear a face mask due to a mental or physical concern or limitation;
(c) is providing or receiving care or assistance where a face mask would hinder that caregiving or assistance; or

(d) is separated from every other person by a physical barrier.

E. School buses (effective February 14, 2022)

10.15 Part E is effective February 14, 2022.

10.16 Subject to Part 3 of this Order, an operator of a school must ensure that all adults who are not students attending kindergarten through grade 12 wear a face mask while on a school bus.

10.17 All adults referred to in section 10.16 must wear a face mask that covers their mouth and nose while being transported on a school bus, unless the adult:

(a) is unable to place, use or remove a face mask without assistance;

(b) is unable to wear a face mask due to a mental or physical concern or limitation;

(c) is providing or receiving care or assistance where a face mask would hinder that caregiving or assistance; or

(d) is separated from every other person by a physical barrier.

F. Exception to masking where physical distancing can be maintained

10.18 Subject to section 10.19 of this Order, sections 10.4 to 10.17 of this of Order do not apply in respect of an operator of a school who is able to ensure that all students, staff members and visitors maintain a minimum of two metres distance from every other person while attending an indoor location within a school or while being transported on a school bus.

10.19 An operator of a school must:

(a) create a written plan that sets out how physical distancing will be maintained;

(b) provide the plan upon request from the Chief Medical Officer of Health, Medical Officer of Health or Alberta Education; and

(c) receive an exemption from the Chief Medical Officer of Health.

10.20 Despite section 10.18 of this Order, an operator of a school does not need to ensure that students, staff members and visitors are able to maintain a minimum of two metres distance from every other person when a student, staff member or visitor is seated at desk or table:

(a) within a classroom or place where the instruction, course or program of study is taking place, and

(b) where the desks, tables and chairs are arranged in a manner

i. to prevent persons who are seated from facing each other, and

ii. to allow the greatest possible distance between seated persons.

Part 11 – General

11.1 Notwithstanding anything in this Order, the Chief Medical Officer of Health may exempt a person or a class of persons from the application of this Order.

11.2 This Order provides the minimum standards for public health measures in Alberta for those matters addressed by this Order.

11.3 For greater certainty, nothing in this Order relieves a person from complying with any provision of any federal, provincial or municipal law or regulation or any requirement of any lawful permit, order or licence covering those matters which are addressed in this Order.

11.4 This Order remains in effect until rescinded by the Chief Medical Officer of Health.

Signed on this 10th day of February, 2022.

Deena Hinshaw, MD
Chief Medical Officer of Health

TAB 1

Jurisdictional Scan – School Masking Requirements as of January 31

Jurisdiction	School masking requirements
World Health Organization	Did not recommend masks for children under age 6
European Centre for Disease Prevention and Control	The use of masks was not recommended for children in primary school
United Kingdom	January 20: secondary and college students are no longer required to wear a mask in classrooms January 27: mask mandate for events and venues lifted
Ireland	Mask mandate and school measures to be removed February 28
United Kingdom, Denmark, Sweden, Finland, Norway, Netherlands	Did not require children under the age of 12 to wear masks at any time
British Columbia, Manitoba	Masking is required in public spaces for everyone over 5
Saskatchewan, Ontario	Masking is required in public spaces for everyone over 2
Quebec	Masking is required in all indoor public spaces for everyone over 10. QC recommends people from 2 to 9 wear masks.

TAB 2

COVID-19 INFORMATION

GUIDANCE FOR SCHOOLS (K-12) AND SCHOOL BUSES

Overview

Routine public health practices can minimize transmission of respiratory infections, including COVID-19, influenza and common colds. These practices include: getting vaccinated, staying home when sick, proper hand hygiene and respiratory etiquette, enhanced cleaning and disinfecting, and maintaining ventilation systems.

The guidance provided in this document is intended to support school and school authority leaders in reducing opportunities for transmission of COVID-19, including the more transmissible Omicron variant, in schools under the 2021-22 School Year Plan. This includes:

a) practices to minimize the risk of transmission of infection among attendees;
b) procedures for rapid response if an attendee develops symptoms of illness, and
c) maintenance of high levels of sanitation and personal hygiene.

All schools are required to follow this guidance to the extent possible. Schools/school authorities should establish their own COVID-19 plans based on this guidance. Where any part of this guidance is inconsistent or in conflict with enhanced or stronger public health restrictions set out in a CMOH Order, the enhanced or stronger public health measures would prevail.

Schools refers to public, separate, francophone, charter schools, independent (private) school authorities, independent (private) Early Childhood Services (ECS), online/distance education programs, home education programs and First Nations education authorities, from kindergarten through grade twelve. School-based and curriculum-based activities that may be impacted by this guidance include sports, music and field trips into the community or to other schools, and professional development/activity days.

This information is relevant to all schools in Alberta including those on reserve, recognizing that First Nation schools on reserve are a federal responsibility. For public health information, COVID-19 questions or for reporting purposes, First Nation schools should contact their local Health Centre or Indigenous Services Canada-First Nations and Inuit Health Branch Environmental Public Health Services (ISC-FNIHB) office (see Appendix A), in accordance with normal practice.

It is important that measures be implemented in all settings to reduce the risk of transmission of COVID-19. This includes, but is not limited to ensuring: physical distancing, barrier use (where appropriate), proper hand hygiene and respiratory etiquette, enhanced cleaning and disinfecting, records management and building maintenance. Schools and school authorities must also follow the requirements set out in the General Operational Guidance and CMOH orders in effect.

Zone Medical Officers of Health (MOHs) and their designates are available to provide guidance on communicable disease risk and risk management. If you have concerns, need specific guidance, or have questions about how to apply the measures in this document, please contact Environmental Public Health in your Zone for assistance (see Appendix A).

COVID-19 INFORMATION

GUIDANCE FOR SCHOOLS (K-12) AND SCHOOL BUSES

COVID-19 Risk Mitigation

Vaccination	• All Albertans aged 5 and older are eligible for a COVID-19 vaccine. • Vaccines provide a significant level of protection against severe outcomes from COVID-19. Two doses of the COVID-19 vaccine plus a booster, when appropriate, have been shown to be highly protective against infection, and most importantly against severe disease. • While vaccine uptake in children aged 5 to 11 years old continues to grow, the subsequent protective effects of the vaccine may take time for this age group. It is important that those around them, including parents/guardians, older students and school staff, receive the vaccine in order to reduce community transmission and protect this age group. • For more information, please visit alberta.ca/covid19-vaccine.
General Building Safety	• HVAC systems should be maintained in accordance with manufacturer operational guidelines. For more information on building ventilation, please refer to the General Operational Guidance and School Indoor Air Quality (IAQ) - Mechanical Ventilation in Schools (albertahealthservices.ca). o If the use of portable air purifiers with HEPA filters is being considered, they should be used in combination with established public health measures, considering the impact they may have on overall indoor air quality and ventilation, and only in situations where enhancing natural or mechanical ventilation is not possible. If used, air purifiers should be large enough for the size of the room or area where they are being used. • Schools should have procedures that outline hand hygiene requirements: o Hand hygiene frequency should be based on activity (e.g., entering/leaving school or classroom, boarding/exiting the bus, changing activities, before and after using shared equipment, before and after eating, putting on/removing a mask, after using washrooms, etc.) o Handwashing with soap and water where possible is very effective. o Hand sanitizer containing at least 60% alcohol should be placed in convenient locations throughout the school where soap and water may not be available, such as in entrances, exits and near high touch surfaces. If parents have questions about their child using alcohol-based hand sanitizer they should contact their school administration to discuss potential alternatives.

GUIDANCE FOR SCHOOLS (K-12) AND SCHOOL BUSES

- Hand sanitizer can cause serious harm if ingested. Keep out of reach of younger children/students, supervise them during use and place hand sanitizer in monitored areas.

- Schools should have procedures that outline cleaning requirements:
  - Increase frequency of cleaning (removing visible dirt) and disinfection (killing germs) of high-touch areas and equipment (e.g., desks, doorknobs, handrails, microwave ovens, vending machines, etc.) inside and outside classrooms.
  - Common area surfaces should be cleaned and disinfected frequently throughout the day.
  - Student contact surfaces (e.g., desks and equipment) should be cleaned and disinfected between each student/user. Restrict sharing of supplies as much as possible.
  - Students should be provided with separated areas to store personal items. Individual assigned lockers may be used. Scheduling or planning times for locker use to minimize congregating at lockers may also be considered. Follow general guidance for cleaning and minimize crowding around lockers.
  - Disinfectants used must have a Drug Information Number (DIN) and a broad-spectrum virucidal claim OR a virucidal claim against non-enveloped viruses or coronaviruses. Alternatively, 1000 ppm bleach solution can be used.
  - Follow the instructions on the product label to disinfect effectively.
  - More information on cleaning and disinfection can be accessed in the General Operational Guidance. Further recommendations are available in the AHS COVID-19 public health recommendations for environmental cleaning of public facilities.
- Water fountains can remain open. Mouthpieces of drinking fountains are not a major source of virus transmission and require regular cleaning according to manufacturer recommendations.
- Use hand hygiene before and after handling items, including paper tests and assignments.
- Items that cannot be cleaned or disinfected between routine use (e.g., paper books, shared electronics, blocks, crayons, etc.) should be stored for 24 hours between uses.
- Additional Alberta Health Services resources:
  - AHS Infection Prevention & Control posters
  - Hand Washing Posters (AHS)
    - Poster 1
    - Poster 2

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	○ How to Hand Wash (AHS) poster ○ How to use alcohol-based hand rub/sanitizer (AHS) poster
Screening	• Before leaving home, staff (including substitute teachers), children/students, visitors, and volunteers who will access the school for work or education, are expected to self-screen for symptoms each day that they enter the school using the applicable checklist for their age group (Child Alberta Health Daily Checklist or Adult Alberta Health Daily Checklist). • Parents and children/students should be provided a copy of the screening checklist. This can be a hard copy or a link to the digital copy of the screening checklist. • Schools should have copies of the daily checklists available for visitors to the school. • Although health screening of staff, students and visitors is required, there is no requirement for verification or the collection and retention of formal records. • Schools should keep records of children's known pre-existing medical conditions. If a child develops symptoms that could be caused by either COVID-19 or by a known pre-existing condition (e.g., allergies), the child should be tested at least once for COVID-19 to confirm that it is not the source of their symptoms before entering or returning to school. • Written confirmation by a physician that a student or staff member's symptoms are due to a chronic illness is not necessary. • Anyone who reports symptoms should be directed to stay home and use an at-home rapid antigen test if available. For more information refer to the rapid testing at home website. • If anyone requires urgent medical attention, they should call 911 for emergency response. • Signs must be posted reminding persons not to enter if they have COVID-19 symptoms, even if symptoms resemble a mild cold.
Cohorting in Kindergarten Through Grade 6	• A cohort is defined as a group of students and/or staff who remain together. • Students in kindergarten through grade 6 are to remain in cohorts wherever possible. Typically a cohort in a school will be a class. • Limit the number of cohorts that students in kindergarten through grade 6 are involved in.

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	• The size of the cohort will depend on the physical space of the classroom or learning setting. In very small schools (e.g., equivalent to a single class size), the school may be considered one cohort. • For the purposes of minimizing exposure, consider limiting the number of individuals in a room that allows for physical distancing (i.e., fewer students in a smaller room and more students in a larger room). • Cohorting should be maintained during activities outside the classroom, such as recess and lunch breaks. If students from two different cohorts wish to socialize, they should remain 2 metres apart. • If two or more people from different cohorts are required to come within 2 metres of one another for the purposes of instruction, practice or undertaking examinations, additional protections should be instituted. Consider using engineering controls such as plexiglass barriers or partitions that extend across breathing zones and are made of materials that can be cleaned and disinfected between users, or administrative controls such as adapting the activity to minimize or eliminate close contacts. • Teachers who regularly interact within 2 metres of students in their class are considered part of the cohort. If teachers interact with more than one group of students without distancing, they are part of multiple cohorts. • As much as operationally possible, limit the number of classroom cohorts that teachers belong to. • If a teacher or staff member does not interact within 2 metres of students in their classes, they would not be considered part of the cohort. • Teachers/staff should not be in a cohort with each other, unless it is required for operational purposes. (i.e., a teacher and a teacher's assistant who work with the same classroom cohort).
Physical Distancing	• Schools should institute controls to promote physical distancing as much as possible between all students/staff in areas inside and outside of the classroom, including hallways, washrooms and common areas. This may include: o Staggering start and end times for classes to avoid crowded entrances or exits and hallways. o Posting signs and marking floors with arrows to control the flow of traffic. o Removing and restaging seating in public areas to prevent gathering.

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	○ Considering limiting bathroom occupancy to support physical distancing. • It is still recommended to maintain physical distancing within a cohort whenever possible to minimize the risk for disease transmission (i.e., spacing between desks). Students are not expected to sit at their desks for the duration of the day. ○ If 2 metres spacing cannot be arranged between desks/tables, the greatest possible spacing is recommended. Students should be arranged so they are not facing each other (e.g., arranged in rows rather than in small groups of 4 or a semi-circle). This way, if a student coughs or sneezes, they are not likely to cough or sneeze directly on the face of another student. ○ Consider removing additional items or pieces of equipment that are not in use from classrooms to allow more space to spread out. • In situations where physical distancing is not possible (e.g., on the bus, in classrooms and while participating in some sporting activities), or for younger grades with play-based curricula, there should be extra emphasis on hand hygiene, respiratory etiquette, not attending school when ill and cleaning and disinfecting on a regular basis before and after activities. • Schools should develop procedures for drop-off that support physical distancing where possible between all persons (except household members). Consider strategies to support physical distancing or utilize other protocols to limit contact between staff/parents/guardians/children/students as much as possible: ○ Designate entrances for classes/groups of students. ○ Physical distancing markers in crowded areas. ○ Stagger drop off/bus arrival times, coordinated with entry/exit. ○ Encourage parents/guardians to remain outside during drop-off and pick-up. • Where possible, avoid large gatherings of students and staff (e.g., assemblies, in-person group professional development day activities). ○ Virtual options are recommended instead of in person gatherings whenever possible. ○ If virtual assemblies are not possible, minimize the number of people in attendance as much as possible and keep cohorts (K-6) 2 metres apart.
Masks	• Masking is no longer required for students in K-12 during curriculum-related activities or when participating in extracurricular school activities. Masking during the school day remains a personal health choice for students and their parents/guardians.

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- Masking is required for anyone 13 years and older while attending spectator events.

- Students at higher risk of severe outcomes from COVID-19 are recommended to continue wearing a well-fitting three layer cloth mask or medical mask to reduce their risk of infection.
- Students who become ill while at school should be provided with a medical mask that can be worn while waiting to go home (See Section on Responding to Illness).
- Fully vaccinated students or staff recovering from COVID-19 who are completing their day 6-10 mandatory masking period at school must wear a mask at all times and must not share breaks where masks must be removed to consume food or beverages with non-COVID-19 infected individuals. If more than one individual is isolating, it is possible to cohort people with COVID-19 for breaks and lunch.
- Teachers, staff and adult visitors must follow provincial requirements for masks.
  - Masks should be well-constructed, well-fitted and properly worn.
  - If non-medical masks are worn, they should be constructed of at least three layers: two of breathable tightly woven fabric, such as cotton, and an additional effective middle filter layer, such as non-woven polypropylene.
  - Medical masks can also be worn to provide additional protection.
- All staff members, volunteers, and adult visitors are required to wear a mask while in indoor shared areas of school, outside the classroom, and on a school bus. Please see current CMOH orders for additional information.
  - A teacher/staff may remove a mask when alone at a workstation and separated by at least two metres from all other persons.
- Face shields are not equivalent to non-medical face masks and offer insufficient protection on their own. Other alternatives (e.g., neck gaiters, buffs or bandanas) offer less protection than masks and are therefore not recommended.
- Face shields may be worn in addition to a mask, at the discretion of the individual. Staff may elect to wear a face shield or eye protection in addition to a mask when completing personal care of students or when staff are in close contact with students (i.e., symptomatic students awaiting pick up by parents/guardians).

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	• Schools should consult their designated Occupational Health and Safety department for mask-wearing policies and other personal protective equipment policies for their staff.
	• Very few individuals may not be able to wear masks due to sensory or health issues. It is important to comply with other personal preventative practices such as frequent hand hygiene, physical distancing and strict cohorting as much as possible.
	• Persons seeking a mask exception at a school should discuss their request with the school administration.
	• Exceptions to the mask requirement for staff, volunteers and all adult visitors include:
	  ○ Persons who are unable to place, use or remove a non-medical face mask without assistance;
	  ○ Persons unable to wear a non-medical face mask due to a mental or physical concern or limitation;
	  ○ Persons consuming food or drink in designated areas;
	  ○ Persons engaged in physical exercise;
	  ○ Persons seated at a desk or table within a classroom or place where instruction is taking place and where the desks, tables and chairs are arranged in a manner to prevent persons who are seated from facing each other, and to allow the greatest possible distance between seated persons;
	  ○ Persons providing or receiving care or assistance where a non-medical face mask would hinder that caregiving or assistance, and
	  ○ Persons separated from every other person by a physical barrier.
	• School administrators/authorities should develop a plan to ensure that students who are hearing impaired or who rely on facial cues are able to communicate with others in areas where masks are being worn, or have their educational needs met when teachers are wearing masks in the classroom. This may include the use of transparent masks. As with other masks, it is important that transparent masks cover the nose and mouth, as well as fit securely against the face.
	• School staff should monitor for and address any discrimination or bullying associated with a student either wearing or not wearing a mask.
	• Students who prefer to wear a mask while attending school should be supported to do so.

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	• Masks should not be worn by anyone who is unable to remove the mask without assistance (e.g., due to age, ability or developmental status).
Field Trips	• If schools wish to continue with off-site activities including field trips, they should follow the school guidance, as well as any sector-specific restrictions or recommendations relevant to the location of the field trip. This includes physical distancing, cohorting for students in kindergarten through grade 6, hand hygiene, respiratory etiquette and enhanced cleaning and disinfection. Considerations would include: o Avoiding off-site activities or locations with higher risks including those that might involve crowded public venues, hands-on activities with shared items, shared transport or situations where vulnerable populations are involved (e.g. congregate care, hospital). o Individual classroom cohorts for students in kindergarten through grade 6 should be maintained during transportation to and from any external field trip site, as well as at the location of the field trip site. If two cohorts share a bus, separate the cohorts by 2 metres. o Organizations providing off-site activities should comply with sector-specific restrictions and recommendations. o An organization or facility should only host one classroom cohort at a time, or should take clear steps to separate multiple groups to ensure they do not use shared areas (e.g., lunch rooms). o Organization or facility staff at the off-site activity should maintain physical distancing of at least 2 metres from the visiting students and staff. o Hold activities outdoors as much as possible. o Schools should develop procedures to address students or staff developing symptoms during the field trip; plans should include a designated area to isolate the ill individual, what extra supplies may be needed (e.g., mask for the child, mask/face shield for the individual attending to the child, etc.), how to notify a parent/guardian and how the ill child will be transported home from the off-site activity. • Schools must follow the CMOH orders as they relate to curriculum-based educational activities and extra-curricular activities. For more information about current restrictions, see the webpage for public health actions.

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	• In-school field trips may also occur. All visitors to the school are expected to follow the public health measures that are in place for the school.

Performance Activity	• Students are able to participate in a group performance activity (i.e., singing, dancing, playing instruments, theatre) as part of their education program curriculum.
	  ○ Maintain 2 metres physical distancing between participating students, where possible.
	  ○ Singers and wind instrument musicians should keep 2 metres away from other performers and individuals at all times.
	  ○ Wind instruments should be equipped with a cover intended to prevent droplet transmission.
	  ○ In indoor settings, groups should not sing or play wind instruments for more than 30 minutes at a time, with a 10-minute break afterwards to allow for air exchange in the room.
	• Students are able to participate in an extracurricular performance activity following the CMOH orders for general youth performance activities. For more information about current restrictions, see the webpage for public health actions.
	• All spectators and attendees 13 years or older must be masked.
	• It is recommended that at this time, school authorities limit opportunities for spectating at school performance and sporting events to reduce potential exposures to COVID-19.
	• If spectating opportunities are offered, spectators at school-related indoor performance activities held at the school (e.g., Christmas/Holiday concerts, recitals, etc.) are subject to the following restrictions:
	• Spectator attendance limits at indoor performance activities are removed except for:
	  ○ Facilities with capacity of 500 to 999, which will be limited to 500.
	  ○ Facilities with capacity of 1,000-plus, which will be limited to 50 per cent.
	• It is recommended that spectators maintain 2 metres physical distance between households. Individuals who live alone may sit with their two designated close contacts.

Physical Activity	• Students are permitted to participate in group physical activity as part of an education program curriculum (i.e., physical education class and

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	sports academy classes may occur). Participants must continue to follow the school guidance regarding cohorting (kindergarten through grade 6), physical distancing, hand hygiene and respiratory etiquette. ○ When possible, physical education should be done outside instead of inside as the risk of transmission is higher in indoor settings. ○ For physical education classes, administrators and teachers should, where possible, choose activities or sports that support physical distancing and limit face-to-face activities (e.g., badminton over wrestling). • Students are able to participate in an extracurricular physical activity following the current CMOH orders for youth physical activity. For more information about current restrictions, see the webpage for public health actions. • It is recommended that school authorities limit extracurricular sport tournaments and inter-school games at this time, to reduce potential exposures to COVID-19. • Spectators and attendees 13 years or older must be masked (unless participating in the physical activity). • It is recommended that at this time, school authorities limit opportunities for spectating at school performance and sporting events to reduce potential exposures to COVID-19. • If spectating opportunities are offered, spectators at school-related group physical activities held at the school (e.g., sports games, tournaments) are subject to the following restrictions. • Spectator attendance limits at indoor performance activities are removed except for: ○ Facilities with capacity of 500 to 999, which will be limited to 500. ○ Facilities with capacity of 1,000-plus, which will be limited to 50 per cent • It is recommended that spectators maintain 2 metres physical distance between households. Individuals who live alone may sit with their two designated close contacts.
Expectations for Visitors and Other Service Providers Entering the School	• Adult visitors and volunteers are required to follow the school policies such as physical distancing, hand hygiene, staying home when ill and wearing a mask. • Parents/guardians can attend the school if they are required (e.g., parents/guardians may drop off student lunches or other necessary items as required).

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	• When a visitor, volunteer or service provider (including delivery drivers and independent contractors) enters the school they should be asked to use the applicable checklist for their age group (Child Alberta Health Daily Checklist or Adult Alberta Health Daily Checklist) before they enter the school.
	  ○ If a visitor, volunteer or service provider answers YES to any of the questions, the individual must not be admitted into the school.
	  ○ In the case of a delivery driver answering YES, the driver/school will make alternate delivery arrangements.

Food Services	• Classes that teach food preparation may occur as long as students follow general precautions, such as ensuring hand hygiene, respiratory etiquette, maintaining 2 metres physical distancing (where possible) and avoiding handling common or shared serving utensils or cookware.
	  ○ Any food prepared during a class that teaches food preparation should be served by a designated person. Students should follow physical distancing measures while eating and during food preparation where possible.
	• Activities that involve the sharing of food items between students or staff should not occur (e.g., pot luck, buffet-style service).
	• Parents/teachers can provide food/treats for a classroom if there is a designated person serving the food and appropriate hand hygiene is followed before and after eating. Please follow the school's policy for parent-provided food.
	• For classroom meals and snacks:
	  ○ Pre-packaged meals or meals served by designated staff should be the norm. No self-serve or family-style meal service should occur.
	  ○ There should be no common food items (e.g., salt and pepper shakers, ketchup bottle).
	  ○ Designated staff should serve food items using utensils (not fingers).
	• For food service program (e.g., cafeteria) establishments:
	  ○ Group students in kindergarten through grade 6 in their cohorts for meal breaks. Use alternate processes to reduce the numbers of people dining together at one time.
	  ○ If a school is using a common lunchroom and staggering lunch times, ensure that all surfaces of the tables and chairs (including the underneath edge of the chair seat) are cleaned and disinfected after each use.

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	○ Adapt other areas to serve as additional dining space to increase spacing among persons in the same room. ○ Do not use buffet-style self-serve. Instead, switch to pre-packaged meals or meals served by staff. ○ Dispense cutlery, napkins and other items to students/children, rather than allowing them to pick up their own items.
Responding to Illness	• Schools should have detailed plans for a rapid response if a student, teacher, staff member or visitor becomes symptomatic while at school. This includes: ○ Sending home students or staff who are sick, where possible. ○ Having a separate area for students and staff who are sick and waiting to go home. ○ Ensuring that students and staff with respiratory illness symptoms wear a medical mask continuously while in school setting. ○ Disinfecting areas and items touched by the sick student or staff member. ○ Staff members caring for an ill student should wear a medical mask and may use a face shield or other eye protections, if available. • Anyone with symptoms should isolate immediately, following AH isolation guidance and orders, use an at-home rapid antigen test if available. Refer to rapid testing at home for more information. • Fully vaccinated students experiencing fever, cough, shortness of breath or loss of sense of taste/smell **must** continue to isolate for 5 days from when their symptoms started or until they resolve, whichever is longer. For more information on isolation please visit alberta.ca/isolation. • For up to five days following their isolation, all fully vaccinated individuals must wear masks at all times when around others outside of home for up to 5 more days (10 days total). This means they must eat or drink alone, away from others. ○ If it's not possible to give each student in their day 6-10 mandatory masking period a private space to eat in, they can cohort together for meals in the same well-ventilated room. Distancing is recommended and individuals should remain masked at all times when not actively consuming food and drink. • If schools find this operationally challenging to accommodate, the consistent use of a 10 day absence prior to return, for both immunized and non-immunized cases, is an acceptable approach. • Students who are not fully vaccinated who are a case of COVID 19 or who have a fever, cough, shortness of breath or loss of sense of

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	taste/smell must continue to isolate for 10 days from when their symptoms started or until they are fever free for 24 hours without the use of fever reducing medication and other symptoms are improving, whichever is longer. If they receive a negative test result, they must continue to isolate until their symptoms resolve. For more information on isolation please visit alberta.ca/isolation.
	• Please see Appendix B for management of adults and children who are symptomatic and/or tested for COVID-19.
	• Proof of a negative COVID-19 test result is not necessary for a student, teacher or staff member to return to school.
	• It is strongly recommended that household contacts who are NOT fully vaccinated, stay home for 10 days from the date of last household exposure to the COVID-19 case
	  ○ In addition, they should monitor for symptoms for 10 days from the last day of household exposure, and if they develop any symptoms, they should isolate and complete the AHS Self-Assessment tool.
	  ○ If rapid antigen testing kits are available, they can be used on individuals to test for COVID-19. Refer to rapid testing at home for more information.
	  ○ For more information on isolation requirements for people with symptoms, please visit alberta.ca/isolation.

Student Transportation (Including School Buses)	• Parents and children/students should not be in the pick-up area or enter the bus if they have symptoms of COVID-19.
	• Bus drivers should be provided with a protective zone, which may include:
	  ○ 2 metre physical distance;
	  ○ Physical barrier; or
	  ○ Mask.
	• Students should be assigned seats. Students who live in the same household should be seated together.
	• Masks remain mandatory for all teachers, staff members and adult visitors on school buses and publicly accessible transit, such as municipal buses, taxis and ride-shares. School administrators/authorities must comply with current CMOH orders regarding masking requirements on school buses.
	• Schools/bus companies should develop procedures for student loading, unloading and transfers that support physical distancing of 2 metres between all persons (except household members), when possible and may include:

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	○ Children/students start loading from the back seats to the front of bus. ○ Where feasible, limit the number of students per bench unless from the same household. ○ Students from the same household may share seats. ○ Students start unloading from the front seats to the back of bus. ○ If there are students from two schools on the same bus, it is recommended to keep students from each school separated by 2 metres (3 rows) if possible. • A child who becomes symptomatic during the bus trip should be provided a mask if they are not already wearing one. The driver should contact the school to make the appropriate arrangements to pick up the child/student (see Responding to Illness above). • School bus cleaning and records: ○ Choose a disinfectant that has a Drug Identification Number (DIN) and a broad-spectrum virucidal claim OR a virucidal claim against non-enveloped viruses or coronaviruses and use it according to the manufacturer's instructions. More information is available in the AHS COVID-19 public health recommendations for environmental cleaning of public facilities. ○ Increase frequency of cleaning and disinfection of high-touch surfaces, such as door handles, window areas, rails, steering wheel, mobile devices and GPS prior to each run. ○ It is recommended that vehicle cleaning logs be kept. • Students and staff should be discouraged from carpooling unless they are from the same household. If carpooling is necessary, limit the number of people in the vehicle to maintain as much physical distance as possible and ensure all adult occupants wear masks and practice hand hygiene.
Work Experience	• Work experience is permitted as long as the risk of infection is mitigated for all participants. • If the work experience placement is in a workplace, the child/student is expected to follow health rules set out by the workplace which should comply with the General Operational Guidance and any applicable sector-specific guidance.
International Students/Programs	• International travel programs and international education programs in Alberta must follow current public health orders and local restrictions. • Individuals who have traveled from outside of Canada are provided with specific instructions and requirements at the border. They are to follow the Government of Canada Travel, Testing, Quarantine and

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	Borders instructions, including any requirements for exempt travelers related to attending high-risk environments. • School administrators/authorities are not expected to be assessing students for following requirements set out by the Federal *Quarantine Act*. • Students/families are not required to provide proof of vaccination status for school administrators/authorities. • Providing school administrators with proof of a negative test result after arrival in Canada is not required to attend school.
Compliance	• Concerns with individuals not complying with school protocols should be directed to the school principal, the school authority central office or Alberta Education. • School administrators and school authorities who have concerns, need specific guidance or have questions about how to apply the measures outlined in the guidance document may contact AHS Environmental Public Health in their zone for assistance. • Concerns identified by AHS should be discussed with the school administration. Concerns that cannot be resolved through this process should be directed to Alberta Health, who may bring forward to Alberta Education as appropriate.

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Appendix A: Environmental Public Health Contacts

Alberta Health Services

Portal link: https://ephisahs.albertahealthservices.ca/create-case/

ZONE	CONTACT EMAIL ADDRESS	PHONE NUMBERS FOR MAIN OFFICE
Calgary Zone	calgaryzone.environmentalhealth@ahs.ca	Calgary 403-943-2288
Central Zone	centralzone.environmentalhealth@ahs.ca	Red Deer 403-356-6366
Edmonton Zone	edmontonzone.environmentalhealth@ahs.ca	Edmonton 780-735-1800
North Zone	northzone.environmentalhealth@ahs.ca	Grande Prairie 780-513-7517
South Zone	she.southzoneeph@ahs.ca	Lethbridge 403-388-6689

Indigenous Services Canada – First Nations and Inuit Health Branch

OFFICE	REGULAR BUSINESS HOURS 8:00 AM – 4:00 PM	
Edmonton	Environmental Public Health	780-495-4409
Tsuut'ina	Environmental Public Health	403-299-3939

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Appendix B: Management of Individuals who are Symptomatic and/or Tested for COVID-19

Symptoms	COVID-19 Test Result:	Management of Individual:
Symptomatic	Positive molecular (e.g. PCR) test or rapid antigen take-home test	• **Fully vaccinated staff (i.e. staff who have received the complete vaccine series for COVID-19 and it has been 14 days after the second dose in a two dose series or one dose in a one dose series [i.e. Janssen vaccine]) or student (2 doses of mRNA vaccine)**: Isolate for 5 days from the start of symptoms or until they are fever free for 24 hours without the use of fever reducing medication and other symptoms are improving, whichever is longer, if symptoms are not related to a pre-existing condition • Following their home isolation period, all fully vaccinated individuals must wear masks at all times when in a public place or otherwise in the company of other persons for up to 5 more days (10 days total). This means they must eat or drink alone, away from others. • If it's not possible to give each student on day 6-10 isolation a private space to eat in, they can cohort together with other COVID-19-infected individuals for meals in the same well-ventilated room. Distancing is recommended and individuals should remain masked at all times when not actively consuming food and drink. • If schools find this operationally challenging to accommodate, the consistent use of a 10 day absence prior to return, for both immunized and non-immunized cases, is an acceptable approach. **Not fully vaccinated:** Isolate at home for 10 days from the start of symptoms or until they are fever free for 24 hours without the use of fever reducing medication and other symptoms are improving, whichever is longer, if symptoms are not related to a pre-existing condition.
	Negative molecular (e.g. PCR) test	**Fully vaccinated staff (i.e. staff who have received the complete vaccine series for COVID-19 and it has been 14 days after the second dose in a two dose series or one dose in a one dose series [i.e. Janssen vaccine]) or student (2 doses mRNA**

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Symptoms	COVID-19 Test Result:	Management of Individual:
		vaccine): Stay home until they are fever free for 24 hours without the use of fever reducing medication and other symptoms are improving, before cautiously resuming normal activities. **Not fully vaccinated:** Stay home until they are fever free for 24 hours without the use of fever reducing medication and other symptoms are improving if symptoms are not related to a pre-existing condition, before cautiously resuming normal activities.
	Negative rapid antigen take-home test	**NOTE**: A negative test result does not rule out infection. Rapid tests can be falsely negative, early in COVID infections. Continue monitoring your symptoms and following public health guidelines. Isolate immediately for 24 hours. Take second rapid antigen test not less than 24 hours from initial test: • If negative, continue isolating until they are fever free for 24 hours without the use of fever reducing medication and other symptoms are improving before cautiously resuming normal activities. • If positive, continue isolation: **Fully vaccinated**: Isolate at home for 5 days or until they are fever free for 24 hours without the use of fever reducing medication and other symptoms are improving, whichever is longer. For up to five days following their home-isolation period, they must wear masks at all times when in a public place or otherwise in the company of other persons for up to 5 more days (10 days total). This means they must eat or drink alone, away from others. • If it's not possible to give each student on day 6-10 isolation a private space to eat in, they can cohort together with other COVID-19-infected individuals for meals in the same well-ventilated room. Distancing is recommended and individuals should remain masked at all times when not actively consuming food and drink. • If schools find this operationally challenging to accommodate, the consistent use of a 10 day absence prior to return, for both immunized and non-immunized cases, is an acceptable approach.

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Symptoms	COVID-19 Test Result:	Management of Individual:
		Not fully vaccinated: 10 days or until symptoms resolve, whichever is longer
	Not tested	**Student:** If symptoms include fever, cough, shortness of breath or loss of sense of taste/smell, follow instructions for symptomatic positive above. **Adult:** If symptoms include fever, cough, shortness of breath, sore throat, loss of taste/smell or runny nose, follow instructions for symptomatic positive above.
		Student: If other symptoms (chills, sore throat/painful swallowing, runny nose/congestion, feeling unwell/fatigued, nausea/vomiting/diarrhea, unexplained loss of appetite, muscle/joint aches, headache or conjunctivitis): • ONE symptom: stay home, monitor for 24hours. If improves, return when well enough to go (testing not necessary). • TWO symptoms OR ONE symptom that persists or worsens: Stay home until they are fever free for 24 hours without the use of fever reducing medication, and other symptoms are improving. **Adult:** If other symptoms, stay home until they are fever free for 24 hours without the use of fever reducing medication, and other symptoms are improving.
Asymptomatic	Positive molecular (e.g. PCR) test	**Fully vaccinated staff (i.e. staff who have received the complete vaccine series for COVID-19 and it has been 14 days after the second dose in a two dose series or one dose in a one dose series [i.e. Janssen vaccine]) or student (2 doses of mRNA vaccine)**: Isolate for 5 days from the collection date of the swab or from the date when the molecular test was completed. • Following their home isolation period, all fully vaccinated individuals must wear masks at all times when in a public place or otherwise in the company of other persons for up to 5 more days (10 days total). This means they must eat or drink alone, away from others. • If it's not possible to give each staff on day 6-10 isolation a private space to eat in, they can cohort together with other COVID-19-infected individuals for meals in the same well-ventilated room. Distancing is recommended and individuals

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Symptoms	COVID-19 Test Result:	Management of Individual:
		should remain masked at all times when not actively consuming food and drink. • If schools find this operationally challenging to accommodate, the consistent use of a 10 day absence prior to return, for both immunized and non-immunized cases, is an acceptable approach. **Not fully vaccinated:** Isolate at home for 10 days from the collection date of the swab or from the date when the molecular test was completed.
	Positive Rapid antigen take-home test	**Fully vaccinated staff (i.e. staff who have received the complete vaccine series for COVID-19 and it has been 14 days after the second dose in a two dose series or one dose in a one dose series [i.e. Janssen vaccine]) or student (2 doses of mRNA vaccine)**: Isolate at home for 5 days from the collection date of the swab or from the date when the rapid take-home test was completed. • Following their home isolation period, all fully vaccinated individuals must wear masks at all times when in a public place or otherwise in the company of other persons for up to 5 more days (10 days total). This means they must eat or drink alone, away from others. • If it's not possible to give each staff on day 6-10 isolation a private space to eat in, they can cohort together with other COVID-infected individuals for meals in the same well-ventilated room. Distancing is recommended and individuals should remain masked at all times when not actively consuming food and drink. • If schools find this operationally challenging to accommodate, the consistent use of a 10 day absence prior to return, for both immunized and non-immunized cases, is an acceptable approach. **Not fully vaccinated:** Isolate at home for 10 days from the collection date of the swab or from the date when the rapid take-home test was completed. Individuals can conduct a second test not less than 24 hours after the initial test, and if negative, and still no symptoms, they do not

GUIDANCE FOR SCHOOLS (K-12) AND SCHOOL BUSES

Symptoms	COVID-19 Test Result:	Management of Individual:
		need to continue to isolate. If the result is positive on the repeat test, they should continue to isolate. If at any time, symptoms develop, they must follow isolation instructions for symptomatic individuals.
	Negative	No isolation required.

TAB 3

Office of the Chief Medical Officer of Health
10025 Jasper Avenue NW
PO Box 1360, Stn. Main
Edmonton, Alberta T5J 2N3

RECORD OF DECISION – CMOH Order 02-2022

Re: 2022 COVID-19 Response

Whereas I, Dr. Deena Hinshaw, Chief Medical Officer of Health (CMOH) have initiated an investigation into the existence of COVID-19 within the Province of Alberta.

Whereas under section 29(2.1) of the *Public Health Act*, I have the authority to take whatever steps that are, in my opinion, necessary in order to lessen the impact of the public health emergency.

Whereas having determined that it is possible to modify certain restrictions while still protecting Albertans from exposure to COVID-19 and preventing the spread of COVID-19, I hereby make the following order (the Order):

Table of Contents

Part 1 – Application

1.1 This Order applies throughout the Province of Alberta and is effective January 10, 2022.

1.2 This Order rescinds Record of Decision CMOH Order 01-2022 and CMOH Order 48-2021.

Part 2 – Definitions

2.1 In this Order and the Schedule to this Order, the following terms have the following meanings:

(a) "asymptomatic" means a person who is not exhibiting COVID-19 symptoms.

(b) "confirmed case of COVID-19" means a COVID-19 infection where a person is:

i. asymptomatic and has taken two rapid tests, not less than 24 hours of each other, and both rapid tests indicate the person is positive for COVID-19;
ii. symptomatic and has taken one or more rapid tests indicating the person is positive for COVID-19; OR
iii. asymptomatic or symptomatic and has taken a PCR test which indicates the person is positive for COVID-19.

(c) "COVID-19 symptoms" means the following symptoms of COVID-19 that are not related to a pre-existing illness or health condition:

i. cough;
ii. fever;
iii. sore throat;
iv. shortness of breath;
v. runny nose; or
vi. loss of taste or smell.

(d) "COVID-19 test" means a Health Canada approved rapid test or a lab based PCR test approved by Health Canada or the lab accreditation body of the jurisdiction in which the test is performed.

(e) "critical worker" means a person identified by the owner or operator of a business or entity who is essential to continued safe operations and who provides or is responsible for services that are essential to the safe operation of the business or entity.

(f) "fully vaccinated" means a person eligible for vaccination who has:

i. proof of receiving no less than two doses of a World Health Organization approved COVID-19 vaccine in a two dose vaccine series and has had fourteen or more days elapse since the date on which the person received the last dose of vaccine; or
ii. proof of receiving at least one dose in a World Health Organization approved COVID-19 vaccine in a one dose series and has had fourteen days or more elapse since the date on which the person received the last dose of vaccine.

(g) "health care facility" means

i. an auxiliary hospital under the *Hospitals Act*;
ii. a nursing home under the *Nursing Homes Act*;
iii. a designated supportive living accommodation under the *Supportive Living Accommodation Licensing Act*;
iv. any facility in which residential hospice services are offered or provided by Alberta Health Services or by a service provider under contract with Alberta Health Services.

(h) "isolation" means the separation of a person from any other person for the purpose of preventing the spread of COVID-19.

(i) "isolation period" means the period of time that a person is required to be in isolation pursuant to this Order.

(j) "PCR test" means the polymerase chain reaction test for COVID-19.

(k) "rapid test" means a COVID-19 testing device that is listed in authorized medical devices for uses related to COVID-19: List of authorized testing devices by Health Canada published on the Government of Canada website and is approved for point-of-care molecular or antigen COVID-19 testing, including but not limited to, symptomatic, asymptomatic, tests performed by a health care professional, tests performed by a lay-person, or self-testing.

(l) "symptomatic" means a person who is exhibiting COVID-19 symptoms which are not related to a pre-existing illness or health condition.

(m) "symptoms resolve" means the state when a person's COVID-19 symptoms improve and the person remains afebrile for a period of twenty four hours without using fever reducing medications.

Part 3 – Isolation requirements

General Requirement

3.1 A person is required to be in isolation if the person is:

(a) symptomatic; or

(b) asymptomatic and has taken one rapid test with a positive result; or

(c) a confirmed case of COVID-19.

For symptomatic persons

3.2 A symptomatic person who is fully vaccinated is required to isolate in accordance with Part 3 and must:

(a) immediately start isolation and isolate for a minimum period of five days from the first day on which the person is symptomatic, or until the person's COVID-19 symptoms resolve, whichever is longer;

(b) remain at home, and two metres distant from any other person at all times;

(c) not attend work, school, social events or any other public gatherings; and

(d) not take public transportation.

3.3 A symptomatic person who is not fully vaccinated is required to isolate in accordance with Part 3 and must:

(a) immediately start isolation and isolate for a minimum period of ten days from the first day on which the person is symptomatic, or until the person's COVID-19 symptoms resolve, whichever is longer;

(b) remain at home, and two metres distant from any other person at all times;

(c) not attend work, school, social events or any other public gatherings; and

(d) not take public transportation.

3.4 Despite section 3.2 and section 3.3, a symptomatic person is not required to isolate in accordance with Part 3 if:

(a) a PCR test indicates the person is negative for COVID-19 and the COVID-19 symptoms have resolved; or

(b) two rapid tests, taken not less than 24 hours of each other, both indicate the person is negative for COVID-19 and the COVID-19 symptoms have resolved.

For asymptomatic persons

3.5 An asymptomatic person who is fully vaccinated and has taken one rapid test indicating the person is positive for COVID-19 or is a confirmed case of COVID-19, is required to isolate in accordance with Part 3 and must:

(a) immediately start isolation and isolate for a minimum period of five days from the day on which the asymptomatic person takes a COVID-19 test that indicates the person is positive for COVID-19;

(b) remain at home, and two metres distant from any other person at all times;

(c) not attend work, school, social events or any other public gatherings; and

(d) not take public transportation.

3.6 An asymptomatic person who is not fully vaccinated and has taken one rapid test indicating the person is positive for COVID-19 or is a confirmed case of COVID-19, is required to isolate in accordance with Part 3 and must:

(a) immediately start isolation and isolate for a minimum period of ten days from the day on which the asymptomatic person takes a COVID-19 test that indicates the person is positive for COVID-19;

(b) remain at home, and two metres distant from any other person at all times;

(c) not attend work, school, social events or any other public gatherings; and

(d) not take public transportation.

3.7 Despite section 3.5, if an asymptomatic person who is fully vaccinated develops COVID-19 symptoms during the isolation period, the person must continue to isolate for five

days from the first day on which the person is symptomatic or until the COVID-19 symptoms resolve, whichever is later.

3.8 Despite section 3.6, if an asymptomatic person who is not fully vaccinated develops COVID-19 symptoms during the isolation period, the person must continue to isolate for 10 days from the first day on which the person is symptomatic or until the COVID-19 symptoms resolve, whichever is later.

3.9 Despite section 3.5 and section 3.6, an asymptomatic person is not required to isolate in accordance with Part 3 if:

(a) a PCR test indicates the person is negative for COVID-19; or

(a) the result of a second rapid test, taken not less than 24 hours from the initial rapid test, is negative for COVID-19.

Residents of Designated Supportive Living, Auxiliary Hospital, Nursing Home and Hospice facilities

3.10 A person who is a resident of a health care facility, whether fully vaccinated or not, is required to isolate in accordance with Part 3 if the resident is:

(a) symptomatic, and is not a confirmed case of COVID-19, then the resident must immediately start isolation and isolate from the first day on which the resident is symptomatic, for a minimum period of ten days, or until the resident's COVID-19 symptoms resolve, whichever is longer;

(b) asymptomatic and has taken one rapid test with a positive result, then the resident must immediately start isolation and isolate for a minimum period of ten days from the day on which the asymptomatic resident takes a COVID-19 test that indicates the resident is positive for COVID-19;

(c) confirmed case of COVID-19, then the resident must immediately start isolation and isolate for a minimum period of ten days from the day on which the resident takes a COVID-19 test that indicates the resident is positive for COVID-19.

3.11 A person who is a resident of a health care facility who is required to isolate in accordance with section 3.10 must:

(a) remain at the health care facility, and two metres distant from any other person at all times;

(b) not attend social events or any other public gatherings; and

(c) not take public transportation.

3.12 Despite sections 3.10 and 3.11, a resident of a health care facility is not required to isolate in accordance with Part 3 if the:

(a) symptomatic resident has taken a PCR test which indicates the resident is negative for COVID-19 and COVID-19 symptoms resolve;

(b) symptomatic resident has taken two rapid tests, not less than 24 hours of each other, both indicating the resident is negative for COVID-19 and COVID-19 symptoms resolve; or

(c) asymptomatic resident has taken a second rapid test, not less than 24 hours from the initial rapid test, and the results indicate the resident is negative for COVID-19.

Requirement to wear a mask

3.13 Despite any other CMOH Order in effect that pertains to masking, every person required to isolate for the isolation periods set out in Part 3 must wear a mask at all times when in a public place or otherwise in the company of other persons for a period of up to five days following the expiry of the applicable isolation period. The period during which a person is required to mask expires ten days from the first day on which the person is:

(a) symptomatic; or

(b) asymptomatic and has taken one rapid test with a positive result; or

(c) a confirmed case of COVID-19.

For greater certainty, none of the masking exceptions set out in any CMOH Order in effect applies to a person required to mask in accordance with this section.

Part 4 – Critical worker exception

4.1 Despite Part 3 of this Order, and in accordance with Schedule A, a person or class of persons is excepted from the application of this Order where the owner or operator of a business, sector or service determines that a certain person or class of persons:

(a) is a critical worker; and

(b) the critical worker's absence would cause a substantive disruption of services that would be harmful to the public.

4.2 The owner or operator seeking an exception must have a plan to accommodate the presence of the critical worker, identified in section 4.1 that, at minimum, meets the criteria in Schedule A to mitigate the risk of the spread of infection by the critical worker who would otherwise be required to isolate pursuant to this Order.

4.3 To mitigate the risk of the spread of infection by the critical worker, the owner or operator must ensure that a critical worker identified in section 4.1 follows the:

(a) plan developed by the owner or operator pursuant to section 4.2, and

(b) criteria in Schedule A.

4.4 To mitigate the risk of the spread of infection by a critical worker, a critical worker who is excepted from isolation must follow the:

(a) plan developed by the owner or operator pursuant to section 4.2; and

(b) criteria in Schedule A.

For greater certainty, a critical worker is subject to the requirements in Part 3, when not under this exception to complete critical work duties.

Part 5 - General

5.1 Notwithstanding anything in this Order, the Chief Medical Officer of Health may exempt a person or classes of persons from the application of this Order.

5.2 This Order remains in effect until rescinded by the Chief Medical Officer of Health.

Signed on this 10 day of January, 2022.

Deena Hinshaw, MD
Chief Medical Officer of Health

Schedule A: Critical Worker Isolation Exceptions

1. This exception is only permitted when:

   (a) services provided by the business or entity are critical for the ongoing operation of services that impact the public interest;
   (b) any substantive service disruption will be detrimental to the public interest;
   (c) the person otherwise required to be in isolation are asymptomatic or mildly symptomatic; and
   (d) all other means of staffing critical worker positions have been exhausted.

Critical Worker Eligibility:

2. The only workers eligible for the isolation exception are those critical workers who are required to be on-site, in-person for critical work duties.

Risk Hierarchy for Isolation Exception:

3. Wherever possible, the owner or operator should implement the isolation exception for critical workers following a least risk to most manner. This prioritizes that the persons who temporarily leave isolation for critical, in-person work duties are the least likely to transmit infection, in conjunction with the public health criteria and controls below. It is strongly recommended that the hierarchy of risk follows:

   (a) A critical worker under this Order will be in one of the following categories, with preference in each category to be given first to a person who has received a booster dose; then a person who is fully immunized; then a person who is partially immunized; and finally a person who is unimmunized:
      i. a symptomatic person who tests negative for COVID-19 but exhibits mild COVID-19 symptoms;
      ii. an asymptomatic person who has taken one rapid test with a positive result;
      iii. an asymptomatic person who is a confirmed case of COVID-19;
      iv. a symptomatic person who is a confirmed case of COVID-19 but exhibits mild COVID-19 symptoms.

Public health criteria and controls:

4. Attending the business or entity location:
   (a) Access to the work location is limited to only critical workers whose presence is critical to the provision of service, to the extent possible.
   (b) Critical workers are only permitted to attend the work location for the purposes of completing their job duties that require them to be on-site, in-person, to ensure the ongoing functioning of the service.
   (c) All critical workers must travel directly to the work location, and immediately return to their place of residence until the applicable isolation period is complete.

5. Masking Requirements:
   (a) Medical masks are worn to enter and exit the building.
   (b) If there is any possibility of a critical worker under this exception being in the same room as another person, even temporarily, the critical worker under this exception must wear a medical mask at all times during this period of time.

i. The other persons that may be in the same area as the critical worker should also wear medical face masks, whenever possible

(c) Critical workers must have access to medical masks in the event that they need to replace their mask on shift.

6. Work spaces:
   (a) Whenever possible, critical workers will be alone in their workspace for the duration of their shift.
   (b) Work spaces for critical workers should include, whenever possible:
      i. a single office that have been established with doors that can close;
      ii. located on a separate floor from the general areas and other work spaces in the location;
      iii. have their own washroom and kitchen facilities which can only be accessed by the critical worker;
      iv. if work spaces are shared by critical workers on different shifts, the critical worker from the first shift must leave the work space before the critical worker from the second shift arrive;
      v. in between shifts, rooms are thoroughly sanitized with 70% alcohol.
   (c) The HVAC system must be functioning properly.

7. Additional Requirements:
   (a) The business or entity must develop and implement protocols for COVID-19 that align with this exception and address appropriate hygiene to protect critical workers and other persons from further transmission of COVID-19.
   (b) The business or entity must train staff on the protocols implemented pursuant to section 7(a) above.
   (c) The business or entity, critical workers and any other staff must follow any further public health conditions or requirements that relate to public health and safety that may be provided by Alberta Health or Alberta Health Services.

TAB 4

Alberta Health

Office of the Chief Medical Officer of Health
10025 Jasper Avenue NW
PO Box 1360, Stn. Main
Edmonton, Alberta T5J 2N3
Canada

RECORD OF DECISION – CMOH Order 04-2022

Re: 2022 COVID-19 Response – Modification of Record of Decision CMOH Order 02-2022, Record of Decision CMOH Order 54-2021, and Record of Decision CMOH Order 57-2021

Whereas I, Dr. Deena Hinshaw, Chief Medical Officer of Health (CMOH) have initiated an investigation into the existence of COVID-19 within the Province of Alberta.

Whereas the investigation has confirmed that COVID-19 is present in Alberta and constitutes a public health emergency as a novel or highly infectious agent that poses a significant risk to public health.

Whereas under section 29(2.1) of the *Public Health Act* (the Act), I have the authority by order to prohibit a person from attending a location for any period and subject to any conditions that I consider appropriate, where I have determined that the person engaging in that activity could transmit an infectious agent. I also have the authority to take whatever other steps that are, in my opinion, necessary in order to lessen the impact of the public health emergency.

Whereas I have determined that it is necessary to revise Record of Decision - CMOH Order 02-2022 to recognize the change of use of Health Canada approved rapid antigen tests and molecular tests.

Whereas I have also determined that is necessary to revise Record of Decision – CMOH Order 02-2022, Record of Decision – CMOH Order 54-2021, and Record of Decision – CMOH Order 57-2021 to amend the definitions of COVID-19 test and PCR test, and to make consequential amendments.

I hereby make the following Order modifying Record of Decision - CMOH Order 02-2022, Record of Decision - CMOH Order 54-2021, and Record of Decision - CMOH Order 57-2021:

1. Record of Decision - CMOH Order 02-2022 is amended as follows:

    (a) Section 2.1(b) is deleted and substituted with the following:

    "confirmed case of COVID-19" means a COVID-19 infection where a person is:

    i. asymptomatic and has taken two rapid antigen tests, not less than 24 hours of each other, and both rapid antigen tests indicate the person is positive for COVID-19;

    ii. symptomatic and has taken one or more rapid antigen tests indicating the person is positive for COVID-19; OR

iii. asymptomatic or symptomatic and has taken a molecular test which indicates the person is positive for COVID-19.

(b) Section 2.1(d) is deleted and substituted with the following:

"COVID-19 test" means a Health Canada approved rapid antigen test or a molecular test approved by Health Canada or the lab accreditation body of the jurisdiction in which the test is performed.

(c) Section 2.1(j) is deleted and substituted with the following:

"molecular test" means a nucleic acid amplification test to detect RNA of SARS-CoV-2 [e.g. Polymerase Chain Reaction (PCR), loop-mediated isothermal amplification (LAMP), rapid molecular test, etc.]. The test may be performed within an approved laboratory or at the point of care using a Health Canada approved test/instrument.

(d) Section 2.1(k) is deleted and substituted with the following:

"rapid antigen test" means a COVID-19 testing device that is listed in authorized medical devices for uses related to COVID-19: *List of authorized testing devices* by Health Canada published on the Government of Canada website and is approved for COVID-19 antigen testing, including but not limited to, symptomatic, asymptomatic, tests performed by a health care professional, tests performed by a lay-person, or self-testing.

(e) In Part 3, all references to "rapid test" or "rapid tests" are deleted and substituted with "rapid antigen test" or "rapid antigen tests" as the context requires.

(f) In Part 3, all references to "PCR test" or "PCR tests" are deleted and substituted with "molecular test" or "molecular tests" as the context requires.

(g) The numbering in section 3.9 is amended by deleting the second reference to subsection (a) and substituting it with subsection (b).

2. Record of Decision - CMOH Order 54-2021 is amended as follows:

(a) Section 2.1(c) is deleted and substituted with the following:

"COVID-19 test" means a Health Canada approved rapid screening test or a molecular test approved by Health Canada or the lab accreditation body of the jurisdiction in which the test is performed which:

i. a person has taken within the last 72 hours;

ii. clearly outlines the laboratory that completed the test, if applicable, the type of test, time of sample collection, and clear indication of negative result; and

iii. is not sourced from Alberta Health Services public COVID-19 testing system.

(b) Section 2.1(r) is deleted and substituted with the following:

"molecular test" means a nucleic acid amplification test to detect RNA of SARS-CoV-2 [e.g. Polymerase Chain Reaction (PCR), loop-mediated isothermal amplification (LAMP), etc.]. The test may be performed within an approved laboratory or at the point of care using a Health Canada approved test/instrument.

(c) By deleting all instances of "Record of Decision – CMOH Order 06-2021" and replacing them with "Record of Decision – CMOH Order 02-2022".

4. Record of Decision – CMOH Order 57-2021 is amended as follows:

(a) Section 2.1(c) is deleted and substituted with the following:

"confirmed case of COVID-19" means a COVID-19 infection where a person is:

i. asymptomatic and has taken two rapid antigen tests, not less than 24 hours of each other, and both rapid antigen tests indicate the person is positive for COVID-19;

ii. symptomatic and has taken one or more rapid antigen tests indicating the person is positive for COVID-19; OR

iii. asymptomatic or symptomatic and has taken a molecular test which indicates the person is positive for COVID-19.

(b) Section 2.1(l) is deleted and substituted with the following:

"molecular test" means a nucleic acid amplification test to detect RNA of SARS-CoV-2 [e.g. Polymerase Chain Reaction (PCR), loop-mediated isothermal amplification (LAMP), rapid molecular test, etc.]. The test may be performed within an approved laboratory or at point-of-care using a Health Canada approved test/instrument.

(c) Section 2.1(j) is deleted and substituted with the following:

"rapid antigen test" means a COVID-19 testing device that is listed in authorized medical devices for uses related to COVID-19: *List of authorized testing devices* by Health Canada published on the Government of Canada website and is approved for COVID-19 antigen testing, including but not limited to, symptomatic, asymptomatic, tests performed by a health care professional, tests performed by a lay-person, or self-testing.

(d) In Part 3, all references to "rapid screening test" or "rapid screening tests" are deleted and substituted with "rapid antigen test" or "rapid antigen tests" as the context requires.

(e) By deleting all instances of "Record of Decision – CMOH Order 06-2021" and replacing them with "Record of Decision – CMOH Order 02-2022".

This Order remains in effect until rescinded by the Chief Medical Officer of Health.

Signed on this 2nd day of February 2022.

Deena Hinshaw, MD
Chief Medical Officer of Health

TAB 5

February 8, 2022

Alberta COVID-19 Immunization Program Report

(Information as of February 7, 2022)

Executive Summary

- **8,384,070** doses have been administered to Albertans as of February 7 with **3,562,573** first doses, **3,308,279** second doses, **1,503,982** third doses, and **9,236** fourth doses.
- There were **6,474** doses administered yesterday. However, reporting has been adjusted to be **38,627** over the past 4 days due to retrospective changes.
- **85.80%** of Albertans 5 years of age and up have received one dose, **79.83%** have received two doses, **36.22%** have received three doses, and **0.22%** have received four doses.
- **89.92%** of Albertans 12 years of age and up have received one dose, **86.26%** have received two doses, **39.99%** have received three doses, and **0.25%** have received four doses.
- **90.25%** of Albertans 18 years of age and up have received one dose, **86.65%** have received two doses, **43.52%** have received three doses, and **0.27%** have received four doses.
- **80.60%** of all Albertans have received one dose, **75.00%** have received two doses, **34.03%** have received three doses, and **0.21%** have received four doses.
- There are **640,929** doses of Pfizer and **404,514** doses of Moderna in current inventory and we have an estimated **15,004** mRNA doses for ages 12+ booked to be administered in the next 7 days.
- There are **3,065** doses of Janssen in current inventory and we have an estimated **133** Janssen doses booked to be administered in the next 7 days.
- There are **1,096** doses of AstraZeneca in current inventory and we have an estimated **37** AstraZeneca doses booked to be administered in the next 7 days.
- There are **164,740** doses of Pfizer Pediatric 5 to 11 years in current inventory and we have an estimated **11,037** doses booked to be administered in the next 7 days.
- Alberta Health Services has the capacity to administer **70,000** doses a week and has the ability to scale up to **140,000** doses per week if demand dictates.
- There are **1,413** pharmacies offering vaccines.
- Alberta is expecting to receive **0** doses of vaccine the week starting February 7th.
- **78.71%** of doses Alberta has received have been administered compared to **93.03%** for Ontario, **92.21%** for Quebec, and **90.69%** for BC as of February 8 at 12:45 pm according to the COVID-19 Tracker Canada Data by Province.

Alberta

February 8, 2022

Summary

- **8,384,070** doses of COVID-19 vaccine have been administered in Alberta (**189,683** doses per 100,000 population).

	Doses Received to Date	Administered in the Past Day	Administered to Date***	Wastage	Expired	Current Inventory*	Remaining Doses to be Received the Week of February 7th	% of Doses Received that have been Administered
AstraZeneca	319,700	1	310,197	21,413	23,446	1,096	-	97.03%
Janssen	10,000	10	6,607	651	-	3,065	-	66.07%
Moderna	2,814,240	875	1,706,861	647,985	5,641	404,514	-	60.65%
Pfizer Pediatric 5 to 11	394,000	1,305	219,905	20,299	-	164,740	-	55.81%
Pfizer/BioNTech	7,056,075	4,283	6,095,009	440,778	2,299	640,929	-	86.38%
Total	**10,594,015**	**6,474**	**8,338,579**	**1,131,126**	**31,386**	**1,214,344**	-	**78.71%**
Federal / OOP			45,491					
Total Administered			**8,384,070**					

126,866 Moderna doses have been returned to Federal inventory.

Inventory, wastage and expired data sourced from AVI.

**Doses Received to Date is reflective of doses per vial as described in the product monograph. A higher number of doses per vial are regularly able to be administered.*

***As of January 19, 2022, all doses administered in First Nations are submitted directly into Imm/ARI and the data reconciliation resulted in the removal of approximately 20,000 doses.*

Dose Breakdown

	Administered to Date*	Dose 1	Dose 2	Dose 3	Dose 4**
AstraZeneca	310,197	267,208	42,505	484	-
Janssen	6,607	6,561	31	15	-
Moderna	1,706,861	633,418	681,374	390,465	1,604
Pfizer Pediatric 5 to 11	219,905	162,179	57,710	15	1
Pfizer/BioNTech	6,095,009	2,461,493	2,512,891	1,112,994	7,631
Total	**8,338,579**	**3,530,859**	**3,294,511**	**1,503,973**	**9,236**
Federal / OOP	45,491	31,714	13,768	9	-
Total Administered	**8,384,070**	**3,562,573**	**3,308,279**	**1,503,982**	**9,236**

As of January 19, 2022, all doses administered in First Nations are submitted directly into Imm/ARI and the data reconciliation resulted in the removal of approximately 20,000 doses.

**As of January 20, 2022, immunocompromised Albertans are eligible to receive a 4th dose at least 5 months following their 3rd dose.*

Alberta

February 8, 2022

Upcoming Bookings by Dose

All Doses	Bookings in Next 7 Days	Bookings 8 to 14 Days	Bookings 15 to 28 Days	Total Bookings Next 28 Days
1st Dose Bookings	1,692	632	254	2,578
2nd Dose Bookings	10,706	5,330	2,386	18,422
3rd & 4th Dose Bookings	13,813	5,673	5,260	24,746
Total Bookings	**26,211**	**11,635**	**7,900**	**45,746**
Projected Total Immunizations	**8,410,281**	**8,421,916**	**8,429,816**	**8,429,816**

Upcoming Bookings by Vaccine Type

All Doses	Bookings in Next 7 Days	Bookings 8 to 14 Days	Bookings 15 to 28 Days	Total Bookings Next 28 Days
AstraZeneca Bookings	37	6	1	44
Janssen Bookings	133	16	22	171
Moderna Bookings	1,236	480	290	2,006
Pfizer Pediatric 5 to 11	11,037	5,520	2,276	18,833
Pfizer/BioNTech	13,768	5,613	5,311	24,692
Total Bookings	**26,211**	**11,635**	**7,900**	**45,746**

Alberta

February 8, 2022

Reason for Additional Doses Administered

	Age Group	Zone	Dose 3	% with 3 Doses	Dose 4	% with 4 Doses***	Population
Travel	NA	NA	69,289	30.93%	2,211	0.99%	224,000
Congregate Living Settings (e.g.LTC/DSL residents)	NA	NA	45,158	77.86%	46	0.08%	58,000
Health Care Workers (excluding LTC/DSL)	NA	NA	52,382	NA	45	NA	NA
Other risks*	NA	NA	1,337,160	NA	6,934	NA	NA
Albertans (18+)	18+	Alberta	1,499,063	43.52%	-	-	3,444,862
Albertans (18+)	18+	South Zone	95,702	40.07%	-	-	238,814
Albertans (18+)	18+	Calgary Zone	628,074	46.80%	-	-	1,342,134
Albertans (18+)	18+	Central Zone	134,132	36.11%	-	-	371,429
Albertans (18+)	18+	Edmonton Zone	530,296	46.88%	-	-	1,131,071
Albertans (18+)	18+	North Zone	109,835	30.40%	-	-	361,331
Albertans (18+)	18+	Unknown	1,024	NA	-	-	-
First Nations (18+)**	18+	Alberta	25,859	22.60%	-	-	114,408

The population of 224,000 is the approximate number of Albertans that received a mixed vaccine series. It is unknown how many will want a third dose for travel purposes.

** Includes Albertans who are immunocompromised and those who received a third dose but their eligibility cannot be determined therefore there is no known population. The population of immunocompromised is approximately 80,000.*

***First Nations population in this chart does not include Métis or Inuit people.*

****As of January 20, 2022, immunocompromised Albertans are eligible to receive a 4th dose at least 5 months following their 3rd dose.*

Alberta

February 8, 2022

Immunization by Age Group

Age Group	Population	One Dose	% of Population with 1 dose	Two Doses***	% of Population with 2 Doses	Three Doses	% of Population with 3 Doses	Four Doses	% of Population with 4 Doses	Total Administered**
00-04	267,791	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0
05-11	391,430	180,764	46.18%	70,718	18.07%	25	0.01%	1	0.00%	251,508
12-14	162,518	141,094	86.82%	133,257	82.00%	1,580	0.97%	4	0.00%	275,935
15-19	256,700	222,721	86.76%	211,744	82.49%	26,976	10.51%	14	0.01%	461,284
20-24	276,916	238,383	86.08%	223,598	80.75%	59,170	21.37%	44	0.02%	520,754
25-29	314,340	260,375	82.83%	245,002	77.94%	70,717	22.50%	63	0.02%	575,566
30-34	356,224	299,032	83.94%	284,402	79.84%	94,305	26.47%	107	0.03%	676,977
35-39	359,135	312,102	86.90%	299,862	83.50%	110,982	30.90%	121	0.03%	722,126
40-44	319,735	283,634	88.71%	275,677	86.22%	115,808	36.22%	637	0.20%	674,887
45-49	288,613	257,042	89.06%	249,777	86.54%	116,488	40.36%	735	0.25%	623,307
50-54	266,607	242,367	90.91%	235,867	88.47%	125,248	46.98%	716	0.27%	603,594
55-59	284,313	254,861	89.64%	246,476	86.69%	145,027	51.01%	1,259	0.44%	647,122
60-64	264,324	248,877	94.16%	242,026	91.56%	162,721	61.56%	4,477	1.69%	657,733
65-69	209,995	204,175	97.23%	200,536	95.50%	152,158	72.46%	424	0.20%	557,063
70-74	157,696	154,397	97.91%	154,010	97.66%	122,351	77.59%	283	0.18%	430,910
75-79	103,045	98,597	95.68%	97,507	94.63%	86,282	83.73%	189	0.18%	282,495
80-84	68,661	64,771	94.33%	64,045	93.28%	55,849	81.34%	92	0.13%	184,745
85-89	44,188	41,183	93.20%	40,660	92.02%	35,351	80.00%	44	0.10%	117,225
90+	27,809	26,051	93.68%	25,695	92.40%	22,949	82.52%	26	0.09%	74,717
Unknown*	0	32,147	NA	13,974	NA	2	NA	0	NA	46,122
18+	3,444,862	3,108,843	90.25%	2,985,017	86.65%	1,499,063	43.52%	9,229	0.27%	7,595,592
12+	3,760,818	3,381,809	89.92%	3,244,115	86.26%	1,503,964	39.99%	9,235	0.25%	8,132,562
5+	4,152,248	3,562,573	85.80%	3,314,833	79.83%	1,503,989	36.22%	9,236	0.22%	8,384,070
ALL	4,420,039	3,562,573	80.60%	3,314,833	75.00%	1,503,989	34.03%	9,236	0.21%	8,384,070

Note: Due to retrospective changes in the live database, total administered may not reconcile with breakdown of first, second, third and fourth doses.

**Includes doses notified as administered by FNIHB, but not yet entered onto Imm/ARI system.*

***Total Administered = At Least 1 Dose + Second Doses + Third Doses + Fourth Doses. A small number of records exist in ImmARI where only a second dose has been recorded (with no corresponding first dose record). For the purpose of this report, first doses for these records are assumed.*

***As of January 19, 2022, all doses administered in First Nations are submitted directly into Imm/ARI and the data reconciliation resulted in the removal of approximately 20,000 doses.*

**** Individuals who received a first dose in one age category may cross into another age category for a second or additional dose.*

Albertans who have received one dose of Janssen are also included in the number of Albertans with two doses.

Third dose coverage (this table) differs from third doses administered (table 2) because some individuals received Janssen and then Moderna.

Alberta

Percentage of Albertans by Vaccination Status

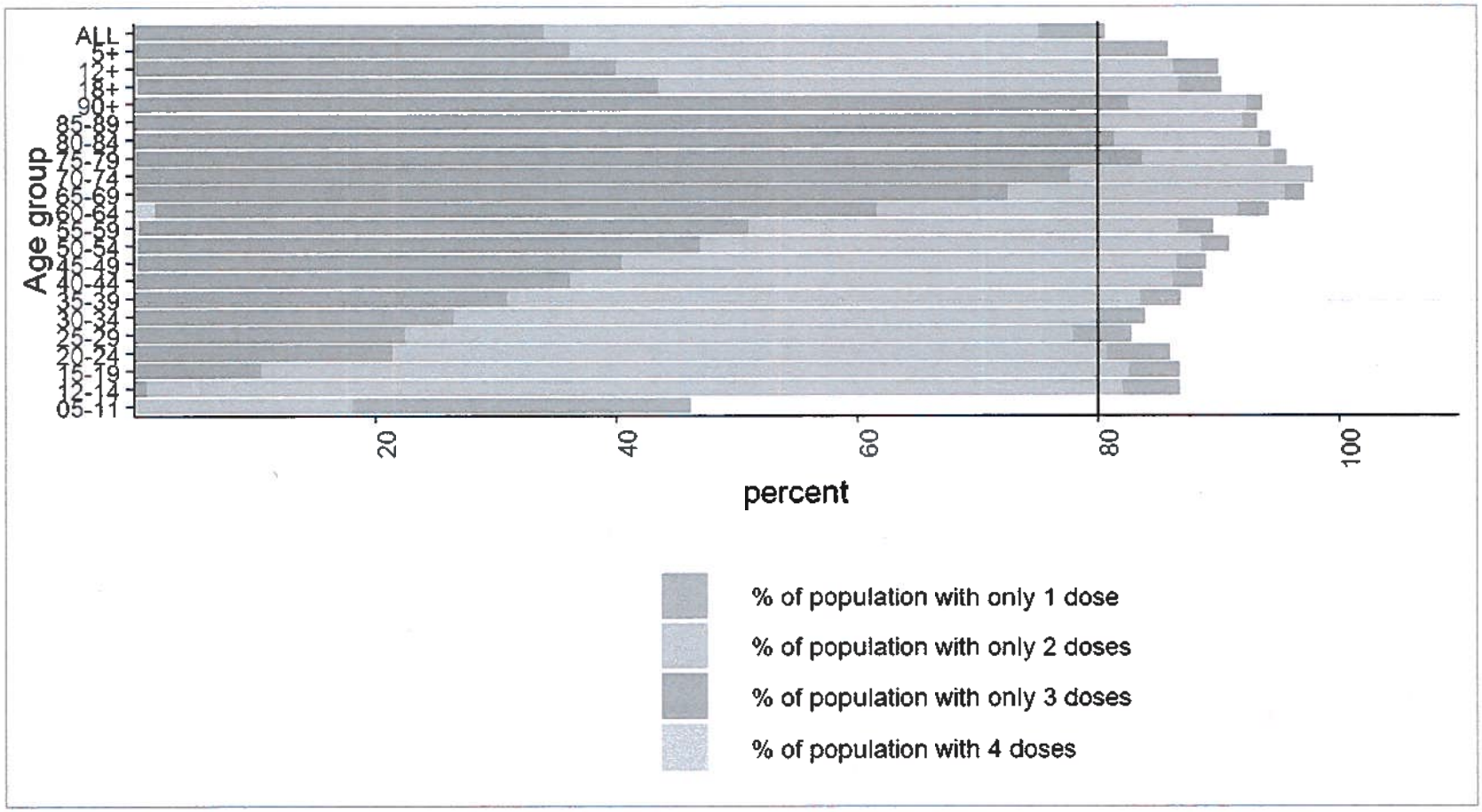

Figure 1: Percent of Albertans who received one, two, three or four doses of COVID-19 vaccine by age group.

TAB 6

Premier's Office Staff
February 7, 2022

TO: Premier Kenney

SUBJECT: Student Masking in Schools

CONTENTS & HIGHLIGHTS:

1. **Background on COVID-19 & School-Aged Children**
2. **Evidence Summary**
    - There is insufficient direct evidence of the effectiveness of face masks in reducing COVID-19 transmission in education settings.
    - Existing research supporting mask use in schools has limitations that make the pool of evidence weak and the benefits of masking children unclear.
3. **Harmful Effects of Mask Wearing on Children**
    - Masks can disrupt learning and interfere with children's social, emotional, and speech development by impairing verbal and non-verbal communication, emotional signaling, and facial recognition.
4. **Jurisdictional Scan**
    - The United Kingdom, Denmark, Sweden, Finland, Norway, and the Netherlands do not require children under the age of 12 to wear masks.
    - Florida, Oklahoma, Texas, and Utah in the United States have banned mask mandates in schools.

BACKGROUND ON COVID-19 & SCHOOL-AGED CHILDREN:

- Children and young people are at very low risk of severe outcomes from COVID infection.
    - In Alberta, case hospitalization, ICU, and death rates per 100 cases for school-aged children (ages 5 to 19[1]) are 0.47, 0.07, and 0.004, respectively.
    - An Albertan aged 5 to 19 infected with COVID is about 223 times less likely to die from COVID than an Albertan aged 20+.
- There is a lower risk of hospitalization among Omicron cases in school-aged children compared to Delta, according to preliminary analysis by the UK Health Security Agency.
- In Alberta:
    - 46.1% of 5- to 11-year-olds received one dose of COVID vaccine.
    - 86.8% of 12- to 19-year-olds received one dose, 82.2% received two doses.

EVIDENCE SUMMARY:

- A 2022 evidence summary by the UK Department for Education (DfE) found that the evidence for masking students in schools to reduce the spread of COVID is "not conclusive".
    - Existing studies are largely observational therefore prone to bias, and results from studies are "mixed".
    - The DfE also reported results from its own study on masks in schools showing no statistically significant impact on student absences.
    - The DfE ultimately concluded that the evidence taken together is in favour of masking in schools, though it should be noted that this summary was published to support the UK government's mask mandate in secondary schools, a policy that has since been reversed.
- A 2022 article by the Brownstone Institute (a US think tank opposed to COVID measures) found that the daily new cases and hospitalization rates among children in states with and without school mask mandates are nearly identical.
- A 2021 study from Spain showed that the use of masks in schools for students was not associated with a large effect in slowing COVID transmission.
    - Transmission rate did not drop sharply among children subject to the masking requirement (ages 6+).
- A 2021 CDC study of elementary schools in Georgia found that masking *teachers* was associated with a statistically significant decrease in COVID transmission, but masking *students* was not.
- Non-peer-reviewed/non-academic evidence:
    - A 2021 study from Brown University found no correlation between student cases and mask mandates in schools in New York, Massachusetts, and Florida.
    - Davidson and Williamson, two neighbouring counties in Tennessee with similar vaccination rates, had similar fall 2021 case-rate trends in their school-age

[1] Including 19-year-olds as data for ages 5 to 18 is not yet available.

populations despite one county having a mask mandate and the other a mask opt-out option.
    - Mask-optional school districts in Cass County, North Dakota had *lower* prevalence of COVID-19 cases among students last fall than districts with mask mandates.

Research supporting the use of masks in schools has limitations that make the pool of evidence weak and the benefits of masking children unclear.

- ***Lack of study controls*** – A 2021 Arizona study oft-cited by the CDC to support its recommendation of masking all kids aged 2 and older has been disputed by experts. The study failed to control for exposure times across schools and most importantly the vaccination status of staff or students.
- ***Failure to isolate the impact of masks*** – Studies in North Carolina, Utah, Wisconsin, and Missouri cited by the CDC failed to isolate the impact of masks and did not make comparisons with schools that did not require masks.
    - Schools often "layer" masking with other measures to reduce the spread of COVID, making it challenging to measure the independent impact of mask-wearing.
- ***Not statistically significant*** – Studies that do show a reduction in COVID transmission with masks in school produced results that were not statistically significant.
- ***Lack of randomized controlled trials*** ("RCTs") – Studies have been largely observational and "provide less direct evidence of the effectiveness of face coverings than RCTs."
- ***Not specific to students or schools*** – A 2021 randomized controlled trial conducted in Bangladesh reported that surgical masks were effective at reducing rates of symptomatic COVID infection, but it did not include children in the study, leading to some experts questioning the applicability of this research in education settings.
    - The same criticism applies for studies that showed universal masking (not masking in schools) reduces COVID transmission.

HARMFUL EFFECTS OF MASK WEARING ON CHILDREN:

- Masks impair verbal and non-verbal communication between teachers and students.
    - It can be harder to hear and understand speech with masks.
    - In a survey conducted by the UK DfE, 80% of students reported that wearing a mask made it difficult to communicate, and 55% felt it made learning more difficult. 94% of school leaders and teachers reported that masking made communication more difficult.
    - Young children need to see full faces to learn language and identify emotions.
    - Masks impair face recognition and identification.
    - Masks can be especially detrimental to students with hearing impairments.
- Masks block emotional signaling between teachers and students.
    - Emotions are a major driver of group cohesion.

- Masks hinder social perception and interfere with social interaction, emotional bonding, and emotional development.
- Physical side effects of mask use include headaches, dermatitis with rashes and redness, and discomfort.
  - N95 or KN95 masks can be uncomfortable for children to wear (N95s are not sized for children) and "hinder communication more than other types of masks."

JURISDICTIONAL SCAN:

- World Health Organization
  - Advises against masks for kids under the age of 6
  - Advises only selectively for kids between the ages of 6 and 11
- United Kingdom & Europe
  - The European Centre for Disease Prevention and Control
    - Advises against masks for any children in primary school
  - United Kingdom:
    - No face coverings needed in classrooms and school communal areas
    - Masks have never been advised for children under the age of 11
  - Denmark:
    - Masking rules generally do not apply to children under the age of 12
  - Sweden:
    - The use of face masks is not required for students while at school
  - Finland
    - Masking rules do not apply to children under the age of 12
  - Norway:
    - Masking rules do not apply to children under the age of 12
    - The use of face masks is not required for students while at school
  - Netherlands:
    - Masking rules do not apply to children under the age of 12
- United States:
  - The American Federation of Teachers "supports a path away from school mask mandates."
  - Four states banned mask mandates in schools: Florida, Oklahoma, Texas and Utah.
    - Six additional states have bans that are either blocked, suspended, or not being enforced: Arizona, Arkansas, Iowa, South Carolina, Tennessee, and Virginia.
  - 14 states plus the District of Columbia require masks in schools.

TAB 7

COVID-19 – COVID and Schools

Questions

- **Outbreaks in schools with and without mask mandates**
- **Provide Alberta school data comparing last year and this year**

Overall Themes

- School boards without mask mandates have 3 times more outbreaks in their schools, on average
  - Case and hospitalization rates per 100,000 population lower in areas where mask mandates are required in both children (5-11 year old) and adults (30-59 years old)
  - Hospitalization rates per 100,000 population are lower in adults (30-59 years old) in areas with mask mandates
- The outbreak in Westglen school in Edmonton (Fall 2021) is an example that illustrate that a school outbreak can lead to increased spread within the local community
- Hospitalization rate per 100,000 population are higher (<10 years old) and comparable (10-19 years old) in the fifth wave compared to other waves

Analysis: Masks Mandates

School boards without mask mandates had 3 times more outbreaks in their schools, on average

Table 1. Top 10 school Boards with the highest proportion of outbreaks in their schools as of Sept 27, 2021

School Board	Municipality	N Schools	N Outbreaks	Percent of schools with outbreaks (%)*	Mask mandate at start of school?
The Lakeland Roman Catholic Separate School Division	Bonnyville	8	6	75%	N
The Wild Rose School Division	Rocky Mountain House	17	11	65%	N
The Grande Prairie School Division	Grande Prairie	20	11	55%	N

Alberta

The Grande Prairie Roman Catholic Separate School Division	Grande Prairie	13	7	54%	N
The High Prairie School Division	High Prairie	13	6	46%	N
The Parkland School Division	Stony Plain	25	11	44%	N
The Holy Family Catholic Separate School Division	Peace River	9	4	44%	N
The Black Gold School Division	Nisku	31	11	35%	N
The Sturgeon School Division	Morinville	17	6	35%	N
The St. Thomas Aquinas Roman Catholic Separate School Division	Leduc	12	4	33%	N

* This is the same as the rate of outbreaks per 100 schools

Table 2. Schools with the 10 lowest proportions of outbreaks in their schools as of Sept 27, 2021

School Board	Municipality & Area	N Schools	N Outbreaks	Percent of schools with outbreaks (%)*	Mask mandate at start of school?
The Greater St. Albert Roman Catholic Separate School Division	St. Albert	18	1	6%	Yes
The Northland School Division	Peace River	21	1	5%	Yes
The Edmonton School Division	Edmonton	232	12	5%	Yes
The Calgary School Division	Calgary	256	11	4%	Yes
The Edmonton Catholic Separate School Division	Edmonton	103	3	3%	Yes
The Rocky View School Division	Airdrie	52	1	2%	N
The Calgary Roman Catholic Separate School Division	Calgary	120	1	1%	Yes
The Wetaskiwin School Division	Wetaskiwin	22	0	0	N
The Aspen View School Division	Athabasca	18	0	0	N
The Canadian Rockies School Division	Canmore	8	0	0	Yes

* This is the same as the rate of outbreaks per 100 schools

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Table 3. Average percent of outbreaks per school board, by mask mandate status

Mask mandate at start of school?	Average percent of outbreaks per school board
Implemented after 1st week	19.7
N	23.4
Y	7.3

A comparison of geographies with and without mask mandates

Method:

- "Masks Required" is defined as communities where 75% of schools required masks from the start of the school year (excludes fancophone and private schools).
- "Other" is defined as communities that did not meet the 75% cut-off and/or do not require mask mandates. Note: small towns that had 1 of each public school, separate school, and private school would not meet the 75% cut-off
- Limitations
    - Did not account for community vaccine coverage. This may impact hospitalization rate by communities in schools that have and do not have mask mandates.
    - Mask mandates were not available for all boards.

Results:

- Case and hospitalization rates per 100,000 population lower in areas where mask mandates are required in both children (5-11 year old) and adults (30-59 years old) (See Figure 1)
- Hospitalization rates per 100,000 population are lower in adults (30-59 years old) in areas with mask mandates (See Figure 1)

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COVID-19 – COVID and Schools

Figure 1. Rate of COVID-19 cases (Left) and hospitalization rates (right) per 100,000 population in children, 5-11 years old (top) and adults, 30-59 years old (bottom) by mask mandates in school.

NOTE: this work was done October 2021, prior to vaccine availability for 5-11 year olds. The 30-59 year olds were selected based on potential impacts on households.

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Analysis: Westglen School

September 28, 2021

- 71 cases
  - 1 staff member, 70 students
    - Staff member (music teacher) was not immunized
    - Students spread roughly evenly across grades 1-6
  - The outbreak opened Sept 23rd – they had reported 10% absenteeism and a positive case on Mon Sept 20th
    - Symptomatic children continued to attend school until they moved to online learning Sept 24th.
  - Even young children likely transmitted to their families
    - As of Sept 26th, 14 families had additional cases in their families, the index case (ie earliest onset date) was an adult only once (7%).
      - 7 (50%) - index case was a child age 5-9
      - 6 (43%) – index was a child age 10-12
  - This outbreak has had a significant effect on case counts in the neighbourhood; while cases in Edmonton were stabilizing and decreasing, cases in the T5M postal code reversed trend, increasing significantly after the Westglen outbreak (See Figure 2)
    - **66/94 (70%) of all cases with the T5M postal code** reported between Sept 17-26 are linked to the outbreak or are family members of outbreak cases.

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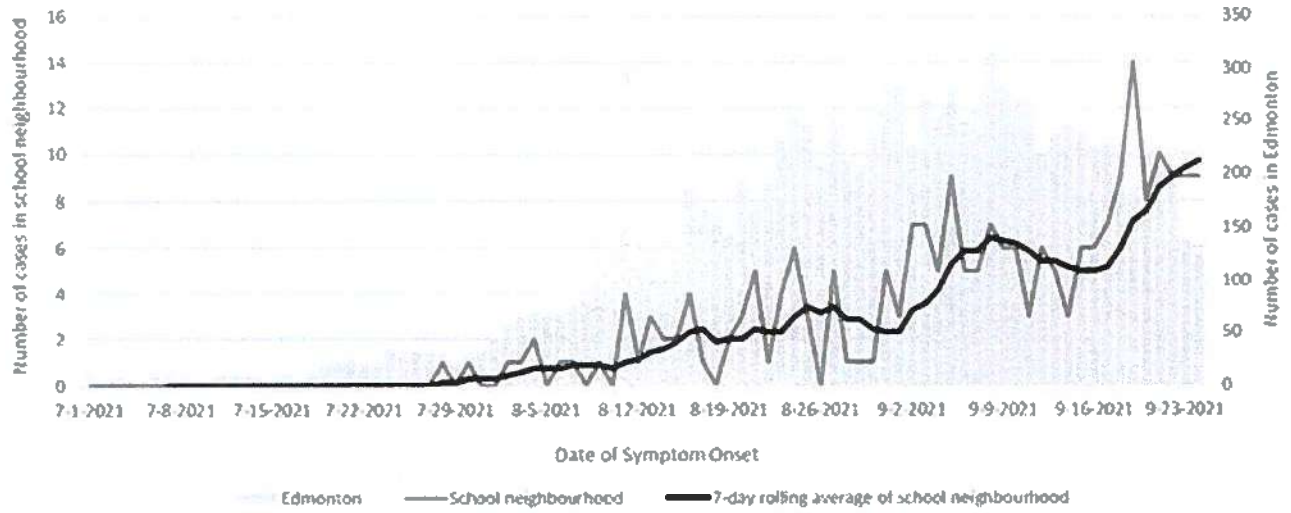
Figure 2. Number of cases in the neighbourhood surrounding the school and the City of Edmonton



Analysis: Hospitalizations

Definition of waves:

Third Wave: Feb 6, 2021 to July 9, 2021
Fourth Wave: July 10, 2021 to December 15, 2021
Fifth Wave: December 16, 2021 - Current

Summary:

- Hospitalization rate per 100,000 population are higher (<10 years old) and comparable (10-19 years old) in the fifth wave compared to other waves

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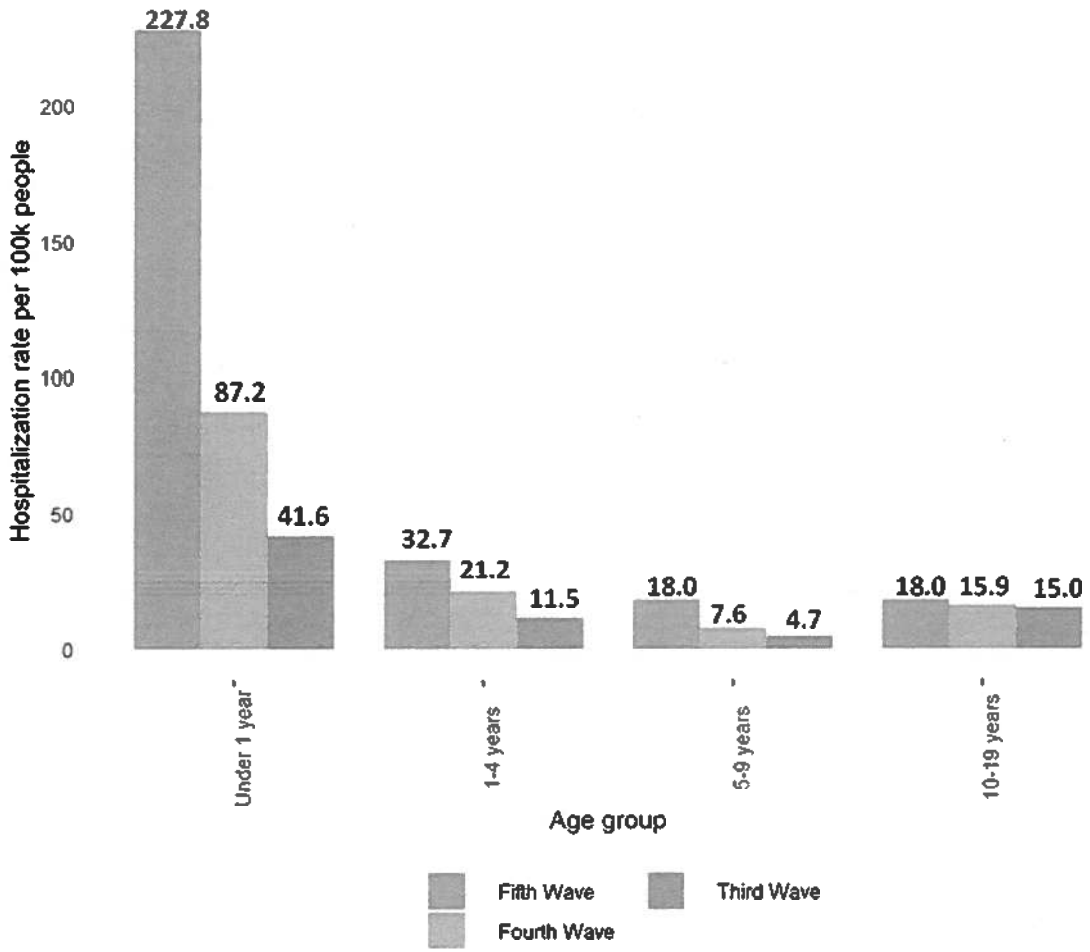
COVID-19 – COVID and Schools

Figure 3. Hospitalization Rate per 100,000 population comparison across wave three to five among people under 20 years old



Alberta

TAB 8

From: Scott Fullmer <Scott.Fullmer@gov.ab.ca>
Sent: Monday, February 07, 2022 2:13 PM
To: Mark Hicks; Kait Wolfert; Mugove Manjengwa; Deena Hinshaw; Fiona Cavanagh; Elena Kubatka-Willms; Alex Alexander
Subject: FW: School Masking Evidence Summary

Hello everyone, we went back through the evidence on school transmission and found the new material on how effective in schools some of the mitigation measures have been in the literature. Let me know if this is what your looking for.

Summary

1. According to the research literature, wearing masks can be effective in contributing to reducing transmission of COVID-19 in public and community settings. This is informed by a range of research, including randomised control trials, contact tracing studies, and observational studies.
2. **The evidence for protection from masks, in schools is less direct**—and it might be small but taken together support the conclusion that face coverings in schools can contribute as part of a host of measures to reduce transmission. **What data do exist have been interpreted into guidance in many different ways**. The World Health Organization, for example, does not recommend masks for children under age 6. The European Centre for Disease Prevention and Control recommends against the use of masks for any children in primary school. In North America masking in schools was part of public health guidelines as schools returned after the first and second waves.
3. **Studies find that transmission in schools has remained limited and comparable to the wider community** under a wide range of prevention measures such as masking, cohorting, cancelling higher-risk activities, distancing, hygiene protocols, reduced class size and enhanced ventilation.
4. The studies available were performed prior to the emergence of the Omicron VOC.

Systematic Reviews of Multiple Measures

1. The evergreen MacMaster University literature review (49 studies) (August 2021) reports wide variability in policies in place across different jurisdictions limiting the ability to evaluate the impact of specific measures or make best practice recommendations for daycare or school settings due to variability in the combination of measures implemented. However, implementation of infection control measures is critically important to reducing transmission, especially when community transmission rates are high.
    - There is evidence that wearing masks, maintaining at least 3ft of distance (especially amongst staff), restricting entry to the school to others, cancelling extracurriculars, introducing outdoor instruction, and daily symptom screening reduce the number of cases within schools;
    - There are inconsistent findings for associations between ventilation, and class size.
    - Hybrid or part-time in-person learning appears to be associated with higher incidence compared to full-time in-person.
2. In July 2021, European Centre for Disease Control and Prevention published its second update to its review of COVID-19 in children and the role of school settings in transmission. The review examined case-based epidemiological surveillance analysis from The European Surveillance System, grey, pre-print and peer reviewed scientific literature, focusing on studies published in 2021; and modelling of the effects of closing schools on community transmission based on data from the ECDC-Joint Research Centre (JRC) Response Measures Database.
    - Similar to the literature review produced by Macmaster University, this report that implementing multiple physical distancing and hygiene measures can significantly reduce the possibility of transmission within schools (high confidence), including

- De-densification (classroom distancing, staggered arrival times, cancellation of certain indoor activities, especially among other students)
- Hygiene measures (handwashing, respiratory etiquette, cleaning, ventilation, and face masks for certain age groups).
- Timely testing and isolation or quarantine of symptomatic cases is important. Rapid antigen tests should be considered

3. The latest Cochrane literature review examined evidence is up to December 2020 on which measures implemented in the school setting allow schools to safely reopen, stay open, or both, during the COVID-19 pandemic. The review suggests that *many measures implemented in the school setting* can have positive impacts on the transmission of SARS-CoV-2, and on healthcare utilisation outcomes related to COVID-19.
    - ***Measures reducing the opportunity for contacts***: by reducing the number of students in a class or a school, opening certain school types only (for example primary schools) or by creating a schedule by which students attend school on different days or in different weeks, the face-to-face contact between students can be reduced.
        - All 23 studies showed reductions in the spread of the virus that causes COVID-19 and the use of the healthcare system. Some studies also showed a reduction in the number of days spent in school due to the intervention.
    - ***Measures making contacts safer***: by putting measures in place such as face masks, improving ventilation by opening windows or using air purifiers, cleaning, handwashing, or modifying activities like sports or music, contacts can be made safer.
        - Five (of 11) of these studies combined multiple measures, which means we cannot see which specific measures worked and which did not. Most studies showed reductions in the spread of the virus that causes COVID-19; some studies, however, showed mixed or no effects.
    - ***Surveillance and response measures***: screening for symptoms or testing sick or potentially sick students, or teachers, or both, and putting them into isolation (for sick people) or quarantine (for potentially sick people).
        - Twelve (of 13) studies focused on mass testing and isolation measures, while two looked specifically at symptom-based screening and isolation. Most studies showed results in favour of the intervention, however some showed mixed or no effects.
    - ***Multicomponent measures***: measures from categories 1, 2 and 3 are combined.
        - Three studies assessed physical distancing, modification of activities, cancellation of sports or music classes, testing, exemption of high-risk students, handwashing, and face masks. Most studies showed reduced transmission of the virus that causes COVID-19, however some showed mixed or no effects.

Transmission Compared to the Community

- These 4 studies in Vancouver, Georgia, and Italy were some of the earlier studies in the first/second wave that found that students were less of a risk for secondary infections compared to teachers however, teachers rates of infection were no higher than other members of the community in occupations outside the home.
    - **Vancouver (Oct 2020-May 2021)** Goldfarb et al. seroprevelance study showed **no detectable increase in SARS-CoV-2 infections in school staff** working in Vancouver public schools following a period of widespread community transmission **compared to the community**. These findings corroborate claims that, with *appropriate mitigation strategies in place*, in-person schooling is not associated with significantly higher risk for school staff.
        - Of the 1,556 school staff who had their blood sample tested, 2.3% tested positive for antibodies. This percentage was similar to the number of infections in a reference group of blood donors matched by age, sex and area of residence.
        - NPIs: (Physical distancing, Enhanced cleaning, Enhanced ventilation, Cohorts, Screening (staff and students), Regular surface cleaning, Unidirectional flow of students, Masks (not mandatory until Feb 2021 for grades 6-12 and for grades 4-12 in Apr 2021), Hand hygiene

(hand sanitizer in classrooms and common areas), Quarantine policies, Staggered recess and lunch breaks)

- **Georgia CDC Study –USA (Dec 2020-Jan 2021)** Gettings, J.R., et al. found that masking teachers was associated with a statistically significant decrease in COVID transmission, **but masking students was not.**
    - NPI's: (enhanced cleaning, enhanced ventilation, hand hygiene, masks – except during sports, and physical distancing)
    - Highest Secondary Attack Rates were:
        - Indoor High-contact sports settings - 23.8%
        - staff meetings/lunches - 18.2%
        - Elementary school classrooms 9.5%
    - Lowest Secondary Attack Rates:
        - Asymptomatic Students – 2.3%
        - Elementary Students – 2.7%
    - The SAR was higher for staff 13.1% vs student index cases 5.8% and for symptomatic 10.9% vs asymptomatic index cases 3.0
    - In school settings, J. Gettings et al. point out that in addition to masking, **schools that improved ventilation through dilution methods alone, COVID-19 incidence was 35% lower, whereas in schools that combined dilution methods with filtration, incidence was 48% lower.**
- **Italy (Sept 30 2020-Feb 2021)** Gandini et al. performed a cross-sectional and prospective cohort study in Italy during the second COVID-19 wave (from September 30, 2020 until at least February 28, 2021. Incidence and positivity were lower amongst elementary and middle school students compared to general population; incidence was higher in high school students in 3 of 19 regions. Incidence in teachers was no different from other occupations after adjusting for age.
    - NPI's: (Ban on sports and music, Frequent ventilation, Hand hygiene, Masks (staff, high school students), Negative test following exposure (some schools), Physical distancing (1m between seats), Reduced school hours, Temperature check, Unidirectional flow of students)
- **Georgia – USA (Dec 2020-Jan 2021)** J. A. W. Gold et al. examined incidence in a Georgia school district during December 1, 2020–January 22, 2021 identified nine clusters of COVID-19 cases involving 13 educators and 32 students at six elementary schools. Two clusters involved probable educator-to-educator transmission that was followed by educator-to-student transmission in classrooms and resulted in approximately one half (15 of 31) of school-associated cases. Preventing SARS-CoV-2 infections through multifaceted school mitigation measures and COVID-19 vaccination of educators is a critical component of preventing in-school transmission.
    - NPI's: (Masks - except while eating, Plastic dividers on desks but students sat less than 3 feet apart)

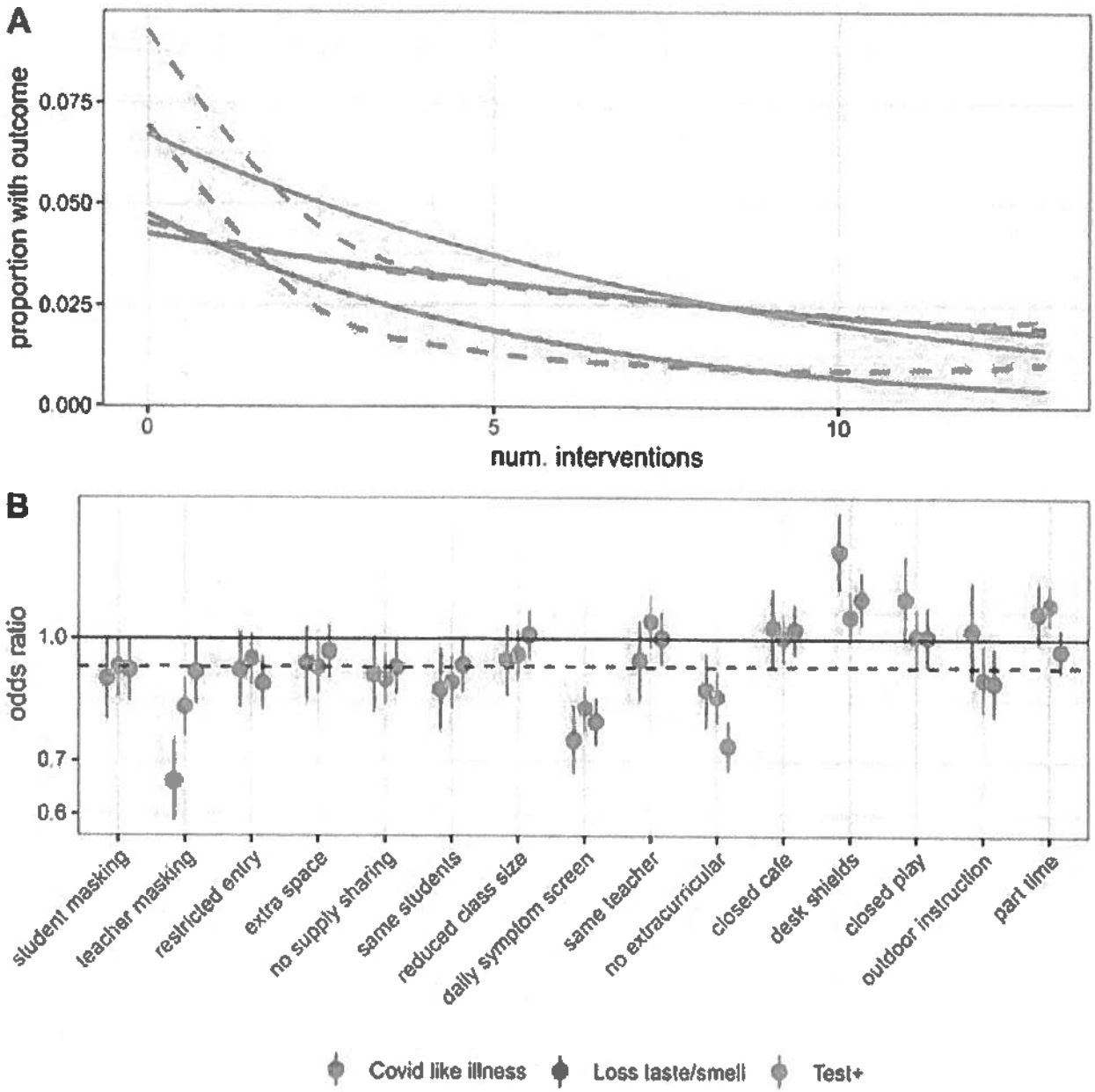
Impact of Multiple Mitigation Measures

4. These observational studies that assess the use of multiple interventions in schools and are a good example of the kinds of studies that show mixed results (as was noted in the systematic reviews)
    - **Utah – USA (Dec 2020-Jan 2021)** R. B. Hershow et al. reviewed K-6 schools opening in Salt Lake County, Utah, from Dec 3 – Jan 21, 2021. Despite high community incidence and an inability to space students' classroom seats ≥6 ft apart, this investigation found low SARS-CoV-2 transmission and no school-related outbreaks in 20 Salt Lake County elementary schools with *high student mask use and implementation of multiple strategies* to limit transmission.
        - NPIs: (6ft distance, High mask use (86%), 81% in-person learning, Plexiglass barriers for teachers, Staggered mealtimes)
        - Other studies, similar to the Utah in North Carolina, Wisconsin, and Missouri, isolated the impact of masks specifically, but showed that taken together mitigation strategies reduced transmission.
    - **Florida, New York, Mass – USA (2020-21)** E. Oster et al reported on the correlation of mitigation practices with staff and student COVID-19 case rates in Florida, New York, and Massachusetts during the 2020-2021

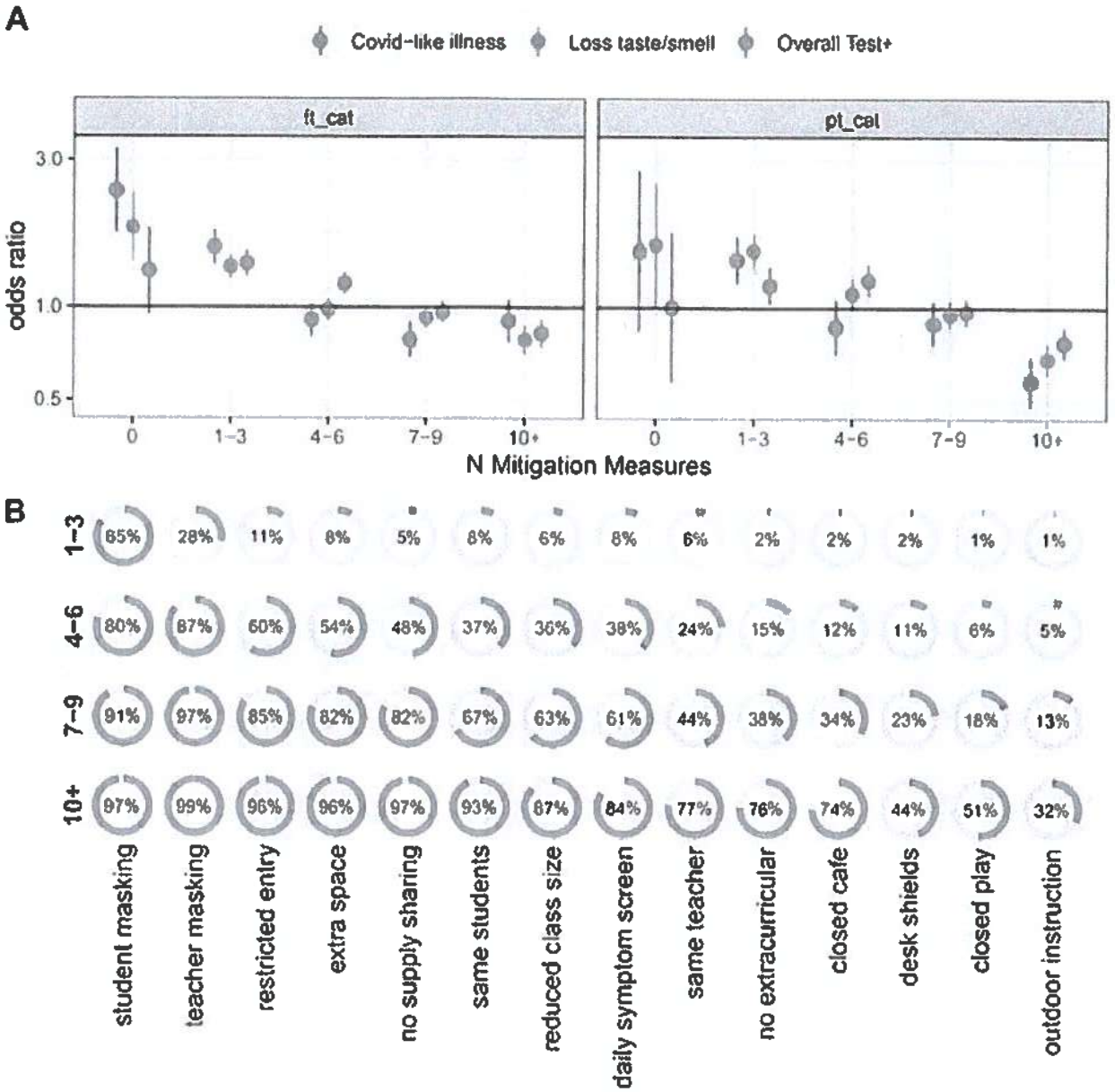
school year focusing on *student density, ventilation upgrades, and masking*. Ventilation upgrades are correlated with lower rates in Florida but not in New York. **Did not find any correlations with mask mandates.** All rates are lower in the spring, after teacher vaccination is underway.

- NPI's Varied by state: (Cohorts, Enhanced ventilation, Masks, Reduced student density, Physical distancing (6 ft.), Symptom screening, Temperature checks)

- **USA All States (Dec 2020-Feb 2021)** J. Lessler et al. For every additional measure implemented there was a decrease in odds of a positive test (adjusted OR: 0.93, 95% CI=0.92,0.94); *symptoms screening* was associated with the greatest risk reduction. When *7 or more IPAC measures were implemented, risk largely disappeared (with a complete absence of risk with 10 or more IPAC measures)*. Among those reporting 7 or more mitigation measures, *80% reported student/teacher mask mandates, restricted entry, desk spacing and no supply sharing*. Outdoor instruction, restricted entry, no extracurriculars, and daily symptom screening were associated with significant risk reductions.
  - NPI's : (Cancelled extracurriculars, Closed common spaces (playgrounds, cafeterias), Cohorting, Masks, Physical distancing (extra space, separators between desks), Reduced class size, Restricted entry, Symptom screening)
- **A Science Magazine Summary on in-person schooling concludes that in-person schooling carries with it increased COVID-19 risk to household members; but also evidence that common, low cost, mitigation measures can reduce this risk**
  - School-based mitigation measures are associated with significant reductions in risk, particularly daily symptoms screens, teacher masking, and closure of extra-curricular activities.
  - A positive association between in-person schooling and COVID-19 outcomes persists at low levels of mitigation, but **when seven or more mitigation measures are reported, a significant relationship is no longer observed.**
    - Regression treating each individual mitigation measure as having an independent effect shows that **daily symptom screening is clearly associated with greater risk reductions than the average measure with some evidence that teacher mask mandates and cancelling extra-curricular activities are also associated with larger reductions than average**.
    - **In contrast, closing cafeterias, playgrounds and use of desk shields are associated with lower risk reductions (or even risk increases);** however this may reflect saturation effects as these are typically reported along with a high number of other measures. Notably, part-time in-person schooling is not associated with a decrease in the risk of COVID-19-related outcomes compared to full-time in-person schooling after accounting for other mitigation measures.


A
proportion with outcome
0.075
0.050
0.025
0.000
0
5
10
num. interventions

B
odds ratio
1.0
0.7
0.6
student masking
teacher masking
restricted entry
extra space
no supply sharing
same students
reduced class size
daily symptom screen
same teacher
no extracurricular
closed cafe
desk shields
closed play
outdoor instruction
part time
Covid like illness
Loss taste/smell
Test+



Evidence on Masking Alone

- In community settings the conclusion on the effectiveness of face coverings to reduce transmission of COVID-19 in community settings is informed by a range of research, including transferable insight from other contagious diseases, modelling studies, laboratory experiments, contact tracing studies, and observational studies. The addition of randomised control trials and substantially more individual-level observational studies has increased the strength of the conclusions and strengthens the evidence for the effectiveness of face coverings in reducing the spread of COVID-19 in the community, through source control, wearer protection, and universal masking.
- There are only 2 RCTs that have been done during the pandemic on masking (1 non-peer-reviewed report, both rated as medium quality) provided evidence on the effectiveness of face coverings to reduce transmission of COVID-19, for universal masking (Bangladesh) and 1 for wearer protection (Denmark).[1]
    - Denmark RCT in Spring 2020 (H. Bundgaard et al.) The first was conducted in Denmark in the spring of 2020 and found no significant effect of masks on reducing COVID-19 transmission
        - Adults who spent 3 hours or more a day outside the home and did not wear a face covering while at work were randomised either to wearing study-provided surgical masks outside the home or no intervention.

        - There was a small, non-significant reduction in COVID-19 infections reported in the group that wore surgical masks: 42 of 2,392 participants (1.8%) developed COVID-19 in the intervention group compared with 53 of 2,470 participants (2.1%) in the control group.
        - The study was inconclusive, reporting a non-significant reduction in COVID-19 infections from wearer protection using surgical masks, but the results lacked precision due to an insufficiently large sample size and low prevalence in the study population, so few participants developed COVID-19.
    - Bangladesh RCT in 2021 (J. Abaluck et al.) - reported that surgical masks (but not cloth) were modestly effective at reducing rates of symptomatic infection. However, neither of these studies included children, let alone vaccinated children.
        - Randomized trial involving nearly 350,000 people across rural Bangladesh. The study's authors found that surgical masks — but not cloth masks — reduced transmission of SARS-CoV-2 in villages where the research team distributed face masks and promoted their use.
        - **The study linked surgical masks with an 11% drop in risk, compared with a 5% drop for cloth.** That finding was reinforced by laboratory experiments whose results are summarized in the same preprint. The data show that even after 10 washes, surgical masks filter out 76% of small particles capable of airborne transmission of SARS-CoV-2, says Mushfiq Mobarak, an economist at Yale University in New Haven, Connecticut, and a co-author of the study. By contrast, the team found that 3-layered cloth masks had a filtration efficiency of only 37% before washing or use.
- **The UK PHE has produced two literature reviews on masking**
    - In community they assembled a committee to evaluate this evidence from their most recent literature review on face coverings in community included 25 studies (including 9 preprints and 2 non-peer reviewed reports): 2 randomised controlled trials (RCTs) and 23 observational studies. The evidence predominantly suggests that face coverings reduce the spread of COVID-19 in the community.
        - Respiratory Evidence Panel: **evidence suggests that all types of face coverings are, to some extent, effective in reducing transmission of SARS-CoV-2 in both healthcare and public, community settings** – this is through a combination of source control and protection to the wearer (high confidence).
            - 8 contact tracing studies suggested that contacts of primary cases were less likely to develop COVID-19 if either the primary case or the close contact, or both, wore a face covering.
            - 11 observational association studies had mixed results, with 6 studies suggesting face coverings were associated with reduced COVID-19 transmission and 5 suggesting no statistically significant association.
    - In the school setting **(Jan 2022)** they conducted a literature review as well as publishing the results of their own study that looked at schools with mask mandates in secondary schools. The literature review on the Evidence of associations between COVID-19 and the use of masks in educational settings was inconclusive, but some studies showed higher rates of COVID-19 in schools without mask requirements for students.
        - "The new study presented in this report is a comparison of covid absence rates 2-3 weeks later in 123 schools which introduced masks on the 1st October 2020 with covid absence rates in 1192 schools which did not have a policy of mask wearing in school.
        - There were several differences between the two sets of schools included in this study including the covid absence rates at the start of the study (the schools which introduced masks had much higher rates). The researchers tried to adjust for these factors in their analysis.
            - **No Reduction in the UK with Masks in Schools: Schools where face coverings were used in October 2021 saw a reduction two to three weeks later in Covid absences from 5.3% to 3% - a drop of 2.3 percentage points.**

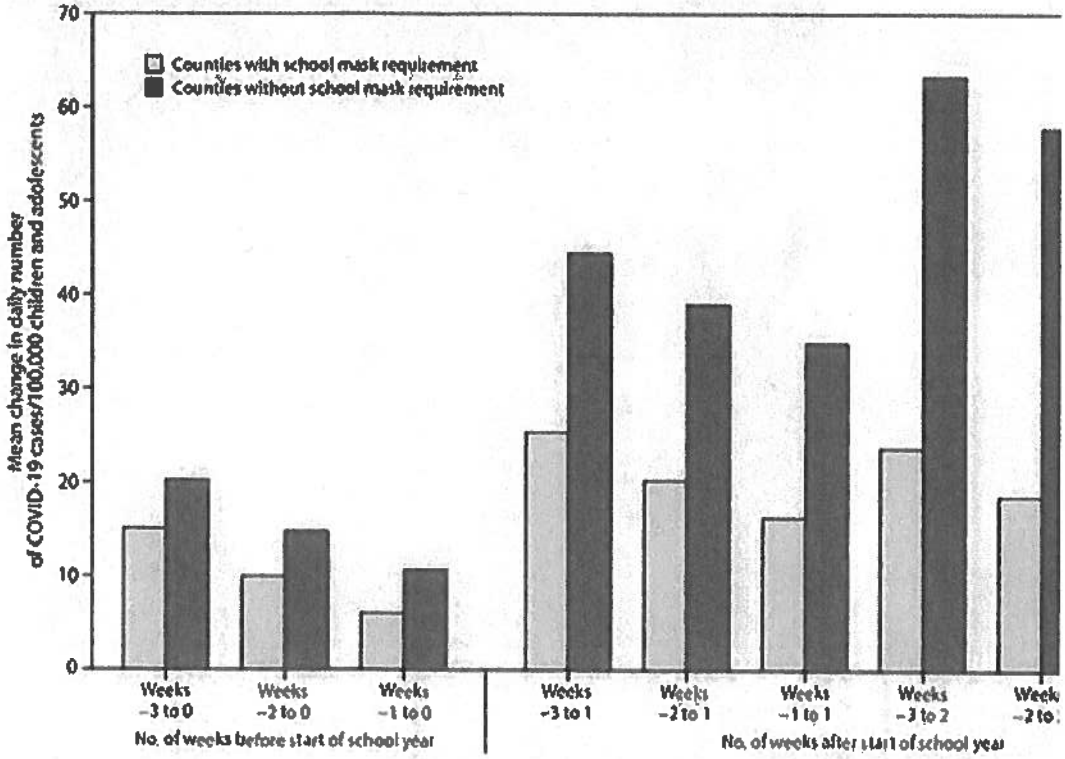
- **In schools which did not use face coverings absences fell from 5.3% to 3.6% - a fall of 1.7 percentage points (not statistically significant)**

- Public Health Ontario has also assessed most of this evidence as well and summarized that several studies found that mask mandates in schools have been associated with lower incidence of SARS-CoV-2 infection. Many of the studies examining COVID-19 incidence in schools had layered Infection prevention and control measures in place, so it was challenging to measure the independent Impact of mask-wearing.
- There are 3 commonly cited studies (all rated as low quality) assessing whether wearing a face covering was effective in schools in the UK, US and Germany in autumn and winter 2020, and in a summer camp in the US in summer 2020. These results provide less direct evidence of the effectiveness of face coverings than either the RCTs or contact tracing, but still provide evidence on the difference in COVID-19 transmission between people who did and did not wear face coverings in school and summer camp settings.
    - **California Study:** D. Cooper et al. in a prospective cohort study in the US assessed whether face coverings were effective as universal masking in four schools in Autumn to Winter 2020 found SARS-CoV-2 infections in 17 learners (N=320) only during the surge. School A (97% remote learners) had the highest infection (10/70, 14.3%, p<0.01) and IgG positivity rates (13/66, 19.7%). School D (93% on-site learners) had the lowest infection and IgG positivity rates (1/63, 1.6%). Mitigation compliance [physical distancing (mean 87.4%) and face covering (91.3%)] was remarkably high at all schools.
    - **Germany Study:** Theuring et al. in a cross-sectional study in Germany (n=177 primary school students, n=175 secondary school students and n=142 staff members) assessed whether face coverings were effective as wearer protection in 12 primary and 12 secondary schools in Germany in November 2020. It concluded that prevalence increased with inconsistent facemask-use in school, walking to school, and case-contacts outside school.
    - **US Summer Camp Study:** S. Suh et al. conducted a cross-sectional study (n=486 US summer camps comprising 89,635 campers) assessed whether face coverings were effective as universal masking in 486 summer camps in the US in summer 2020. It found in both single and multi-NPI analyses, the risk of COVID-19 cases was lowest when campers always wore facial coverings.

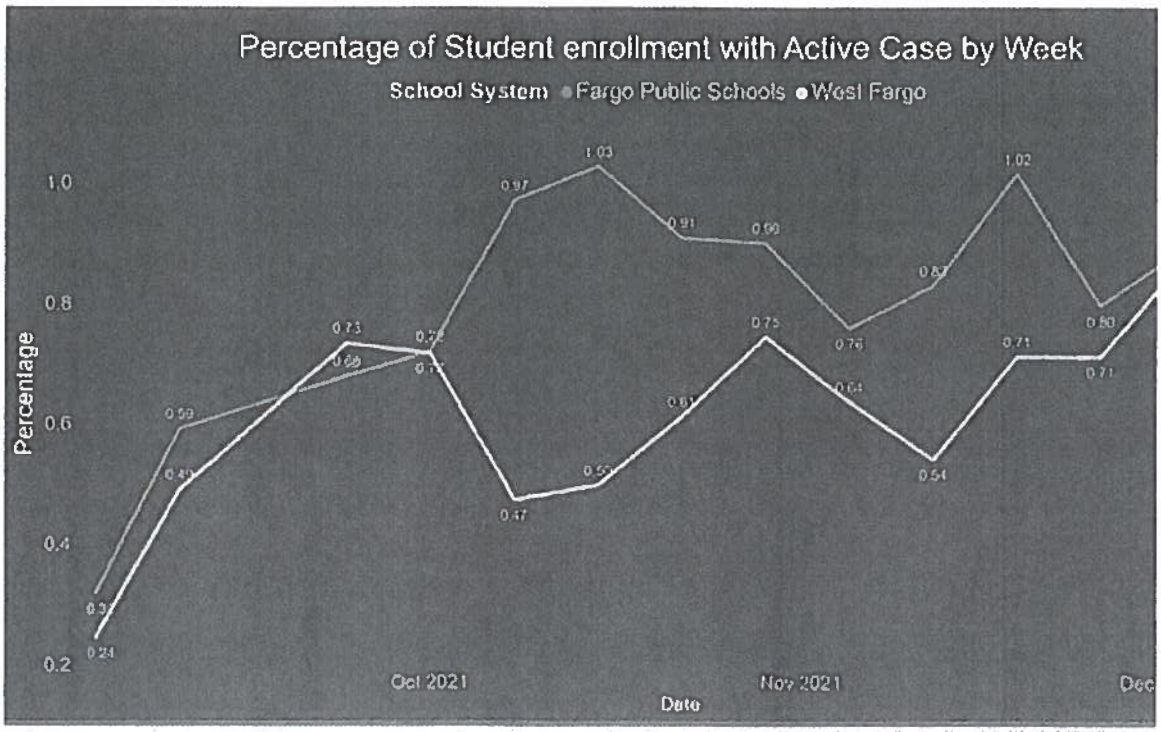
More recent evidence from Delta Wave and CDC Commissioned Studies

- To demonstrate any independent effect of masks on COVID-19 transmission requires comparing communities with similar vaccination rates or statistically controlling for differences in vaccination rates or other covariates. Without making these adjustments, it is difficult to attribute differences in case rates, or differences in in-school transmission, to mask wearing in school.
- When CDC examined the evidence on school transmission, it concluded that the preponderance of the available evidence from United States schools indicates that even when students were placed less than 6 feet apart in classrooms, **there was limited SARS-CoV-2 transmission *when other layered prevention strategies were consistently maintained; notably, masking and student cohorts.***
    - The Oct 2021 Arizona CDC Study (M. Jehn et al.) in the Maricopa and Pima Counties concluded that **schools without mask mandates were more 3.5 times likely to have COVID-19 outbreaks than schools with mask mandates.** The study noted that given the high transmissibility of the SARS-CoV-2 B.1.617.2 (Delta) variant, universal masking, in addition to vaccination of all eligible students, staff members, and faculty and implementation of other prevention measures, remains essential to COVID-19 prevention in K–12 settings.
        - However, the study has been found to have numerous flaws as pointed out in this Atlantic Article – including a failure to quantify the size of outbreaks and failure to report testing protocols for the students. They also do not control for different vaccination rates in the counties, meaning that vaccination could have played a bigger role than masking.
    - Another Oct 2021 CDC study by S. E. Budzyn et al. **found that U.S. counties without mask mandates saw larger increases in pediatric COVID-19 cases after schools opened,** but again did not control for important differences in vaccination rates, stating it will be done at a later date.
        - The study examined 520 counties from July to September, 62% of which didn't have a school mask requirement.
            - Over the two-week period before and after school started, **counties with school mask requirements saw their COVID-19 rates rise by 16 daily cases per 100,000 children, on average.**

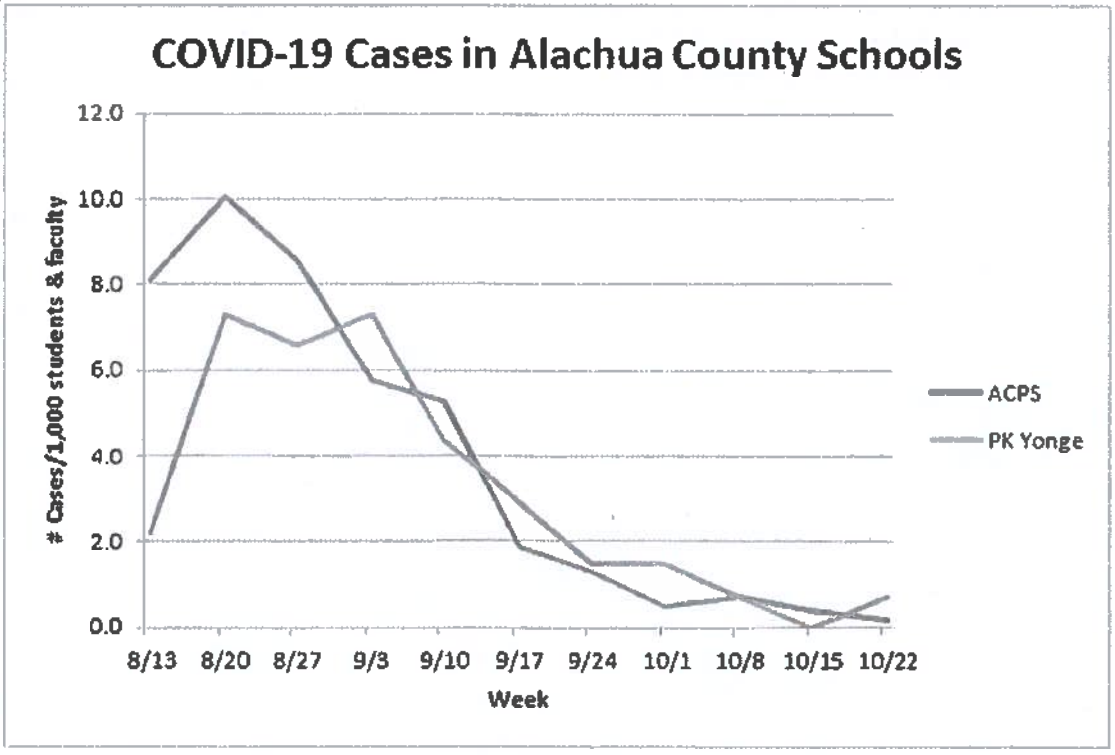
- **Meanwhile, counties without school mask requirements saw their COVID-19 rates rise by 35 daily cases per 100,000 children, as shown in the chart below.**



- These smaller studies are often shared online to show that there isn't a difference between schools that mask during the Delta variant's spread in the US:
  - In Tennessee, two neighboring counties with similar vaccination rates, Davidson and Williamson, have virtually overlapping case-rate trends in their school-age populations, despite one having a mask mandate and one having a mask opt-out rate of about 23 percent.
  - Another recent analysis of data from Cass County, North Dakota by Tracy Hoeg, comparing school districts with and without mask mandates, concluded that mask-optional districts had lower prevalence of COVID-19 cases among students this fall.



- Analyses of COVID-19 cases in Alachua County, Florida, also suggest no differences in mask-required versus mask-optional schools.



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Alberta Government

[1] Both studies were used to guide previous advice on masking in Alberta, both excluded children

Classification: Protected A

TAB 9

COVID-19 Situation Update

Epidemiology and Surveillance

08 February, 2022

Note: This report was generated on 08 February, 2022 for data reported up to end-of-day 07 February, 2022.

Summary

- **28,265** active cases in Alberta
- There has been a weekly average of **1.7%** of COVID cases screened for variants (excluding the last two days due to reporting delays).

- On **07 February, 2022**, there was:

  - an increase of **1,733** cases (**+1,537** confirmed cases and **+196** probable cases)
  - a **net** change of **1,667** cases (net change includes adjustments such as removing out of province cases and confirming or removing probable cases)
  - an additional **253** variant of concern cases (142,420 total)
  - an increase of **4,269** tests (6,793,485 total) and **819** people tested for the first time (2,717,900 total)

- 14 new deaths reported in the last 24 hours. One (1) previously reported death was determined to be non-COVID; as a result, the total death count will increase by 13.
- The testing positivity rate is **36.4%**
- There are **1,911** active and **19,418** recovered cases at long term care facilities and supportive/home living sites. **1,599** residents at these facilities have died. To date, **1,599/3,686 (43%)** of deaths have been in long term care facilities or supportive/home living sites.
- **477,767** people recovered from COVID-19 (an additional **3483** people)

ALBERTA CASES

Table 1: Case information by Zone

Zone*	Case numbers	Active cases in community	Current hospitalizations	Current ICU admissions**	Deaths	Recovered
Calgary	206,337	10,549	597	44	998	194,193
Central	50,671	3,084	168	6	456	46,963
Edmonton	163,289	7,657	641	61	1,468	153,523
North	56,246	2,670	127	6	438	53,011
South	32,119	2,403	90	12	326	29,300
Unknown	1,056	279	0	0	0	777
Total	509,718	26,642	1,623	129	3,686	477,767

*Zone of current hospitalization and current ICU admission based on location of hospitalization not zone of patient residence.
**ICU cases are a subset of those in hospital.

Classification: Protected A

Table 2: Case difference by Zone

Zone	Cases on February 07, 2022	Difference (February 06-February 07)
Calgary Zone	206,337	801
Central Zone	50,671	139
Edmonton Zone	163,289	471
North Zone	56,246	160
South Zone	32,119	137
Unknown	1,056	25
Total	509,718	1733

Table 3: Variants of Concern by Zone

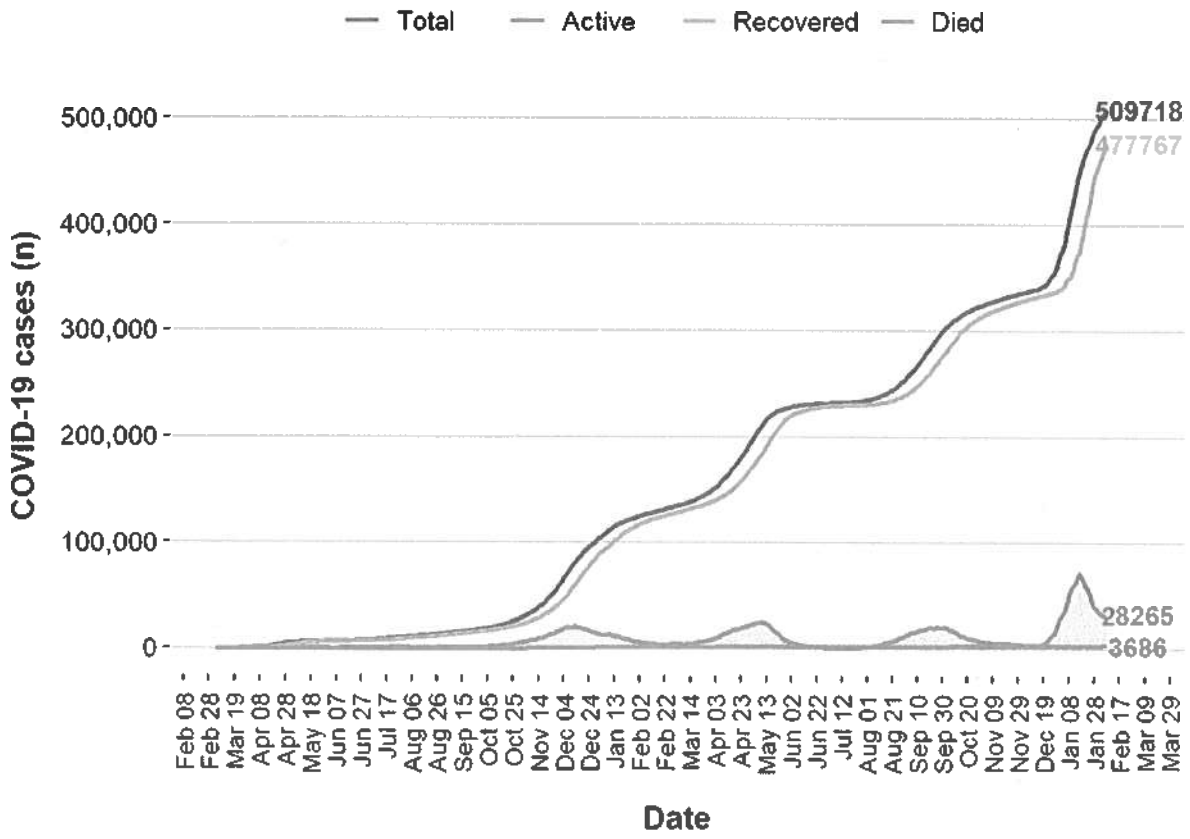
Zone	Alpha	Beta	Delta	Gamma	Kappa	Omicron	Total
Calgary Zone	20045	79	16381	804	6	12528	49843
Central Zone	5458	2	8565	192	0	1604	15821
Edmonton Zone	11429	65	22948	1063	13	8692	44210
North Zone	6253	34	14173	768	0	1387	22615
South Zone	2686	0	6137	97	0	971	9891
Unknown	0	0	4	0	0	36	40
Alberta	45871	180	68208	2924	19	25218	142420

Table 4: Variants of Concern (active cases only) by Zone

Zone	Delta	Omicron	Total
Calgary Zone	10	432	442
Central Zone	4	158	162
Edmonton Zone	0	517	517
North Zone	3	126	129
South Zone	2	99	101
Unknown	0	0	0
Alberta	19	1332	1351

Classification: Protected A

Figure 1: COVID-19 cases in Alberta by day and case status



Classification: Protected A

Figure 2: Current COVID-19 hospitalizations in Alberta per day

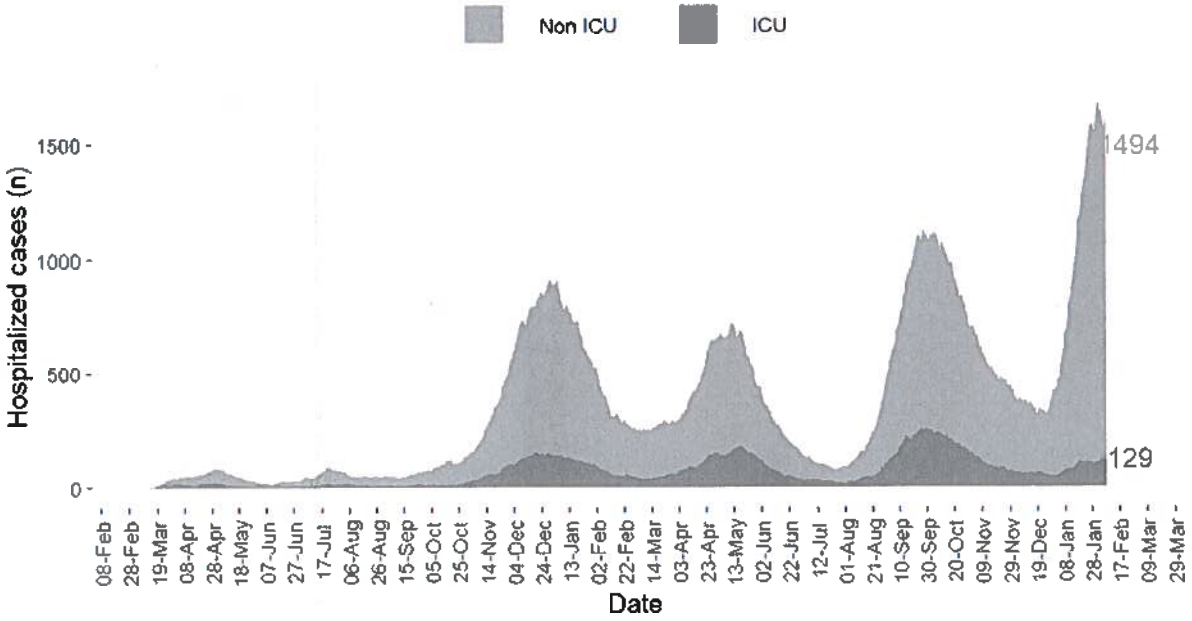
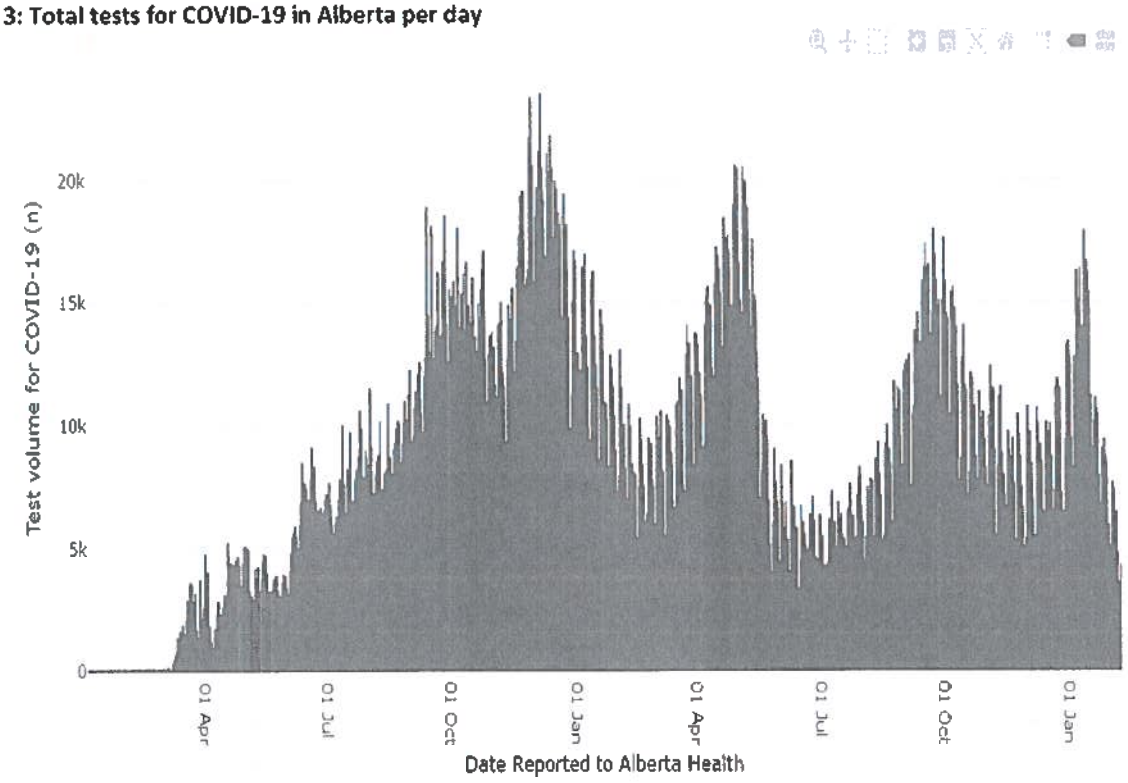


Figure 3: Total tests for COVID-19 in Alberta per day



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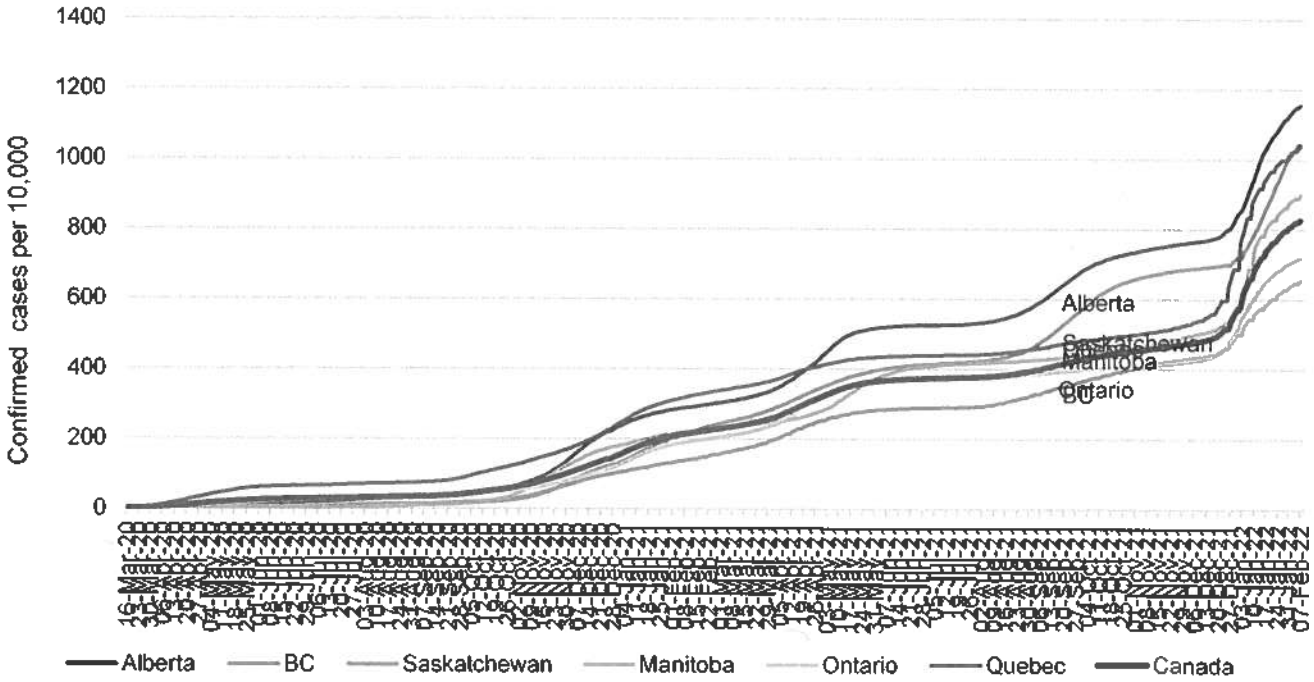
CANADIAN CASES (UPDATED TUESDAYS AND FRIDAYS)

Table 3: Cases and testing within past seven days, current hospitalization and ICU, and deaths within past 7 days for Canada's 6 largest provinces as of February 07, 2022

	Cases in past 7 days		PCR tests in past 7 days		Current hospitalizations		Current ICU		Deaths in past 7 days	
Province	# Cases	Per 10,000	# Tests	Per 10,000	# Cases	Per 10,000	# Cases	Per 10,000	# Cases	Per 10,000
Alberta	14,073	31.89	40,362	91.46	1,623	3.68	129	0.2923	107	0.242
British Columbia	9,310	18.22	43,167	84.46	987	1.93	141	0.2759	91	0.178
Saskatchewan	4,652	39.37	14,901	126.10	332	2.81	31	0.2623	20	0.169
Manitoba	3,095	22.47	12,010	87.19	529	3.84	35	0.2541	38	0.276
Ontario	22,855	15.54	150,620	102.38	2,155	1.46	486	0.3303	392	0.266
Quebec	21,075	24.68	150,463	176.23	2,380	2.79	178	0.2085	265	0.310
		23.576		96.919		2.799		0.2691		0.254

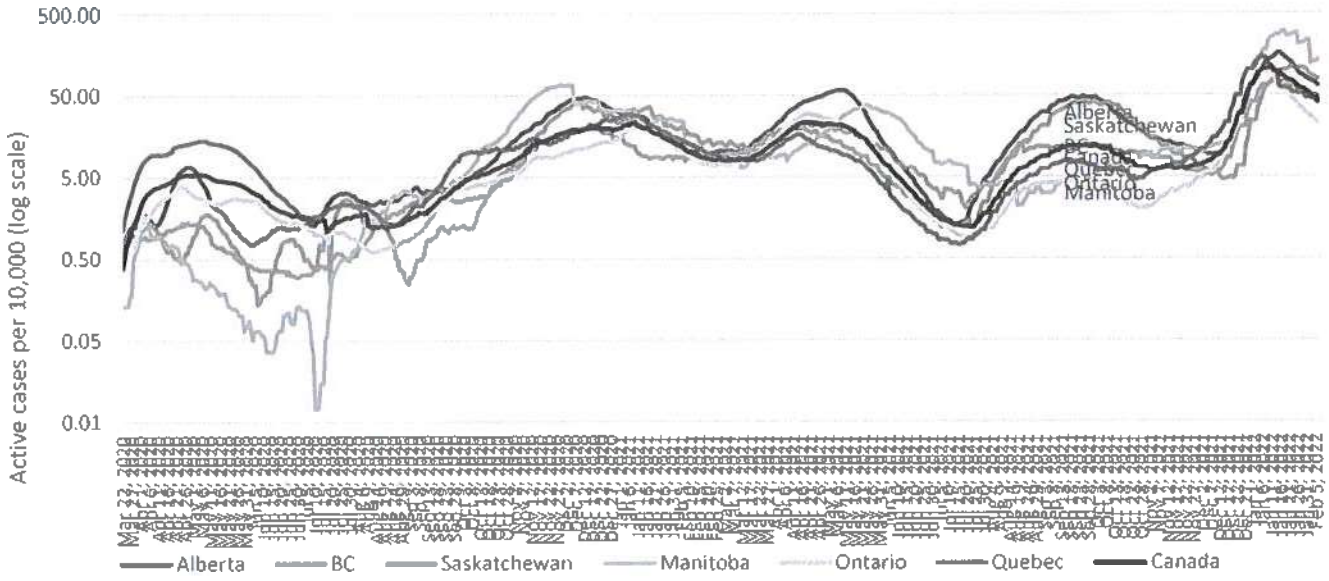
Notes: Green circles indicate rates that sit under the median of the six provinces (for testing, green indicates over the median). For consistency, numbers are extracted at the same time; as a result, data for Alberta may not reflect the current numbers reported elsewhere in this document. Hospitalization and ICU counts reflect current numbers (not cumulative). Hospitalization counts includes ICU.

Figure 4: Confirmed COVID-19 cases (per 10,000) over time in Alberta vs. Canada and select provinces as of February 07, 2022



Classification: Protected A

Figure 5: Active COVID-19 cases (per 10,000) over time in Alberta vs. Canada and select provinces as of February 07, 2022



Note: March 30, 2020 is the most historic date data are available for all provinces. As of July 17, 2020, Quebec implemented a new definition for estimating the number of people recovered. This results in a significant increase in the number of recovered individuals in Quebec and Canada and, therefore, a significant decrease in the number of active cases in both Quebec and across Canada. This definition has been applied to historic data. August 10, 2020 Quebec changed their methods and applied them retrospectively so number may vary from previous reports.

Classification: Protected A

OUTBREAK TRACKING

Table 5: Open outbreaks by municipality and location type

Municipality	Location Type	Outbreak Facility	Cases	Active	Recovered	Deaths
Edmonton	Acute Care	University of Alberta - Division of Infectious Diseases	43	15	28	0
Edmonton	Acute Care	Royal Alexandra Hospital	32	14	16	2
Red Deer	Acute Care	Red Deer Regional Hospital Centre	30	16	14	0
Edmonton	Acute Care	Misericordia Community Hospital [EDM]	29	2	22	5
Westlock	Acute Care	Westlock Healthcare Centre [NOR]	27	4	23	0
High River	Acute Care	High River General Hospital	26	4	22	0
Calgary	Acute Care	Rockyview General Hospital [CAL]	23	6	17	0
Calgary	Acute Care	Foothills Medical Centre	22	6	16	0
Fort Mcmurray	Acute Care	Northern Lights Regional Health Centre	19	6	13	0
Calgary	Acute Care	Peter Lougheed Centre [CAL]	18	15	3	0
Edmonton	Acute Care	Grey Nuns Community Hospital - In-Patient	17	5	12	0
Calgary	Acute Care	Foothills Medical Centre	15	13	1	1
Lethbridge	Acute Care	Chinook Regional Hospital [SOU]	15	5	9	1
Calgary	Acute Care	Rockyview General Hospital [CAL]	15	3	12	0
Red Deer	Acute Care	Red Deer Regional Hospital Centre	14	13	1	0
Edmonton	Acute Care	Royal Alexandra Hospital	14	10	4	0
Ponoka	Acute Care	Ponoka Hospital And Care Centre	14	2	12	0
Edmonton	Acute Care	University of Alberta Hospital	14	3	10	1
Calgary	Acute Care	Foothills Medical Centre	13	6	6	1
Edmonton	Acute Care	Royal Alexandra Hospital	12	11	1	0
Edmonton	Acute Care	Royal Alexandra Hospital	12	5	6	1
Leduc	Acute Care	Leduc Community Hospital	11	3	8	0
Calgary	Acute Care	Foothills Medical Centre - Inpatient	11	4	7	0
Edmonton	Acute Care	Royal Alexandra Hospital - Unit G21	11	6	4	1
Innisfail	Acute Care	Innisfail Health Centre	10	9	1	0
Lacombe	Acute Care	Lacombe Hospital and Care Centre	10	7	1	2
Edmonton	Acute Care	Royal Alexandra Hospital	10	9	1	0
Lac La Biche	Acute Care	William J. Cadzow - Lac La Biche Healthcare Centre, Acute Care [NOR]	9	7	2	0
Edmonton	Acute Care	Misericordia Community Hospital [EDM]	9	5	3	1
Edmonton	Acute Care	Grey Nuns Community Hospital - In-Patient	9	2	7	0
Calgary	Acute Care	Peter Lougheed Centre [CAL]	8	7	1	0
Edmonton	Acute Care	Misericordia Community Hospital [EDM]	8	4	3	1
Redwater	Acute Care	Redwater Health Centre	8	2	6	0

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Calgary	Acute Care	Southern Alberta Forensic Psychiatry Services	7	3	4	0
Edmonton	Acute Care	Grey Nuns Community Hospital - In-Patient	7	4	3	0
Edmonton	Acute Care	Royal Alexandra Hospital	7	5	2	0
Edmonton	Acute Care	Misericordia Community Hospital [EDM]	7	4	3	0
Red Deer	Acute Care	Red Deer Regional Hospital Centre	6	5	0	1
Medicine Hat	Acute Care	Medicine Hat Regional Hospital [SOU]	6	6	0	0
Edmonton	Acute Care	University of Alberta - Unit 5E3	6	6	0	0
High River	Acute Care	High River General Hospital	6	4	2	0
Edmonton	Acute Care	University of Alberta - Inpatient	6	4	2	0
Edmonton	Acute Care	Grey Nuns Community Hospital - In-Patient	6	3	2	1
Medicine Hat	Acute Care	Medicine Hat Regional Hospital [SOU]	5	5	0	0
Edmonton	Acute Care	University of Alberta - Unit 4A7	5	4	0	1
Medicine Hat	Acute Care	Medicine Hat Regional Hospital [SOU]	5	0	5	0
Edmonton	Acute Care	West Edmonton Kidney Care Dialysis Unit	5	2	3	0
Edmonton	Acute Care	Royal Alexandra Hospital - Unit G24	4	4	0	0
Lethbridge	Acute Care	Chinook Regional Hospital [SOU]	4	4	0	0
Calgary	Acute Care	Peter Lougheed Centre [CAL]	4	4	0	0
Edmonton	Acute Care	Glenrose Rehabilitation Hospital	4	4	0	0
Rocky Mountain House	Acute Care	Rocky Mountain House Health Centre - Emergency	4	4	0	0
Red Deer	Acute Care	Red Deer Regional Hospital Centre	4	4	0	0
Drumheller	Acute Care	Drumheller Health Centre	4	0	4	0
Edmonton	Acute Care	University of Alberta Hospital	4	4	0	0
Calgary	Acute Care	Foothills Medical Centre	4	3	1	0
Calgary	Acute Care	South Health Campus [CAL]	3	3	0	0
Stettler	Acute Care	Stettler Hospital and Care Centre [CEN]	3	3	0	0
Calgary	Acute Care	Rockyview General Hospital - Inpatient	3	3	0	0
Ponoka	Acute Care	Centennial Centre - Mental Health and Brain Injury	3	2	0	1
Barrhead	Acute Care	Barrhead Healthcare Centre	3	3	0	0
Edmonton	Acute Care	Grey Nuns Community Hospital - In-Patient	3	3	0	0
Leduc	Acute Care	Leduc Community Hospital	3	2	0	1
Edmonton	Acute Care	Royal Alexandra Hospital - Unit G34	3	2	1	0
Edmonton	Acute Care	Alberta Hospital [EDM]	3	3	0	0
Edmonton	Acute Care	University of Alberta - Inpatient	3	1	2	0
Edmonton	Acute Care	Glenrose Rehabilitation Hospital	3	1	2	0

Classification: Protected A

Blairmore	Acute Care	Crowsnest Pass Health Centre	3	0	3	0
Ponoka	Acute Care	Centennial Centre - Mental Health and Brain Injury	2	2	0	0
St Paul	Acute Care	St. Therese - St. Paul Healthcare Centre	2	2	0	0
St. Albert	Acute Care	Sturgeon Community Hospital	2	2	0	0
Lethbridge	Acute Care	Chinook Regional Hospital	2	2	0	0
Calgary	Acute Care	Foothills Medical Centre	2	2	0	0
Calgary	Acute Care	Foothills Medical Centre	2	2	0	0
Grande Prairie	Acute Care	Grande Prairie Regional Hospital	2	2	0	0
Edmonton	Acute Care	Misericordia Community Hospital [EDM]	2	2	0	0
St. Albert	Acute Care	Sturgeon Community Hospital	2	1	1	0
Edmonton	Acute Care	Royal Alexandra Hospital	1	1	0	0
Edmonton	Acute Care	Alberta Hospital Edmonton	1	1	0	0
Elk Point	Acute Care	Elk Point Healthcare Centre, Acute Care	1	1	0	0
Edmonton	Acute Care	University of Alberta Hospital	1	0	1	0
Calgary	Continuing Care	AgeCare Seton	163	26	136	1
Calgary	Continuing Care	AgeCare Glenmore	159	15	138	6
Calgary	Continuing Care	Agecare Skypointe	133	19	113	1
Calgary	Continuing Care	Mayfair Care Centre, Travois Holdings [CAL]	128	0	123	5
Calgary	Continuing Care	Dr. Vernon Fanning Centre, Carewest [CAL]	128	25	103	0
Calgary	Continuing Care	Bethany, Calgary [CAL]	122	16	102	4
Edmonton	Continuing Care	Chartwell - Griesbach	120	20	99	1
Calgary	Continuing Care	Mckenzie Towne Continuing Care	119	11	106	2
Calgary	Continuing Care	CareWest George Boyak	115	24	89	2
Calgary	Continuing Care	Bow View Manor	104	8	95	1
Calgary	Continuing Care	Cedars Villa, Extendicare [CAL]	91	13	72	6
Calgary	Continuing Care	Carewest Sarcee	90	14	76	0
Calgary	Continuing Care	Carewest, Glenmore Park	84	17	67	0
Brooks	Continuing Care	AgeCare Sunrise Gardens	83	9	70	4
Calgary	Continuing Care	Trinity Lodge	83	1	81	1
Edmonton	Continuing Care	Allen Gray Continuing Care Centre [EDM]	79	10	63	6

Classification: Protected A

Calgary	Continuing Care	Garrison Green, Carewest [CAL]	77	20	57	0
Calgary	Continuing Care	Cambridge Manor	77	2	73	2
Edmonton	Continuing Care	Lewis Estates Retirement Residence [EDM]	76	4	72	0
Calgary	Continuing Care	Sage Hill Retirement Residence	75	14	61	0
Calgary	Continuing Care	Intercare Chinook Care Centre	74	15	59	0
Sherwood Park	Continuing Care	Capital Care Strathcona Campus	74	14	60	0
Edmonton	Continuing Care	Lynnwood - Capital Care [EDM]	73	13	59	1
Calgary	Continuing Care	Colonel Belcher LTC, Carewest [CAL]	72	5	67	0
High River	Continuing Care	Seasons Retirement Home High River	71	18	52	1
St. Albert	Continuing Care	Youville Home [EDM]	70	12	54	4
Calgary	Continuing Care	Covenant Care St. Teresa	65	18	46	1
Calgary	Continuing Care	The Manor Village Fish Creek Park	65	1	64	0
Calgary	Continuing Care	Bethany Riverview	62	3	56	3
St. Albert	Continuing Care	Chartwell St Albert Retirement Residence	61	10	50	1
Calgary	Continuing Care	Beverly, Lake Midnapore (Agecare) [CAL]	60	12	47	1
Edmonton	Continuing Care	Miller Crossing Care Centre [EDM]	59	8	51	0
Edmonton	Continuing Care	Shepherd's Care Kensington Village LTC	56	3	51	2
Westlock	Continuing Care	Smithfield Lodge [NOR]	55	3	49	3
Lethbridge	Continuing Care	Edith Cavell Care Centre [SOU]	54	5	42	7
Edmonton	Continuing Care	Jasper Place Continuing Care Centre [EDM]	54	8	45	1
Wainwright	Continuing Care	Wainwright Health Centre	51	2	47	2
Edmonton	Continuing Care	Capital Care Grandview	51	8	43	0
Viking	Continuing Care	Extendicare Viking	50	10	40	0
Edmonton	Continuing Care	Hardisty Care Centre [EDM]	50	7	42	1
Strathmore	Continuing Care	AgeCare Sagewood	50	3	45	2
Edmonton	Continuing Care	Edmonton People In Need Society	49	4	44	1

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Edmonton	Continuing Care	Chartwell Heritage Valley Retirement Residence	49	19	30	0
Leduc	Continuing Care	Lifestyle Options - Leduc [EDM]	48	7	41	0
Edmonton	Continuing Care	Shepherd Care Kensington	48	7	41	0
Edmonton	Continuing Care	Norwood - Capital Care [EDM]	48	10	38	0
Medicine Hat	Continuing Care	Masterpiece River Ridge [SOU]	47	14	33	0
Red Deer	Continuing Care	Extendicare Michener Hill [CEN]	47	12	34	1
Parkland County	Continuing Care	Everglades Special Care Lodge	46	46	0	0
Camrose	Continuing Care	Seasons Camrose	46	10	34	2
St. Albert	Continuing Care	Chateau Mission Court [EDM]	46	0	45	1
Spruce Grove	Continuing Care	Copper Sky Lodge	46	15	31	0
Innisfail	Continuing Care	Autumn Grove Lodge	45	4	41	0
Edmonton	Continuing Care	Grand Manor [EDM]	45	13	32	0
Edmonton	Continuing Care	Good Samaritan Society Southgate Care Centre	44	8	35	1
Brooks	Continuing Care	Orchard Manor [SOU]	43	4	39	0
Red Deer	Continuing Care	Bethany Collegeside Care Centre [CEN]	43	5	38	0
Grande Prairie	Continuing Care	Grande Prairie Care Centre, Supportive Living [NOR]	42	15	27	0
Calgary	Continuing Care	Holy Cross Manor	42	2	39	1
Edmonton	Continuing Care	Riverbend Retirement Residence [EDM]	42	7	35	0
Pincher Creek	Continuing Care	GSS - Vista Village [SOU]	42	3	37	2
Edmonton	Continuing Care	Greater Edmonton Foundation (GEF) Seniors Housing Sakaw Terrace	41	4	36	1
Edmonton	Continuing Care	Rutherford Heights [EDM]	41	2	39	0
Edmonton	Continuing Care	Millwoods Shepherds Care Centre [EDM]	40	7	33	0
Calgary	Continuing Care	Rocky Ridge Retirement Community by Signature	40	14	26	0
Calgary	Continuing Care	Evanston Grand Village	40	5	34	1
Calgary	Continuing Care	United Active Living-Garrison Green	40	3	37	0
Grande Prairie	Continuing Care	Prairie Lake Seniors Community	39	12	26	1

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Calgary	Continuing Care	Monterey Seniors Village	39	10	29	0
Medicine Hat	Continuing Care	South Country Village - LTC [SOU]	39	4	34	1
Red Deer County	Continuing Care	The Hamlets at Red Deer	39	16	23	0
Edmonton	Continuing Care	Villa Marguerite [EDM]	39	6	33	0
Edmonton	Continuing Care	Villa Caritas Hospital	38	1	35	2
Calgary	Continuing Care	Prince Of Peace Manor [CAL]	38	1	37	0
Red Deer	Continuing Care	Timberstone Mews	37	13	23	1
Calgary	Continuing Care	Auburn Heights Retirement Residence	37	4	31	2
Edmonton	Continuing Care	Villa Caritas Hospital	37	1	33	3
Calgary	Continuing Care	McKenzie Towne, Revera Retirement Residence	37	8	29	0
Elk Point	Continuing Care	Elk Point Heritage Lodge [NOR]	36	6	30	0
Edmonton	Continuing Care	Balwin Villas	36	3	32	1
Cochrane	Continuing Care	Points West Living Cochrane	36	10	25	1
Linden	Continuing Care	Westview Care Community	35	25	10	0
Cold Lake	Continuing Care	Cold Lake Healthcare Centre, Auxiliary [NOR]	35	8	26	1
Panoka	Continuing Care	Northcortt Care Centre	35	15	20	0
Edmonton	Continuing Care	Wedman Facilities - Good Samaritan [EDM]	35	2	33	0
Calgary	Continuing Care	The Manor Village Varsity	35	10	25	0
Sherwood Park	Continuing Care	Silver Birch Place	35	13	21	1
Red Deer	Continuing Care	Points West Living Red Deer Phase 2	34	9	25	0
Edmonton	Continuing Care	Villa Caritas Hospital	34	0	34	0
Edmonton	Continuing Care	Villa Caritas Hospital	34	3	31	0
Calgary	Continuing Care	Grand Seton Village	33	0	33	0
Edmonton	Continuing Care	Villa Caritas Hospital	33	1	32	0
Medicine Hat	Continuing Care	Masterpiece Southland Meadows	32	21	11	0
Innisfail	Continuing Care	Rosefield Care Centre	32	2	30	0

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Edmonton	Continuing Care	Greater Edmonton Foundation (GEF) Seniors Housing Rosslyn Place Lodge	32	2	29	1
Ponoka	Continuing Care	Centennial Centre - Mental Health and Brain Injury	32	0	32	0
Calgary	Continuing Care	Beaver Dam Lodge, MCF Housing [CAL]	32	0	32	0
Medicine Hat	Continuing Care	The Wellington [SOU]	32	16	15	1
Calgary	Continuing Care	St. Marguerite Manor & Dulcina Hospice Covenant Care	31	0	31	0
Ponoka	Continuing Care	Centennial Centre - Mental Health and Brain Injury	30	9	20	1
Ponoka	Continuing Care	Ponoka Hospital And Care Centre - Facility Living	30	1	29	0
Calgary	Continuing Care	Brenda Strafford Foundation Wentworth Manor Court	30	10	20	0
Calgary	Continuing Care	Eau Claire Retirement Residence, Chartwell [CAL]	30	7	23	0
Drayton Valley	Continuing Care	Drayton Valley Hospital & Care Centre [CEN]	29	18	11	0
Sherwood Park	Continuing Care	Sherwood Care	29	3	26	0
Westlock	Continuing Care	Westlock Continuing Care Centre [NOR]	29	7	22	0
Edmonton	Continuing Care	St Thomas Supportive Living	28	5	23	0
Edmonton	Continuing Care	McConachie Gardens	28	2	26	0
Edmonton	Continuing Care	MacTaggart Place Retirement Residence	28	0	26	2
Edmonton	Continuing Care	Churchill Manor [EDM]	28	0	28	0
Edmonton	Continuing Care	Shepherd's Care Kensington Village	27	5	22	0
Medicine Hat	Continuing Care	Meadowlands [SOU]	27	6	21	0
Fort Saskatchewan	Continuing Care	Dr. Turner Lodge [EDM]	27	3	24	0
Edmonton	Continuing Care	Rosedale Estates [EDM]	27	3	24	0
Calgary	Continuing Care	Clifton Manor	26	5	21	0
Athabasca	Continuing Care	Athabasca Extendicare [NOR]	26	3	23	0
Calgary	Continuing Care	Bethany, Harvest Hills [CAL]	26	5	21	0
Edmonton	Continuing Care	St. Michael's Long Term Care Centre [EDM]	26	5	21	0
Calgary	Continuing Care	Father Lacombe Nursing Home [CAL]	26	5	21	0
Calgary	Continuing Care	Aspen Lodge, MCF Housing [CAL]	26	20	6	0

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Calgary	Continuing Care	Age care walden heights	25	25	0	0
Wetaskiwin	Continuing Care	Good Samaritan Society Good Shepherd Home.	25	4	21	0
Edmonton	Continuing Care	McQueen lodge	25	8	16	1
Edmonton	Continuing Care	Benevolence Care Centre	25	1	21	3
Calgary	Continuing Care	Southwood, Intercare [CAL]	25	8	16	1
Clairmont	Continuing Care	Lakeview Seniors Housing	25	2	23	0
Fort Mcmurray	Continuing Care	Willow Square Continuing Care Centre	25	7	18	0
Lacombe	Continuing Care	Royal Oak Dev. Lacombe LTD [CEN]	24	6	18	0
Edmonton	Continuing Care	Shepherd'S Care Greenfield [EDM]	23	9	14	0
Sherwood Park	Continuing Care	Robin Hood Association Aspen Village	23	11	12	0
Calgary	Continuing Care	Wing Kei Greenview	23	2	20	1
Edmonton	Continuing Care	Devonshire Care Centre [EDM]	23	2	21	0
Stony Plain	Continuing Care	Stony Plain Care Centre - Good Samaritan [EDM]	23	5	18	0
Edmonton	Continuing Care	Shepherd's Care Eden House	23	4	19	0
Medicine Hat	Continuing Care	South Ridge Village [SOU]	22	17	5	0
Edmonton	Continuing Care	Devonshire Village [EDM]	22	6	16	0
Edmonton	Continuing Care	Covenant Health St. Joseph's Edmonton [EDM]	22	3	18	1
Falher	Continuing Care	Villa Beausejour Seniors Lodge, Fahler	21	21	0	0
Stettler	Continuing Care	Paragon Place [CEN]	21	18	3	0
Edmonton	Continuing Care	Holyrood - Extendicare [EDM]	21	19	2	0
Okotoks	Continuing Care	Strafford Foundation Tudor Manor	21	6	15	0
Olds	Continuing Care	Seasons Encore Retirement Community	21	1	20	0
Edmonton	Continuing Care	CapitalCare McConnell Place North	21	0	20	1
Edmonton	Continuing Care	Touchmark at Wedgewood	21	1	20	0
Lamont	Continuing Care	Lamont Health Care Centre	20	15	2	3
Wetaskiwin	Continuing Care	Madyson Manor [CEN]	20	17	3	0

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Red Deer	Continuing Care	Points West Living Red Deer Phase I	20	6	14	0
Barrhead	Continuing Care	Shepherd's Care Barrhead [NOR]	20	14	6	0
Myrnam	Continuing Care	Eagle View Lodge	20	0	20	0
Wabasca	Continuing Care	Keekenow Senior Facility	20	3	17	0
Sylvan Lake	Continuing Care	Bethany Sylvan Lake [CEN]	20	15	5	0
Calgary	Continuing Care	Scenic Acres, Revera Retirement Residence [CAL]	20	1	19	0
Edson	Continuing Care	Edson Continuing Care Center	19	8	11	0
Edmonton	Continuing Care	Extendicare Eaux Claires [EDM]	19	2	17	0
Edmonton	Continuing Care	Grace Manor Salvation Army [EDM]	19	2	17	0
Edmonton	Continuing Care	Kipnes Centre For Veterans [EDM]	19	4	15	0
Calgary	Continuing Care	Mount Royal, Revera [CAL]	19	9	10	0
Medicine Hat	Continuing Care	Meadow Ridge Seniors Village	18	18	0	0
Edmonton	Continuing Care	Venta Care Centre [EDM]	18	8	10	0
Hinton	Continuing Care	Hinton Continuing Care Center	18	6	12	0
Edmonton	Continuing Care	Village at Westmount	18	3	15	0
Slave Lake	Continuing Care	Vanderwell Heritage Place [NOR]	18	1	17	0
Lethbridge	Continuing Care	Adaptacare (9 Ave S) [SOU]	18	1	17	0
Edmonton	Continuing Care	CapitalCare Laurier House Lynnwood	18	2	16	0
Calgary	Continuing Care	Inclusio	18	4	14	0
Legal	Continuing Care	Chateau Sturgeon Lodge [EDM]	17	15	1	1
Lethbridge	Continuing Care	St. Therese Villa [SOU]	17	4	13	0
Edmonton	Continuing Care	Capital Care Dickensfield	17	7	10	0
Ponoka	Continuing Care	Centennial Centre - Mental Health and Brain Injury	17	13	4	0
Edmonton	Continuing Care	LifeStyle Options Schonsee Retirement Community	17	7	10	0
Villeneuve	Continuing Care	West Country Hearth [EDM]	17	1	16	0
Grande Prairie	Continuing Care	Mackenzie Place Continuing Care Centre [NOR]	17	7	10	0

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Edmonton	Continuing Care	South Terrace Continuing Care [EDM]	16	2	14	0
Red Deer	Continuing Care	Covenant Care Villa Marie	16	4	12	0
Sherwood Park	Continuing Care	Bedford Village	15	15	0	0
Brooks	Continuing Care	Newbrook Lodge [SOU]	15	10	4	1
Edmonton	Continuing Care	Whitemud - Lifestyle Options [EDM]	15	4	11	0
Calgary	Continuing Care	Agape Hospice [CAL]	15	4	9	2
Edmonton	Continuing Care	Park Place Seniors Living Sprucewood Place	15	2	13	0
Whitecourt	Continuing Care	Spruce View Lodge [NOR]	14	14	0	0
Cardston	Continuing Care	GSS Lee Crest	14	1	12	1
Medicine Hat	Continuing Care	AgeCare Valleyview	14	2	12	0
Edmonton	Continuing Care	Our Parents' Home	14	3	11	0
Edmonton	Continuing Care	Stepping Stone Salvation Army [EDM]	14	3	11	0
Sherwood Park	Continuing Care	Summerwood Village Retirement Residence [EDM]	14	3	11	0
Red Deer	Continuing Care	Revera Inglewood	14	2	12	0
Wainwright	Continuing Care	Points West Living [CEN]	14	5	9	0
Barrhead	Continuing Care	Dr.W.R.Keir Barrhead Continuing Care Centre	14	5	9	0
Edmonton	Continuing Care	Urban Manor Housing Society	13	1	12	0
Edmonton	Continuing Care	Edmonton People In Need Society	13	1	12	0
Innisfail	Continuing Care	Sunset Manor [CEN]	13	2	11	0
St. Paul	Continuing Care	Sunnyside Manor [NOR]	13	4	8	1
Camrose	Continuing Care	Louise Jensen Care Centre	12	11	1	0
Fort Macleod	Continuing Care	Extendicare Fort Macleod [SOU]	12	10	2	0
Edmonton	Continuing Care	Canterbury Foundation	12	4	8	0
Central	Continuing Care	Red Deer Hospice Society	12	1	11	0
St Albert	Continuing Care	Ironwood Estates	12	1	11	0
Spruce Grove	Continuing Care	St. Michael's Grove Manor [EDM]	12	6	6	0

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Slave Lake	Continuing Care	Slave Lake Health Care Centre Continuing Care	12	3	8	1
Edmonton	Continuing Care	LifeStyle Options Terra Losa Retirement Community	12	1	11	0
Leduc	Continuing Care	Planeview Place [EDM]	12	5	7	0
Edmonton	Continuing Care	Wild Rose Cottage [EDM]	12	4	7	1
Edmonton	Continuing Care	Kiwanis Place Lodge [EDM]	12	3	9	0
Central	Continuing Care	The West Park Lodge	11	7	4	0
Drumheller	Continuing Care	Drumheller Health Centre - Acute Care [CEN]	11	2	8	1
Mundare	Continuing Care	Father Filas Manor [CEN]	11	4	7	0
Oyen	Continuing Care	Big Country Hospital - LTC [SOU]	11	1	10	0
Edmonton	Continuing Care	Golden Age Manor [EDM]	11	2	9	0
Drayton Valley	Continuing Care	Points West Living - Drayton Valley	11	1	10	0
Drumheller	Continuing Care	Drumheller Health Centre	11	0	11	0
Lloydminster	Continuing Care	Lloydminter Continuing Care Centre	11	3	8	0
Fort Saskatchewan	Continuing Care	Rivercrest Care Centre [EDM]	11	2	9	0
Edmonton	Continuing Care	Revera River Ridge	11	7	4	0
Airdrie	Continuing Care	Luxstone Manor	11	2	9	0
Edson	Continuing Care	Parkland Lodge [NOR]	11	5	6	0
Calgary	Continuing Care	Prince Of Peace, The Harbour [CAL]	11	7	4	0
Edmonton	Continuing Care	Emmanuel Home [EDM]	10	7	3	0
Athabasca	Continuing Care	Athabasca Healthcare Centre (Long Term Care Auxiliary)	10	3	7	0
St. Albert	Continuing Care	Foyer Lacombe [EDM]	10	9	0	1
High Prairie	Continuing Care	J.B. Wood Continuing Care [NOR]	10	3	7	0
Edmonton	Continuing Care	Bissell Centre - Hope Terrace	10	5	5	0
Lethbridge	Continuing Care	St. Michael's Health Centre [SOU]	10	3	7	0
Grande Prairie	Continuing Care	Signature Support Services 83 Ave	10	0	10	0
Lethbridge	Continuing Care	St. Michael's Health Centre [SOU]	10	0	10	0

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Westlock	Continuing Care	Pembina Lodge [NOR]	10	2	8	0
Blairmore	Continuing Care	Crowsnest Pass Health Centre - LTC [SOU]	10	3	7	0
Edmonton	Continuing Care	Edmonton Chinatown Care Centre - Ccc [EDM]	10	1	9	0
Stettler	Continuing Care	Points West Living [CEN]	10	4	6	0
Edmonton	Continuing Care	Churchill Retirement Community [EDM]	10	3	7	0
Calgary	Continuing Care	St. Marguerite Manor & Dulcina Hospice Covenant Care	10	2	8	0
Stony Plain	Continuing Care	Westview Continuing Care Centre [EDM]	10	3	7	0
Airdrie	Continuing Care	Bethany, Airdrie [CAL]	10	3	7	0
Bonnyville	Continuing Care	Bonnylodge	9	8	1	0
Edmonton	Continuing Care	Operation Friendship Senior Society - Sparling Lodge	9	9	0	0
Canmore	Continuing Care	Origin at Spring Creek	9	8	1	0
Wetaskiwin	Continuing Care	Wetaskiwin Hospital and Care Centre	9	6	3	0
Taber	Continuing Care	GSS Linden View	9	4	5	0
Lethbridge	Continuing Care	Pemmican Lodge [SOU]	9	7	2	0
Fort Mcmurray	Continuing Care	Rotary House Seniors Lodge [NOR]	9	3	6	0
Edmonton	Continuing Care	Ambrose Place	9	4	5	0
Edmonton	Continuing Care	Laurel Heights Retirement Living	9	0	9	0
Redwater	Continuing Care	Diamond Spring Lodge [NOR]	9	1	8	0
Edmonton	Continuing Care	Mill Woods Centre - Good Samaritan [EDM]	9	4	5	0
Edmonton	Continuing Care	Chartwell Wescott Retirment Residence	9	2	7	0
Grande Prairie	Continuing Care	Emerald Gardens Retirement Residence	8	6	2	0
Edmonton	Continuing Care	Rose Crest Home	8	4	4	0
Calgary	Continuing Care	Discovery House	8	7	1	0
Black Diamond	Continuing Care	Rising Sun Long Term Care	8	6	2	0
Edmonton	Continuing Care	Touchmark At Wedgewood - Ccc [EDM]	8	6	2	0
Edmonton	Continuing Care	Queen Alexandra Lodge [EDM]	8	4	4	0

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Ponoka	Continuing Care	Centennial Centre - Mental Health and Brain Injury	8	3	5	0
Bonnyville	Continuing Care	Bonnyville Extendicare [NOR]	8	4	4	0
Sherwood Park	Continuing Care	Clover Bar Lodge	8	2	6	0
Calgary	Continuing Care	Evanston Summit Covenant Living	8	2	6	0
Bassano	Continuing Care	Playfair Lodge [SOU]	7	7	0	0
Edmonton	Continuing Care	Vanguard Shepherd's Care	7	3	4	0
Calgary	Continuing Care	Silvera for Seniors Shouldice	7	6	1	0
Stony Plain	Continuing Care	Unlimited Potential Community Services Bright Bank	7	0	7	0
Sturgeon County	Continuing Care	St. Albert Retirement Residence	7	3	4	0
Barrhead	Continuing Care	Hillcrest Lodge	7	3	4	0
Olds	Continuing Care	Olds Hospital & Olds Continuing Care Centre [CEN]	6	4	2	0
Didsury	Continuing Care	Bethany Aspen Ridge Lodge	6	6	0	0
Gibbons	Continuing Care	Spruce View Manor [EDM]	6	5	1	0
Evansburg	Continuing Care	Sunshine Place [EDM]	6	0	6	0
Edmonton	Continuing Care	The Ashbourne Assisted Living	6	1	5	0
St. Albert	Continuing Care	Citadel Care Centre [EDM]	6	0	6	0
Sherwood Park	Continuing Care	Chartwell Emerald Hills Retirement Residence Unit 1	6	2	4	0
Lethbridge	Continuing Care	Black Rock Terrace [SOU]	6	0	6	0
Peace River	Continuing Care	Heritage Towers	5	4	1	0
Edmonton	Continuing Care	Whispering Waters Manor	5	5	0	0
Calgary	Continuing Care	High Country Lodge	5	5	0	0
Lethbridge	Continuing Care	Garden View Lodge [SOU]	5	0	4	1
Grande Prairie	Continuing Care	Prairie Lake Seniors Community	5	1	4	0
Grande Cache	Continuing Care	Whispering Pines Lodge [NOR]	5	1	3	1
Sherwood Park	Continuing Care	Robin Hood Association Residence 24	5	0	5	0
Edmonton	Continuing Care	Winnifred Stewart Group Home Residence 13	5	1	4	0

Classification: Protected A

Lethbridge	Continuing Care	St. Therese Villa [SOU]	5	0	4	1
Calgary	Continuing Care	High Banks Independent Living for Parenting Youth Society	5	2	3	0
Manning	Continuing Care	Del-Air Lodge [NOR]	4	4	0	0
Olds	Continuing Care	Seasons Olds	4	4	0	0
Edmonton	Continuing Care	Edmonton General Care Centre [EDM]	4	3	1	0
Valleyview	Continuing Care	Red Willow Lodge [NOR]	4	4	0	0
Lethbridge	Continuing Care	Seasons Lethbridge Gardens	4	4	0	0
Medicine Hat	Continuing Care	Leisure Way Community Group Home [SOU]	4	4	0	0
Morinville	Continuing Care	Aspen House [EDM]	4	4	0	0
Lethbridge	Continuing Care	St. Therese Villa [SOU]	4	3	1	0
Edmonton	Continuing Care	Kids Kottage Foundation	4	0	4	0
Coronation	Continuing Care	Coronation Long Term Care [CEN]	4	0	4	0
Edmonton	Continuing Care	Optima Living Aster Gardens	4	0	4	0
Mayerthorpe	Continuing Care	Mayerthorpe Extendicare [NOR]	4	1	3	0
Devon	Continuing Care	Discovery Place Senior Independent Living Facility-Devon	4	0	4	0
Radway	Continuing Care	Radway Continuing Care Centre [NOR]	4	0	4	0
Camrose	Continuing Care	Rosehaven LTC Centre	4	2	2	0
Sundre	Continuing Care	Sundre Senior Supporting Living	3	3	0	0
Bow Island	Continuing Care	Bow Island Health Centre - LTC [SOU]	3	3	0	0
Fort Macleod	Continuing Care	Extendicare Fort Macleod [SOU]	3	3	0	0
Calgary	Continuing Care	Millrise Place	3	3	0	0
Edmonton	Continuing Care	Chinese Seniors Lodge [EDM]	3	3	0	0
Calgary	Continuing Care	Revera Scenic Grande	3	3	0	0
Three Hills	Continuing Care	Three Hills Health Centre	3	1	2	0
Mayerthorpe	Continuing Care	Pleasant View Lodge - Mayerthorpe	3	1	2	0
Gibbons	Continuing Care	Renaissance Homes- Riverside	3	0	3	0

Classification: Protected A

Fairview	Continuing Care	Harvest Lodge [NOR]	3	1	2	0
Edmonton	Continuing Care	Virginia Park - Lodge [EDM]	3	1	2	0
Edmonton	Continuing Care	Glastonbury Village	2	2	0	0
Devon	Continuing Care	Devon General Hospital	2	2	0	0
Edmonton	Continuing Care	Chimo Youth Retreat Centre Home 10	2	1	1	0
Edmonton	Continuing Care	Millenium Pavillion Seniors Lodge	2	1	1	0
Edmonton	Continuing Care	Edmonton General Care Centre [EDM]	2	1	1	0
Calgary	Continuing Care	Brentwood Care Centre	2	2	0	0
Central	Continuing Care	Chateau Three Hills	2	2	0	0
Vermilion	Continuing Care	Vermilion Valley Lodge	2	2	0	0
Red Deer	Continuing Care	Aspen Ridge by Revera	1	1	0	0
Calgary	Continuing Care	Manor Village at Rocky Ridge	1	1	0	0
St. Paul	Continuing Care	Aspen House Care Residence	1	1	0	0
Blairmore	Continuing Care	York Creek Lodge [SOU]	1	1	0	0
Lloydminster	Continuing Care	Dr.Cooke Extended Continuing Care	1	1	0	0
Rimbey	Continuing Care	Rimbey Hospital & Care Centre - Facility Living [CEN]	1	1	0	0
Edmonton	Continuing Care	In & Out Home Rehabilitation Ltd. House 5	1	0	1	0
Edmonton	Continuing Care	Edmonton General Care Centre [EDM]	1	0	1	0
Leduc	Continuing Care	Salem Manor [EDM]	1	1	0	0
Trochu	Continuing Care	St. Mary's Health Care Centre - Supportive Living [CEN]	1	1	0	0
Red Deer	Continuing Care	Catholic Social St. Neri	1	1	0	0
Calgary	Other	The Drop In Centre	171	8	163	0
Calgary	Other	Calgary Remand Centre	154	0	154	0
Drumheller	Other	Drumheller Institution [CEN]	135	20	115	0
Edmonton	Other	City of Edmonton Fire Department	108	3	105	0
Innisfail	Other	Bowden Institution	81	28	53	0
Edmonton	Other	Herb Jamieson Centre- Hope Mission	61	7	54	0
Grande Cache	Other	Grande Cache Institute	49	27	22	0
Edmonton	Other	Edmonton Remand Centre	44	2	42	0

Classification: Protected A

Edmonton	Other	Edmonton Remand Centre	43	4	39	0
Edmonton	Other	Hope Mission Downtown	42	0	42	0
Edmonton	Other	Edmonton Remand Centre	41	2	39	0
Medicine Hat	Other	Medicine Hat Remand [SOU]	37	33	4	0
Calgary	Other	Mustard Seed - Foothills	37	3	34	0
Edmonton	Other	Edmonton Institution for Women	36	17	19	0
Edmonton	Other	Edmonton Remand Centre	33	6	27	0
Lethbridge	Other	Alpha House Shelter and Stabilization Centre	33	6	27	0
Fort Saskatchewan	Other	Fort Saskatchewan Correctional Centre	32	11	21	0
Edmonton	Other	Edmonton Remand Centre	31	1	30	0
Edmonton	Other	Edmonton Remand Centre	31	1	30	0
Edmonton	Other	Edmonton Remand Centre	29	4	25	0
Calgary	Other	Calgary Alpha House	29	4	25	0
Red Deer	Other	Safe Harbour Society - Shelter (Cannery Row) & Diversion/Outreach Program	28	13	15	0
Fort Saskatchewan	Other	Fort Saskatchewan Correctional Centre	27	9	18	0
Fort Saskatchewan	Other	Fort Saskatchewan Correctional Centre	27	8	19	0
Edmonton	Other	Edmonton Remand Centre	27	3	24	0
Edmonton	Other	Bissell Centre	26	2	24	0
Edmonton	Other	The Mustard Seed - Commonwealth Site	26	5	21	0
Bon Accord	Other	Oak Hill Ranch	26	3	23	0
Edmonton	Other	Edmonton Remand Centre	25	0	25	0
Edmonton	Other	Edmonton Remand Centre	25	2	23	0
Edmonton	Other	Hope Mission Spectrum	25	4	21	0
Lethbridge	Other	Lethbridge Correctional Services [SOU]	24	15	9	0
Edmonton	Other	Travel Lodge West ~ Bridge Housing	24	3	21	0
Edmonton	Other	Mustard Seed - Knox Evangelical Church	23	1	22	0
Red Deer	Other	Red Deer Remand Centre [CEN]	21	21	0	0
Edmonton	Other	Stan Daniels Healing Centre	20	0	20	0
Edmonton	Other	Mustard Seed Strathcona Baptist Church Shelter	20	3	17	0
Mclennan	Other	Manoir du Lac	19	15	4	0
Edmonton	Other	Edmonton Institution	18	18	0	0
Grande Prairie	Other	Odyssey House Women's Shelter	18	1	17	0
Calgary	Other	Calgary Young Offender Centre - Female Annex	14	4	10	0
Edmonton	Other	Transitional Housing Program - Edmonton Center for Hope Salvation Army	13	2	11	0
Wetaskiwin	Other	Catholic Social Services St. Gabriel	13	0	13	0

Classification: Protected A

Red Deer	Other	Turning Point Supervised Consumption Site	13	0	13	0
Calgary	Other	142 Scenic Bow Place	12	5	7	0
Calgary	Other	Avenue 15 Youth Distress Shelter	12	0	12	0
Calgary	Other	Children's Cottage Brenda's House	12	1	11	0
Peace River	Other	Peace River Regional Women's Shelter	11	11	0	0
Calgary	Other	Calgary Correctional Centre	11	5	6	0
Ponoka	Other	The Centennial Centre [CEN]	11	8	3	0
Edmonton	Other	Edmonton Remand Centre	11	0	11	0
Grande Prairie	Other	Wapiti House	11	5	6	0
Red Deer	Other	Michener Services- 119 Michener Crescent [CEN]	11	0	11	0
Wetaskiwin	Other	Catholic Social Services St Raphael	10	0	10	0
Red Deer	Other	Michener Services - 11 A4 Michener Way [CEN]	10	0	10	0
Edmonton	Other	WIN House #2	10	1	9	0
Calgary	Other	Salvation Army - Centre of Hope	9	0	9	0
Red Deer	Other	Michener Services - 11 A2 Michener Way [CEN]	9	1	8	0
Red Deer	Other	CENTRAL ALBERTA WOMEN'S EMERGENCY SHELTER	9	1	8	0
Edmonton	Other	Wings of Providence Society	8	4	4	0
Edmonton	Other	La Salle Second Stage Shelter	8	2	6	0
Edmonton	Other	Catholic Social Services St. Cecilia	8	2	6	0
Edmonton	Other	Edmonton Remand Centre	8	0	8	0
St. Paul	Other	St. Paul Abilities Network Home 10	8	0	8	0
Fort Saskatchewan	Other	Fort Saskatchewan Correctional Centre	8	0	8	0
Calgary	Other	Enviros Wilderness Schools Association Connects	7	7	0	0
Fort Saskatchewan	Other	Fort Saskatchewan Correctional Centre	7	2	5	0
Strathmore	Other	Woods Homes Willow House	7	7	0	0
Edmonton	Other	Excel Society - Group Home 18	7	5	2	0
Edmonton	Other	Edmonton Remand Centre	7	4	3	0
Calgary	Other	Close to Home Achievement Place 1	7	0	7	0
Edmonton	Other	Residential and Support Services King Edward Park	7	0	7	0
Calgary	Other	Trellis Banff Trail Group Home	7	1	6	0
Calgary	Other	Mustard Seed - First Alliance Church	7	3	4	0
Edmonton	Other	McMan Youth Family Community Services- Belmont	7	0	7	0
Edmonton	Other	Edmonton Remand Centre	7	0	7	0
Wetaskiwin	Other	Mustard Seed Wetaskiwin Warming Shelter	7	2	5	0

Classification: Protected A

Calgary	Other	Edmonton Isolation Facility (STAFF) - Travelodge South, operated by Boyle Street Community Services	7	2	5	0
Edmonton	Other	Catholic Social Services - St. Rita	7	0	7	0
Calgary	Other	Inn From The Cold - Main Site	7	1	6	0
Medicine Hat	Other	Core Licensed Group Home	6	6	0	0
Central	Other	Michener Services	6	0	6	0
Lac La Biche	Other	Hope Haven Women's Shelter	6	2	4	0
Edmonton	Other	Coliseum Inn	6	3	3	0
Red Deer	Other	Michener Services - 87 Michener Green [CEN]	6	0	6	0
Olds	Other	Accredited Supports to the Community Residence 2	6	0	6	0
Red Deer	Other	Central Alberta's Safe Harbour Society [CEN]	6	0	6	0
Calgary	Other	Children's Cottage - Crisis Nursery	6	2	4	0
Calgary	Other	Inn From the Cold Satellite Location	6	1	5	0
Edmonton	Other	Excel Society Group Home 19	5	5	0	0
Grande Prairie	Other	Signature Support Services 62nd East	5	4	1	0
Fort Saskatchewan	Other	Fort Saskatchewan Correctional Centre	5	0	5	0
Calgary	Other	Golden Key Supportive Living	5	4	1	0
Grande Prairie	Other	Signature Support Services 62 West	5	0	5	0
Edmonton	Other	Excel Society Group Home 44	5	4	1	0
Hinton	Other	Pine Valley Lodge [NOR]	5	0	5	0
Edmonton	Other	Glenwood Group Home	4	4	0	0
Calgary	Other	Sister's Care Group Home	4	4	0	0
Peace River	Other	Peace River Correctional Centre	4	4	0	0
Innisfail	Other	Advance Society Innisfail: Support for Developmentally Disabled [CEN]	4	3	1	0
Slave Lake	Other	Community Friendship Temporary Mat Program	4	4	0	0
Calgary	Other	Alberta Home Care-Site 1-Tarawood	4	3	1	0
Edmonton	Other	Family Connections Comfort House	4	1	3	0
Lethbridge	Other	Bridges Day Program	4	2	2	0
Edmonton	Other	Lacreche Home	4	2	2	0
Calgary	Other	Waverley House Personal Care Home #259	4	0	4	0
Calgary	Other	Excel Discovery	4	0	4	0
Calgary	Other	YWCA Mary Dover House	4	0	4	0
Ab	Other	Action Group Enhanced Housing	4	1	3	0
Edmonton	Other	Excel Society Group Home 35	4	0	4	0
Calgary	Other	CSPD 72 St	3	0	3	0
Medicine Hat	Other	Women's Shelter Society	3	2	1	0
Grande Prairie	Other	Signature Support Services 107	3	2	1	0

Classification: Protected A

Sturgeon County	Other	Kihew House	3	1	2	0
Edmonton	Other	Excel Society Group Home 46	3	0	3	0
Edmonton	Other	Residential and Support Services	3	0	3	0
Calgary	Other	Millhurst Community Home Calgary Women's Emergency Shelter	2	2	0	0
High Prairie	Other	High Prairie Youth Assessment Centre	2	2	0	0
Edmonton	Other	Chimo 2	2	0	2	0
Edmonton	Other	Unlimited Potential Community Services Alder House	2	0	2	0
Fort Saskatchewan	Other	Fort Saskatchewan Correctional Centre	2	0	2	0
Edmonton	Other	Winnifred Stewart Adult Group Home Residence 7	2	1	1	0
Calgary	Other	Atria Canyon Meadows Retirement	2	1	1	0
Red Deer	Other	St. Neri Timberlands - Banff Unit	2	0	2	0
Calgary	Other	L'Arche Calgary Group Home-Annapurna	1	1	0	0
Edmonton	Other	Hope Cottage Inc- Residence #1	1	1	0	0
Calgary	Other	Proverbium Homes 5	1	1	0	0
Wetaskiwin	Other	Wetaskiwin and District Association for Community Services Residence 1	1	1	0	0
Wetaskiwin	Other	Wetaskiwin and District Association for Community Services Residence 2	1	1	0	0
Calgary	Other	Vecova Bell Street	1	1	0	0
Edmonton	Other	John Howard Society - Journey Home	1	1	0	0
Edmonton	Other	Medihome House #7	1	1	0	0
Sherwood Park	Other	Robinhood Association Residence #18	1	1	0	0
Calgary	Other	Brenda Strafford Centre Shelter	1	1	0	0
14315 Evergreen Street Sw, Calgary Ab	Other	A Omega 6	1	0	1	0
Morinville	Other	Jessie's House	1	1	0	0
Edmonton	Other	HF Resources Kilkenny House	1	0	1	0
Edmonton	Other	Mustard Seed Trinity Lutheran Church Shelter	1	1	0	0
Central	Other	up community services doreen johnson	1	0	1	0
Wainwright	Other	Catholic Social Services- St. Louise House	1	0	1	0
Wainwright	Other	Catholic Social Services- St. Patrick House	1	0	1	0
Red Deer	Other	Michener Services - 91 Michener Green [CEN]	1	1	0	0
Alberta	All	All	11316	2678	8490	148

Classification: Protected A

Table 6: Summary of the closed outbreaks

Location Type	Alberta	Calgary	Central	Edmonton	North	South	Unknown
Acute Care	406	103	62	180	38	23	0
Continuing Care	1291	531	184	324	111	140	1
Other	2795	1116	227	943	350	158	1
School (K-12)	2458	860	306	731	383	178	0
Total	6950	2610	779	2178	882	499	2

COMMUNICATIONS UPDATE

Classification: Protected A

TAB 10

Analytics and Performance Reporting Branch
Epidemiology and Surveillance Unit
2022-February-08 12:01

COVID-19 in Alberta

Highlights | New Cases | Total Cases | Characteristics | Vaccine Outcomes | Severe outcomes | Comorbidities | Healthcare capacity | Geospatial | Travel history | Laboratory testing | Variants of Concern | Data export | Data notes

1623 current hospitalizations

129 current ICU

3,686 total deaths

28,265 active cases

34.11% percent positivity, 7-day average

78 years average age at death

Analytics and Performance Reporting Branch
Epidemiology and Surveillance Unit
2022-February-08 12:01

COVID-19 in Alberta

Highlights | New Cases | Total Cases | Characteristics | Vaccine Outcomes | Severe outcomes | Comorbidities | Healthcare capacity | Geospatial | Travel history | Laboratory testing | Variants of Concern | Data export | Data notes

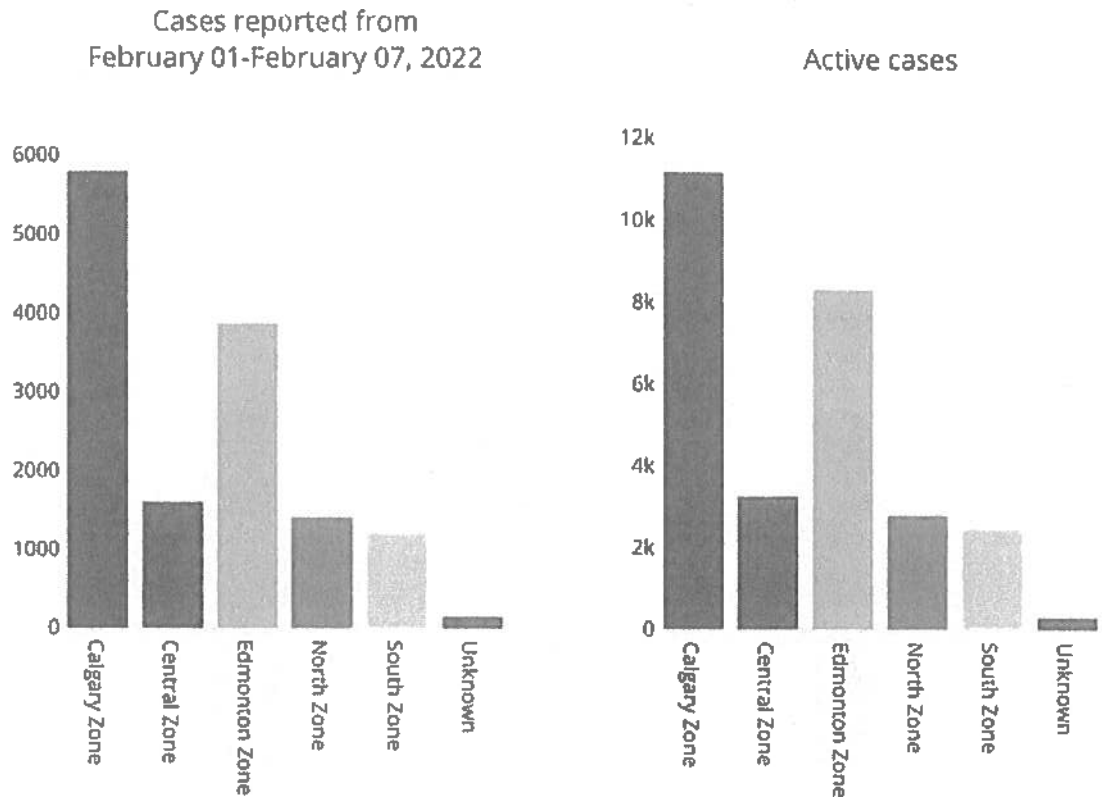

Figure 1: COVID-19 cases in Alberta by zone. First and second panels display new (from February 01-February 07, 2022) and active cases, respectively. Cases without a postal code or incorrect postal codes are labelled as unknown. Cases are under investigation and numbers may fluctuate as cases are resolved.

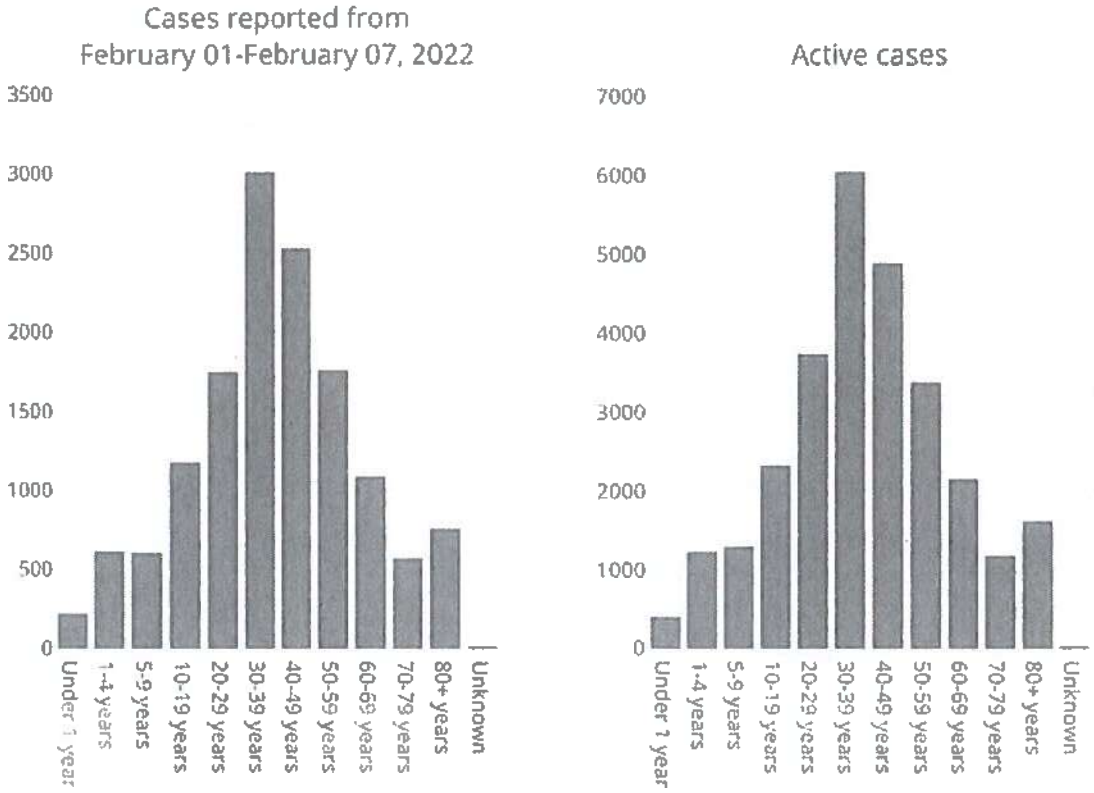

Figure 2: COVID-19 cases in Alberta by age group. First and second panels display new (from February 01-February 07, 2022) and active cases, respectively. Cases are under investigation and numbers may fluctuate as cases are resolved.

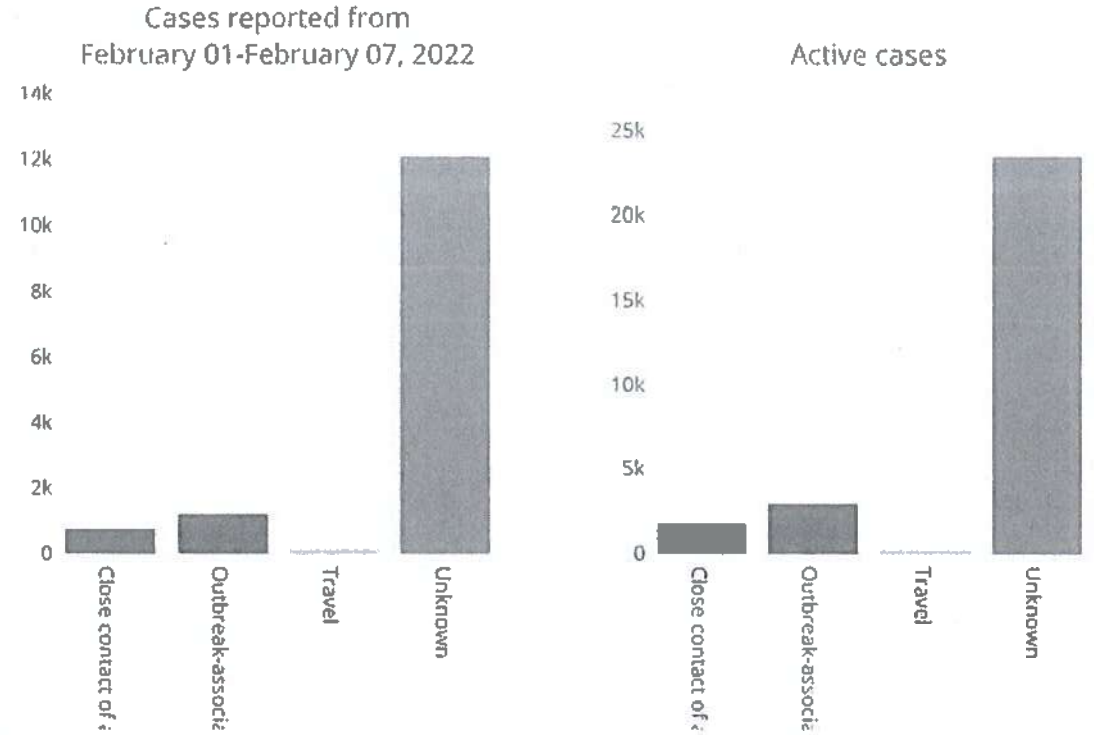

Figure 3: COVID-19 cases in Alberta by route of suspected acquisition. First and second panels display new (from February 01-February 07, 2022) and active cases, respectively. Cases are under investigation and numbers may fluctuate as cases are resolved.

Analytics and Performance Reporting Branch
Epidemiology and Surveillance Unit
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COVID-19 in Alberta

Summary

- There are 503790 laboratory-confirmed, and 5928 probable cases in Alberta.
- There have been 465850/509718 cases report forms received.

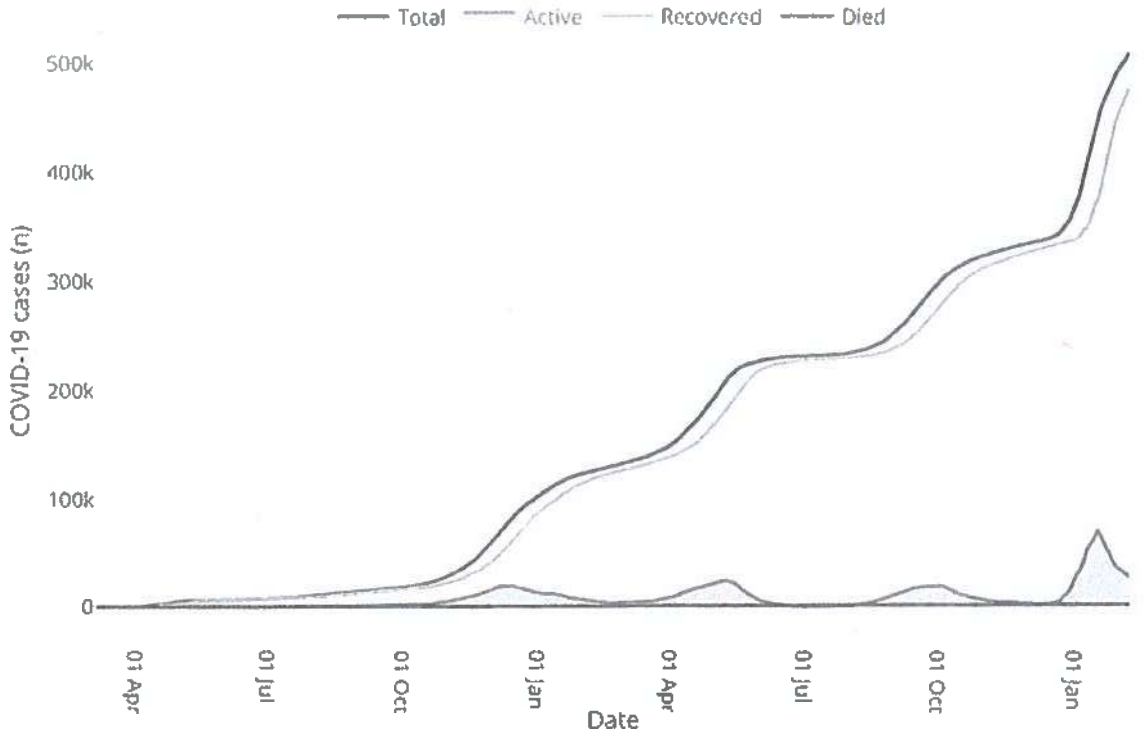

Figure 4: COVID-19 cases in Alberta by day and case status. Recovered is based on the assumption that a person is recovered 14 days after a particular date (see data notes tab), if they did not experience severe outcomes (hospitalized or deceased). Cases are under investigation and numbers may fluctuate as cases are resolved. Data included up to end of day February 07, 2022.

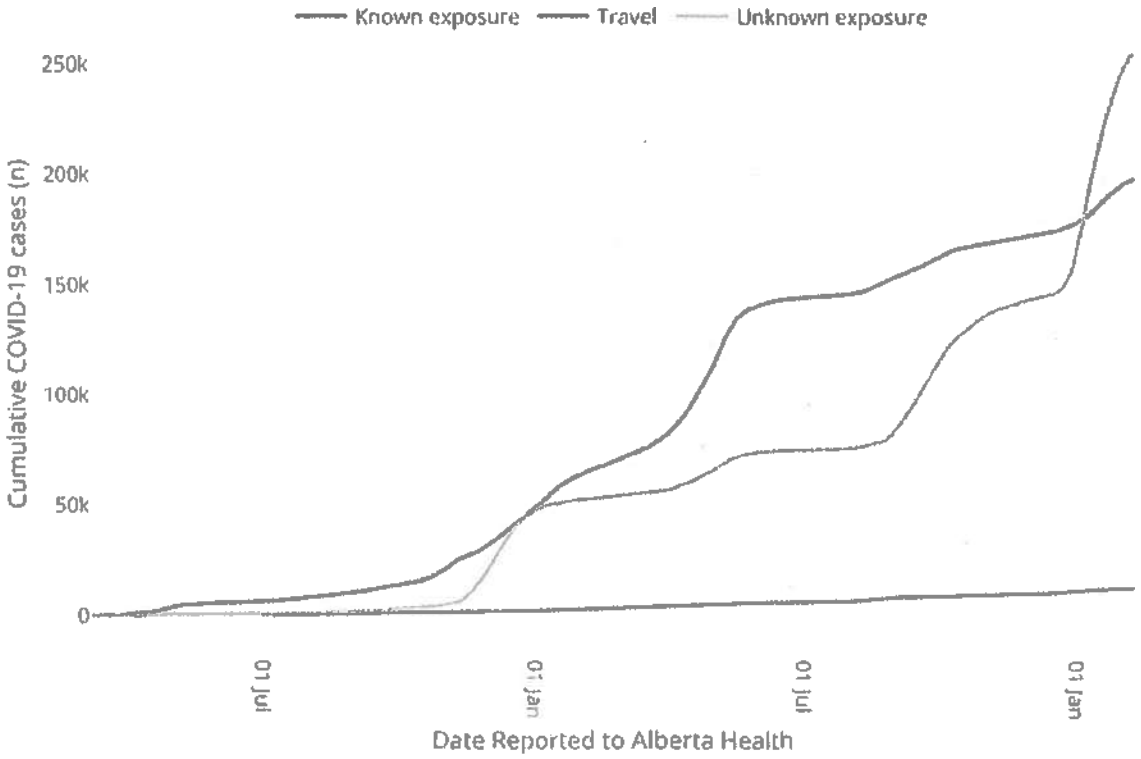

Figure 5: Cumulative COVID-19 cases in Alberta by route of suspected acquisition. Only includes COVID-19 cases where case report forms have been received. Suspected community refers to cases where there is no known epi-link, setting or travel where the person may have acquired infection. This includes cases where the investigation is still ongoing. Data included up to end of day February 07, 2022.

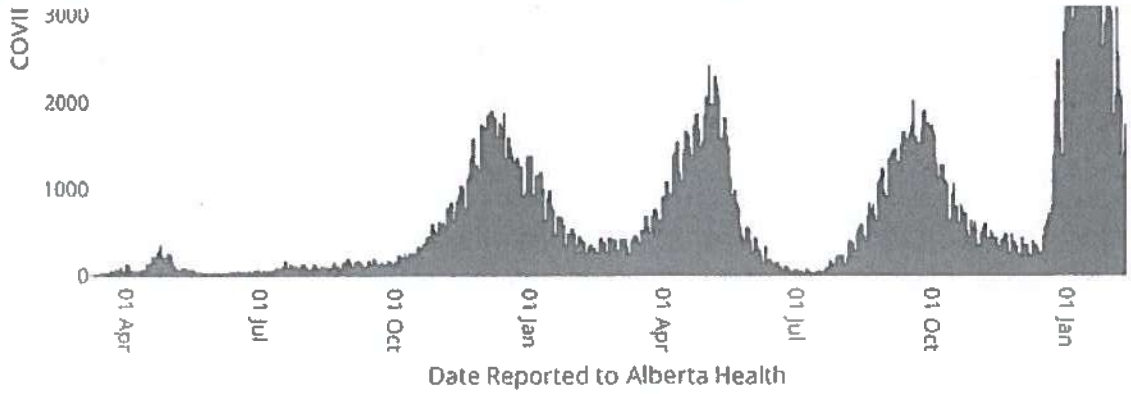

Figure 6: COVID-19 cases in Alberta by day and case status. Probable cases include cases where the lab confirmation is pending. Data included up to end of day February 07, 2022.

Analytics and Performance Reporting Branch
Epidemiology and Surveillance Unit
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COVID-19 in Alberta

Highlights | New Cases | Total Cases | Characteristics | Vaccine Outcomes | Severe outcomes | Comorbidities | Healthcare capacity | Geospatial | Travel history | Laboratory testing | Variants of Concern | Data export | Data notes

Summary

- The median age range is 34 years (0-121)

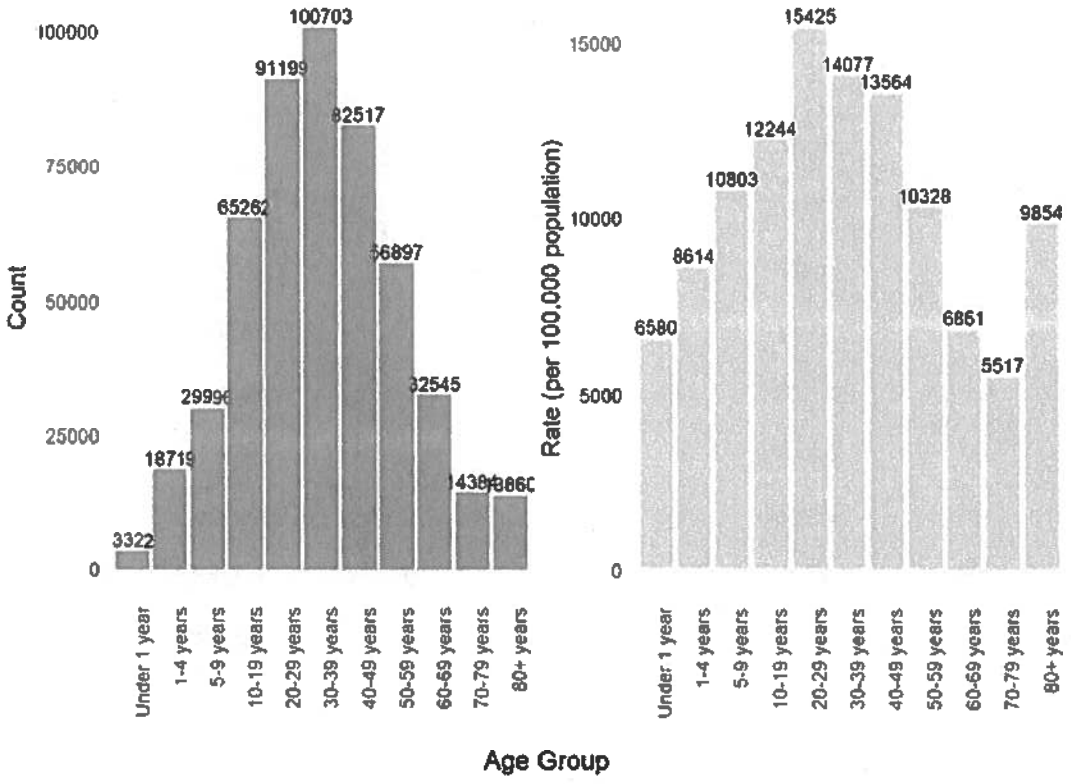

Figure 7: Number and rate of COVID-19 cases in Alberta by age group

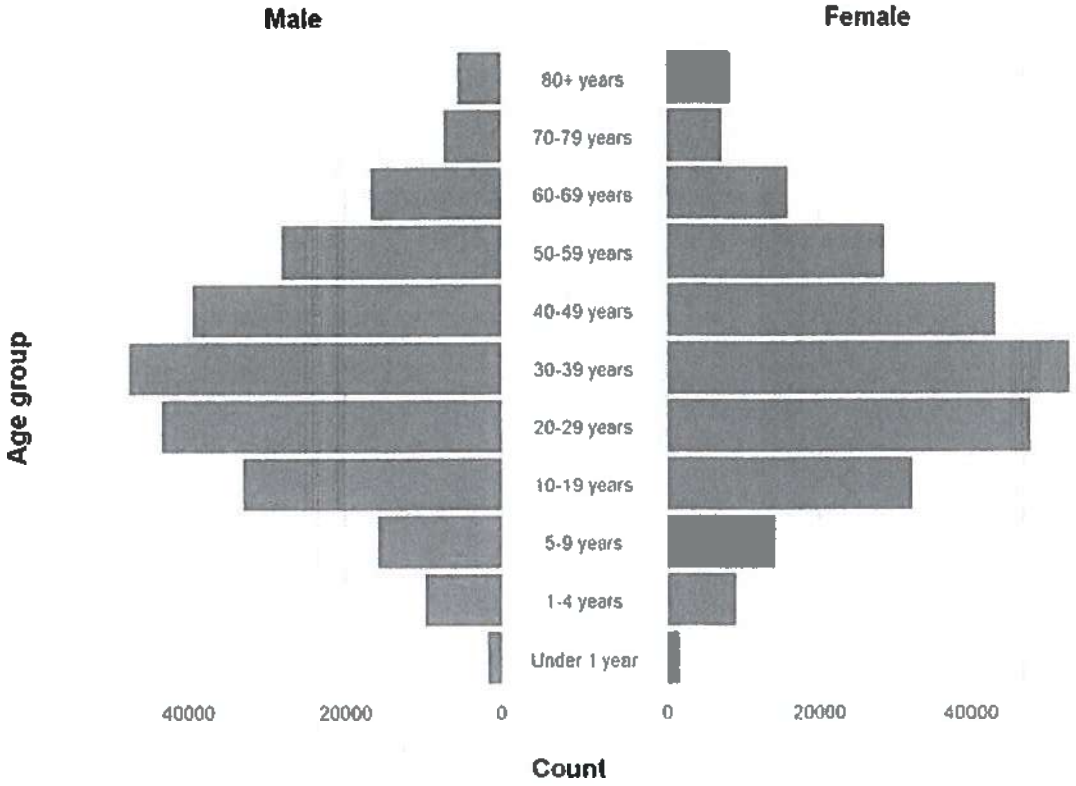

Figure 8: COVID-19 cases in Alberta by age group and gender

Table 1. COVID-19 cases in Alberta by age group and gender

	Gender							
	Female		Male		Unknown		All	
Age	Count	Percent	Count	Percent	Count	Percent	Count	Percent
Under 1 year	1,510	0	1,807	0	5	0	3,322	1
1-4 years	8,964	2	9,744	2	11	0	18,719	4
5-9 years	14,163	3	15,823	3	10	0	29,996	6
10-19 years	32,328	6	32,873	6	61	0	65,262	13
20-29 years	47,778	9	43,304	8	117	0	91,199	18
30-39 years	53,024	10	47,606	9	73	0	100,703	20
40-49 years	43,128	8	39,349	8	40	0	82,517	16
50-59 years	28,694	6	28,175	6	28	0	56,897	11
60-69 years	15,823	3	16,701	3	21	0	32,545	6
70-79 years	7,129	1	7,247	1	8	0	14,384	3
80+ years	8,375	2	5,475	1	10	0	13,860	3
Unknown	160	0	142	0	12	0	314	0

	Gender							
	Female		Male		Unknown		All	
Age	Count	Percent	Count	Percent	Count	Percent	Count	Percent
All	261,076	51	248,246	49	396	0	509,718	100

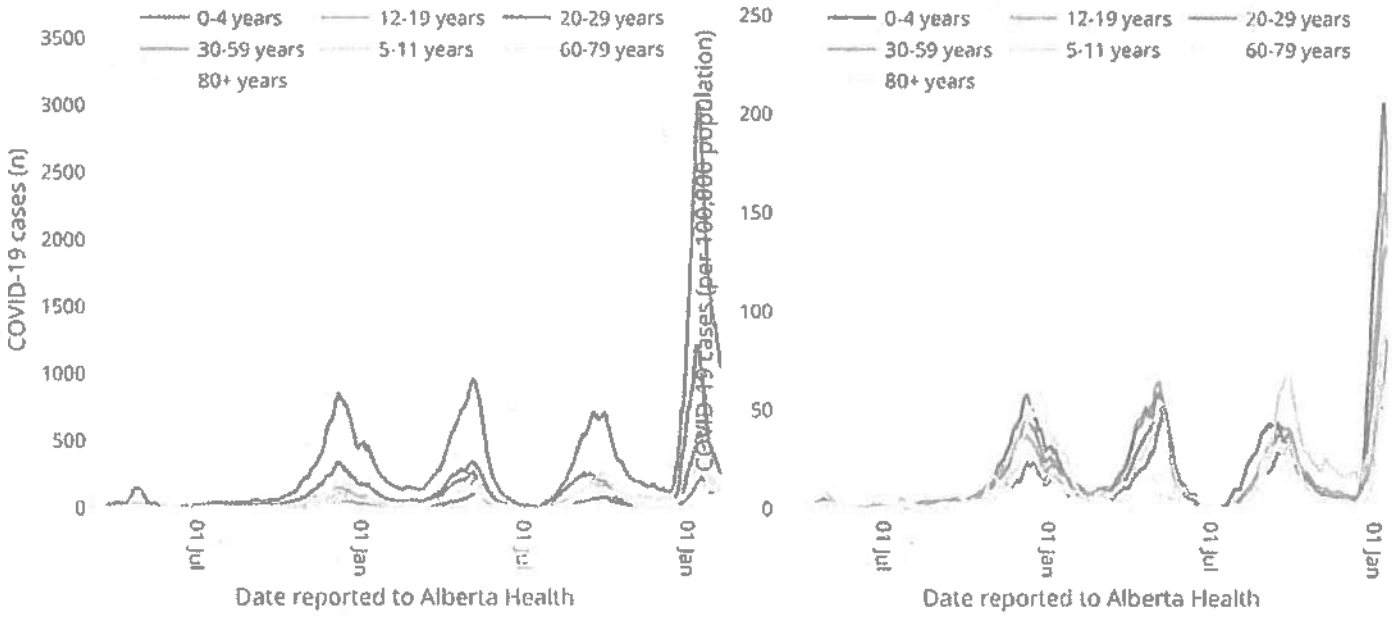

Figure 9: COVID-19 cases in Alberta by age group. First and second panels display counts (7-day rolling average) and rate per 100,000 (7-day rolling average), respectively.

Healthcare Workers

Table 2. Healthcare workers among COVID-19 cases

	Total	Active	Recovered	Died
Calgary Zone	13981	1471	12506	4
Central Zone	3676	467	3209	0
Edmonton Zone	12174	1131	11040	3
North Zone	2599	331	2267	1
South Zone	2520	420	2098	2
Unknown	2	0	2	0

Note:

Status of Healthcare workers is self-reported and might be different from other sources. Please note these are not necessarily healthcare workers who were infected at work.

	Total	Active	Recovered	Died
Alberta	34952	3820	31122	10

Note:
Status of Healthcare workers is self-reported and might be different from other sources. Please note these are not necessarily healthcare workers who were infected at work.

Symptoms

Table 3. Symptoms reported among COVID-19 cases

Symptom	Count	Percent
Cough	117547	25.2
Headache	87913	18.9
Sore Throat	78306	16.8
Nasal Congestion	70351	15.1
Malaise	58022	12.5
Chills	57320	12.3
Runny Nose	55468	11.9
Fever	51590	11.1
Asymptomatic	46821	10.1
Pain	42062	9
Loss Of Taste/Smell	37842	8.1
Other	31662	6.8
Myalgia	26741	5.7
Difficulty Breathing	22908	4.9
Decreased Appetite	21661	4.6
Diarrhea	17511	3.8
Nausea	15803	3.4
Sneezing	11940	2.6
Dizziness	9836	2.1
Chest Pain	8745	1.9
Vomiting	7252	1.6

Note:
Symptom prevalence based on enhanced case report forms.

Symptom	Count	Percent
Arthralgia	4617	1
Prostration	3735	0.8
Irritability/Confusion/Altered Mental State	3441	0.7
Pharyngeal Exudate	3058	0.7
Conjunctivitis	2195	0.5
Anorexia	1561	0.3
Tachypnea	797	0.2
Abnormal Lung Asculation	703	0.2
Nose Bleed	518	0.1
Hypotension	324	0.1
Seizures	92	0
Encephalitis	24	0
Total Cases With Symptom Data Available	465850	

Note:
Symptom prevalence based on enhanced case report forms.

Analytics and Performance Reporting Branch
Epidemiology and Surveillance Unit
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COVID-19 in Alberta

Highlights | New Cases | Total Cases | Characteristics | Vaccine Outcomes | Severe outcomes | Comorbidities | Healthcare capacity | Geospatial | Travel history | Laboratory testing | Variants of Concern | Data export | Data notes

- Since Jan 1, 2021, 0.6% of people with one dose (20,733/3,546,680) were diagnosed with COVID-19 14 days after the first immunization date
- Since Jan 1, 2021, 4.1% of people with two doses (136,426/3,306,246) were diagnosed with COVID-19 14 days after the second immunization date
- Since Jan 1, 2021, 1.8% of people with three doses (27,153/1,499,676) were diagnosed with COVID-19 14 days after the third immunization date
- 54.7% of cases (222,147/406,459) since Jan 1, 2021 were unvaccinated or diagnosed within two weeks from the first dose immunization date
- 67.8% of hospitalized cases (11,379/16,781) since Jan 1, 2021 were unvaccinated or diagnosed within two weeks from the first dose immunization date
- 67.3% of COVID-19 deaths (1,451/2,155) since Jan 1, 2021 were unvaccinated or diagnosed within two weeks from the first dose immunization date

Table 4. COVID-19 vaccine effectiveness in Alberta by vaccine manufacturer

Vaccine	Vaccine Effectiveness: Partial (95% CI)	Vaccine Effectiveness: Complete (95% CI)
AstraZeneca	61% (58 to 63%)	89% (89 to 90%)
Moderna	81% (80 to 82%)	91% (90 to 91%)
Pfizer	75% (74 to 76%)	90% (90 to 90%)

Table 5. COVID-19 vaccine effectiveness against variants of concern in Alberta

Variant of Concern	Vaccine Effectiveness: Partial (95% CI)	Vaccine Effectiveness: Complete (95% CI)
B.1.1.7 UK Variant	76% (75 to 77%)	90% (88 to 91%)
B.1.617 Variant	57% (51 to 63%)	89% (89 to 90%)
P1 Brazilian Variant	72% (67 to 76%)	88% (80 to 93%)

Note:
(a) Vaccine effectiveness estimates include 95% confidence intervals (CI) and describes the protection against symptomatic infection. Vaccine effectiveness for hospitalization and death could have different estimates.
(b) Vaccine effectiveness estimates for some variants are not provided due to limited sample sizes, which make estimates unstable and difficult to interpret. Information on other variants will be provided when estimates become stable.

(c) Partial vaccination: people are considered partially vaccinated 14 days after their first dose of a two dose series (for vaccines that require two doses)

(d) Effectiveness: how well a vaccine prevents the outcome of interest in the real world

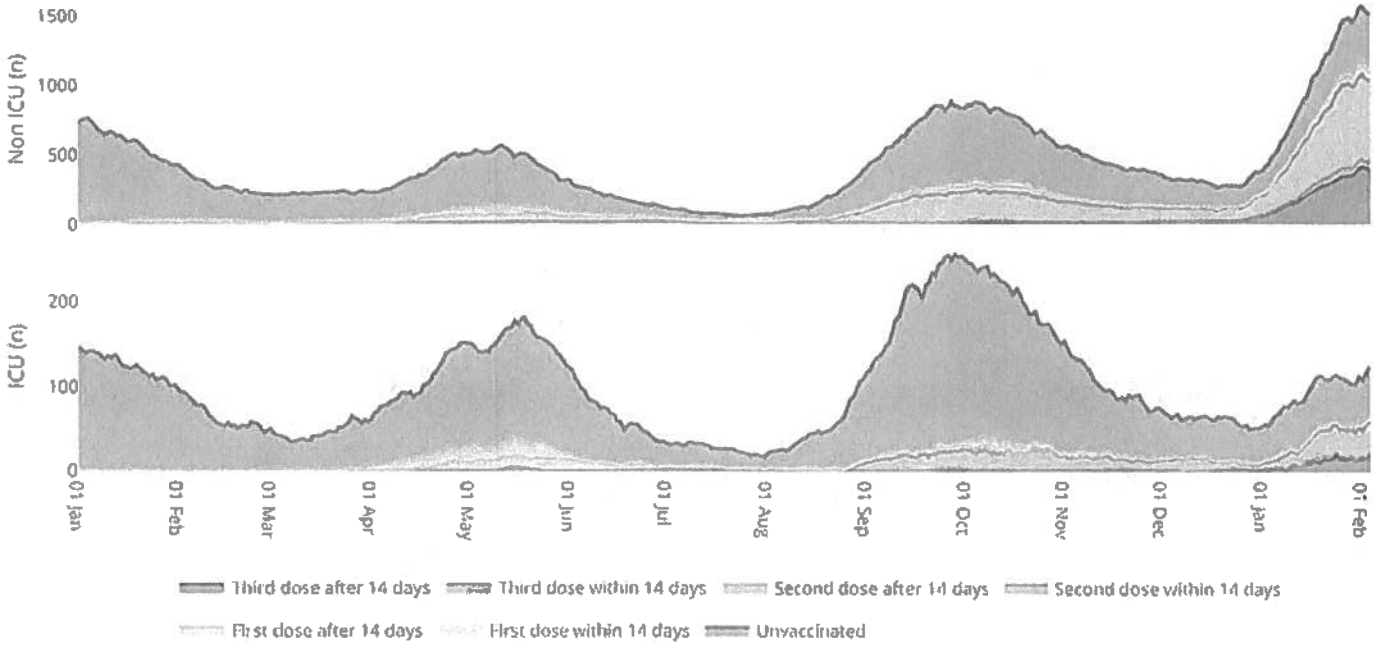
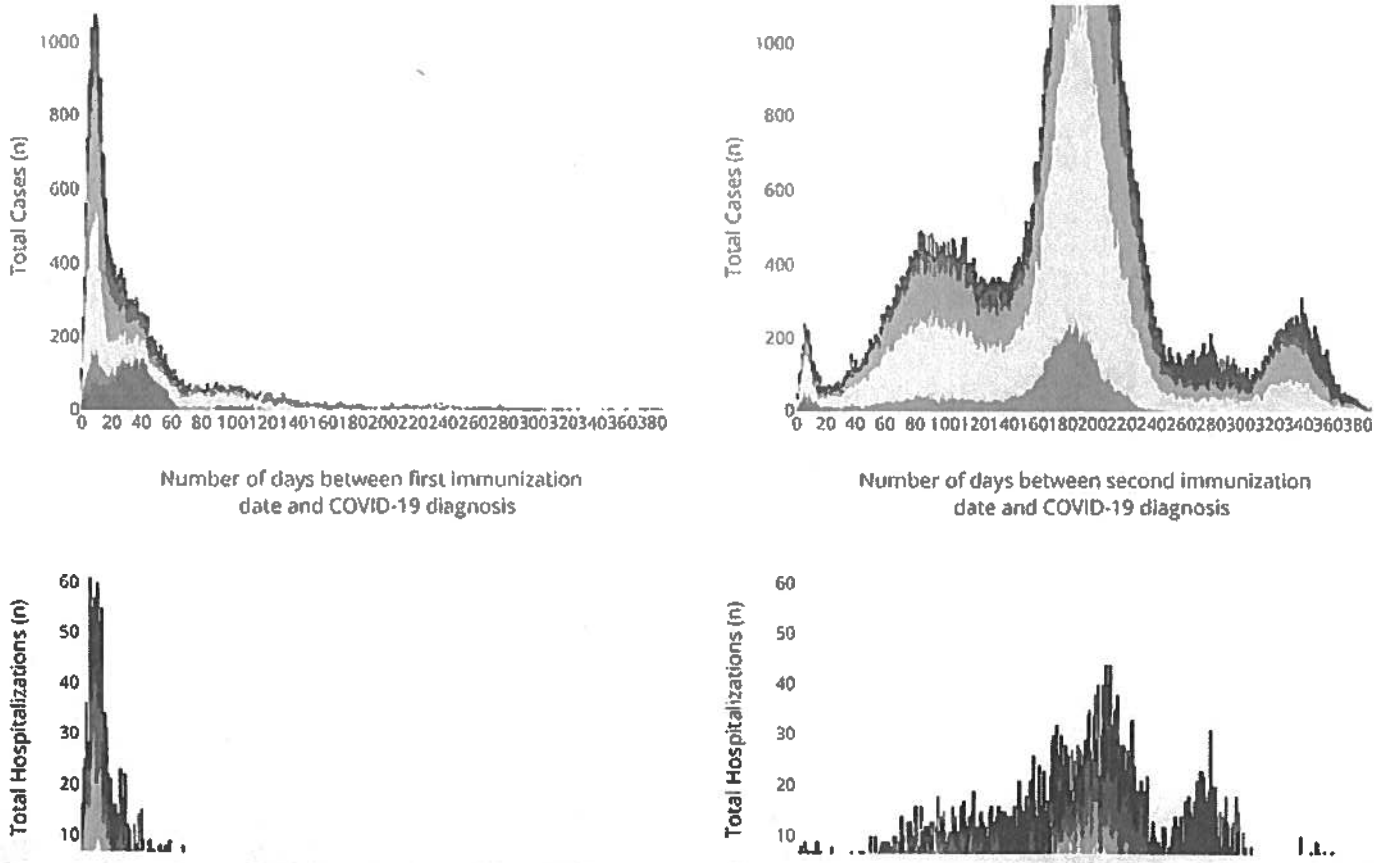


Figure 10: Current non-ICU (top) and ICU(bottom) by vaccine status.

Note:

Time from immunization date to COVID diagnosis date (or Date reported to Alberta Health). COVID-19 hospitalizations reported are not due to immunization events.



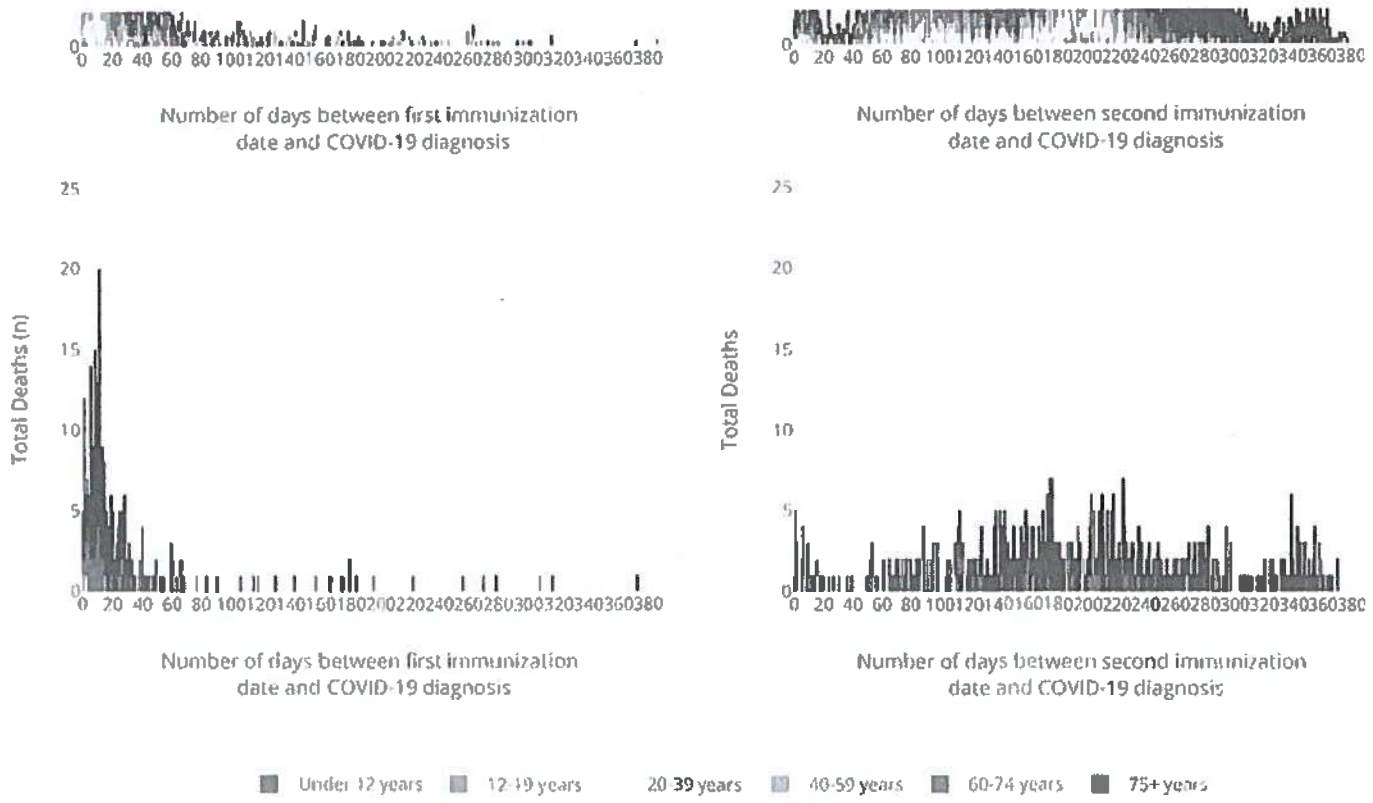


Figure 11: Time from first dose (left) and second dose immunization (right) to COVID-19 diagnosis by age group:
TOP: cases
MIDDLE: of those who became hospitalized
BOTTOM: of those who died from COVID-19
Note: First dose immunization also includes people who became a case prior to their second dose immunization date. COVID-19 hospitalizations reported are not due to immunization events.

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COVID-19 in Alberta

Summary

- Average age for COVID cases that died is 78 years (range: 1-107)
- Average age for COVID cases hospitalized with an ICU stay is 56 years (range: 0-99)
- Average age for COVID cases hospitalized is 59 years (range: 0-104)
- Average age for COVID cases not hospitalized is 34 years (range: 0-121)

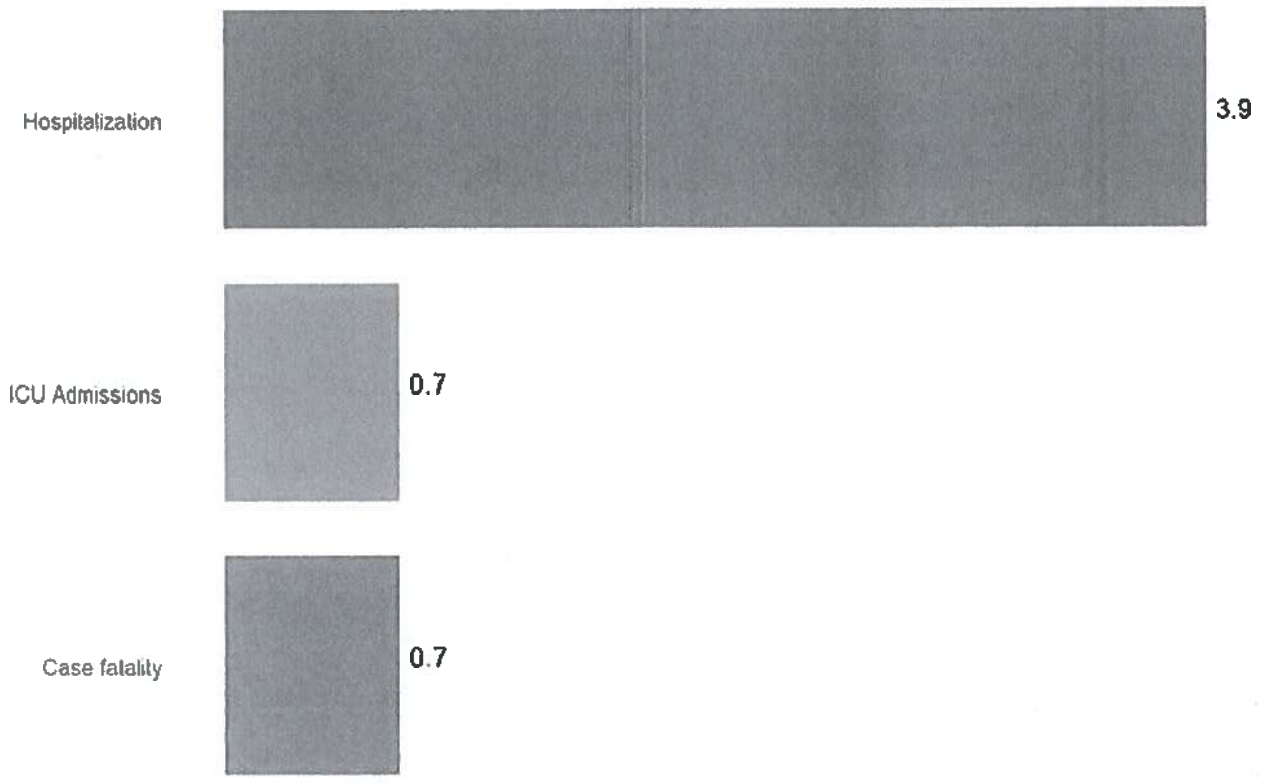

Figure 12: Rate of total hospitalizations, ICU admissions, and deaths among COVID-19 cases in Alberta

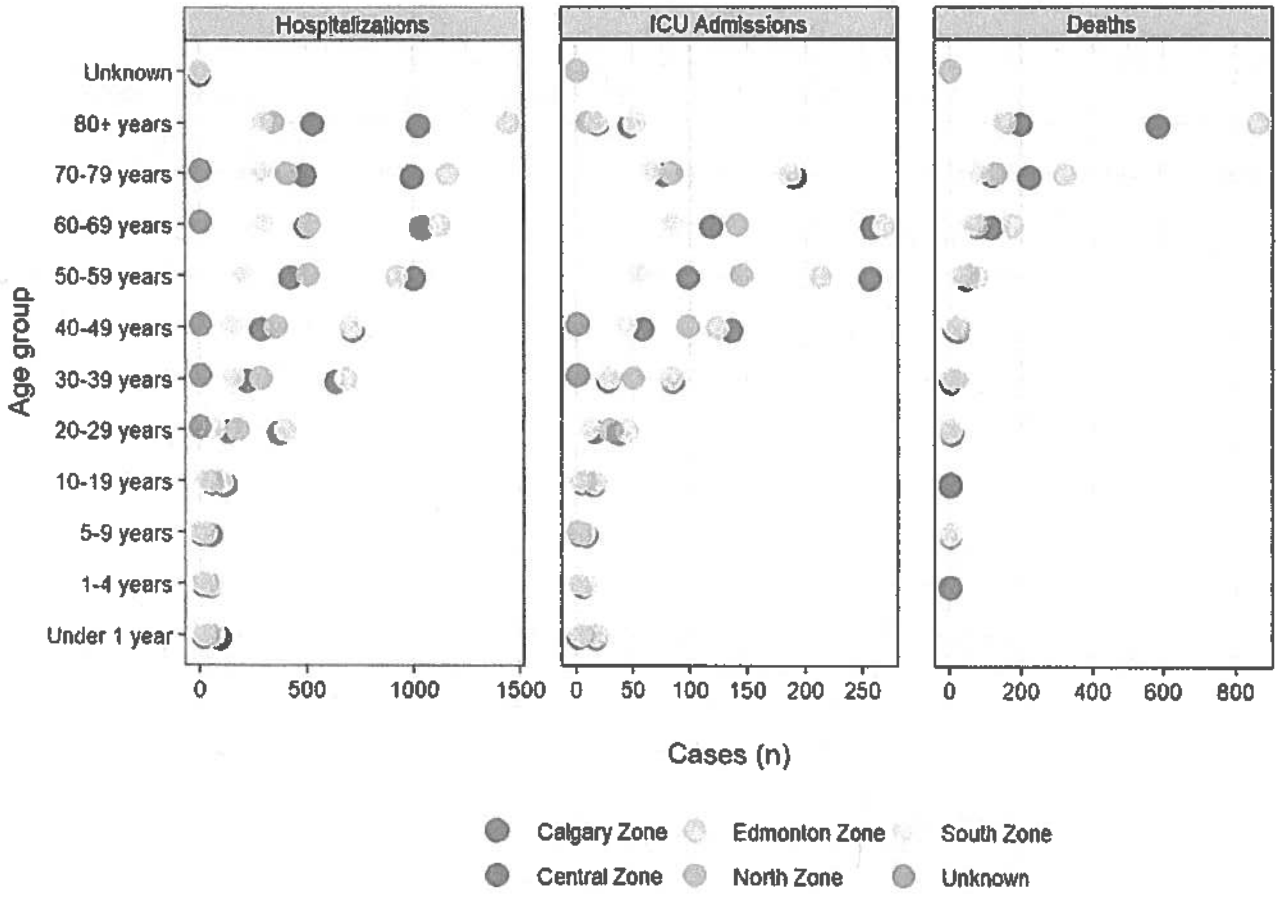

Figure 13: Total hospitalizations, ICU admissions and deaths among COVID-19 cases in Alberta by age group and zone. Each ICU admission is also included in the total number of hospitalizations.

Table 6. Total hospitalizations, ICU admissions and deaths (ever) among COVID-19 cases in Alberta by Zone

Zone	Cases	Hospitalized		ICU		Deaths	
	Count	Count	Case rate	Count	Case rate	Count	Case rate
Alberta	509718	19640	3.9	3383	0.7	3686	0.7
Calgary Zone	206337	6083	2.9	1054	0.5	998	0.5
Central Zone	50671	2692	5.3	424	0.8	456	0.9
Edmonton Zone	163289	6681	4.1	1021	0.6	1468	0.9
North Zone	56246	2697	4.8	570	1.0	438	0.8

Note:
Based on total hospitalizations and ICU admissions ever.
Each ICU admission is also included in the total number of hospitalization
Zone is based on patient postal code of residence.
Case rate (per 100 cases)

Zone	Cases	Hospitalized		ICU		Deaths	
	Count	Count	Case rate	Count	Case rate	Count	Case rate
South Zone	32119	1481	4.6	312	1.0	326	1.0
Unknown	1056	6	0.6	2	0.2	0	0.0

Note:
Based on total hospitalizations and ICU admissions ever.
Each ICU admission is also included in the total number of hospitalization
Zone is based on patient postal code of residence.
Case rate (per 100 cases)

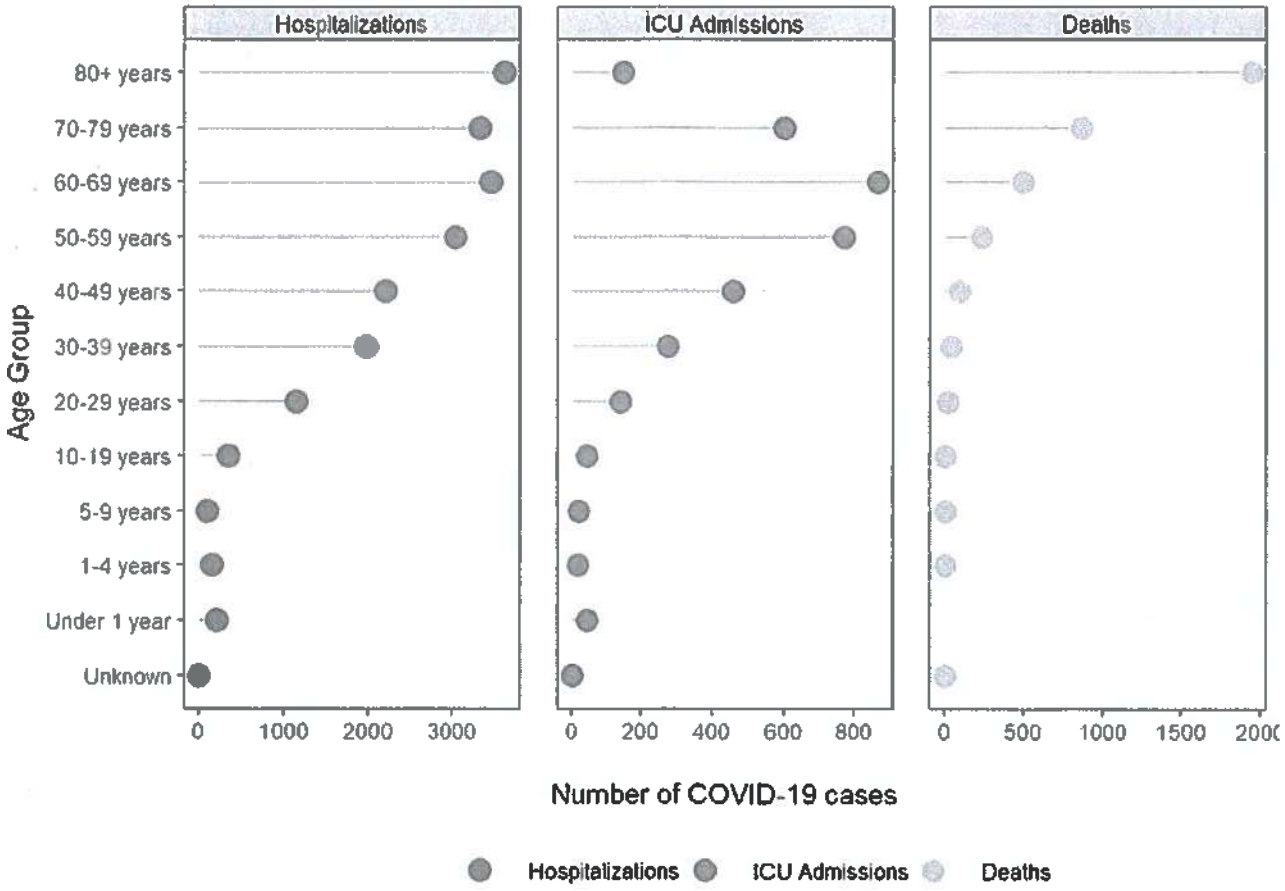

Figure 14: Total hospitalizations, ICU admissions and deaths (ever) among COVID-19 cases in Alberta by age group. Each ICU admission is also included in the total number of hospitalizations.This is based on totals rather than current hospitalizations and ICU admissions.

Table 7. Total Hospitalizations, ICU admissions and deaths (ever) among COVID-19 cases in Alberta by age group

Age Group	Cases	Hospitalized	ICU	Deaths

Age Group	Cases	Hospitalized		Pop.	ICU		Pop.	Deaths		Pop.
	Count	Count	Case rate	rate	Count	Case rate	rate	Count	Case rate	rate
Total	509718	19640	3.9	444.3	3383	0.7	76.5	3686	0.7	83.4
Under 1 year	3322	223	6.7	441.7	44	1.3	87.2	0	0.0	0.0
1-4 years	18719	165	0.9	75.9	18	0.1	8.3	1	0.0	0.5
5-9 years	29996	103	0.3	37.1	20	0.1	7.2	2	0.0	0.7
10-19 years	65262	350	0.5	65.7	44	0.1	8.3	2	0.0	0.4
20-29 years	91199	1146	1.3	193.8	138	0.2	23.3	18	0.0	3.0
30-39 years	100703	1981	2.0	276.9	275	0.3	38.4	40	0.0	5.6
40-49 years	82517	2207	2.7	362.8	459	0.6	75.5	93	0.1	15.3
50-59 years	56897	3040	5.3	551.8	768	1.3	139.4	234	0.4	42.5
60-69 years	32545	3459	10.6	729.3	867	2.7	182.8	496	1.5	104.6
70-79 years	14384	3338	23.2	1280.2	602	4.2	230.9	861	6.0	330.2
80+ years	13860	3621	26.1	2574.3	146	1.1	103.8	1937	14.0	1377.1
Unknown	314	7	2.2	NA	2	0.6	NA	2	0.6	NA

Note:

Based on total hospitalizations and ICU admissions ever.

Row percent is out of the number of cases in each age group.

Each ICU admission is also included in the total number of hospitalization

Case rate (per 100 cases)

Population rate (per 100,000 population)

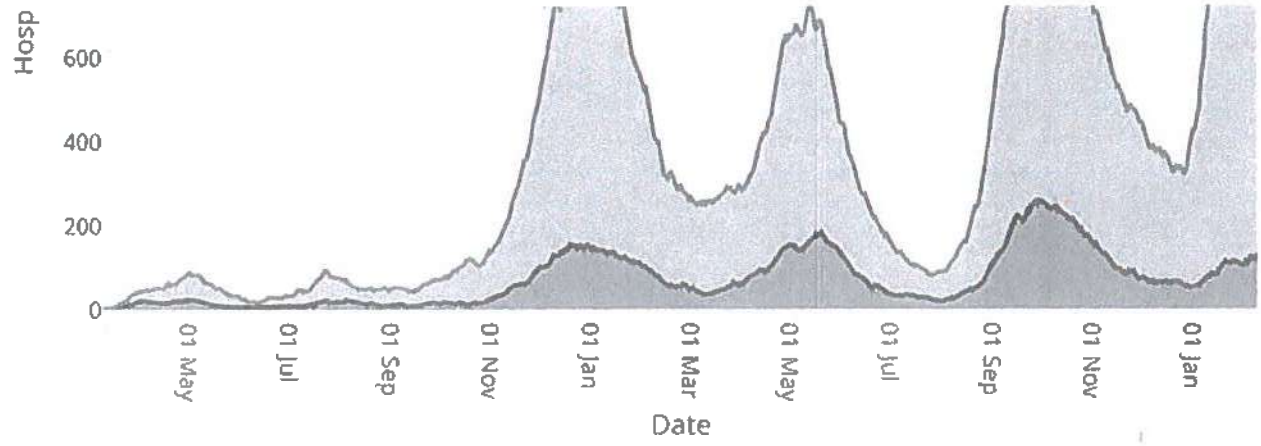

Figure 15: Number of current COVID-19 patients in hospital, ICU and non-ICU

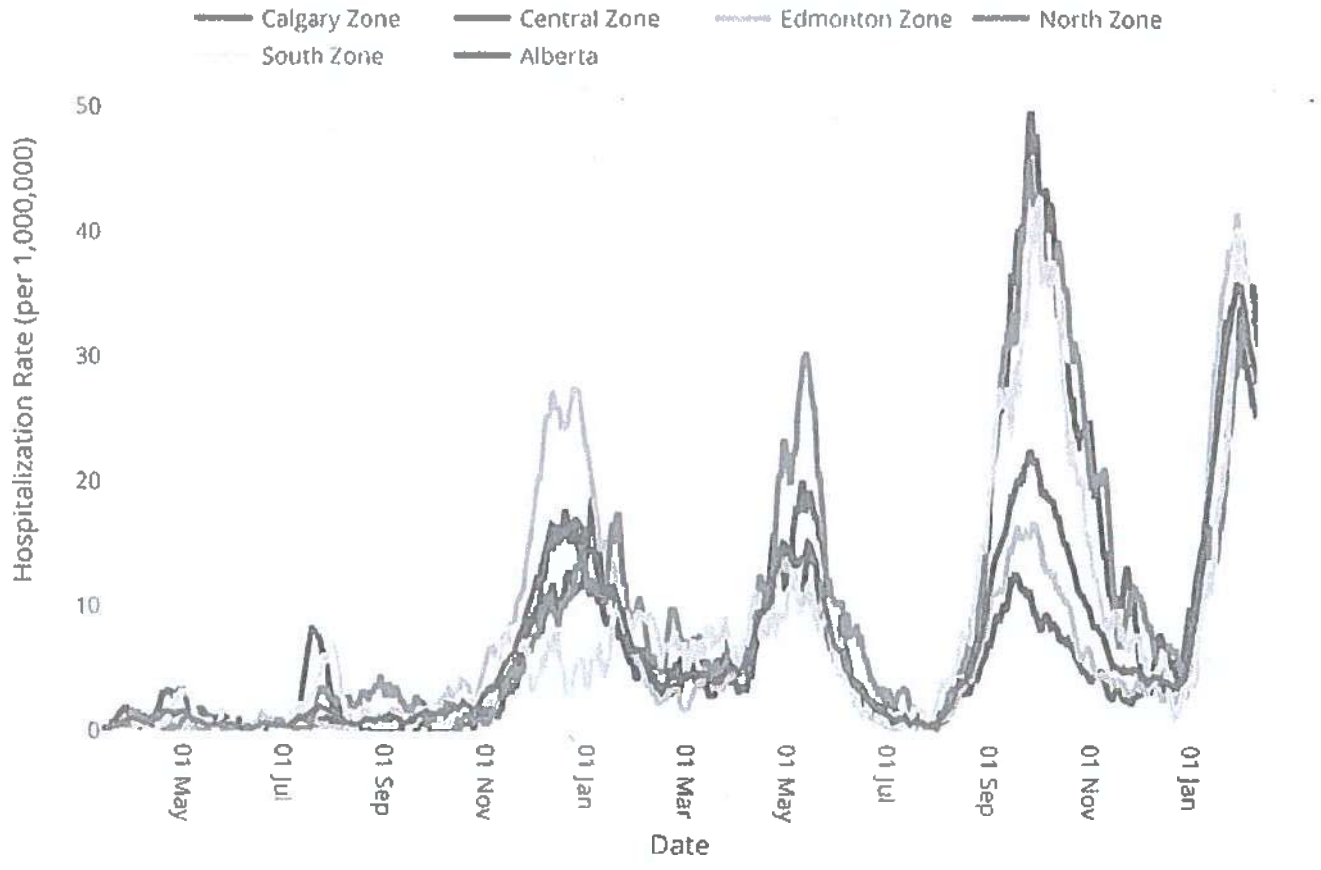

Figure 16: Rate of new hospitalizations (7-day rolling average, average of current day and previous six days) by admission date in Alberta and by zone

30

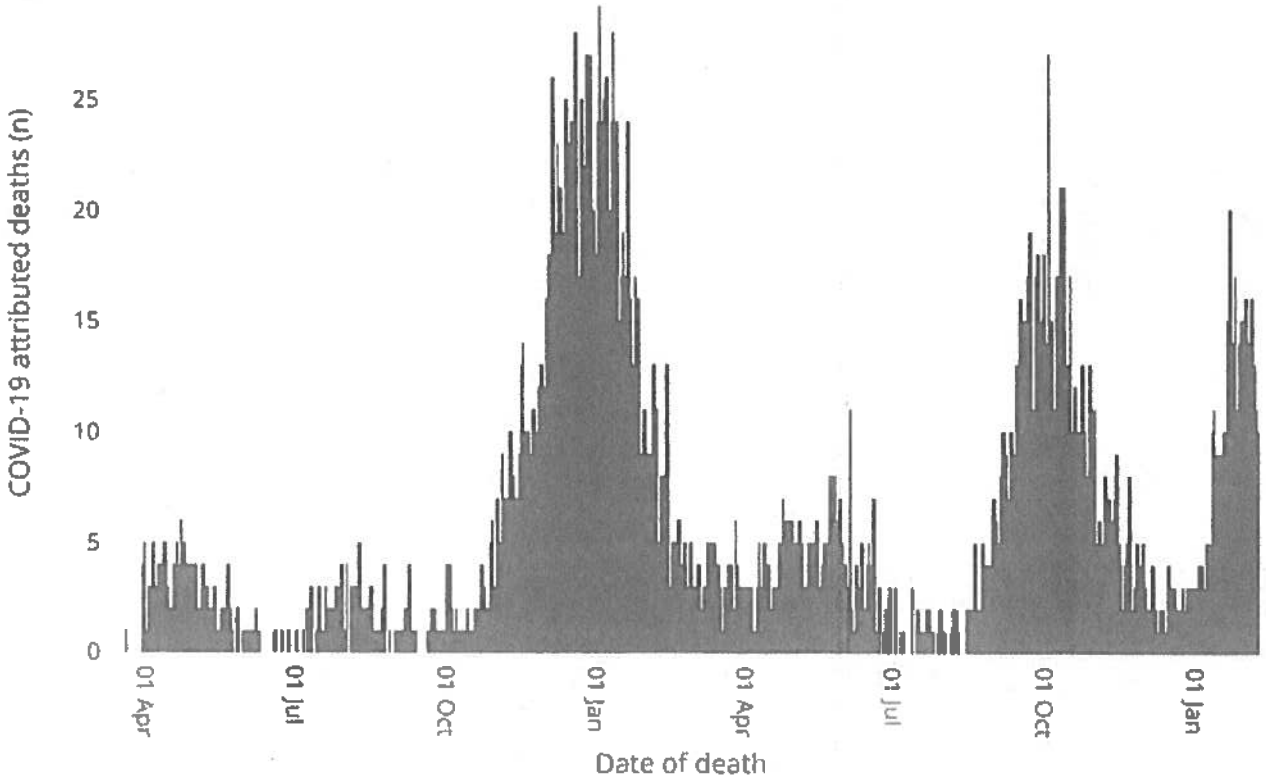

Figure 17: Daily COVID-19 attributed deaths. Data are subject to change; when death date is unavailable the date reported to Alberta Health is used until a death date is known.

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COVID-19 in Alberta

Highlights New Cases Total Cases Characteristics Vaccine Outcomes
Severe outcomes Comorbidities Healthcare capacity Geospatial Travel history
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Table 8. Number and percent of health conditions among COVID-19 deaths. Data updated on 2022-02-07.

Condition	Count	Percent
Hypertension	3024	82.0%
Cardio-Vascular Diseases	1951	52.9%
Renal Diseases	1924	52.2%
Diabetes	1663	45.1%
Respiratory Diseases	1459	39.6%
Dementia	1383	37.5%
Cancer	862	23.4%
Stroke	676	18.3%
Liver Diseases	164	4.4%
Immuno-Deficiency Diseases	142	3.9%

Note:
One individual can have multiple conditions.

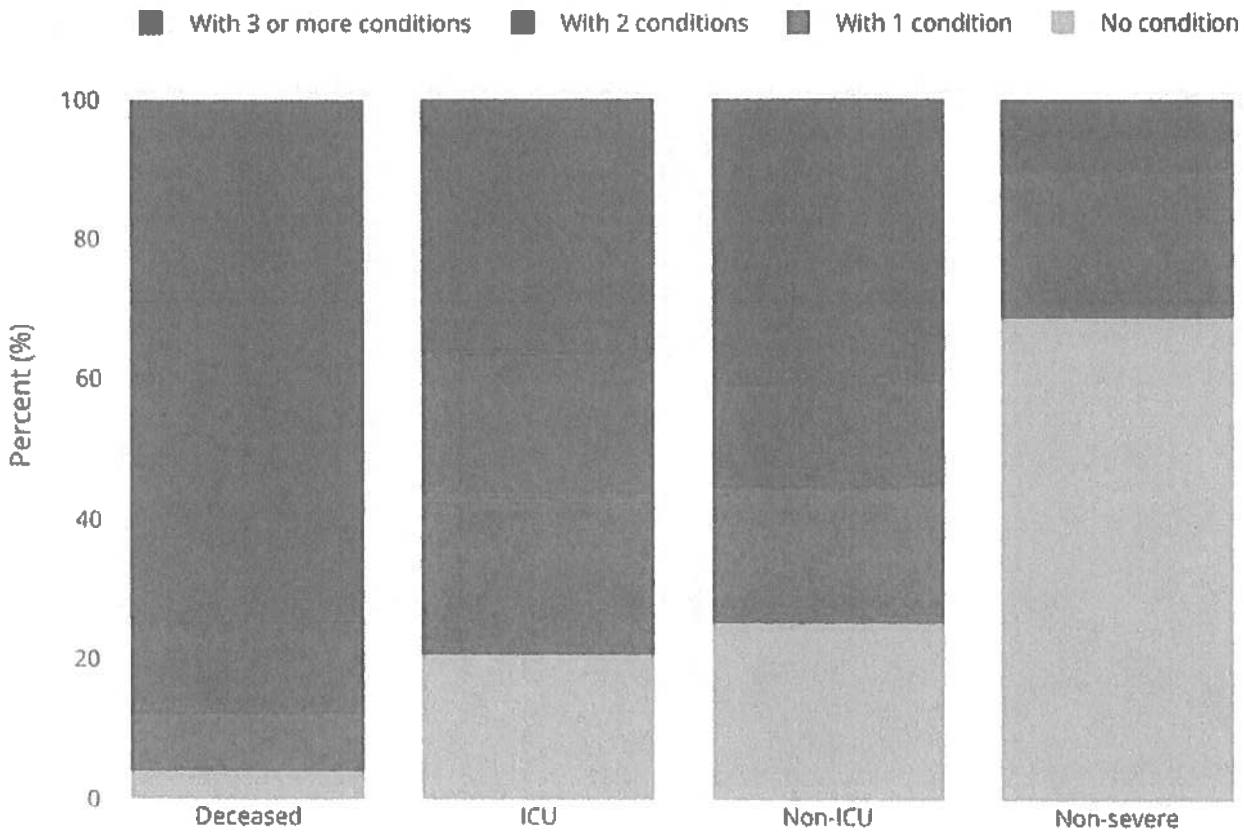

Figure 18: Percent of COVID-19 cases with no comorbidities, one comorbidity, two comorbidities, or three or more comorbidities by case severity (non-severe, hospitalized but non-ICU, ICU but not deceased, and deceased), all age groups and both sexes combined, all Alberta. Comorbitities included are: Diabetes, Hypertension, COPD, Cancer, Dementia, Stroke, Liver cirrhosis, Cardiovascular diseases (including IHD and Congestive heart failure), Chronic kidney disease, and Immuno-deficiency. Data updated on 2022-02-07.

Table 9. Number and percent of COVID-19 cases with no comorbidities, one comorbidity, two comorbidities, or three or more comorbidities by case severity (non-severe, hospitalized but non-ICU, ICU but not deceased, and deceased), all age groups and both sexes combined, Alberta. Comorbitities included are: Diabetes, Hypertension, COPD, Cancer, Dementia, Stroke, Liver cirrhosis, Cardiovascular diseases (including IHD and Congestive heart failure), Chronic kidney disease, and Immuno-deficiency. Data updated on 2022-02-07.

	Non-Severe		Non-ICU		ICU		Deaths	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
No condition	336545	68.8%	3687	25.2%	523	20.7%	148	4.0%
With 1 condition	100184	20.5%	2791	19.1%	579	22.9%	304	8.2%

	Non-Severe		Non-ICU		ICU		Deaths	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
With 2 conditions	30015	6.1%	2410	16.5%	520	20.6%	503	13.6%
With 3 or more conditions	22150	4.5%	5722	39.2%	906	35.8%	2731	74.1%

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COVID-19 in Alberta

Highlights | New Cases | Total Cases | Characteristics | Vaccine Outcomes | Severe outcomes | Comorbidities | Healthcare capacity | Geospatial | Travel history | Laboratory testing | Variants of Concern | Data export | Data notes

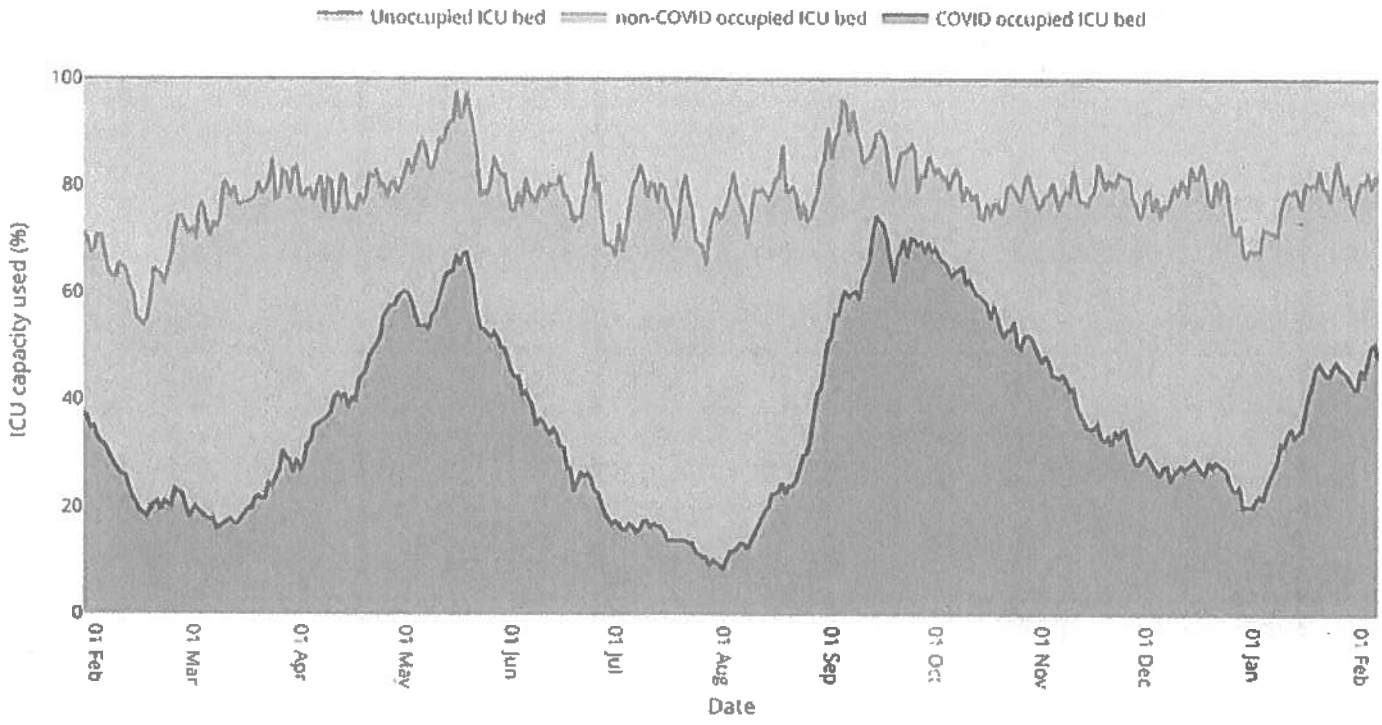
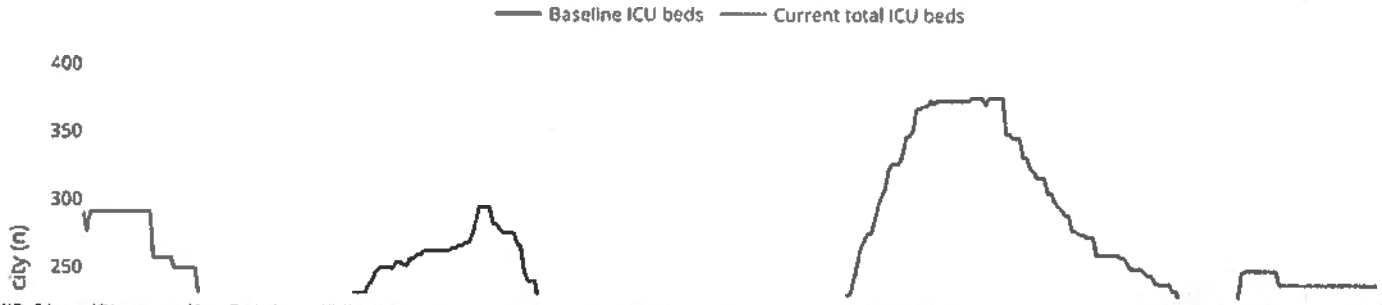


Figure 19: Intensive Care Unit (ICU) bed capacity. Data included may only be available at a lagged interval. As a result, the number of COVID occupied ICU beds on a particular day may not match the number reported elsewhere on the dashboard.



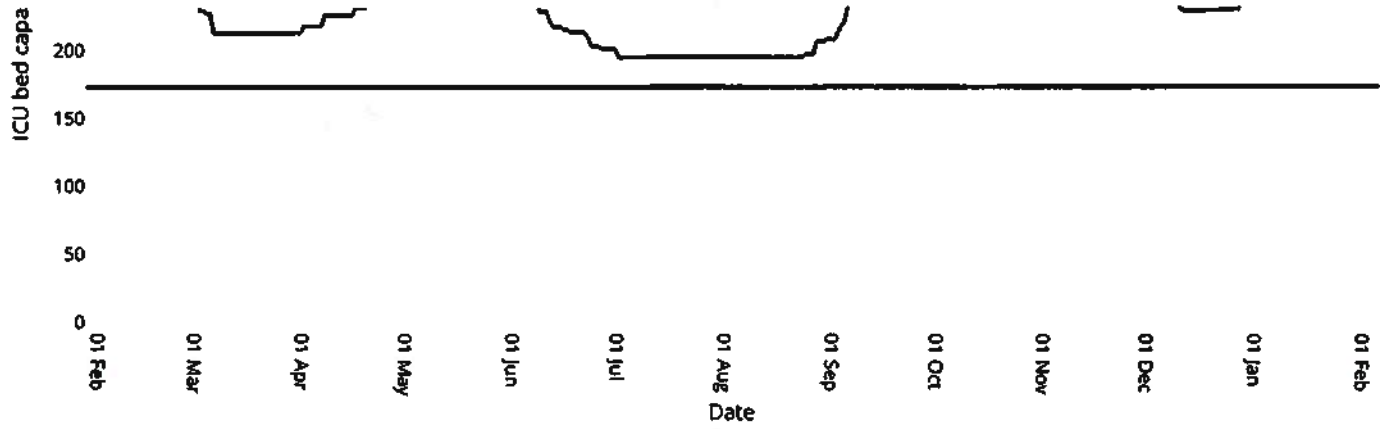


Figure 20: Total ICU bed capacity over time. Data included may only be available at a lagged interval. As a result, the number of COVID occupied ICU beds on a particular day may not match the number reported elsewhere on the dashboard.

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COVID-19 in Alberta

Summary

- The percent of cases from the Calgary Zone is 40%

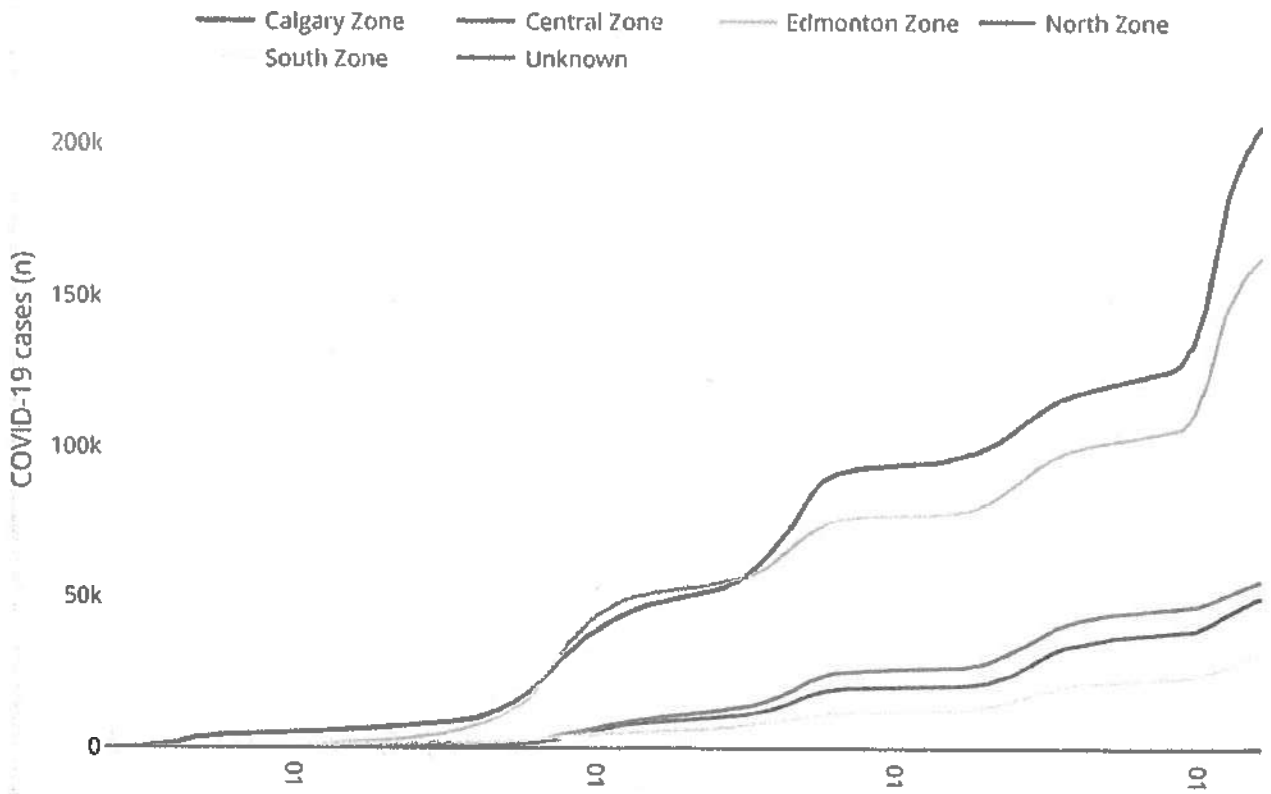


Figure 21: Cumulative COVID-19 cases in Alberta by zone and date reported to Alberta Health. Cases without a postal code or incorrect postal codes are labelled as unknown.

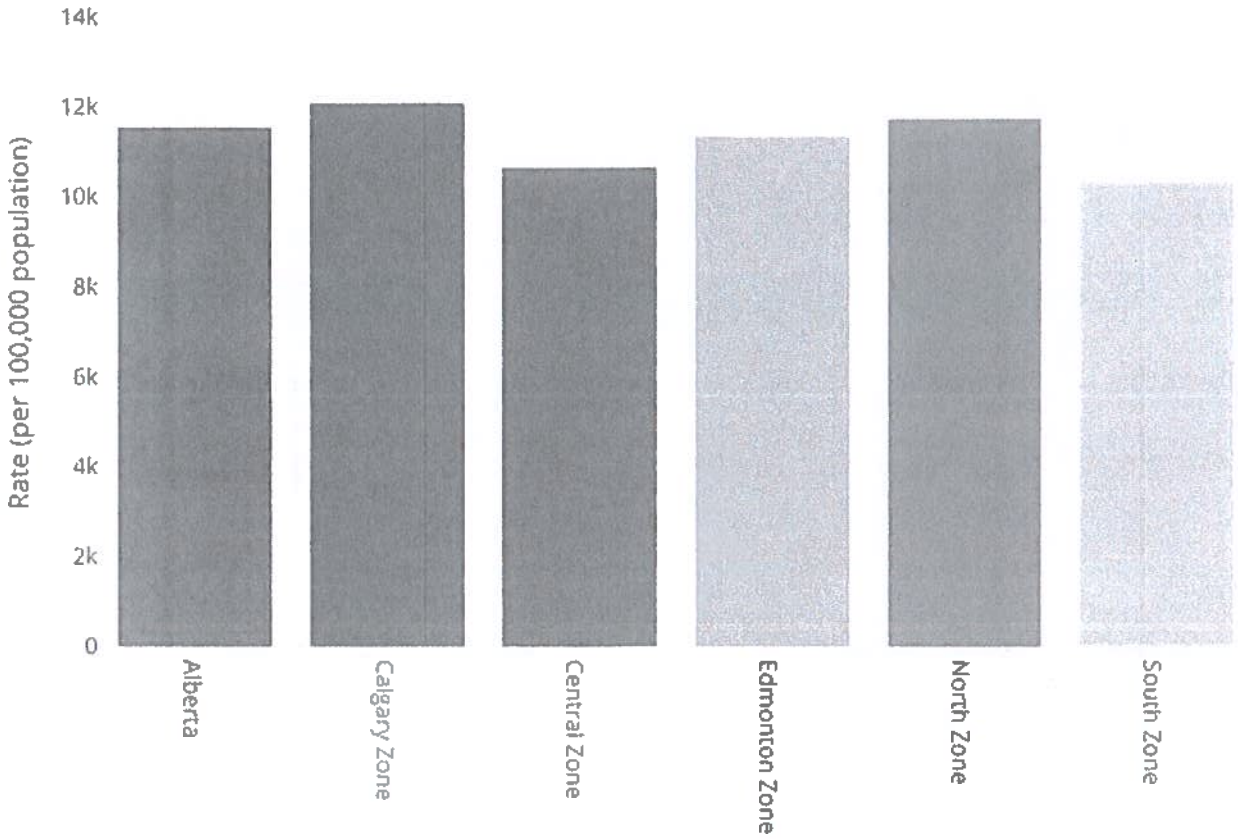


Figure 22: Rate of COVID-19 cases (per 100,000 population) in Alberta and by zone

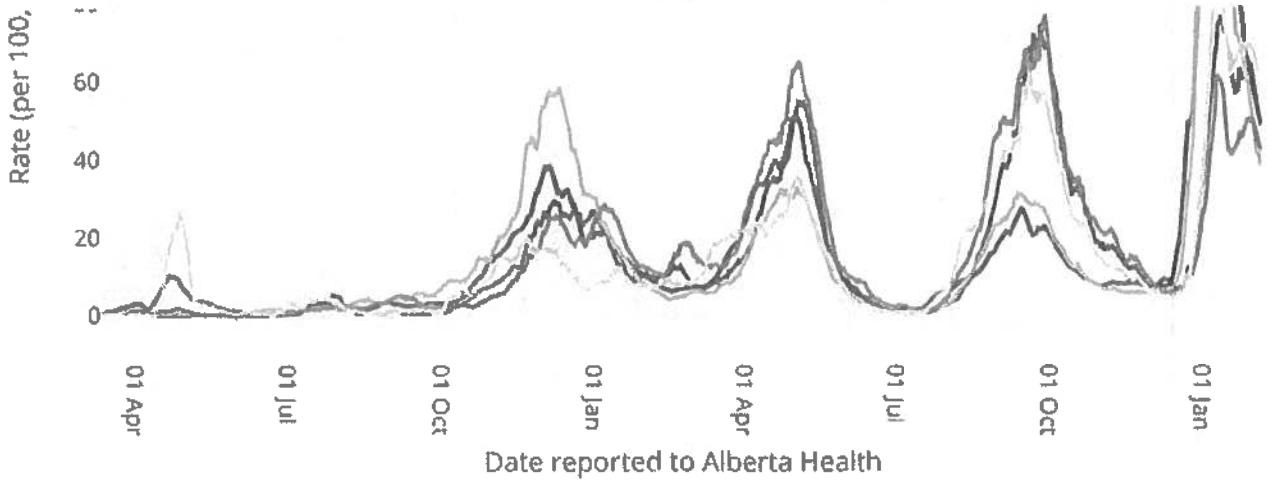


Figure 23: Seven day rolling-average for rates of COVID-19 (per 100,000 population) in Alberta by zone

Table 10. COVID-19 cases in Alberta by zone

Zone	Count	Percent
Calgary Zone	206,337	40
Central Zone	50,671	10
Edmonton Zone	163,289	32
North Zone	56,246	11
South Zone	32,119	6
Unknown	1,056	0
All	509,718	100

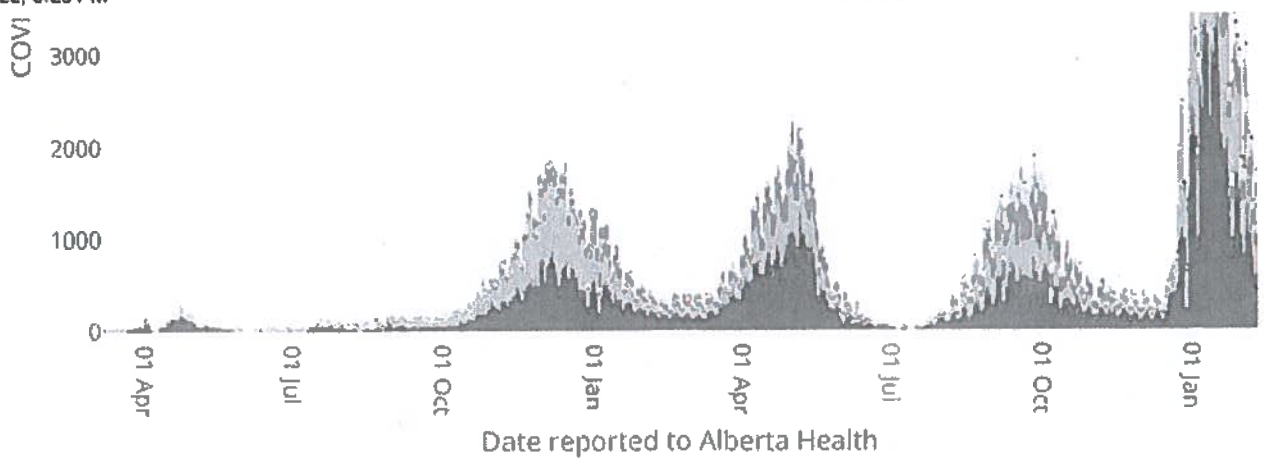
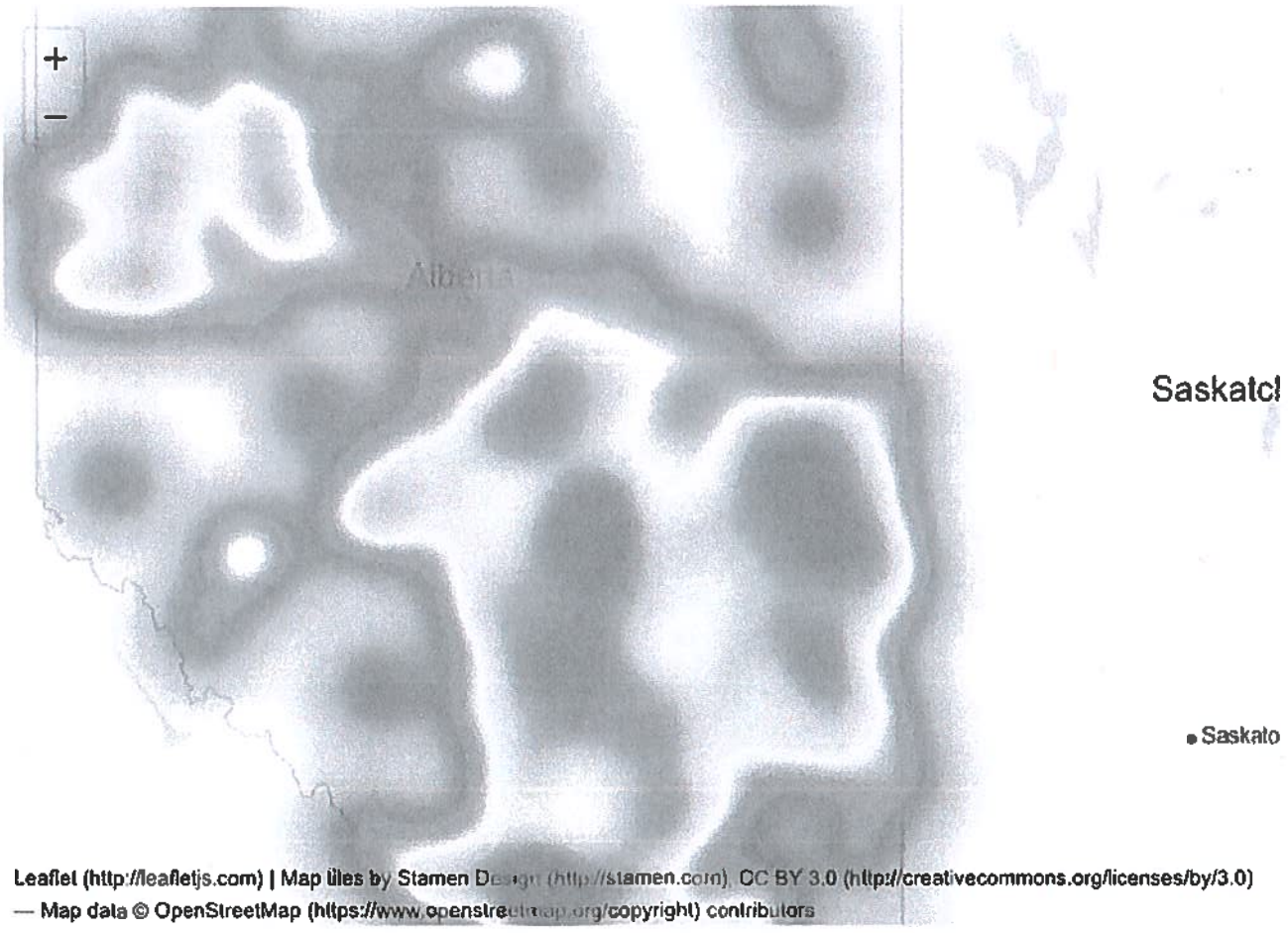
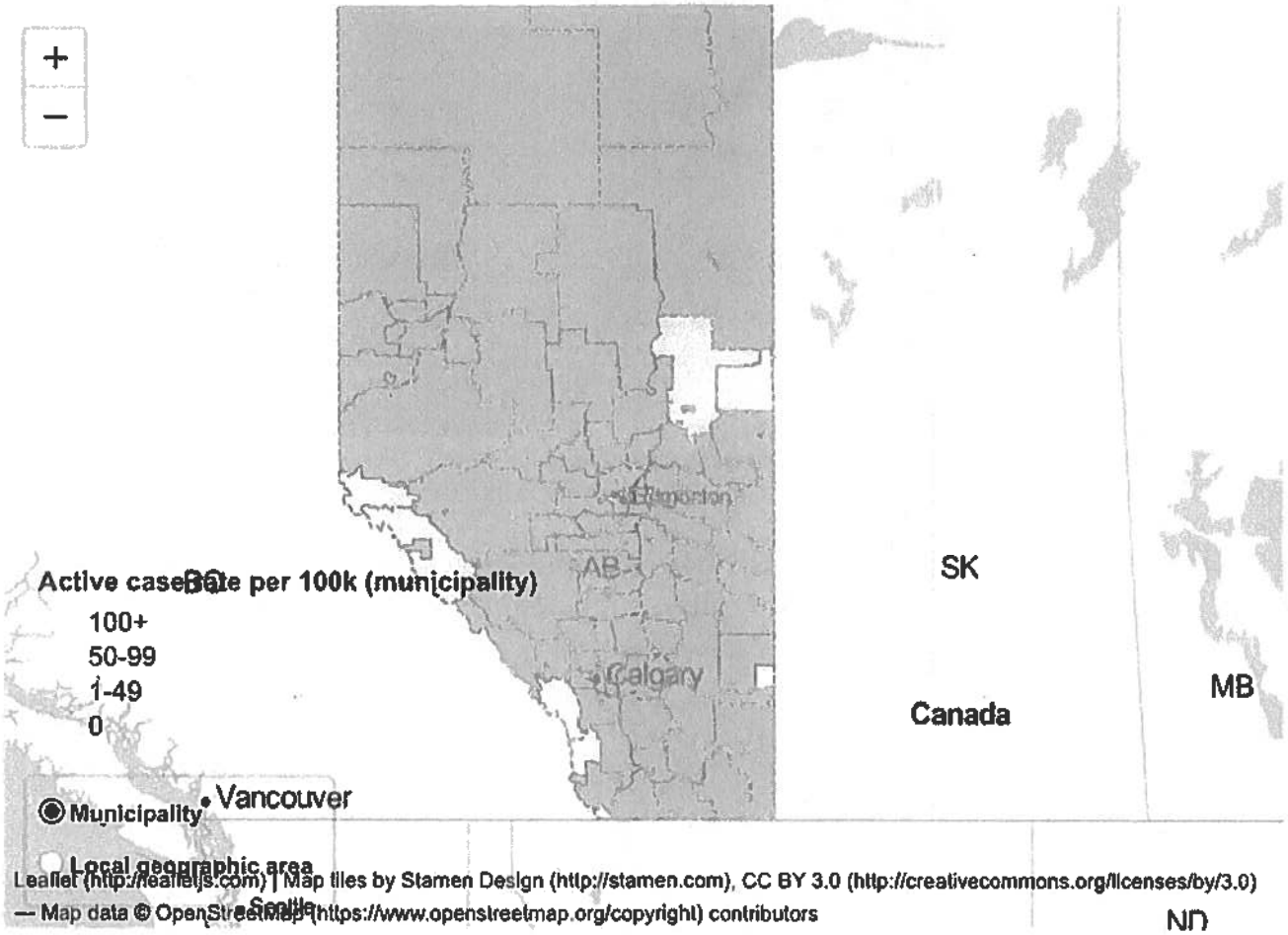


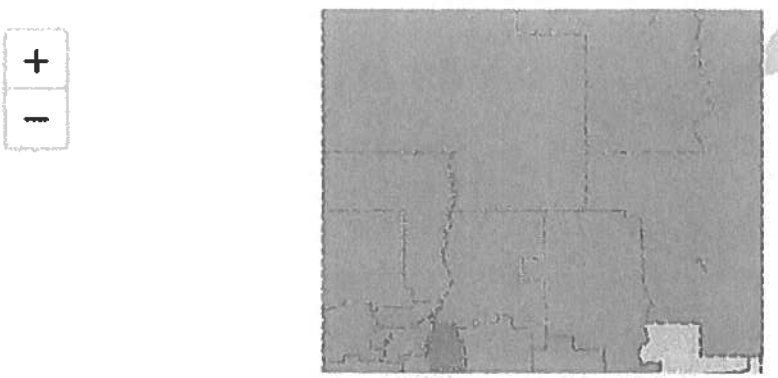
Figure 24: COVID-19 cases in Alberta by zone date reported to Alberta Health

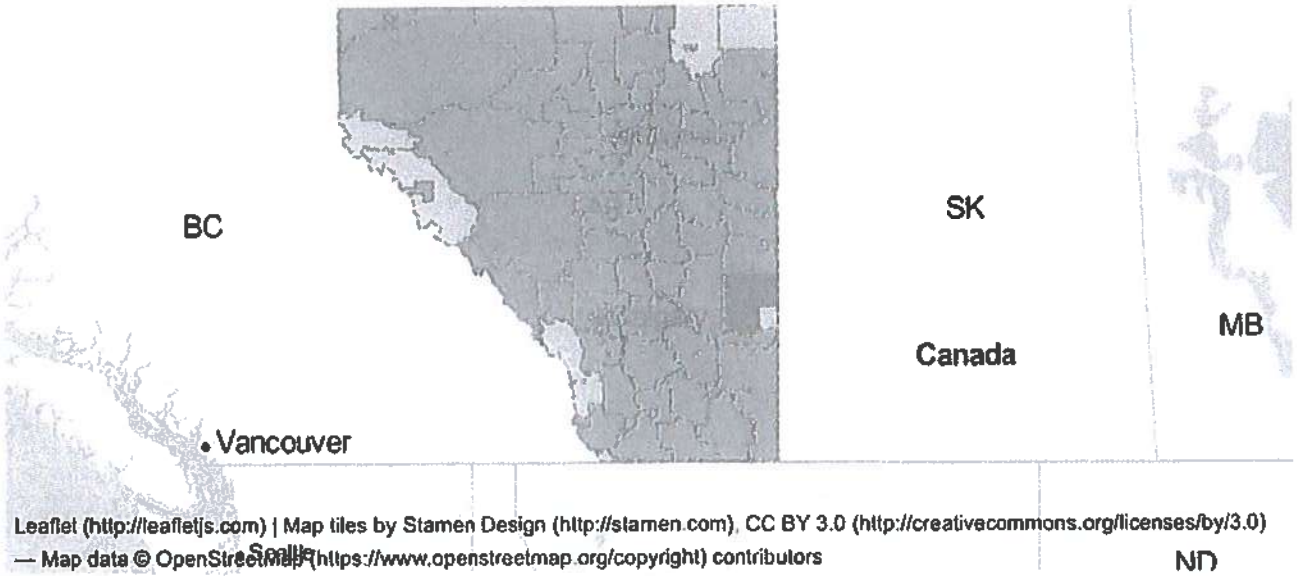


Only active cases are included. Postal codes are not exact locations of cases and are based on patient residence; random noise is applied for privacy. Cases without a postal code or incorrect postal codes are not included. Postal code information missing/invalid for: 379 case(s).



Geographies can be displayed by municipality or local geographic area (LGA). When viewing by municipality, regions are defined by metropolitan areas, cities, urban service areas, rural areas, and towns with approximately 10,000 or more people; smaller regions (i.e. villages, and reserves) are incorporated into the corresponding rural area. Cases without a postal code or incorrect postal codes are not included. Location information missing/invalid for: 2443 case(s).





Comparison restricted to active cases. Unknown exposure defined as cases that are not linked to travel or a known contact/setting of exposure to COVID-19.

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COVID-19 in Alberta

Summary

- 1.135610^{4} (2%) were acquired through travel outside of Alberta
- United States was reported the most frequently (n = 2048; 18%).

Table 11. Country of travel among travel-acquired cases

Country	Number (n)	Percent (%)
Domestic only	6,113	54
International	2,900	26
International - USA only	1,926	17
Missing	417	4

Note:
Cases may have travelled to multiple countries

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COVID-19 in Alberta

Highlights | New Cases | Total Cases | Characteristics | Vaccine Outcomes | Severe outcomes | Comorbidities | Healthcare capacity | Geospatial | Travel history | Laboratory testing | Variants of Concern | Data export | Data notes

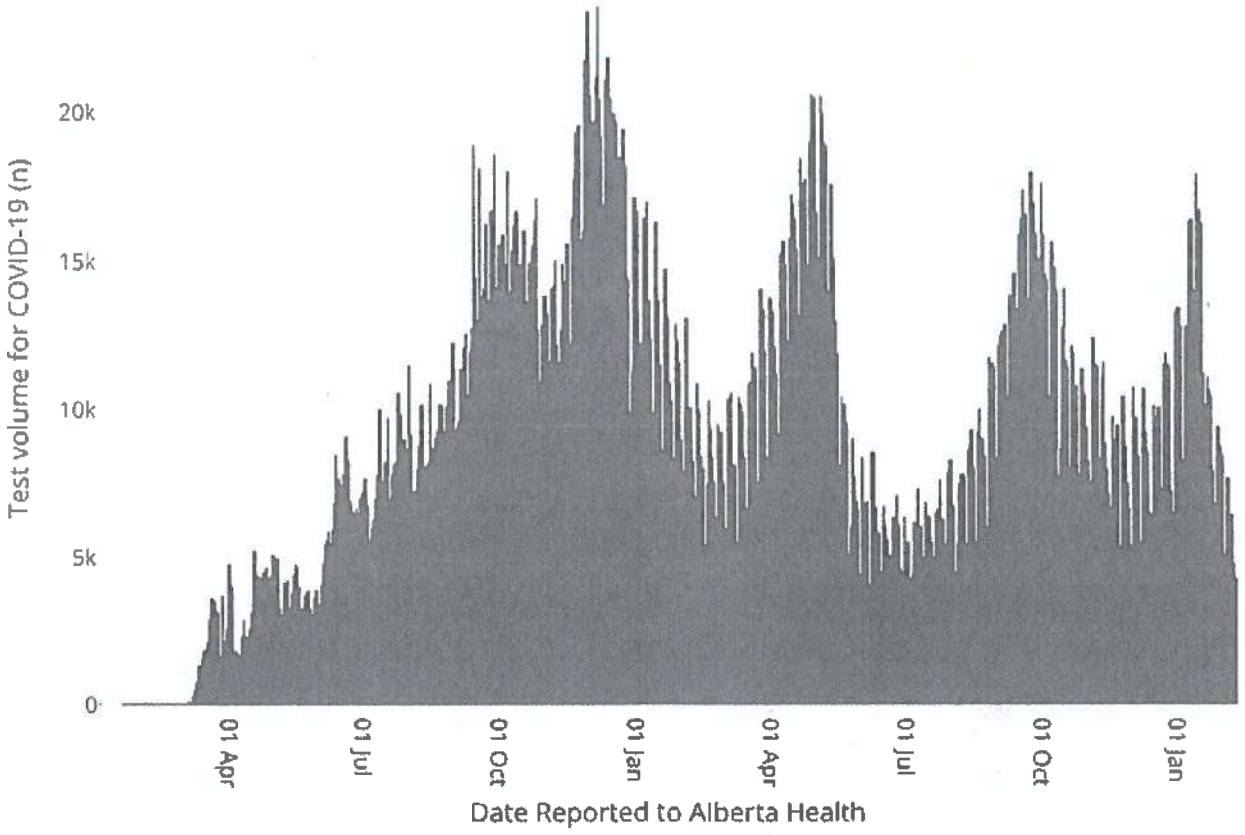


Figure 25: Tests performed for COVID-19 in Alberta by day. Tests can be performed for the same person multiple times.

Table 12. COVID-19 testing in Alberta

	Number (n)
Test volume	6,793,485
People tested	2,717,900

Table 13. People tested for COVID-19 in Alberta by zone

Zone	Count	Percent
Calgary Zone	1,075,920	40
Central Zone	245,643	9
Edmonton Zone	859,300	32
North Zone	260,016	10
South Zone	172,089	6
Unknown	104,932	4
All	2,717,900	100

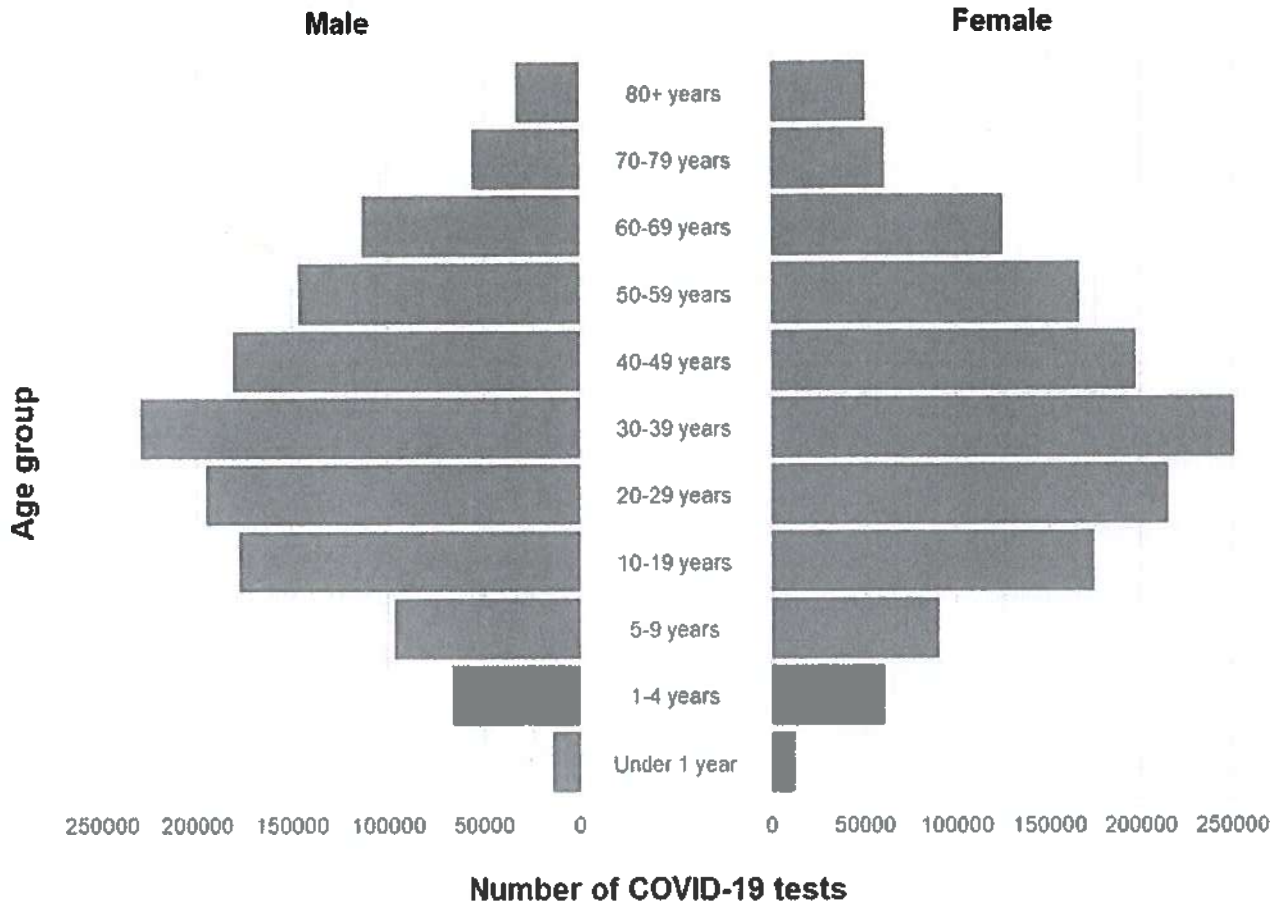


Figure 26: People tested for COVID-19 in Alberta by age group and gender

Table 14. People tested for COVID-19 in Alberta by age group and gender

	Gender							
	Female		Male		Unknown		All	
Age	Count	Percent	Count	Percent	Count	Percent	Count	Percent
Under 1 year	12,447	0	14,436	1	35	0	26,918	1
1-4 years	60,549	2	66,687	2	89	0	127,325	5
5-9 years	89,757	3	96,849	4	135	0	186,741	7
10-19 years	174,373	6	177,583	7	484	0	352,440	13
20-29 years	215,316	8	195,348	7	778	0	411,442	15
30-39 years	251,049	9	229,657	8	768	0	481,474	18

Note:
Count represents the number of people tested

	Gender							
	Female		Male		Unknown		All	
Age	Count	Percent	Count	Percent	Count	Percent	Count	Percent
40-49 years	197,584	7	180,697	7	567	0	378,848	14
50-59 years	166,889	6	145,901	5	474	0	313,265	12
60-69 years	125,151	5	112,963	4	285	0	238,399	9
70-79 years	60,779	2	56,040	2	100	0	116,919	4
80+ years	49,753	2	32,606	1	142	0	82,501	3
Unknown	574	0	617	0	436	0	1,628	0
All	1,404,221	52	1,309,384	48	4,293	0	2,717,900	100

Note:
Count represents the number of people tested

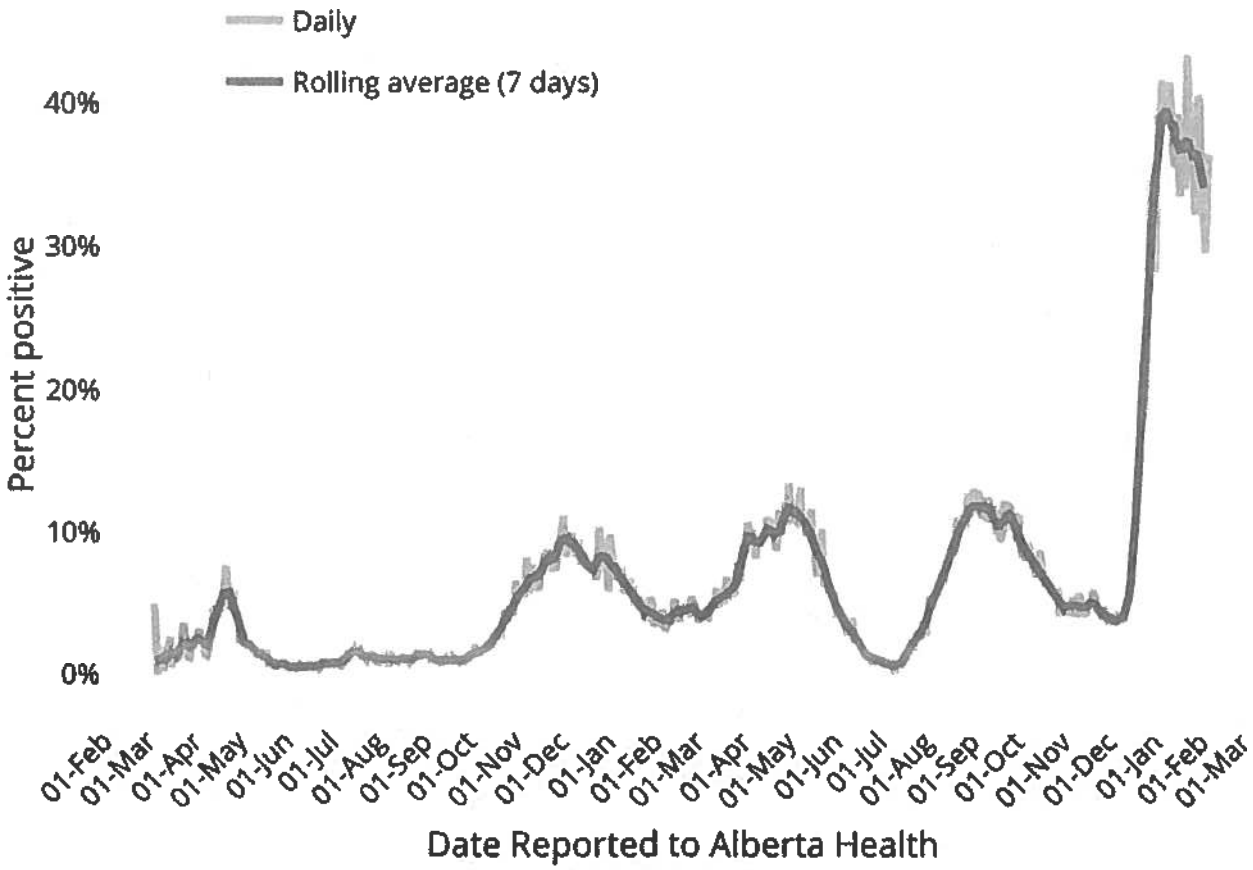
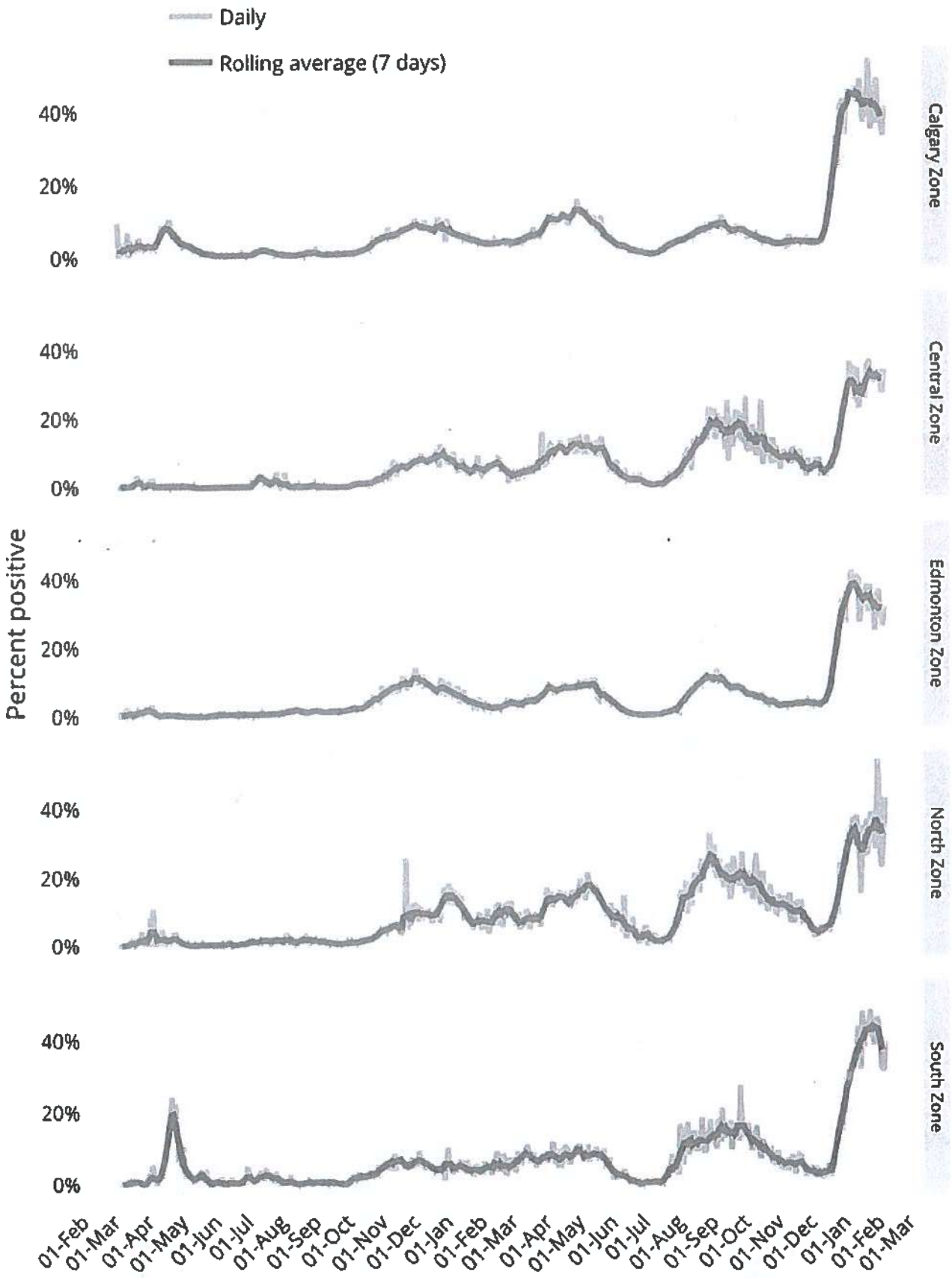


Figure 27: Cumulative and daily test positivity rate for COVID-19 in Alberta.



Date Reported to Alberta Health

Figure 28: Positivity rate for COVID-19 in Alberta by zone.

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2022-February-08 12:01

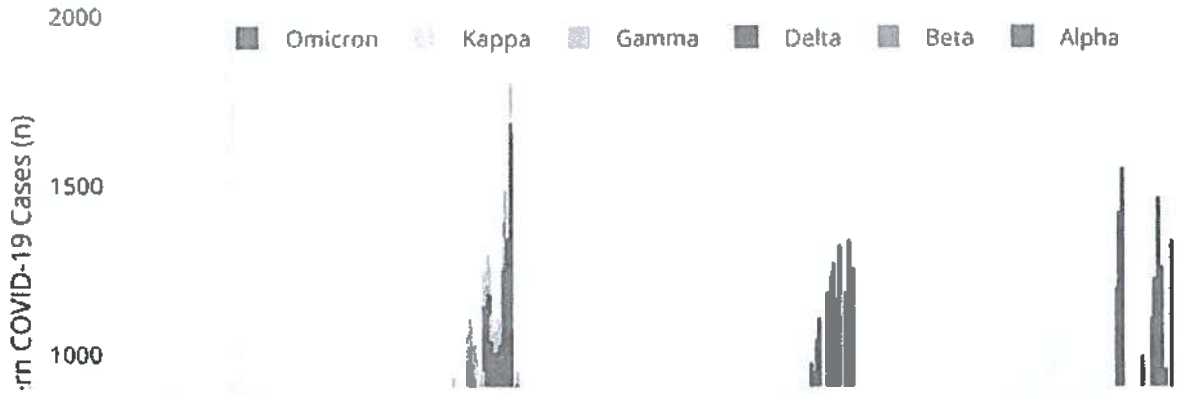
COVID-19 in Alberta

Summary

NOTE: People are identified as COVID-19 cases prior to variant of concern identification. As such, variant of concern reporting is delayed compared to date the case was reported to Alberta Health.

Due to the large number of positive COVID-19 cases, the lab screened a sample of positive cases between May 1, 2021 and May 31, 2021, September 9, 2021 and November 23, 2021, and after December 23rd, 2021.

- **142,420** variants of concern identified
  - **1351** active cases
  - **1,470** died



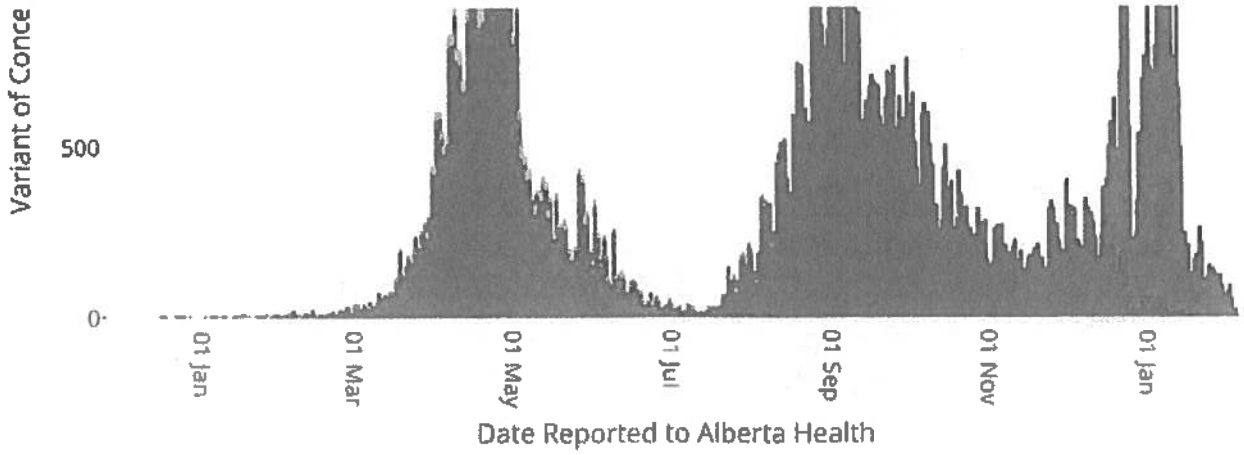


Figure 29: Variant of concern COVID-19 cases in Alberta by day. Note: cases are identified as COVID-19 positive prior to being identified as a variant of concern. Data included up to end of day February 07, 2022.

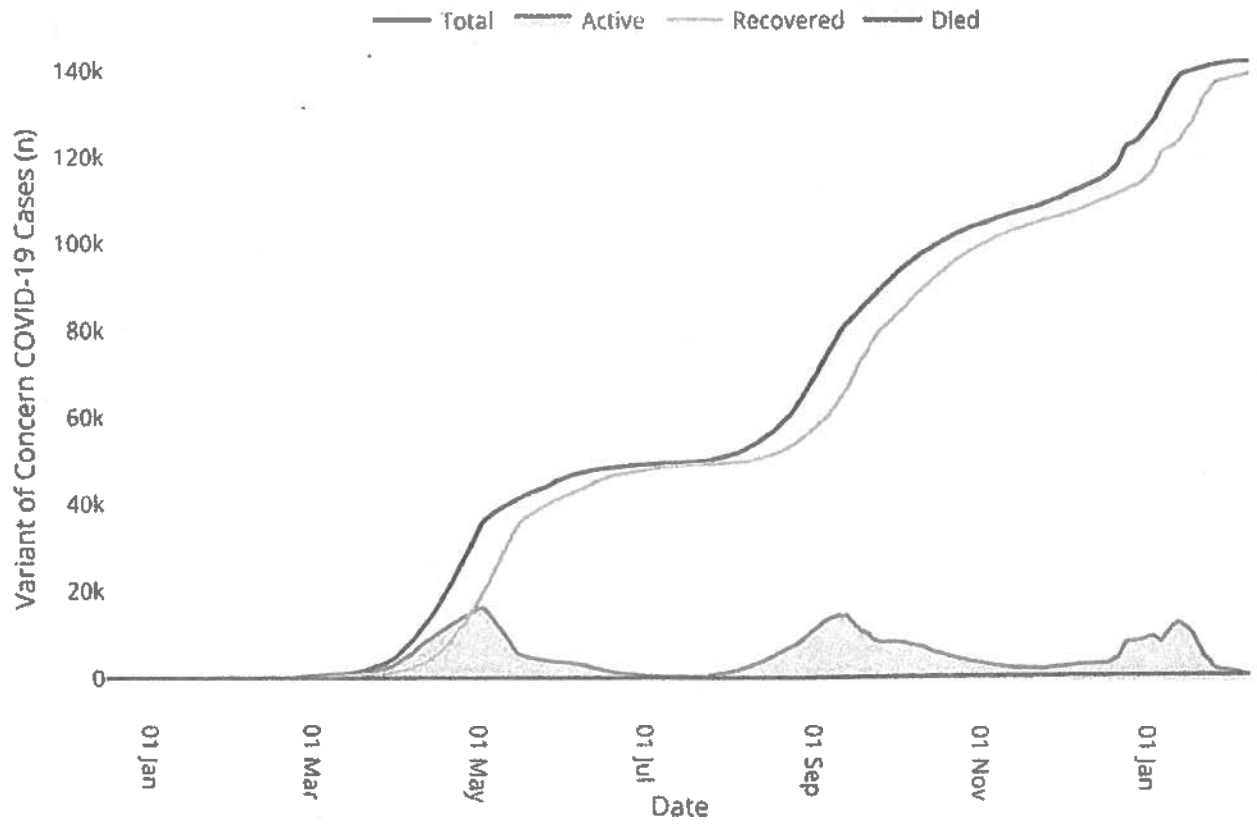


Figure 30: Variant of concern COVID-19 cases in Alberta by day and case status. Recovered is based on the assumption that a person is recovered 14 days after a particular date (see data notes tab), if they did not experience severe outcomes (hospitalized or deceased). Cases are under investigation and numbers may fluctuate as cases are resolved. Data included up to end of day February 07, 2022.

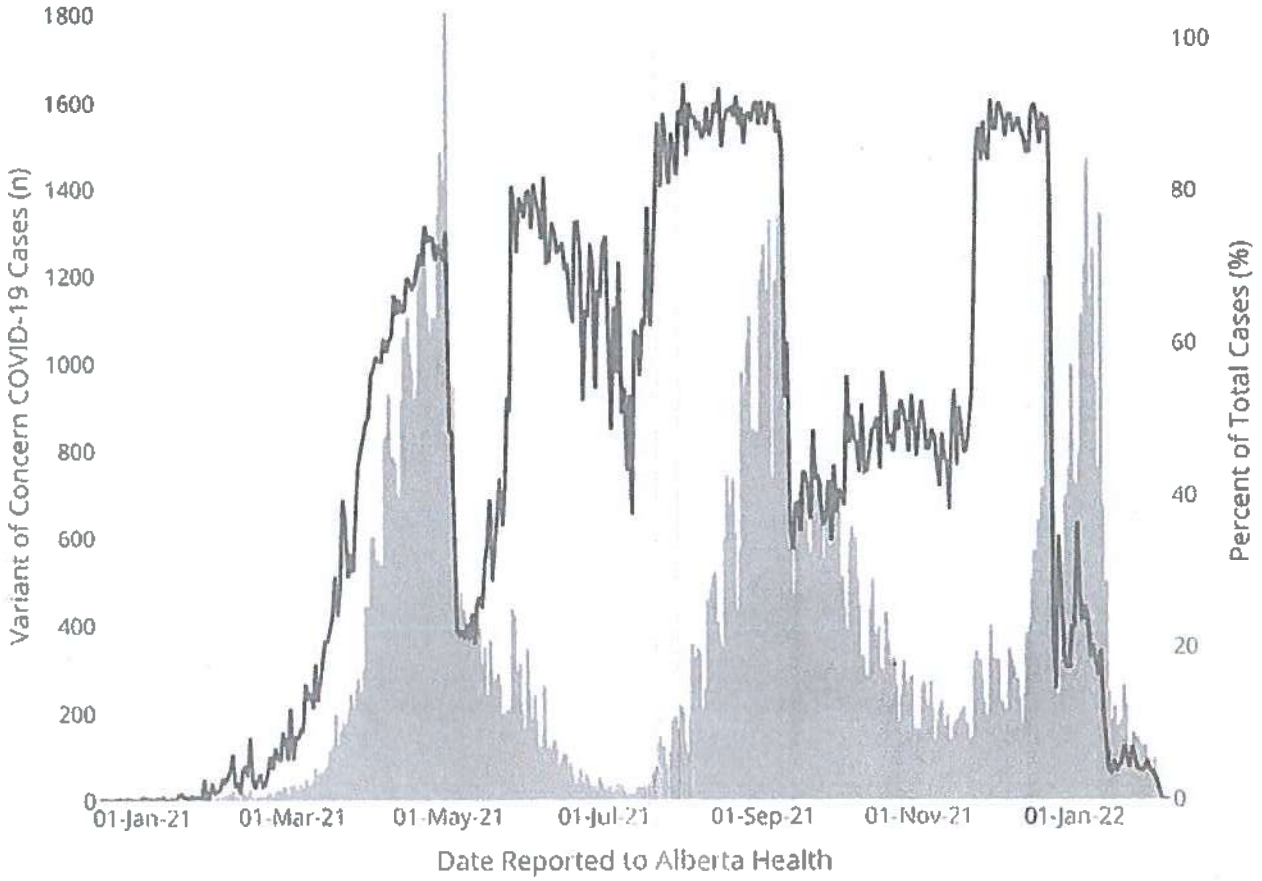
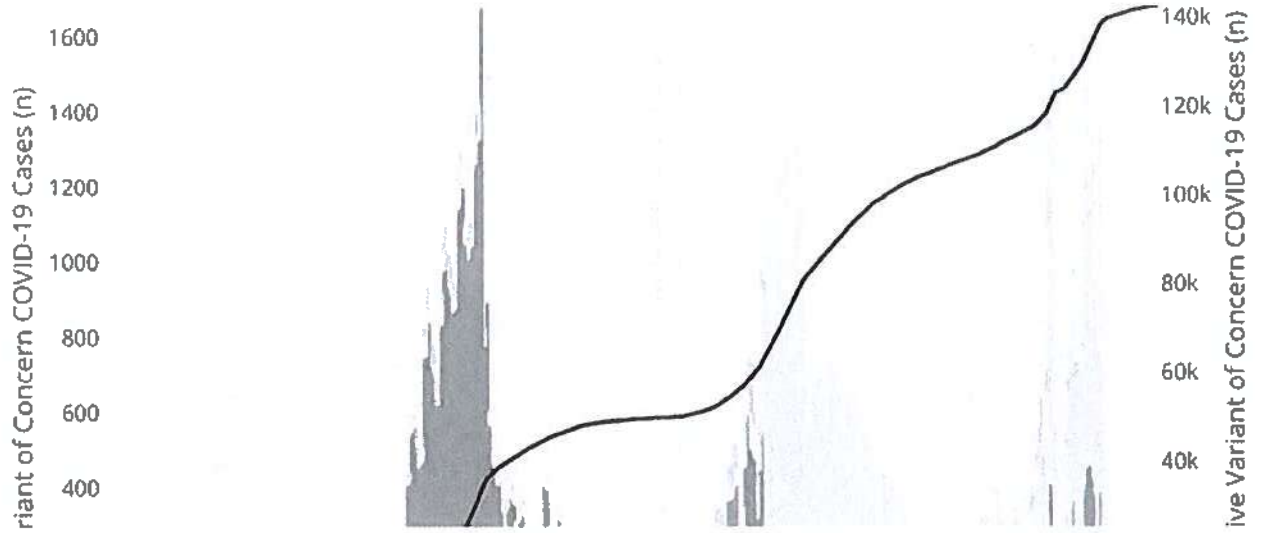


Figure 31: Variant of concern COVID-19 cases in Alberta by day. The bars represent new variant of concern (VOC) cases by day, while the line indicates the proportion of variant of concern cases identified compared to other cases of COVID-19. Note: cases are identified as COVID-19 positive prior to being identified as a variant of concern strain. Data included up to end of day February 07, 2022.



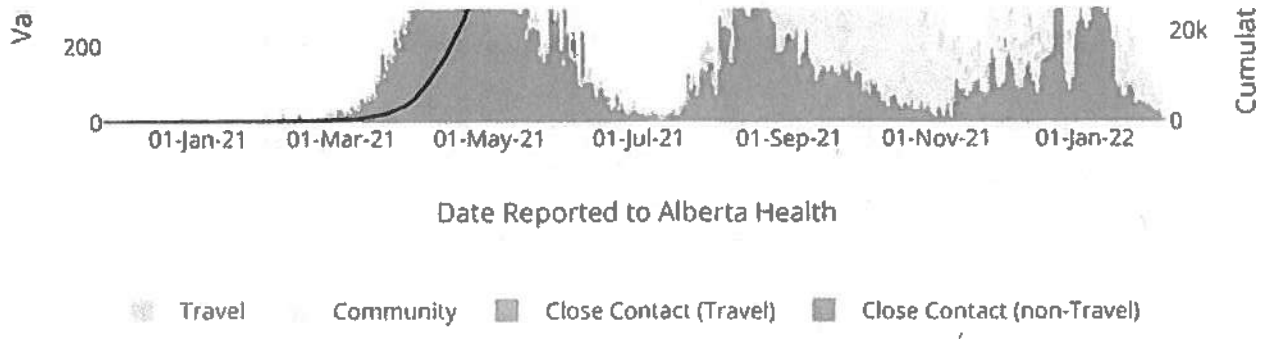


Figure 32: Variant of concern COVID-19 cases in Alberta by day, by exposure type. Data included up to end of day February 07, 2022.

Geospatial

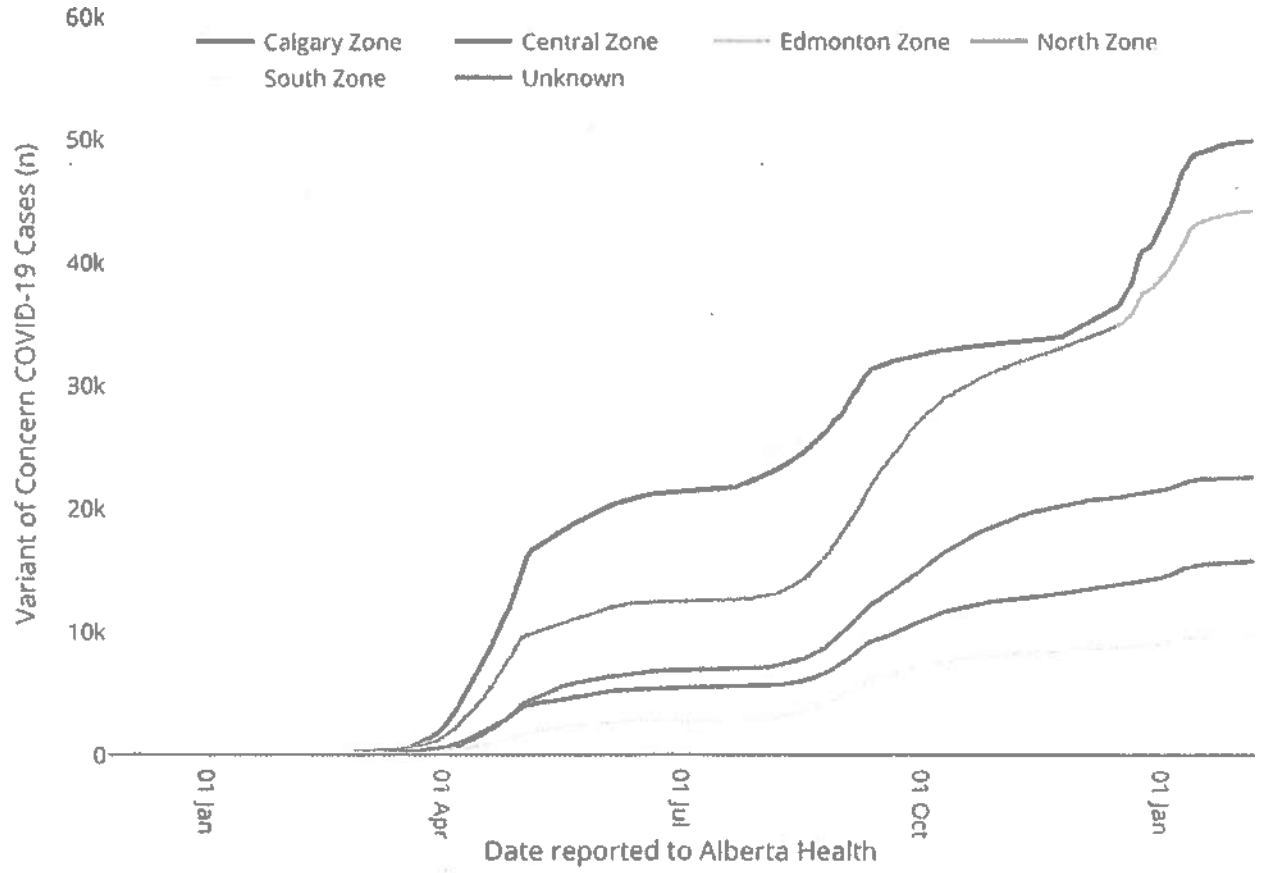


Figure 33: Cumulative variant of concern COVID-19 cases in Alberta by zone and date reported to Alberta Health. Cases without a postal code or incorrect postal codes are labelled as unknown. Data included up to end of day February 07, 2022.

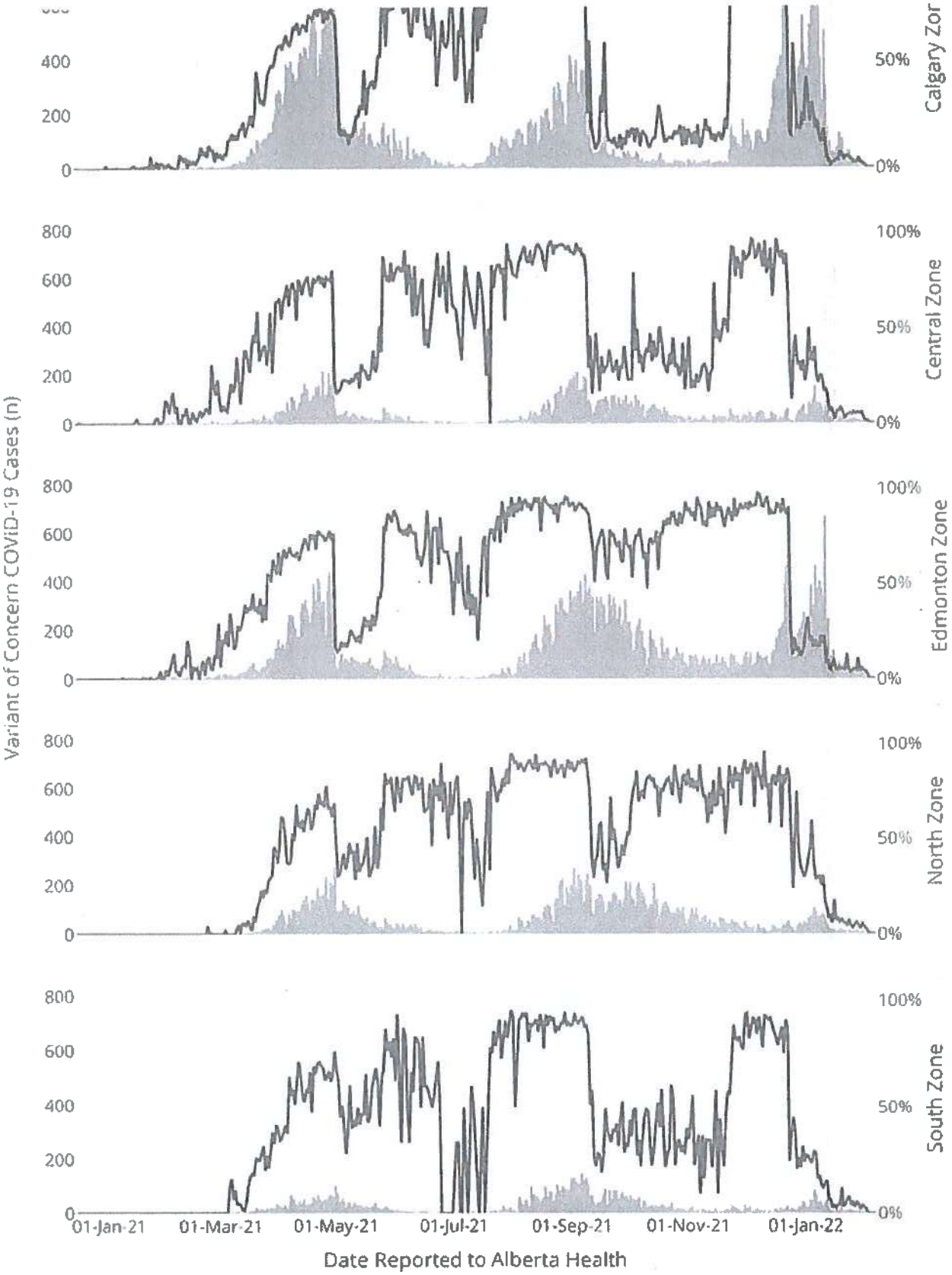


Figure 34: Variant of concern COVID-19 cases in Alberta by day and by zone. The bars represent new variant of concern (VOC) cases by day, while the line indicates the proportion of variant of concern cases identified compared to other cases of COVID-19. Note: cases are identified as COVID-19 positive prior to being identified as a variant of concern strain. Data included up to end of day February 07, 2022.

Table 15. Variants of concern COVID-19 cases identified in Alberta and by Zone

Zone	Alpha	Beta	Delta	Gamma	Kappa	Omicron	Total
Calgary Zone	20,045	79	16,381	804	6	12,528	49,843
Central Zone	5,458	2	8,565	192	0	1,604	15,821
Edmonton Zone	11,429	65	22,948	1,063	13	8,692	44,210
North Zone	6,253	34	14,173	768	0	1,387	22,615
South Zone	2,686	0	6,137	97	0	971	9,891
Unknown	0	0	4	0	0	36	40
Alberta	45,871	180	68,208	2,924	19	25,218	142,420

Table 16. Variants of concern COVID-19 cases identified among active cases in Alberta and by Zone

Zone	Delta	Omicron	Total
Calgary Zone	10	432	442
Central Zone	4	158	162
Edmonton Zone	0	517	517
North Zone	3	126	129
South Zone	2	99	101
Unknown	0	0	0
Alberta	19	1,332	1,351

Note: Active cases are now based on information on a sample of positive cases only and should be interpreted with caution.

Table 17. Variants of concern COVID-19 cases identified who are active, recovered, or died in Alberta and by Zone

Zone	Active	Died	Recovered	Total
Calgary Zone	442	317	49,084	49,843
Central Zone	162	280	15,379	15,821

Zone	Active	Died	Recovered	Total
Edmonton Zone	517	425	43,268	44,210
North Zone	129	255	22,231	22,615
South Zone	101	193	9,597	9,891
Unknown	0	0	40	40
Alberta	1,351	1,470	139,599	142,420

Where Disease Was Likely Acquired

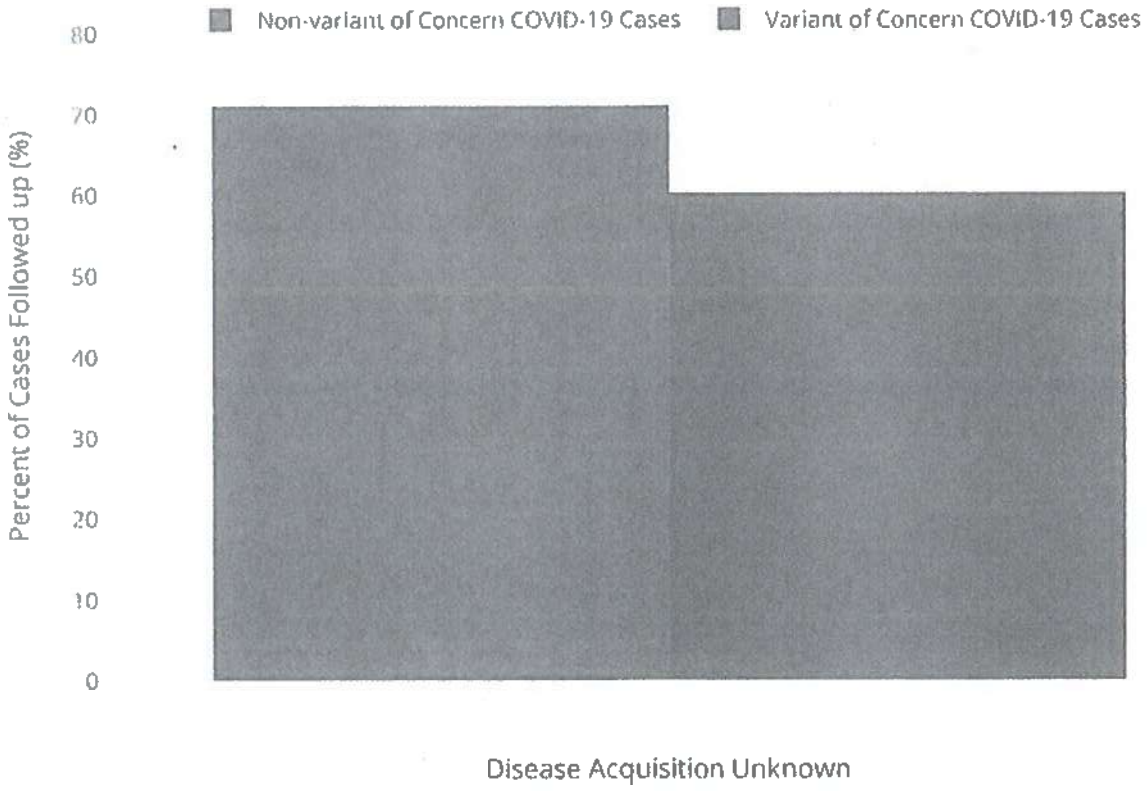


Figure 35: Percent of variants of concern (VOCs) and non-VOCs who were followed up and have an unknown place of disease acquisition. February 07, 2022.

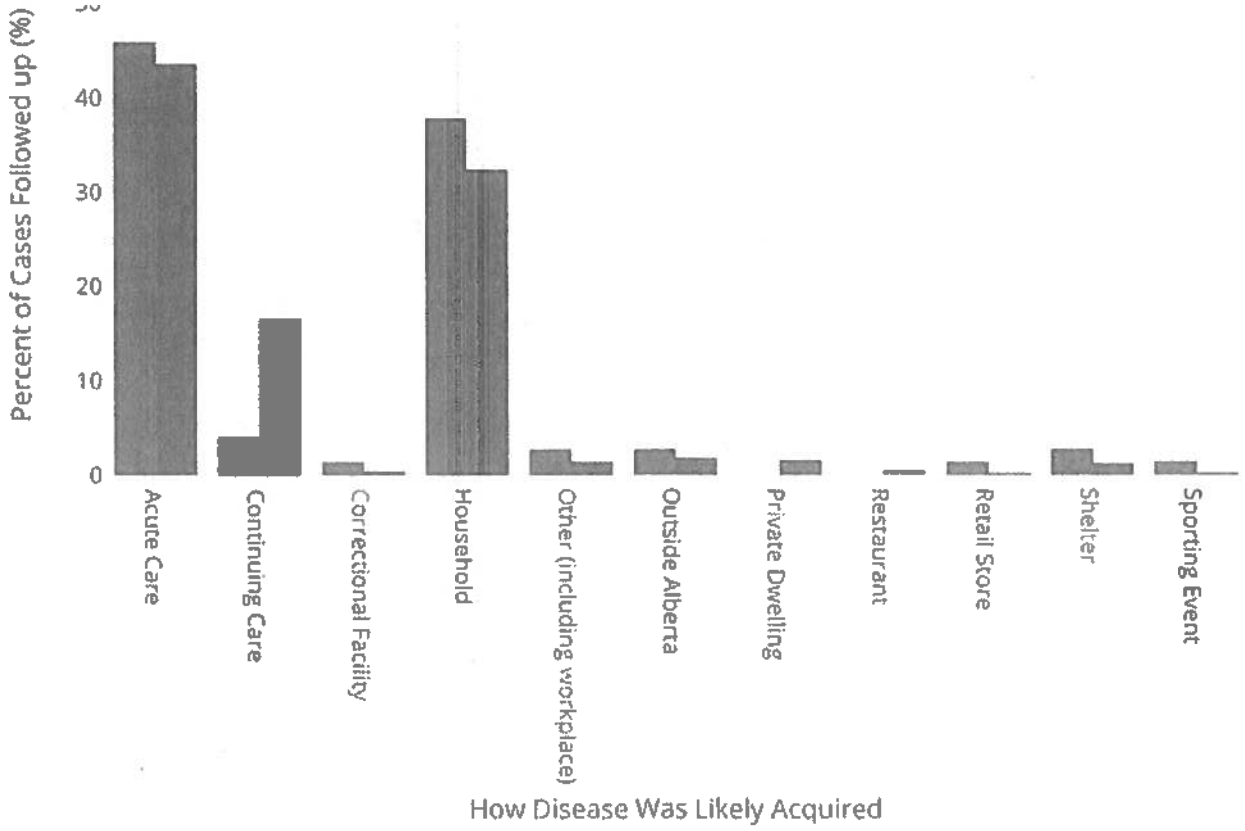


Figure 36: Where disease was likely acquired among active cases who have been followed-up with a known place of acquisition among variants of concern (VOCs) and non-VOCs. February 07, 2022.

Laboratory Testing

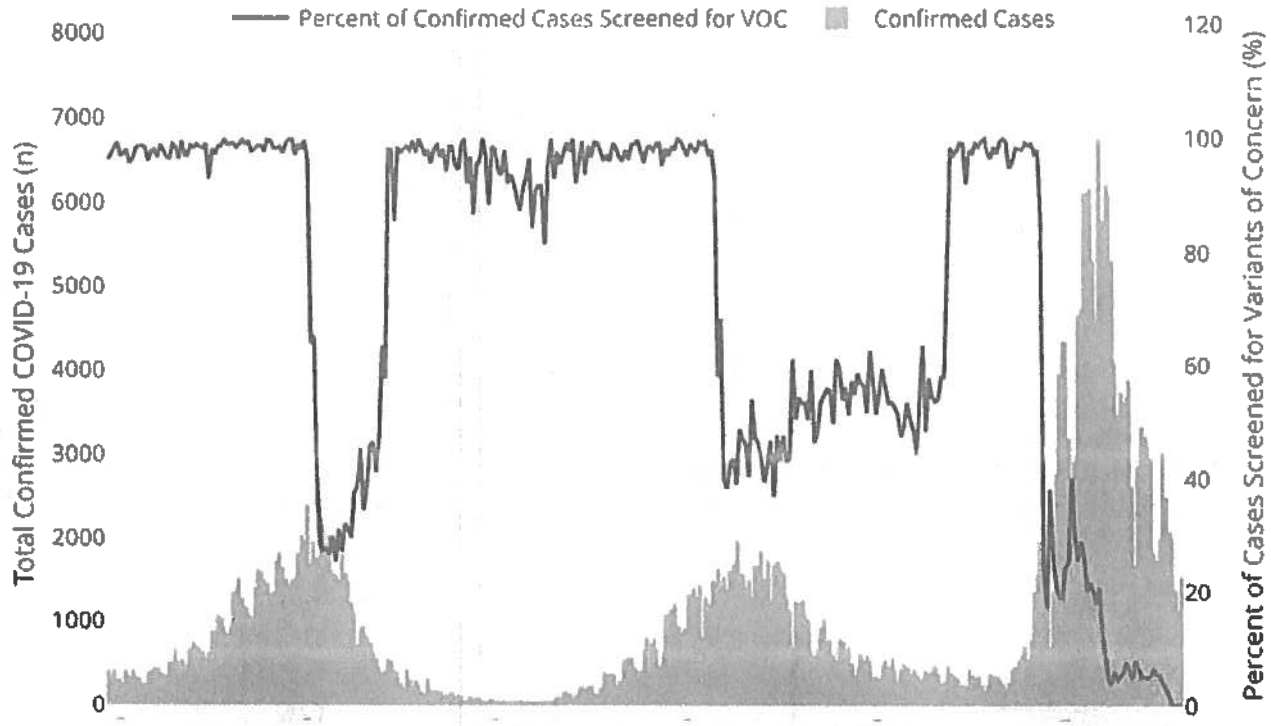


Figure 37: Total confirmed COVID-19 cases and percent of cases screend for variants of concern by day. Note: cases are identified as COVID-19 positive prior to being identified as a variant of concern. Data included up to end of day February 07, 2022.

Analytics and Performance Reporting Branch
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2022-February-08 12:01

COVID-19 in Alberta

Highlights | New Cases | Total Cases | Characteristics | Vaccine Outcomes | Severe outcomes | Comorbidities | Healthcare capacity | Geospatial | Travel history | Laboratory testing | Variants of Concern | Data export | Data notes

Visit this link (https://www.alberta.ca/stats/covid-19-alberta-statistics.htm#data-export) to access various data-sets in csv format.

Analytics and Performance Reporting Branch
Epidemiology and Surveillance Unit
2022-February-08 12:01

COVID-19 in Alberta

Data sources

The Provincial Surveillance Information system (PSI) is a laboratory surveillance system which receives positive results for all Notifiable Diseases and diseases under laboratory surveillance from Alberta Precision Labs (APL). The system also receives negative results for a subset of organisms such as COVID-19. The system contains basic information on characteristics and demographics such as age, zone and gender. The Communicable Disease Reporting System (CDRS) at Alberta Health and the Communicable Disease Outbreak Management (CDOM) system at Alberta Health Services contains information on COVID-19 cases. Data Integration and Measurement Reporting (DIMR) database at Alberta Health Services contains up to date information on people admitted and discharged from hospital in Alberta. Information such as hospitalizations and ICU admissions are received through enhanced case report forms sent by Alberta Health Services (AHS).

Definitions

Recovered

Active and recovered status is a surveillance definition to try to understand the number of active cases in the population. It is not related to clinical management of cases. It is based on the assumption that a case is recovered 14 days after a particular date. For confirmed cases, specimen collected date is used and for probable cases date reported to Alberta Health is used. If a case is hospitalized, the recovered date is when their symptoms have resolved based on case follow-up, or 10 days after being discharged.

COVID-19 Deaths

A death resulting from a clinically compatible illness, in a probable or confirmed COVID-19 case, unless there is a clear alternative cause of death identified (e.g., trauma, poisoning, drug overdose).

A Medical Officer of Health or relevant public health authority may use their discretion when determining if a death was due to COVID-19, and their judgement will supersede the above criteria.

A death due to COVID-19 may be attributed when COVID-19 is the cause of death or is a contributing factor.

Lab Positivity

COVID-19 percent positivity in Alberta is calculated using the Test Over Test method, which is the same method employed by the US Centers for Disease Control and Prevention. The calculation is as follows:

Daily Number of Positive Tests / (Daily Number of Positive Tests + Daily Number of Negative Tests) Q/RT-PCR tests are the only COVID-19 tests included in this calculation.

https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/calculating-percent-positivity-faq.html (https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/calculating-percent-positivity-faq.html)

Comorbidities

The following comorbitities are included in respective analyses: Diabetes, Hypertension, COPD, Cancer, Dementia, Stroke, Liver cirrhosis, Cardiovascular diseases (including IHD and Congestive heart failure), Chronic kidney disease, and Immuno-deficiency.

Disclaimer

The content and format of this report are subject to change. Cases are under investigation and numbers may fluctuate as cases are resolved. Data included in the interactive data application are up-to-date as of end of day February 07, 2022.

TAB 11

Alberta Government

Alberta Health
March 2, 2022
AR 199655

ADVICE TO HONOURABLE JASON COPPING
MINISTER OF HEALTH
COVID-19 Measures in Schools
For Information

ISSUE
The use of public health measures to reduce the risk of COVID-19 transmission in schools.

PURPOSE
To provide information and analysis regarding public health measures implemented in schools and their impact on COVID-19 transmission, with a focus on Alberta cases and data.

ANALYSIS
- Public health measures implemented in Alberta have impacted the transmission of COVID-19 within schools and their surrounding communities, and this is consistent with similar evidence reported in the literature.
- Analysis of research literature indicates wearing masks can be effective in contributing to reducing the transmission of COVID-19 in public and community settings; however, the impact of masking in schools is less clear.
  - The range of policies in place across different jurisdictions limits the ability to evaluate the impact of specific measures for daycare or school settings due to variability in the combination of measures implemented.
  - It is difficult to determine the effect of removing or changing one measure (e.g. masking), as many of the studies examining COVID-19 incidence in schools had layered infection prevention and control measures in place.
- Studies found that transmission in schools has remained limited under a wide range of prevention measures, such as masking, cohorting, cancelling higher-risk activities, distancing, hygiene protocols, reduced class size, and enhanced ventilation.
- While in-person schooling carries an increased risk of infection for household members, studies looking at this outcome have shown mitigation measures like teacher masking, daily symptom screening, and the closure of extra-curricular activities were associated with significant reduction in risk.
- According to observed Alberta data, which could be influenced by factors other than masking, school boards without mask mandates at the start of the school year (September 2021) had three times more outbreaks in their schools in the first few months of the school year.
  - In addition, case and hospitalization rates per 100,000 population in Alberta for children (five to 11 years old) and adults (30 to 59 years old) were lower in areas where mask mandates were required.
- One specific outbreak in Westglen School in Edmonton (fall 2021) illustrates that a school outbreak can lead to increased spread within the local community (71 cases: one staff member and 70 students, see Figure 1).
  - The outbreak was opened September 23 (reported 10 per cent absenteeism and a positive case on September 20). Some symptomatic children continued to attend school until they moved to online learning on September 24.

- This outbreak has had a significant effect on case counts in the neighbourhood; while cases in Edmonton were stabilizing and decreasing, cases in the T5M postal code reversed trend, increasing significantly after the Westglen outbreak.
  - 66/94 (70 per cent) of all cases with the T5M postal code reported between September 17 and 26 are linked to the outbreak or are family members of outbreak cases.

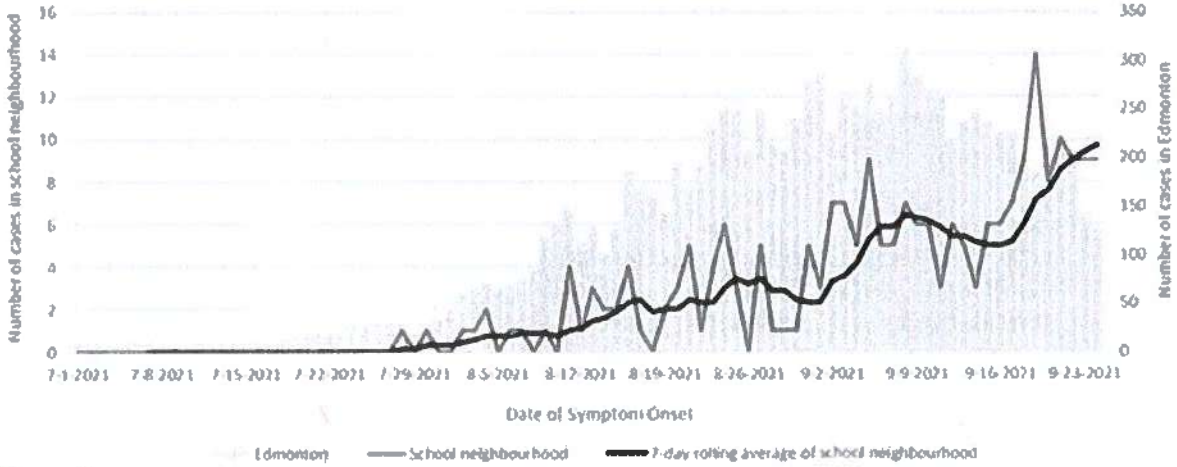


Figure 1: Number of cases in the neighbourhood surrounding the Westglen school and the City of Edmonton

- Additional information on the impact of COVID-19 measures in schools is attached (Attachments 1 and 2).

BACKGROUND

- Alberta Health has provided guidance to schools with the intent of reducing the risk of transmission. Most mandatory school measures were lifted on February 14, 2022, and the remaining mandatory measures were removed on March 1.
- Alberta Health has prepared guidance documents that include the following recommended practices:
  - Encouraging vaccination for eligible students and staff;
  - Active daily symptom screening of all staff, students, visitors, and volunteers;
  - Cohorting for kindergarten through grade six classes;
  - Increased hand hygiene;
  - Increased and enhanced cleaning; and
  - Increased distancing where possible to reduce crowding.

ATTACHMENTS

1. COVID Measures in Schools Alberta Data
2. COVID Measures in Schools Literature Summary

CONTACT:

Drafted by: Susan Novak, Policy and Planning Section Chief, 780-860-2144
Approved by: Ethan Bayne, Incident Commander, Alberta Heath EOC, 780-217-1826

Questions

- **Outbreaks in schools with and without mask mandates.**
- **Provide Alberta school data comparing last year and this year.**

Overall Themes

- This data is observational, and therefore able to only identify correlation, not causation. There are multiple factors that influence COVID transmission that could also be impacting the trends identified below.
- School boards without mask mandates have 3 times more outbreaks in their schools, on average.
    - Case and hospitalization rates per 100,000 population lower in areas where mask mandates are required in both children (5-11 year old) and adults (30-59 years old).
    - Hospitalization rates per 100,000 population are lower in adults (30-59 years old) in areas with mask mandates.
- The outbreak in Westglen school in Edmonton (Fall 2021) is an example that illustrate that a school outbreak can lead to increased spread within the local community.
- Hospitalization rate per 100,000 population are higher (<10 years old) and comparable (10-19 years old) in the fifth wave compared to other waves.

Analysis: Masks Mandates

School boards without mask mandates had 3 times more outbreaks in their schools, on average.

Table 1. Top 10 school Boards with the highest proportion of outbreaks in their schools as of Sept 27, 2021.

School Board	Municipality	N Schools	N Outbreaks	Percent of schools with outbreaks (%)*	Mask mandate at start of school?
The Lakeland Roman Catholic Separate School Division	Bonnyville	8	6	75%	N

The Wild Rose School Division	Rocky Mountain House	17	11	65%	N
The Grande Prairie School Division	Grande Prairie	20	11	55%	N
The Grande Prairie Roman Catholic Separate School Division	Grande Prairie	13	7	54%	N
The High Prairie School Division	High Prairie	13	6	46%	N
The Parkland School Division	Stony Plain	25	11	44%	N
The Holy Family Catholic Separate School Division	Peace River	9	4	44%	N
The Black Gold School Division	Nisku	31	11	35%	N
The Sturgeon School Division	Morinville	17	6	35%	N
The St. Thomas Aquinas Roman Catholic Separate School Division	Leduc	12	4	33%	N

* This is the same as the rate of outbreaks per 100 schools

Table 2. Schools with the 10 lowest proportions of outbreaks in their schools as of Sept 27, 2021.

School Board	Municipality & Area	N Schools	N Outbreaks	Percent of schools with outbreaks (%)*	Mask mandate at start of school?
The Greater St. Albert Roman Catholic Separate School Division	St. Albert	18	1	6%	Yes
The Northland School Division	Peace River	21	1	5%	Yes
The Edmonton School Division	Edmonton	232	12	5%	Yes
The Calgary School Division	Calgary	256	11	4%	Yes
The Edmonton Catholic Separate School Division	Edmonton	103	3	3%	Yes
The Rocky View School Division	Airdrie	52	1	2%	N
The Calgary Roman Catholic Separate School Division	Calgary	120	1	1%	Yes
The Wetaskiwin School Division	Wetaskiwin	22	0	0	N
The Aspen View School Division	Athabasca	18	0	0	N
The Canadian Rockies School Division	Canmore	8	0	0	Yes

* This is the same as the rate of outbreaks per 100 schools

Table 3. Average percent of outbreaks per school board, by mask mandate status.

Mask mandate at start of school?	Average percent of outbreaks per school board
Implemented after 1st week	19.7
N	23.4
Y	7.3

A comparison of geographies with and without mask mandates

Method:

- "Masks Required" is defined as communities where 75% of schools required masks from the start of the school year (excludes francophone and private schools).
- "Other" is defined as communities that did not meet the 75% cut-off and/or do not require mask mandates. Note: small towns that had 1 of each public school, separate school, and private school would not meet the 75% cut-off.
- Limitations
    - Did not account for community vaccine coverage. This may impact hospitalization rate by communities in schools that have and do not have mask mandates.
    - Mask mandates were not available for all boards.

Results:

- Case and hospitalization rates per 100,000 population lower in areas where mask mandates are required in both children (5-11 year old) and adults (30-59 years old) (See Figure 1).
- Hospitalization rates per 100,000 population are lower in adults (30-59 years old) in areas with mask mandates (See Figure 1).

COVID-19 – COVID and Schools

Figure 1. Rate of COVID-19 cases (Left) and hospitalization rates (right) per 100,000 population in children, 5-11 years old (top) and adults, 30-59 years old (bottom) by mask mandates in school.

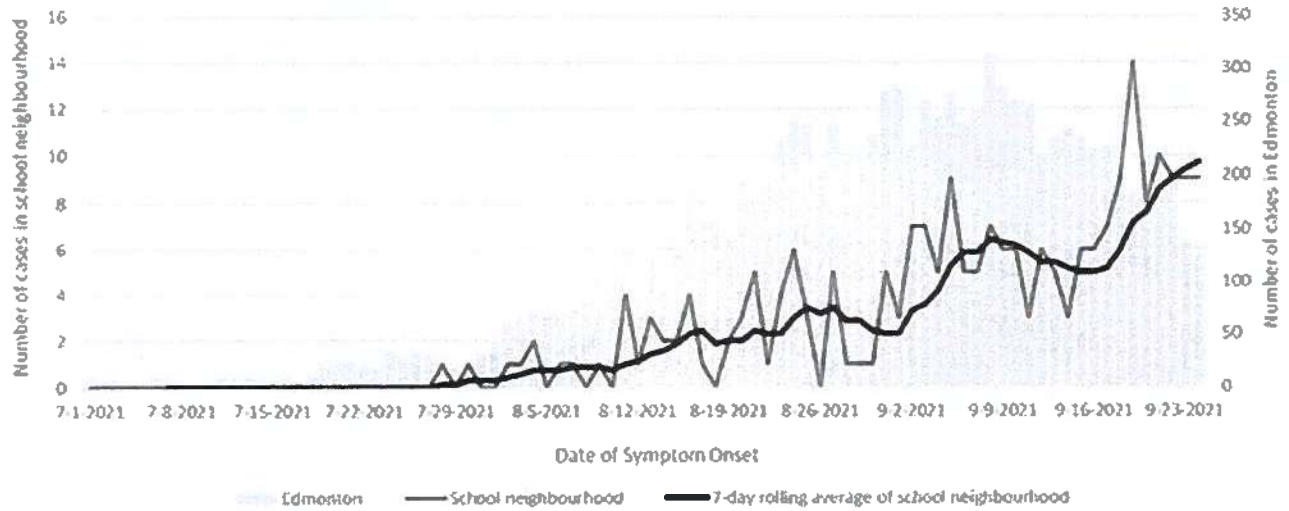
NOTE: this work was done October 2021, prior to vaccine availability for 5-11 year olds. The 30-59 year olds were selected based on potential impacts on households.

Analysis: Westglen School

September 28, 2021

- 71 cases
  - 1 staff member, 70 students.
    - Staff member (music teacher) was not immunized.
    - Students spread roughly evenly across grades 1-6 .
  - The outbreak opened Sept 23rd – they had reported 10% absenteeism and a positive case on Mon Sept 20th.
    - Symptomatic children continued to attend school until they moved to online learning Sept 24th.
  - Even young children likely transmitted to their families.
    - As of Sept 26th, 14 families had additional cases in their families, the index case (ie earliest onset date) was an adult only once (7%).
      - 7 (50%) - index case was a child age 5-9.
      - 6 (43%) – index was a child age 10-12.
  - This outbreak has had a significant effect on case counts in the neighbourhood; while cases in Edmonton were stabilizing and decreasing, cases in the T5M postal code reversed trend, increasing significantly after the Westglen outbreak (See Figure 2).
    - **66/94 (70%) of all cases with the T5M postal code** reported between Sept 17-26 are linked to the outbreak or are family members of outbreak cases.

Figure 2. Number of cases in the neighbourhood surrounding the school and the City of Edmonton.



Analysis: Hospitalizations

Definition of waves:

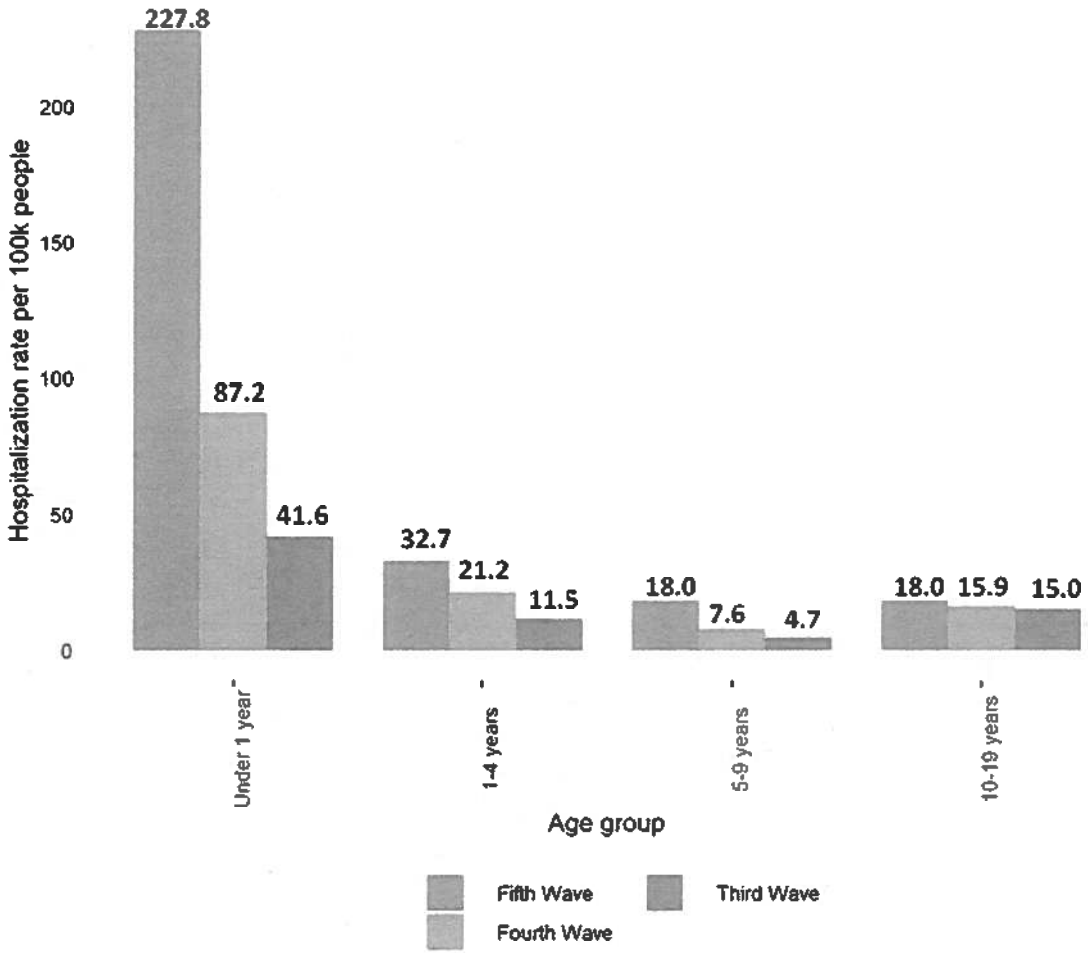
Third Wave: Feb 6, 2021 to July 9, 2021.
Fourth Wave: July 10, 2021 to December 15, 2021.
Fifth Wave: December 16, 2021 – Current.

Summary:

- Hospitalization rate per 100,000 population are higher (<10 years old) and comparable (10-19 years old) in the fifth wave compared to other waves.

COVID-19 – COVID and Schools

Figure 3. Hospitalization Rate per 100,000 population comparison across wave three to five among people under 20 years old.



School Masking Evidence Summary

Copied from Scott Fullmer's email dated February 7, 2022

Summary

1. According to the research literature, wearing masks can be effective in contributing to reducing transmission of COVID-19 **in public and community settings**. This is informed by a range of research, including randomised control trials, contact tracing studies, and observational studies.
2. **The evidence for protection from masks, in schools is less direct,** but taken together with available evidence from all settings, there is support for the conclusion that face coverings in schools can contribute as part of a host of measures to reduce transmission. **What data do exist have been interpreted into guidance in many different ways**. The World Health Organization, for example, does not recommend masks for children under age 6. The European Centre for Disease Prevention and Control recommends against the use of masks for any children in primary school. In North America masking in schools was part of public health guidelines as schools returned after the first and second waves.
3. **Studies find that transmission in schools has remained limited and comparable to the wider community** under a wide range of prevention measures such as masking, cohorting, cancelling higher-risk activities, distancing, hygiene protocols, reduced class size and enhanced ventilation.
4. The studies available were performed prior to the emergence of the Omicron VOC.

Systematic Reviews of Multiple Measures

The evergreen MacMaster University literature review (49 studies) (August 2021) reports wide variability in policies in place across different jurisdictions limiting the ability to evaluate the impact of specific measures or make best practice recommendations for daycare or school settings due to variability in the combination of measures implemented. However, implementation of infection control measures is critically important to reducing transmission, especially when community transmission rates are high.

- There is evidence that wearing masks, maintaining at least 3ft of distance (especially amongst staff), restricting entry to the school to others, cancelling extracurriculars, introducing outdoor instruction, and daily symptom screening reduce the number of cases within schools;
- There are inconsistent findings for associations between ventilation, and class size.
- Hybrid or part-time in-person learning appears to be associated with higher incidence compared to full-time in-person.

In July 2021, European Centre for Disease Control and Prevention published its second update to its review of COVID-19 in children and the role of school settings in transmission. The review examined case-based epidemiological surveillance analysis from The European Surveillance System, grey, pre-print and peer reviewed scientific literature, focusing on studies published in 2021; and modelling of the effects of closing schools on community transmission based on data from the ECDC-Joint Research Centre (JRC) Response Measures Database.

- Similar to the literature review produced by Macmaster University, this report that implementing multiple physical distancing and hygiene measures can significantly reduce the possibility of transmission within schools (high confidence), including

- De-densification (classroom distancing, staggered arrival times, cancellation of certain indoor activities, especially among other students)
- Hygiene measures (handwashing, respiratory etiquette, cleaning, ventilation, and face masks for certain age groups).
- Timely testing and isolation or quarantine of symptomatic cases is important. Rapid antigen tests should be considered

The latest Cochrane literature review examined evidence is up to December 2020 on which measures implemented in the school setting allow schools to safely reopen, stay open, or both, during the COVID-19 pandemic. The review suggests that *many measures implemented in the school setting* can have positive impacts on the transmission of SARS-CoV-2, and on healthcare utilisation outcomes related to COVID-19.

- ***Measures reducing the opportunity for contacts***: by reducing the number of students in a class or a school, opening certain school types only (for example primary schools) or by creating a schedule by which students attend school on different days or in different weeks, the face-to-face contact between students can be reduced.
  - All 23 studies showed reductions in the spread of the virus that causes COVID-19 and the use of the healthcare system. Some studies also showed a reduction in the number of days spent in school due to the intervention.
- ***Measures making contacts safer***: by putting measures in place such as face masks, improving ventilation by opening windows or using air purifiers, cleaning, handwashing, or modifying activities like sports or music, contacts can be made safer.
  - Five (of 11) of these studies combined multiple measures, which means we cannot see which specific measures worked and which did not. Most studies showed reductions in the spread of the virus that causes COVID-19; some studies, however, showed mixed or no effects.
- ***Surveillance and response measures***: screening for symptoms or testing sick or potentially sick students, or teachers, or both, and putting them into isolation (for sick people) or quarantine (for potentially sick people).
  - Twelve (of 13) studies focused on mass testing and isolation measures, while two looked specifically at symptom-based screening and isolation. Most studies showed results in favour of the intervention, however some showed mixed or no effects.
- ***Multicomponent measures***: measures from categories 1, 2 and 3 are combined.
  - Three studies assessed physical distancing, modification of activities, cancellation of sports or music classes, testing, exemption of high-risk students, handwashing, and face masks. Most studies showed reduced transmission of the virus that causes COVID-19, however some showed mixed or no effects.

Transmission Compared to the Community

These four studies in Vancouver, Georgia, and Italy were some of the earlier studies in the first/second wave that found that students were less of a risk for secondary infections compared to teachers however, teachers rates of infection were no higher than other members of the community in occupations outside the home.

- **Vancouver (Oct 2020-May 2021)** Goldfarb et al. seroprevelance study showed **no detectable increase in SARS-CoV-2 infections in school staff** working in Vancouver public schools following a period of widespread community transmission **compared to the community**. These findings corroborate claims that, with *appropriate mitigation strategies in place*, in-person schooling is not associated with significantly higher risk for school staff.

- Of the 1,556 school staff who had their blood sample tested, 2.3% tested positive for antibodies. This percentage was similar to the number of infections in a reference group of blood donors matched by age, sex and area of residence.
- NPIs: (Physical distancing, Enhanced cleaning, Enhanced ventilation, Cohorts, Screening (staff and students), Regular surface cleaning, Unidirectional flow of students, Masks (not mandatory until Feb 2021 for grades 6-12 and for grades 4-12 in Apr 2021), Hand hygiene (hand sanitizer in classrooms and common areas), Quarantine policies, Staggered recess and lunch breaks)

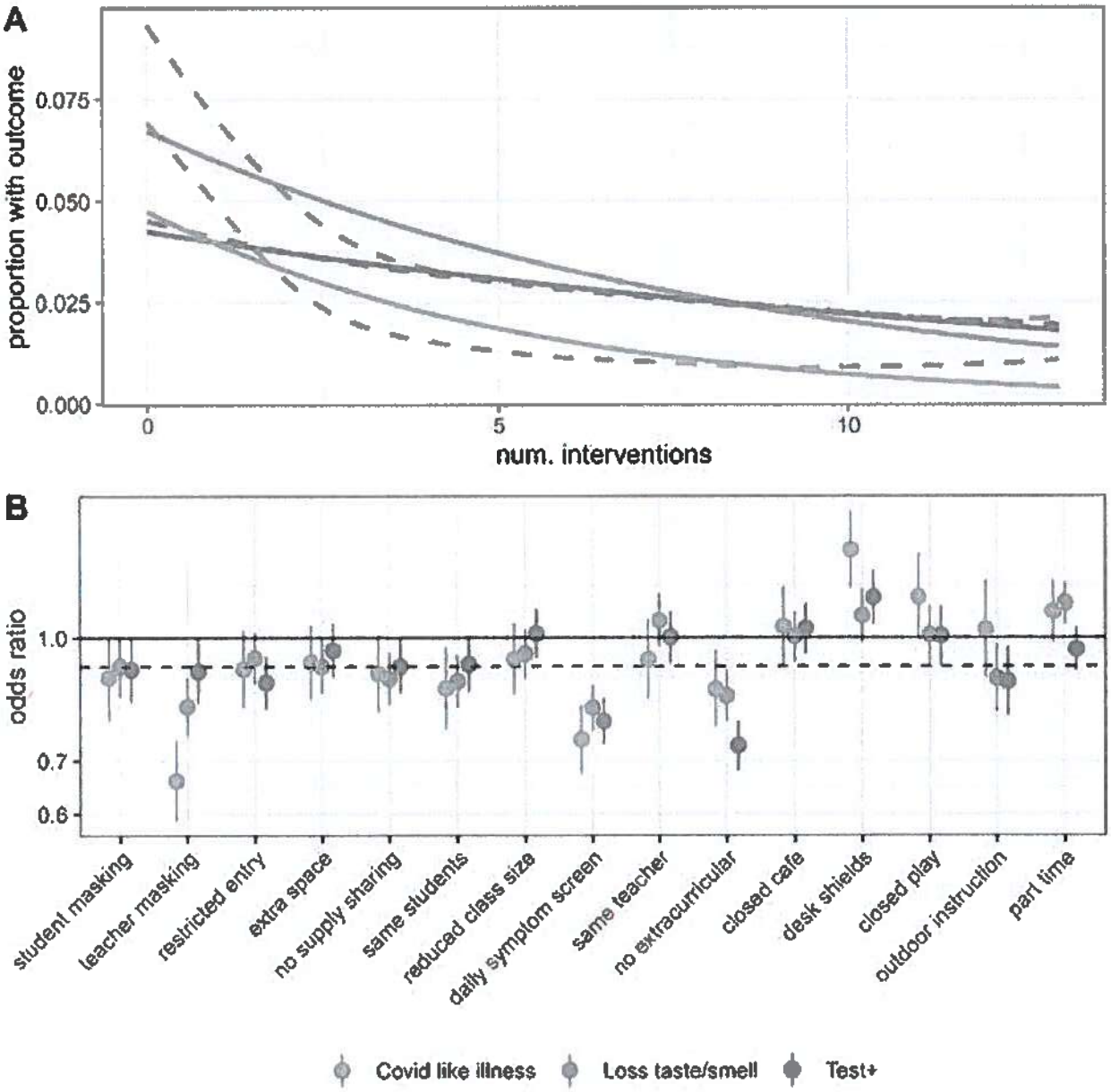
- **Georgia CDC Study –USA (Dec 2020-Jan 2021)** Gettings, J.R., et al. found that masking teachers was associated with a statistically significant decrease in COVID transmission, **but masking students was not**.
  - NPI's: (enhanced cleaning, enhanced ventilation, hand hygiene, masks – except during sports, and physical distancing)
  - Highest Secondary Attack Rates were:
    - Indoor High-contact sports settings - 23.8%
    - staff meetings/lunches - 18.2%
    - Elementary school classrooms 9.5%
  - Lowest Secondary Attack Rates:
    - Asymptomatic Students – 2.3%
    - Elementary Students – 2.7%
  - The SAR was higher for staff 13.1% vs student index cases 5.8% and for symptomatic 10.9% vs asymptomatic index cases 3.0
  - In school settings, J. Gettings et al. point out that in addition to masking, **schools that improved ventilation through dilution methods alone, COVID-19 incidence was 35% lower, whereas in schools that combined dilution methods with filtration, incidence was 48% lower**.
- **Georgia – USA (Dec 2020-Jan 2021)** J. A. W. Gold et al. examined incidence in a Georgia school district during December 1, 2020–January 22, 2021 identified nine clusters of COVID-19 cases involving 13 educators and 32 students at six elementary schools. Two clusters involved probable educator-to-educator transmission that was followed by educator-to-student transmission in classrooms and resulted in approximately one half (15 of 31) of school-associated cases. Preventing SARS-CoV-2 infections through multifaceted school mitigation measures and COVID-19 vaccination of educators is a critical component of preventing in-school transmission.
  - NPI's: (Masks - except while eating, Plastic dividers on desks but students sat less than 3 feet apart).
- **Italy (Sept 30 2020-Feb 2021)** Gandini et al. performed a cross-sectional and prospective cohort study in Italy during the second COVID-19 wave (from September 30, 2020 until at least February 28, 2021. Incidence and positivity were lower amongst elementary and middle school students compared to general population; incidence was higher in high school students in 3 of 19 regions. Incidence in teachers was no different from other occupations after adjusting for age.
  - NPI's: (Ban on sports and music, Frequent ventilation, Hand hygiene, Masks (staff, high school students), Negative test following exposure (some schools), Physical distancing (1m between seats), Reduced school hours, Temperature check, Unidirectional flow of students).

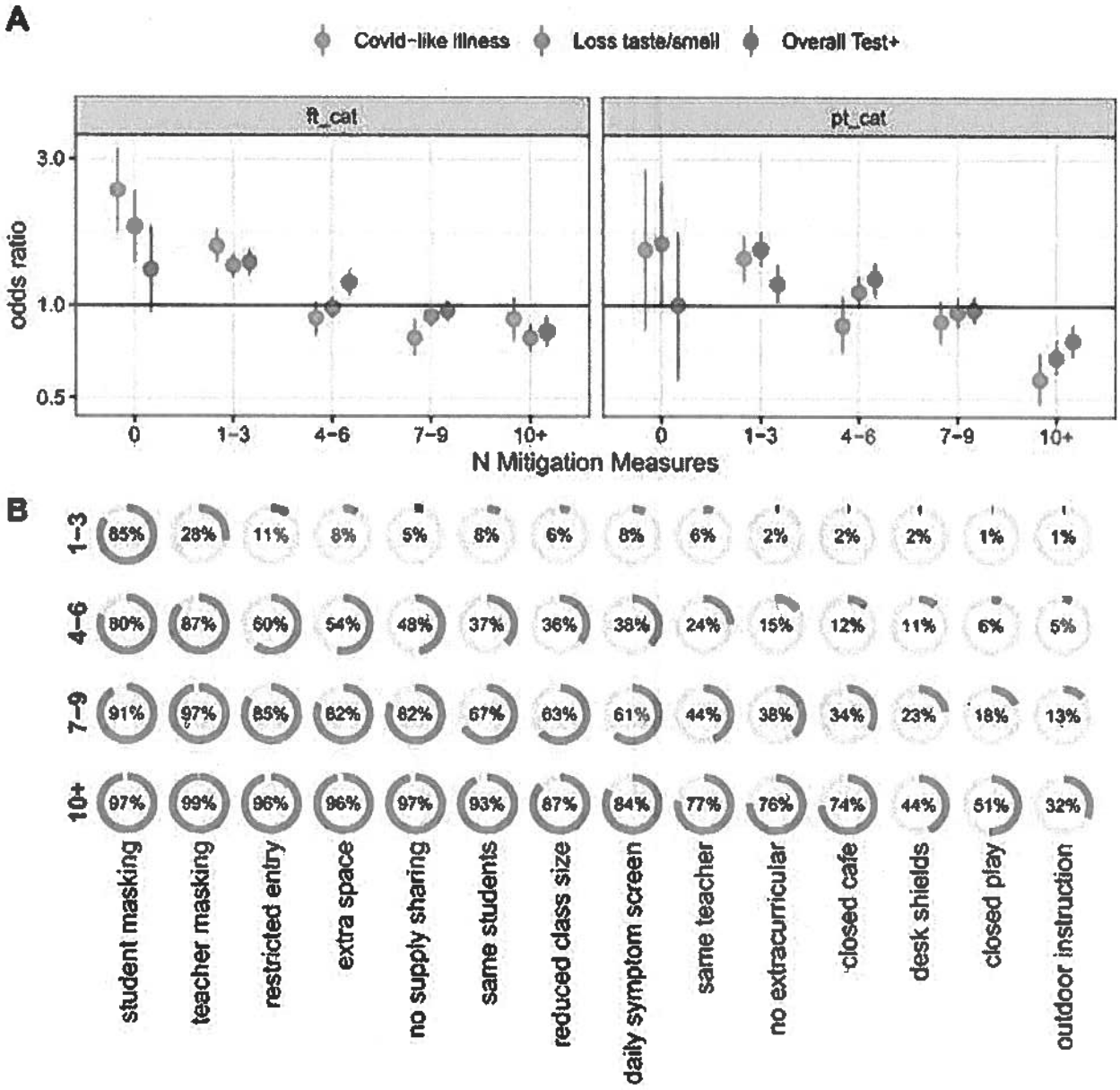
Impact of Multiple Mitigation Measures

These observational studies that assess the use of multiple interventions in schools and are a good example of the kinds of studies that show mixed results (as was noted in the systematic reviews)

- **Utah – USA (Dec 2020-Jan 2021)** R. B. Hershow et al. reviewed K-6 schools opening in Salt Lake County, Utah, from Dec 3 – Jan 21, 2021. Despite high community incidence and an inability to space students' classroom seats ≥6 ft apart, this investigation found low SARS-CoV-2 transmission and no school-related outbreaks in 20 Salt Lake County elementary schools with *high student mask use and implementation of multiple strategies* to limit transmission.
  - NPIs: (6ft distance, High mask use (86%), 81% in-person learning, Plexiglass barriers for teachers, Staggered mealtimes)
  - Other studies, similar to the Utah in North Carolina, Wisconsin, and Missouri, isolated the impact of masks specifically, but showed that taken together mitigation strategies reduced transmission.
- **Florida, New York, Mass – USA (2020-21)** E. Oster et al reported on the correlation of mitigation practices with staff and student COVID-19 case rates in Florida, New York, and Massachusetts during the 2020-2021 school year focusing on *student density, ventilation upgrades, and masking*. Ventilation upgrades are correlated with lower rates in Florida but not in New York. **Did not find any correlations with mask mandates.** All rates are lower in the spring, after teacher vaccination is underway.
  - NPI's Varied by state: (Cohorts, Enhanced ventilation, Masks, Reduced student density, Physical distancing (6 ft.), Symptom screening, Temperature checks)
- **USA All States (Dec 2020-Feb 2021)** J. Lessler et al. For every additional measure implemented there was a decrease in odds of a positive test (adjusted OR: 0.93, 95% CI=0.92,0.94); *symptoms screening* was associated with the greatest risk reduction. When *7 or more IPAC measures were implemented, risk largely disappeared (with a complete absence of risk with 10 or more IPAC measures*). Among those reporting 7 or more mitigation measures, *80% reported student/teacher mask mandates, restricted entry, desk spacing and no supply sharing*. Outdoor instruction, restricted entry, no extracurriculars, and daily symptom screening were associated with significant risk reductions.
  - NPI's : (Cancelled extracurriculars, Closed common spaces (playgrounds, cafeterias), Cohorting, Masks, Physical distancing (extra space, separators between desks), Reduced class size, Restricted entry, Symptom screening)
- **A Science Magazine Summary on in-person schooling concludes that in-person schooling carries with it increased COVID-19 risk to household members; but also evidence that common, low cost, mitigation measures can reduce this risk**
  - School-based mitigation measures are associated with significant reductions in risk, particularly daily symptoms screens, teacher masking, and closure of extra-curricular activities.
  - A positive association between in-person schooling and COVID-19 outcomes persists at low levels of mitigation, but **when seven or more mitigation measures are reported, a significant relationship is no longer observed.**
    - Regression treating each individual mitigation measure as having an independent effect shows that **daily symptom screening is clearly associated with greater risk reductions than the average measure with some evidence that teacher mask mandates and cancelling extra-curricular activities are also associated with larger reductions than average.**

- **<u>In contrast, closing cafeterias, playgrounds and use of desk shields are associated with lower risk reductions (or even risk increases);</u>** however this may reflect saturation effects as these are typically reported along with a high number of other measures. Notably, part-time in-person schooling is not associated with a decrease in the risk of COVID-19-related outcomes compared to full-time in-person schooling after accounting for other mitigation measures.





Evidence on Masking Alone

In community settings the conclusion on the effectiveness of face coverings to reduce transmission of COVID-19 in community settings is informed by a range of research, including transferable insight from other contagious diseases, modelling studies, laboratory experiments, contact tracing studies, and observational studies. The addition of randomised control trials and substantially more individual-level observational studies has increased the strength of the conclusions and strengthens the evidence for the effectiveness of face coverings in reducing the spread of COVID-19 in the community, through source control, wearer protection, and universal masking.

There are only 2 RCTs that have been done during the pandemic on masking (1 non-peer-reviewed report, both rated as medium quality) provided evidence on the effectiveness of face coverings to reduce transmission of COVID-19, for universal masking (Bangladesh) and 1 for wearer protection (Denmark).[1]

- Denmark RCT in Spring 2020 (H. Bundgaard et al.) The first was conducted in Denmark in the spring of 2020 and found no significant effect of masks on reducing COVID-19 transmission
  - Adults who spent 3 hours or more a day outside the home and did not wear a face covering while at work were randomised either to wearing study-provided surgical masks outside the home or no intervention.
  - There was a small, non-significant reduction in COVID-19 infections reported in the group that wore surgical masks: 42 of 2,392 participants (1.8%) developed COVID-19 in the intervention group compared with 53 of 2,470 participants (2.1%) in the control group.
  - The study was inconclusive, reporting a non-significant reduction in COVID-19 infections from wearer protection using surgical masks, but the results lacked precision due to an insufficiently large sample size and low prevalence in the study population, so few participants developed COVID-19.
- Bangladesh RCT in 2021 (J. Abaluck et al.) - reported that surgical masks (but not cloth) were modestly effective at reducing rates of symptomatic infection. However, neither of these studies included children, let alone vaccinated children.
  - Randomized trial involving nearly 350,000 people across rural Bangladesh. The study's authors found that surgical masks — but not cloth masks — reduced transmission of SARS-CoV-2 in villages where the research team distributed face masks and promoted their use.
  - **The study linked surgical masks with an 11% drop in risk, compared with a 5% drop for cloth**. That finding was reinforced by laboratory experiments whose results are summarized in the same preprint. The data show that even after 10 washes, surgical masks filter out 76% of small particles capable of airborne transmission of SARS-CoV-2, says Mushfiq Mobarak, an economist at Yale University in New Haven, Connecticut, and a co-author of the study. By contrast, the team found that 3-layered cloth masks had a filtration efficiency of only 37% before washing or use.
- **The UK PHE has produced two literature reviews on masking**
  - In community they assembled a committee to evaluate this evidence from their most recent literature review on face coverings in community included 25 studies (including 9 preprints and 2 non-peer reviewed reports): 2 randomised controlled trials (RCTs) and 23 observational studies. The evidence predominantly suggests that face coverings reduce the spread of COVID-19 in the community.
    - Respiratory Evidence Panel: **evidence suggests that all types of face coverings are, to some extent, effective in reducing transmission of SARS-CoV-2 in both healthcare and public, community settings** – this is through a combination of source control and protection to the wearer (high confidence).

[1] Both studies were used to guide previous advice on masking in Alberta, both excluded children

Classification: Protected A

Eight contact tracing studies suggested that contacts of primary cases were less likely to develop COVID-19 if either the primary case or the close contact, or both, wore a face covering.

11 observational association studies had mixed results, with 6 studies suggesting face coverings were associated with reduced COVID-19 transmission and 5 suggesting no statistically significant association.

- In the school setting **(Jan 2022)** they conducted a literature review as well as publishing the results of their own study that looked at schools with mask mandates in secondary schools. The literature review on the Evidence of associations between COVID-19 and the use of masks in educational settings was inconclusive, but some studies showed higher rates of COVID-19 in schools without mask requirements for students.
    - "The new study presented in this report is a comparison of covid absence rates 2-3 weeks later in 123 schools which introduced masks on the 1st October 2020 with covid absence rates in 1192 schools which did not have a policy of mask wearing in school.
    - There were several differences between the two sets of schools included in this study including the covid absence rates at the start of the study (the schools which introduced masks had much higher rates). The researchers tried to adjust for these factors in their analysis.
        - **No Reduction in the UK with Masks in Schools: Schools where face coverings were used in October 2021 saw a reduction two to three weeks later in Covid absences from 5.3% to 3% - a drop of 2.3 percentage points.**
        - **In schools which did not use face coverings absences fell from 5.3% to 3.6% - a fall of 1.7 percentage points (not statistically significant)**
- Public Health Ontario has also assessed most of this evidence as well and summarized that several studies found that mask mandates in schools have been associated with lower incidence of SARS-CoV-2 infection. Many of the studies examining COVID-19 incidence in schools had layered Infection prevention and control measures in place, so it was challenging to measure the independent Impact of mask-wearing.

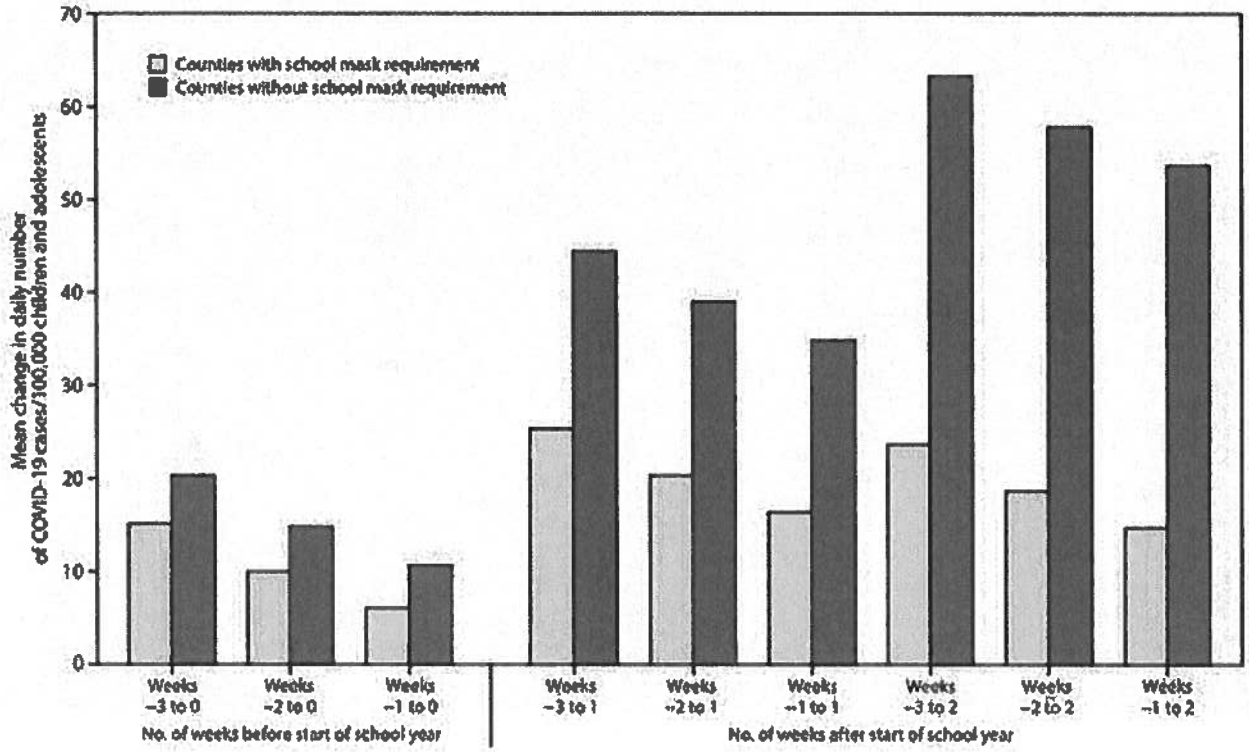
There are 3 commonly cited studies (all rated as low quality) assessing whether wearing a face covering was effective in schools in the UK, US and Germany in autumn and winter 2020, and in a summer camp in the US in summer 2020. These results provide less direct evidence of the effectiveness of face coverings than either the RCTs or contact tracing, but still provide evidence on the difference in COVID-19 transmission between people who did and did not wear face coverings in school and summer camp settings.

- **California Study**: D. Cooper et al. in a prospective cohort study in the US assessed whether face coverings were effective as universal masking in four schools in Autumn to Winter 2020 found SARS-CoV-2 infections in 17 learners (N=320) only during the surge. School A (97% remote learners) had the highest infection (10/70, 14.3%, $p<0.01$) and IgG positivity rates (13/66, 19.7%). School D (93% on-site learners) had the lowest infection and IgG positivity rates (1/63, 1.6%). Mitigation compliance [physical distancing (mean 87.4%) and face covering (91.3%)] was remarkably high at all schools.
- **Germany Study**: Theuring et al. in a cross-sectional study in Germany (n=177 primary school students, n=175 secondary school students and n=142 staff members) assessed whether face coverings were effective as wearer protection in 12 primary and 12 secondary schools in Germany in November 2020. It concluded that prevalence increased with inconsistent facemask-use in school, walking to school, and case-contacts outside school.
- **US Summer Camp Study**: S. Suh et al. conducted a cross-sectional study (n=486 US summer camps comprising 89,635 campers) assessed whether face coverings were effective as universal masking in

486 summer camps in the US in summer 2020. It found in both single and multi-NPI analyses, the risk of COVID-19 cases was lowest when campers always wore facial coverings.

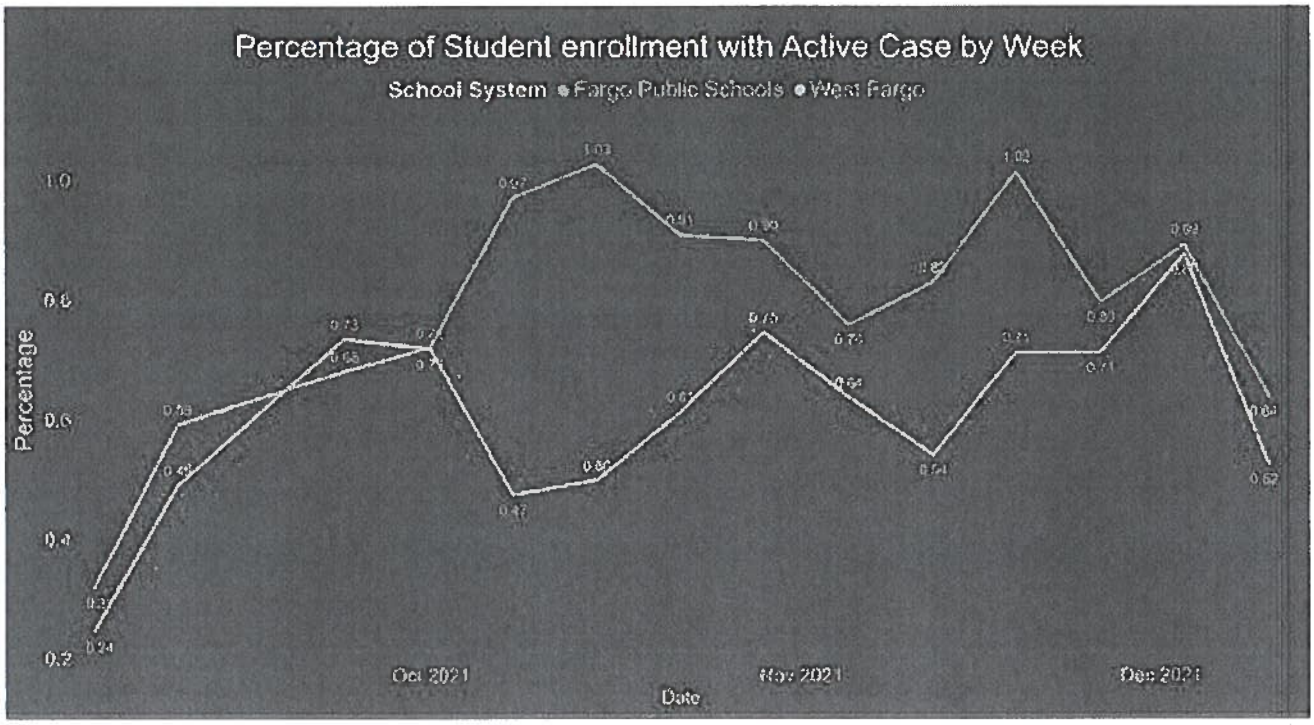
More recent evidence from Delta Wave and CDC Commissioned Studies

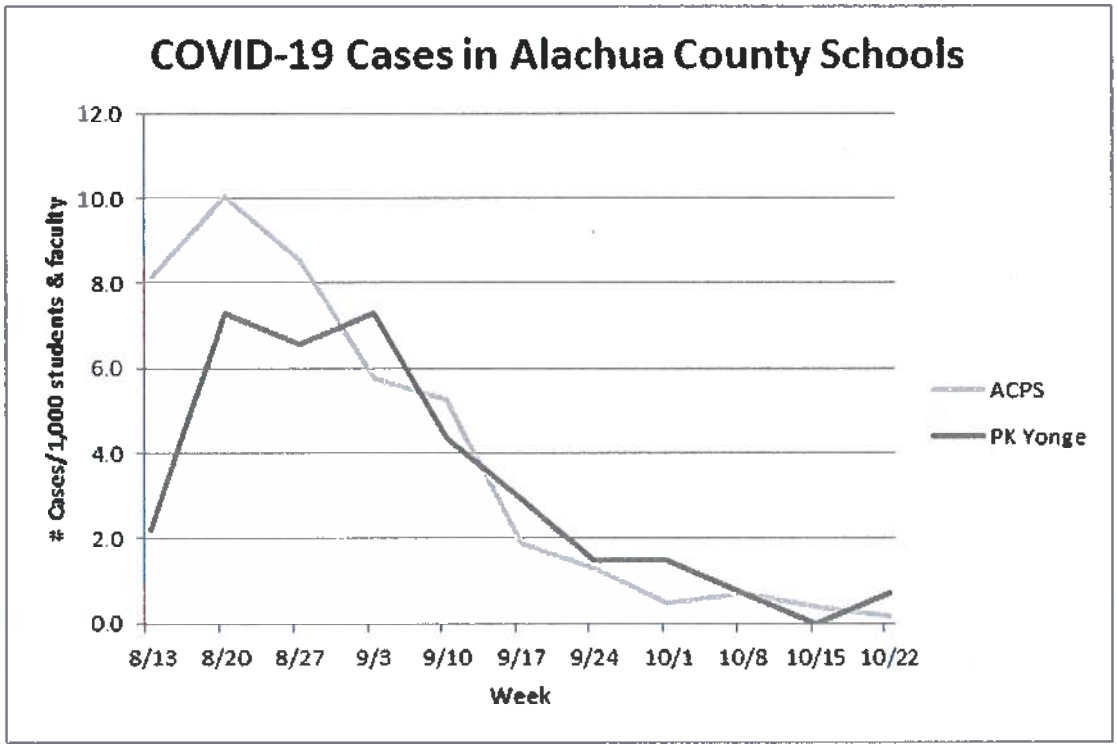
- To demonstrate any independent effect of masks on COVID-19 transmission requires comparing communities with similar vaccination rates or statistically controlling for differences in vaccination rates or other covariates. Without making these adjustments, it is difficult to attribute differences in case rates, or differences in in-school transmission, to mask wearing in school.
- When CDC examined the evidence on school transmission, it concluded that the preponderance of the available evidence from United States schools indicates that even when students were placed less than 6 feet apart in classrooms, **there was limited SARS-CoV-2 transmission *when other layered prevention strategies were consistently maintained; notably, masking and student cohorts.***
  - The Oct 2021 Arizona CDC Study (M. Jehn et al.) in the Maricopa and Pima Counties concluded that **schools without mask mandates were more 3.5 times likely to have COVID-19 outbreaks than schools with mask mandates**. The study noted that given the high transmissibility of the SARS-CoV-2 B.1.617.2 (Delta) variant, universal masking, in addition to vaccination of all eligible students, staff members, and faculty and implementation of other prevention measures, remains essential to COVID-19 prevention in K–12 settings.
    - However, the study has been found to have numerous flaws as pointed out in this Atlantic Article – including a failure to quantify the size of outbreaks and failure to report testing protocols for the students. They also do not control for different vaccination rates in the counties, meaning that vaccination could have played a bigger role than masking.
  - Another Oct 2021 CDC study by S. E. Budzyn et al. **found that U.S. counties without mask mandates saw larger increases in pediatric COVID-19 cases after schools opened**, but again did not control for important differences in vaccination rates, stating it will be done at a later date.
    - The study examined 520 counties from July to September, 62% of which didn't have a school mask requirement.
    - Over the two-week period before and after school started, **counties with school mask requirements saw their COVID-19 rates rise by 16 daily cases per 100,000 children, on average**.
    - **Meanwhile, counties without school mask requirements saw their COVID-19 rates rise by 35 daily cases per 100,000 children**, as shown in the chart below.



These smaller studies are often shared online to show that there isn't a difference between schools that mask during the Delta variant's spread in the US:

- In Tennessee, two neighboring counties with similar vaccination rates, Davidson and Williamson, have virtually overlapping case-rate trends in their school-age populations, despite one having a mask mandate and one having a mask opt-out rate of about 23 percent.
- Another recent analysis of data from Cass County, North Dakota by Tracy Hoeg, comparing school districts with and without mask mandates, concluded that mask-optional districts had lower prevalence of COVID-19 cases among students this fall.
- Analyses of COVID-19 cases in Alachua County, Florida, also suggest no differences in mask-required versus mask-optional schools.





TAB 12

Appendix 1

Context of COVID-19 in Alberta at time of decision

It is important to remember that masks were never provincially required in children in school in kindergarten to grade 3, so the change to the requirements was for those in grades 4 and above.

Immunization (see TAB 5)

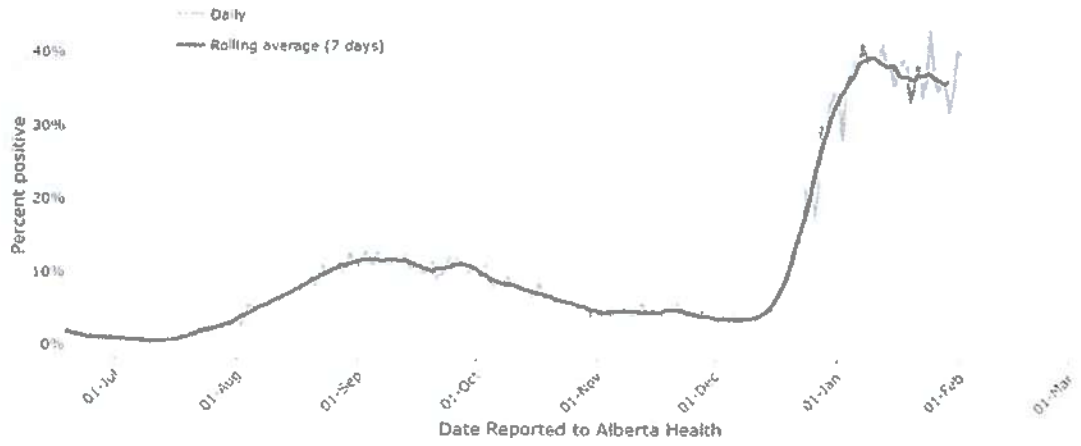
- By February 8, 2022, 46% of children 5-11 years old had received one dose of vaccine while 18% had received two doses. All children in this age group were eligible to receive vaccine, and sufficient time had elapsed for two doses to have been received for those families who chose this layer of protection.
- For 12-19 year olds, 87% had received one dose and 82% had received two doses.

Treatment and testing available

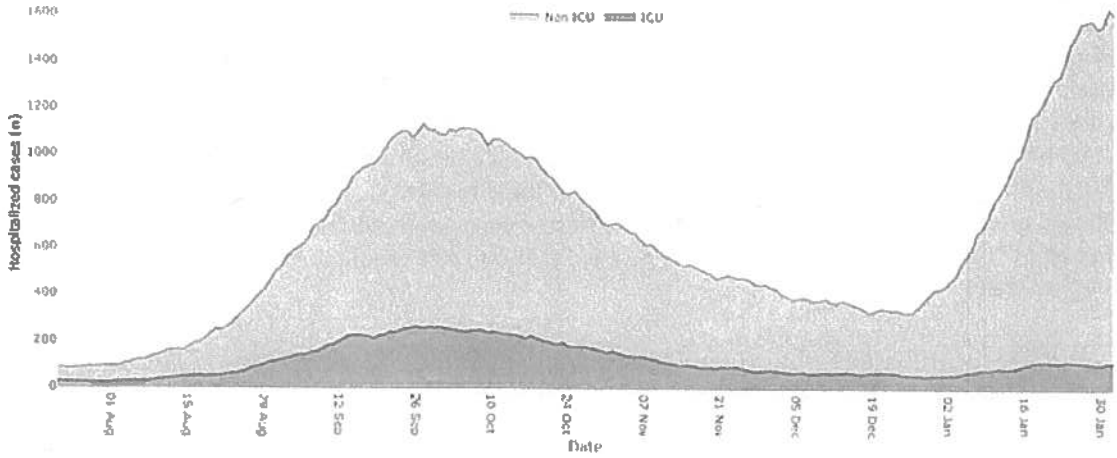
- Rapid Antigen test kits had been made available to families of school-aged children and were being made available to the public for at-home use at participating pharmacies.
- Outpatient treatments were available to prevent the highest risk patients with mild to moderate COVID-19 symptoms from progressing to severe disease.

Cases and hospitalization (see TAB 10)

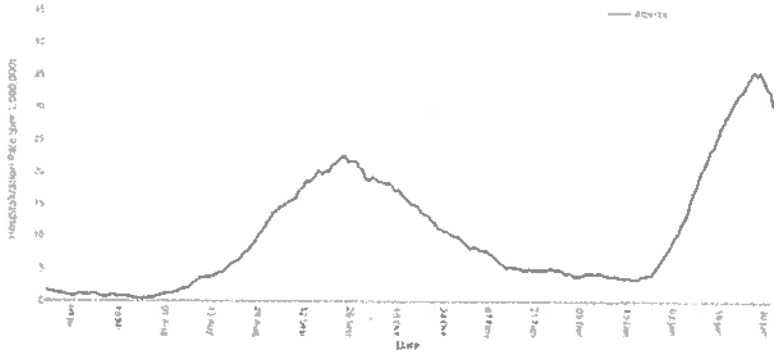
- Daily new case counts were declining from the peak of the Omicron wave.
  Test positivity rate had begun to decline



Hospitalizations were at a plateau



Rate of new hospitalizations was declining



Rate of new hospitalizations (7-day rolling average, average of current day and previous 6 days) by admission date in Alberta and by zone

Evidence of effectiveness of masks in education settings (see TAB 6 and TAB 8)

- Analysis of research literature indicated wearing masks can be effective in contributing to reducing the transmission of COVID-19 in public and community settings; however, the impact of masking in schools was less clear, with mixed results from different studies.
- The range of policies in place across different jurisdictions limited the ability to evaluate the impact of single specific measures for daycare or school settings due to variability in the combination of measures implemented.
- It was difficult to determine the effect of removing or changing one measure (e.g. masking), as many of the studies examining COVID-19 incidence in schools had layered infection prevention and control measures in place.

- Studies found that transmission in schools has remained limited under a wide range of prevention measures, such as masking, cohorting, cancelling higher-risk activities, distancing, hygiene protocols, reduced class size, and enhanced ventilation.
- Alberta data looking at schools that did or didn't have requirements for masks in the fall of 2021, before provincial masking requirements were reinstated, showed more outbreaks in schools without masking requirements than in those with masking requirements. It cannot be definitively concluded that the lack of masking caused more outbreaks, however, as there could be systematic differences in communities that influenced school boards' masking policy decisions that could have also influenced community transmission risk and impacted these results.
- Different groups of clinical experts had come to different conclusions about the importance of school mask mandates as a single intervention, and the balance of benefits and potential risks. For example, see:

    - https://static1.squarespace.com/static/61e5afd7a33d334ec9f84595/t/62115f823054865c6d5497a3/1645305731693/Urgency+of+Normal+Toolkit.pdf

    - https://covid19-sciencetable.ca/wp-content/uploads/2022/01/Ontario-Returns-to-School-An-Overview-of-the-Science_20220112-1.pdf

Negative effects of mask-wearing for children (see TAB 6)

- Masks can disrupt learning and interfere with children's social, emotional, and speech development by impairing verbal and non-verbal communication, emotional signaling, and facial recognition.

Lower risk of severe outcomes for children

- Children are less likely to have a severe outcome if infected with COVID-19. This information can be seen in Table 7 of the Severe Outcomes tab of TAB 10 showing that the rate of COVID-19 hospitalizations in school-aged children is 0.3 per 100 cases in those age 5-9 and 0.5 per 100 cases in those age 10-19. Rates of ICU admissions and deaths are even lower. The severe outcome risks for those in these two age groups is the lowest of all age groups.

Other measures in place to mitigate transmission risk

- While the masking requirement was removed for youth under thirteen years of age in all settings and for students enrolled in kindergarten through grade 12 while attending at a school and participating in curriculum related or extracurricular activities, other measures remained in effect in schools, including:
    - Mandatory symptom screening prior to school attendance, and mandatory isolation for all those with COVID-19 symptoms
    - Cohorting for kindergarten to grade six
    - Physical distancing from those not in their cohort
    - Mandatory masking for adults

- Guidance for schools and school buses supported schools to reduce opportunities for transmission, including:
  - Practices to minimize the risk of transmission of infection among attendees
  - Procedures for rapid response if an attendee developed symptoms of illness
  - Maintenance of high levels of sanitation and personal hygiene.
- Guidance for Schools (K-12) and School Buses https://open.alberta.ca/dataset/eca63dc4-1fd4-4eb4-9e3d-572d6004c0f8/resource/9b2ca09f-5265-48a9-8921-3b03be59d7a9/download/health-covid-19-information-guidance-schools-k12-school-buses-2022-03.pdf
- CMOH Order 02-2022 and CMOH Order 04-2022 (see TABS 3 and 4) required isolation for persons who were symptomatic, asymptomatic but with a positive rapid test result, and confirmed cases of COVID-19. Therefore, children and others in these cases were not permitted to attend school.

Public Context

- Mask requirements for schools was a divisive issue in some communities as increasing numbers of parents and students were protesting mask mandates, including protests staged at schools.

Jurisdictional comparison

- The World Health Organization did not recommend masks for children under age 6.
- The European Centre for Disease Prevention and Control recommended against the use of masks for any children in primary school.
- Some jurisdictions began easing public health measures after reaching their Omicron peak, including Denmark, England, Scotland, Ireland, Norway, South Africa, Finland and Sweden.
- The United Kingdom, Denmark, Sweden, Finland, Norway, and the Netherlands did not require children under the age of 12 to wear masks at any time.
- Mask mandates had been lifted in California, Connecticut Delaware, New Jersey just prior to the change in Alberta.

Decision making process

In the response to the COVID-19 pandemic, the *Public Health Act* was used in ways and on a scale that did not have a precedent. Given the wide-sweeping implications of CMOH orders that set new legal requirements for the province of Alberta in order to minimize the impacts of the novel virus, processes were put in place to ensure that policy of this nature was substantively informed by decisions made by elected officials in committees of cabinet tasked with directing Alberta's COVID-19 response.

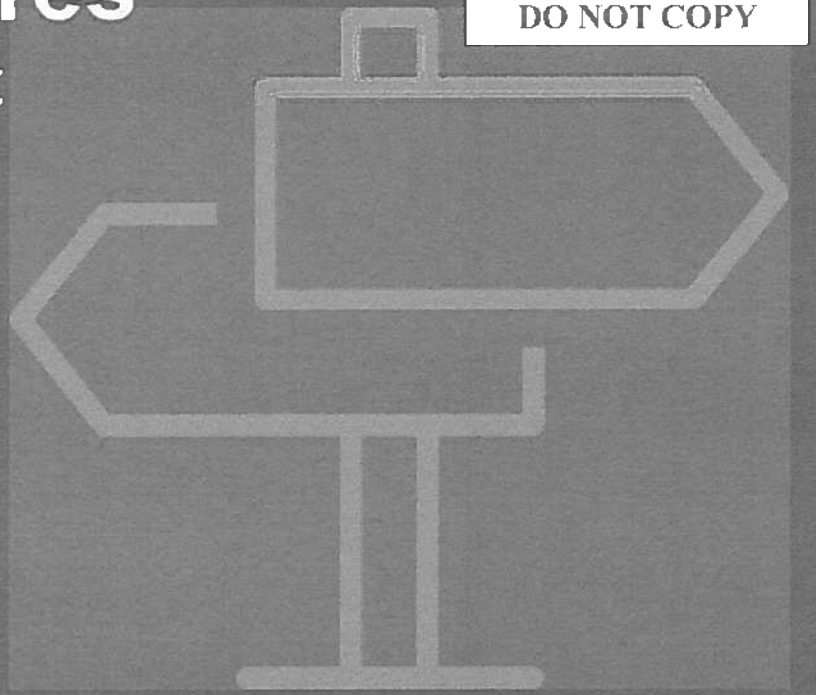
This process involved the CMOH providing advice and recommendations to elected officials on how to protect the health of Albertans. Those elected officials took that advice as one part of the considerations in the difficult decisions that they had to make in response to COVID-19. The final policy decision-making authority rested with the elected officials, and those policy decisions were then implemented through the legal instrument of CMOH Orders. In making the CMOH Orders, the CMOH determined how to operationalize each policy decision.

Given this process described above, in the first submission for this judicial review, the documentation informing CMOH Order 08-2022 was understood to be the information before the Priorities Implementation Committee of Cabinet (PICC) when they determined the next steps in managing COVID-19 in Alberta, and the minutes of the decisions from that committee, which informed the content of CMOH Order 08-2022. Neither of these documents could be released, due to Cabinet confidence.

TAB 13

Endemic Planning – Easing Public Health Measures

Priorities Implementation Cabinet Committee



Alberta Health

Minister Jason Copping

February 8, 2022

For Decision

Alberta

Outline

- Endemic Planning Considerations
- Current State
- Jurisdictional Comparison
- Easing Public Health Measures
  - Alberta Covid Records Consideration

Endemic Planning Considerations

Phases of the Response to COVID-19

Pandemic Phase

Characterized by increased cases with significant levels of severe outcomes, requiring swift government action to protect safety of citizens, measures for mitigating impact and spread, and interventionist government policies in areas of health, economics and social programs.

Transition Phase

Characterized by decline in acceleration of cases, ongoing government surveillance, and a declining reliance on interventionist policies as we approach the endemic phase.

Endemic Phase

Characterized by stable or predictable case increases with decreasing levels of severe outcomes, increased public "tolerance" of the disease, enhanced individual responsibility for managing risk, and public health management focusing on high risk settings.

Endemic Phase

- Pandemics typically move through many waves of transition and heightened response before reaching an endemic state.
- An endemic state does not mean COVID stops impacting the population, but rather that the magnitude of impact is able to be managed within the system.
- Going forward, with no mitigation of community transmission, it is expected that the acute care system will continue to be under strain for several months to come, impacting surgical volumes and other care provision.
- We should expect that future respiratory virus seasons will likely have additive components of seasonal influenza, COVID, and other respiratory illnesses impacting the acute care and public health systems.
- Preparing for possible future variants of concern that may cause severe outcomes will be important, but case suppression will not be the default goal.

COVID-19 Status in Alberta

- COVID-19 in Alberta is coming to the end of the Pandemic Phase, with hospitalizations still putting pressure on the health system.

- We will soon be moving into the Transition Phase.
  - The positivity rate has remained relatively stable in the past few weeks.
  - Hospitalizations seem to be at a plateau, still high and straining the system.

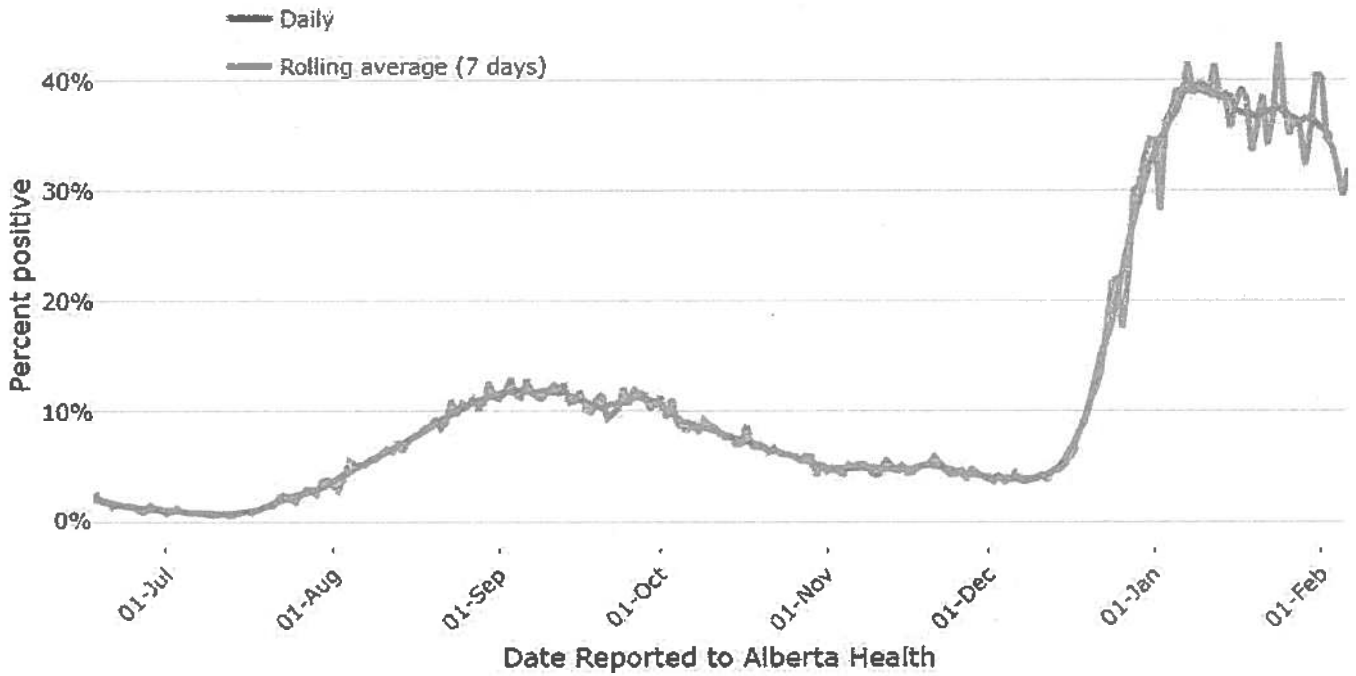
Last Updated: Feb. 7

Omicron Jurisdictional Scan Summary

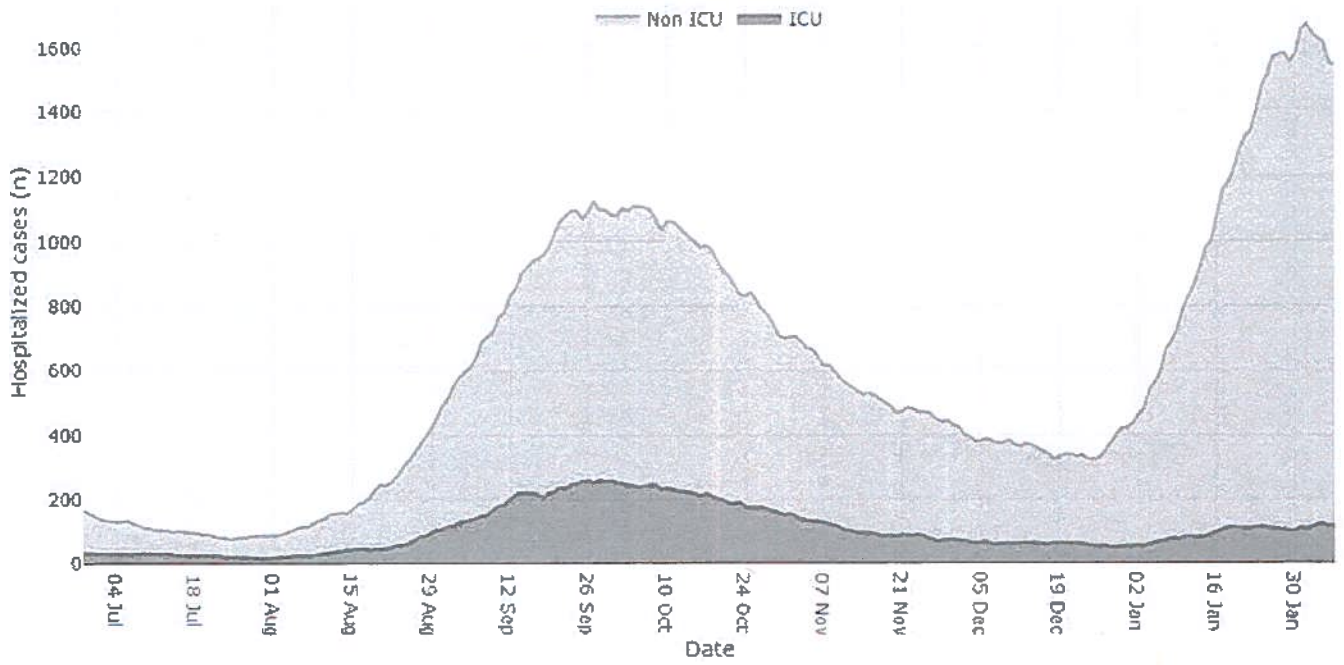
- A few jurisdictions that have reached their Omicron peak have eased most of their public health measures.
  - Denmark – Denmark eased all of their COVID-19 measures despite rising case rates. Their hospital system is coping, but new hospital admissions have increased.
  - England – England has removed all measures. Cases and hospitalizations have continued to fall.
  - Ireland – Ireland has eased most measures but is maintaining the mask mandate and special measures in schools until end February. Case numbers have made a slight rebound, but hospitalizations have continued to fall since the easings took place.
- Some Canadian provinces have announced phased or partial easing of their public health measures. However, most provinces have more restrictive measures than Alberta, and it will take them some time to reduce their measures to Alberta's current level of restrictions.

Current State

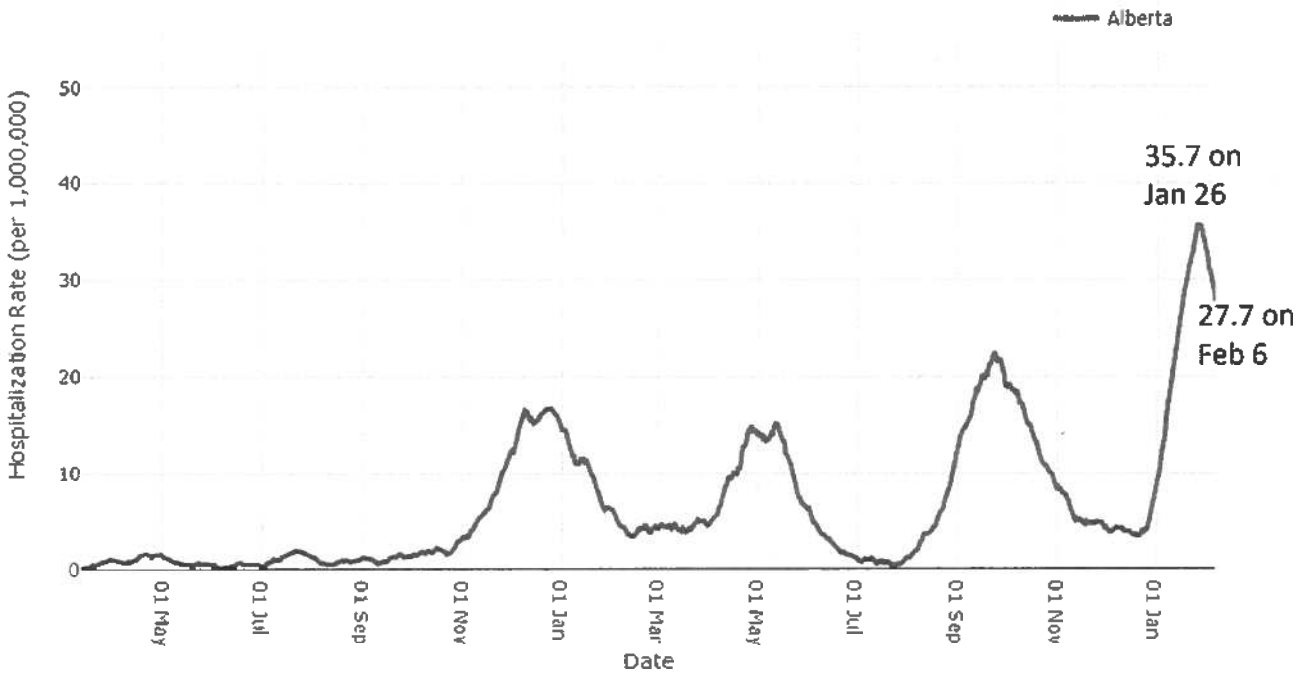
Positivity Rate Trend – As of February 6



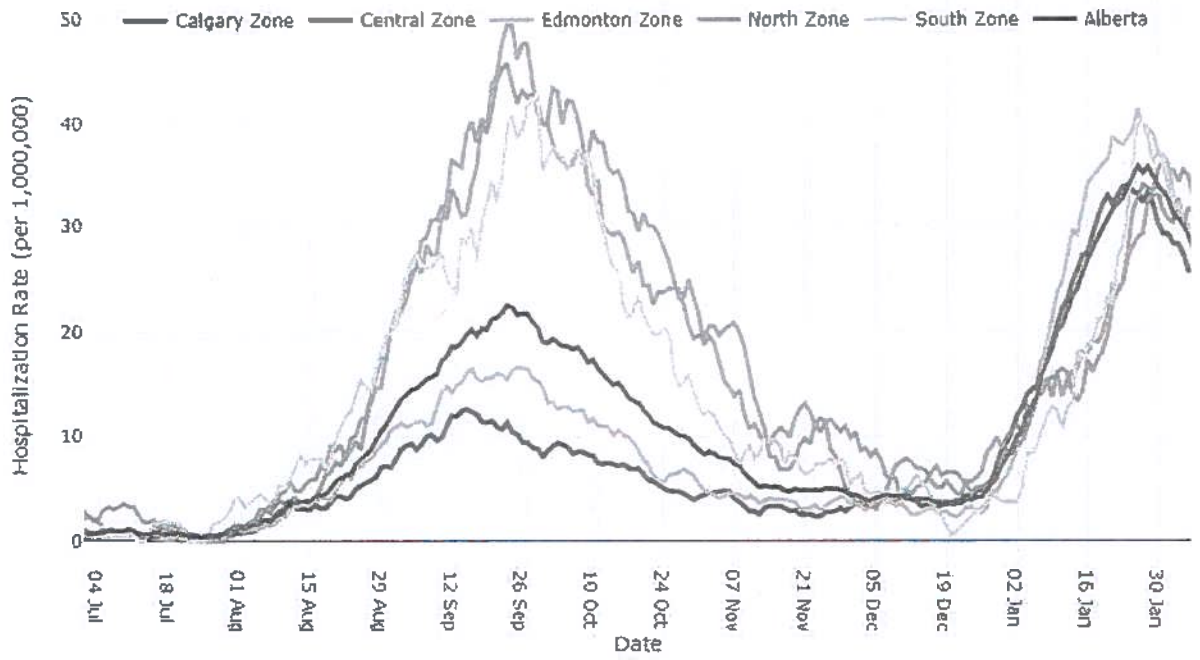
Hospitalizations – As of February 6



Rate of new COVID hospitalizations – As of February 6



Rate of New COVID Hospitalizations – As of February 6



Reasons for Hospitalization Summary

As of February 6

	All Admissions				Last 7 days			
	Non-ICU		ICU		Non-ICU		ICU	
Reason Type	**n**	**%**	**n**	**%**	**n**	**%**	**n**	**%**
Primary COVID admission	1032	38.6	112	48.9	234	39.7	33	49.3
COVID-contributing admission	542	20.3	60	26.2	134	22.8	23	34.3
Incidental	1062	39.7	57	24.9	209	35.5	11	16.4
Unable to determine	40	1.5	0	0.0	12	2.0	0	0.0
Total	2676	100.0	229	100.0	589	100.0	67	100.0

Note:

* Only hospitalizations with available reason types are included.
* Incidental hospitalizations are those where a COVID-positive person has been hospitalized but their reason for admission was deemed to be unrelated to their COVID diagnosis.
* For recent hospital admissions, there may be a delay in reason type information. This may lead to some fluctuations in day-to-day information for "All Admissions" compared to those reported in the "Last 7 days".

Hospitalization Comparisons

		Alberta Health Public Reporting*			AHS Capacity Report (Internal)		
Date		Feb 4	Feb 5	Feb 6	Feb 4	Feb 5	Feb 6
COVID hospitalizations (increase/decrease within report)	ICU	122	116 (-6)	118 (+2)	121	119 (-2)	122 (+3)
	Non-ICU	1,492	1,437 (-55)	1,424 (-13)	1,661	1,630 (-31)	1,620 (-10)
	Total	1,614	1,553 (-61)	1,542 (-11)	--	--	--
Total hospitalizations (increase/decrease within report)	Total ICU	--	--	--	195	193 (-2)	195 (+2)
	Total ICU Occupancy	--	--	--	81%	80% (-1)	81% (+1)
	Total non-ICU	--	--	--	5,247	5,193 (+54)	5,247 (-54)
	Total non-ICU Occupancy	--	--	--	85%	84% (-1)	85% (+1)

*Public health surveillance (population-level impacts reported publicly based on number of people in hospital with COVID) - numbers based on end of day Feb 6.

Wastewater Surveillance – As of February 7

Zone	Testing Site	Previous week trends	Preliminary Signals
South	Lethbridge	Decrease	Increase
	Medicine Hat	Increase	Decrease
	Taber	Increase	Decrease
	Brooks	Decrease	Decrease
Calgary	Airdrie	Increase	Fluctuating, stable trend
	Banff	Decrease	Decrease
	City of Calgary	Decrease	Decrease
	Canmore	Decrease	Increase
	High River	Decrease	Increase
	Okotoks	Decrease	Increase
	Strathmore	Increase	Fluctuating, stable trend
Central	Red Deer	Increase	Decrease
	Lacombe	Fluctuating, stable trend	Decrease
Edmonton	City of Edmonton	Fluctuating, stable trend	Fluctuating, stable trend
	Fort Saskatchewan	Fluctuating, stable trend	Fluctuating, stable trend
North	Fort McMurray	Increase	Decrease
	Grande Prairie	Increase	Increase
	Cold Lake	Decrease	Fluctuating, stable trend
	Edson *new*	NA	Increase

- The trends reported in this table are based on this rolling average as reported the afternoon of February 4, 2022.
- Overall wastewater concentrations of virus have fluctuated greatly between sampling dates at this time, and therefore any trends may be premature.

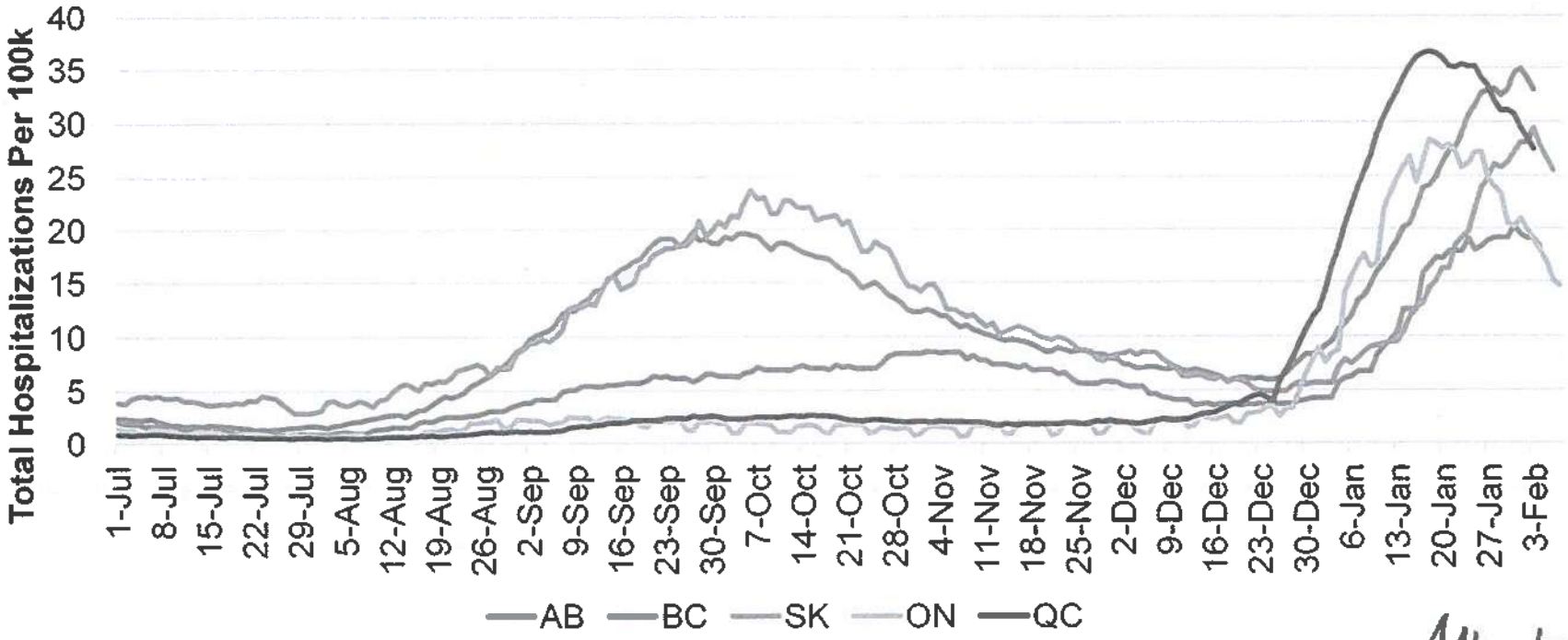
Vaccines – As of February 6

- Doses Administered on February 6: **5,965**
- Total to date: **8,376,671**
- Total pediatric doses (first and second doses): **218,580**
- Total third doses: **1,499,682**
- Percent of 18+ population with three doses: **43.4%**
- Percent of 12+ population with one dose: **89.9%**
- Percent of 12+ population with two doses: **86.2%**
- Percent of 12+ population with three doses: **39.9%**
- Percent of 5+ population with one dose: **85.8%**
- Percent of 5+ population with two doses: **79.8%**
- Percent of 5+ population with three doses: **36.1%**

Jurisdictional Comparison

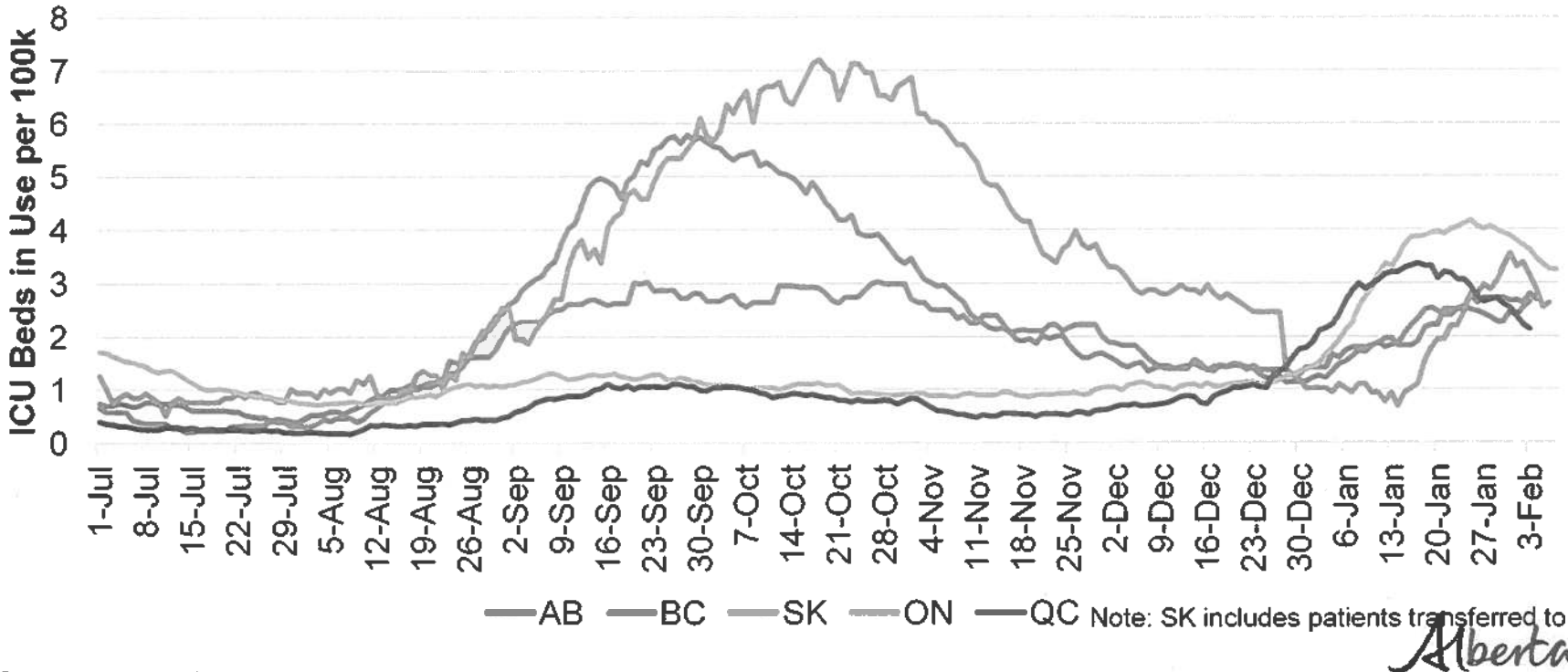
Last Updated: Feb. 7

COVID-19 hospitalization rate per 100k



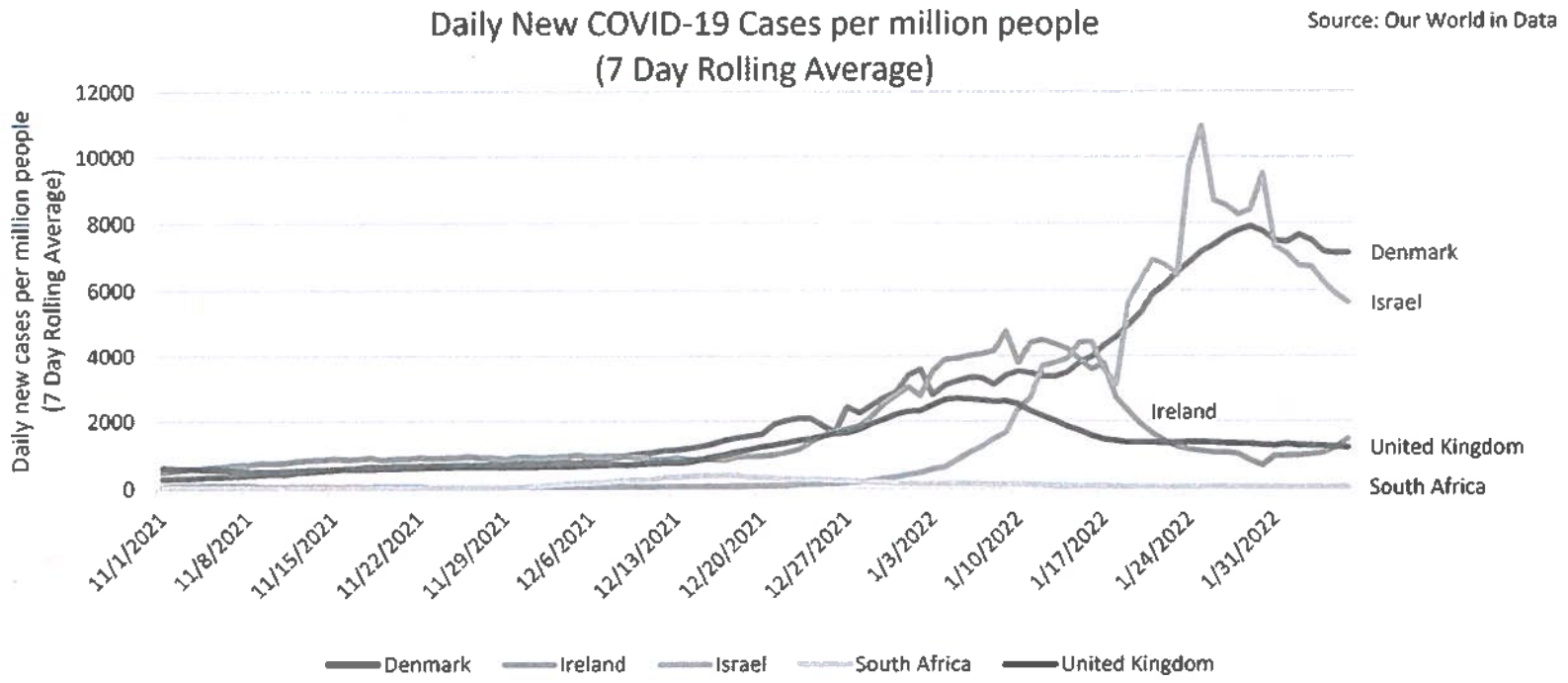
Last Updated: Feb. 7

COVID-19 ICU usage per 100k



Last Updated: Feb. 7

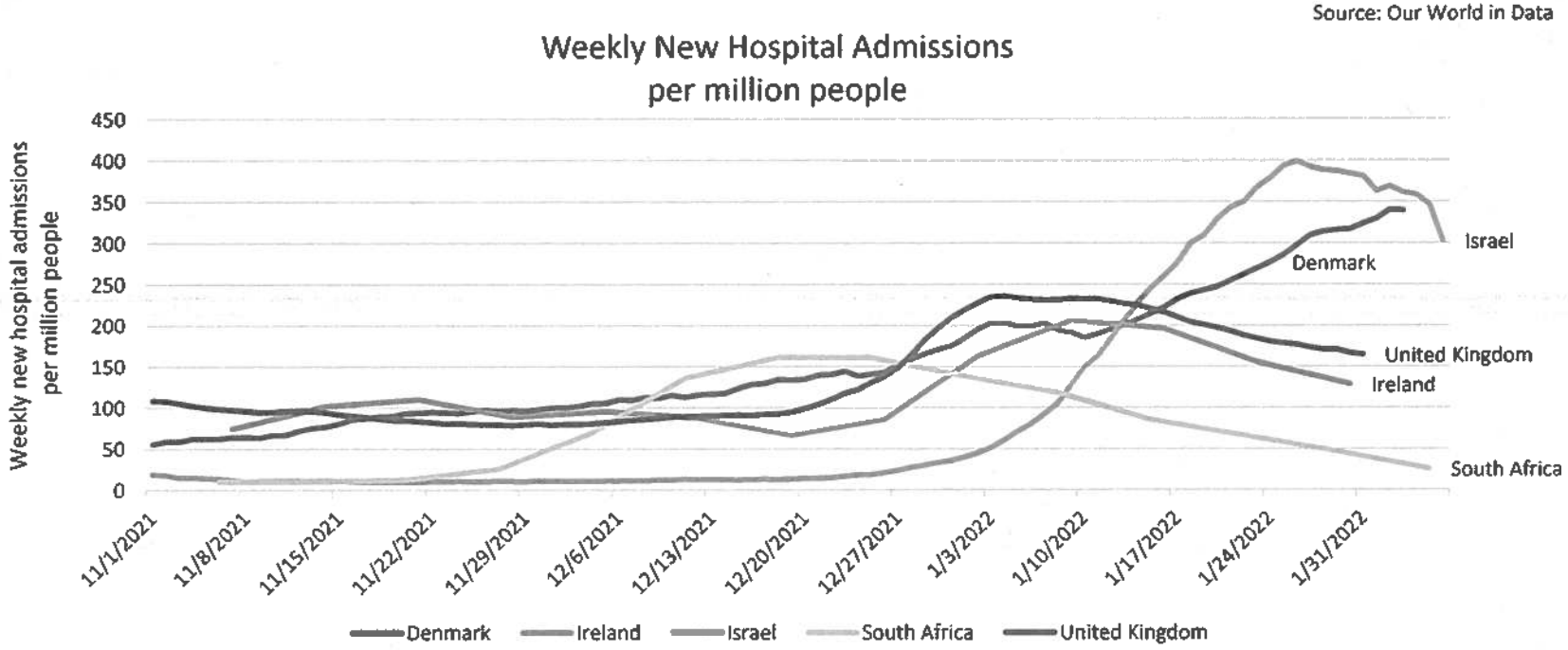
Daily new COVID Cases per million people



Last Updated: Feb. 7

Weekly new hospital admissions per million people

Source: Our World in Data



Easing Public Health Measures

Framework for Easing Public Health Measures

- Previous PICC direction on the following principles has informed the proposed approaches for easing public health measures.
- When:
  - Alberta has opted for a conditions-based approach, which requires certain metrics to be achieved before moving to subsequent steps.
  - Alberta will be a leader in entering the endemic space, balancing the risks and benefits to easing before other Canadian jurisdictions.
- How:
  - Gradual removal of public health measures, signaling the transition to endemic stage through a number of steps, which has the following benefits:
    - Enables monitoring and minimizes the impacts of a potential exit wave, with less risk of quickly losing system resources that may be needed if the exit wave is larger and more impactful than anticipated.
    - More opportunity to monitor and adjust if needed, and less chance of having to reverse easings.

Conditions for Easing of Measures

- Lifting of restrictions should begin only once pressures on the healthcare system have sufficiently eased and are likely to continue easing.
- Easing should also take into account an assessment of relevant trends and context, including positivity rates, wastewater surveillance, and the overall acute care system burden.
- Specifically, easing of measures should be predicated on declining rates of new COVID-19 hospitalizations over a sustained period of time.

Easing Measures

- Previously, Alberta Health recommended that the easing of measures be proportionate to the risk of transmission.
  - Measures should be removed as soon as safe to do so.
  - Measures that are least restrictive to Albertans and entities while effective for reducing the risk of transmission are retained for longer (i.e., allows more freedom for normalcy to resume in as many aspects of life as possible).
- Per previous PICC direction, 3-step approaches to easing are proposed, with a focus on removing the Restrictions Exemption Program and easing youth masking requirements.
- Three approaches have been developed for consideration:
  - The first approach includes a significant easing in step 1; any potential impacts of the initial easing can be monitored and adjusted for before moving to the next step (e.g., delayed entry into subsequent steps).
  - The second approach includes a moderate easing between all steps; any potential impacts more likely to be adjusted for throughout each step (e.g., able to enter subsequent steps without significant delays).
  - The third approach would be defined by the specific measures that PICC chooses.

Post-Easing

- As Alberta eases public health measures, Alberta Health will continue to monitor for any unintended outcomes or scenarios, which could include:
  - Larger than anticipated exit wave that leads to increase in hospitalizations and/or workforce impacts.
  - Emergence of a new, higher risk variant (e.g., changes in transmissibility, severity, effectiveness of vaccine, etc.).
- If the impacts of the above are beyond the ability of the health care system to cope, re-instatement of public health measures may be recommended.
  - Revisiting previous mechanisms to address COVID-19 transmission would need to be weighed with other policy considerations and Alberta's overall risk tolerance.

Option 1:

Step	Measures to be Eased	Potential Condition

1	• Restrictions Exemption Program removed.
	  ○ Entertainment venue restrictions also removed (e.g., capacity limits, liquor sales and operational hours, food/beverage in seating, interactive activities).
	• No capacity limits for entities that were out of scope for Restrictions Exemption Program.
	  ○ Physical distancing requirement removed.
	• Masking not required for youth (17 and under) in any setting.
	• Provincial school requirements removed (masking, K-6 cohorting, etc.).
	• Screening prior to youth activities removed.
	• No limits on indoor or outdoor gatherings.
		• Sustained decline in new COVID-19 hospitalization admission rate.

2	• Masking no longer required. • Shift to individual and family risk assessment. • Mandatory work from home removed.	• Continued decline in new COVID-19 hospitalization admission rate after initiation of Step 1.
3	• COVID-specific Continuing Care measures removed. • Mandatory isolation removed (becomes a recommendation only).	• Continued decline in new COVID-19 hospitalization admission rate after initiation of Step 2.

Considerations for Option 1

- Majority of public health measures are lifted in step 1.
- All existing public health measures will be lifted by step 3.
- Timing between steps depend on conditions.
- Pros
  - Less social and economic impact from prolonged continuation of public health measures. Businesses/entities are able to resume regular operations.
  - Measures that are least restrictive to participation in society are in place after Step 1. Albertans have opportunity to start assessing their personal/family risk and make decisions about their context (i.e., choice to wear mask, space out, size of social network, etc).
  - The measures that remain in place the longest protect the most vulnerable populations.
  - Alberta is a leader in reopening; easings will be ahead of most Canadian jurisdictions.
- Cons
  - Leading reopening provides less opportunity to learn from other jurisdictions, assess impacts, manage risk and avoid potential reversals.
  - Provides less time for the health system to regain capacity and resume normal operations.

Option 2:

Step	Measures to be Eased	Potential Condition

1	• Restrictions Exemption Program removed.
	  o Entertainment venue restrictions retained (liquor sales and operational hours, no food/beverage in seating, no interactive activities).
	• Large venues capped at 50 percent capacity (status quo for previous REP venues; increase for previous out of scope venues).
	  o Physical distancing recommended, but not required.
	• Masking not required for 5 and under.
	• Screening prior to youth activities removed.
	• No limits on outdoor gatherings; indoor gathering limits remain.
		• Sustained decline in new COVID-19 hospitalization admission rate.

2	• Capacity limits removed for large venues and entertainment venue restrictions removed. • No limits on indoor gatherings. • Mandatory work from home lifted. • Provincial school masking requirement removed.	• Continued decline in new COVID-19 hospitalization admission rate after initiation of Step 1.
3	• COVID-specific Continuing Care measures removed. • Remaining school requirements removed (i.e., K-6 cohorting). • Mandatory isolation removed (becomes a recommendation only). • Masking no longer required. • Shift to individual and family risk assessment.	• Continued decline in new COVID-19 hospitalization admission rate after initiation of Step 2.

Considerations for Option 2

- Step 1 includes significant lifting of public health measures while keeping some protective elements in private gatherings (where there is no masking) and large venues.
- All existing public health measures will be lifted by step 3.
- Timing between steps depends on conditions.
- Pros
  - This approach means that some protective measures are still in place while Alberta is experiencing cases and outcomes from the Omicron wave. The health system has additional time to regain capacity while the majority of businesses/entities are able to resume regular operations.
  - The measures that remain in place the longest protect the most vulnerable populations.
  - Provides more time for Albertans to adjust to reopening and to start assessing their personal/family risk and make decisions about their context (i.e., choice to wear mask, space out, size of social network, etc.).
  - Alberta is still a leader in reopening while minimizing any potential exit waves; easings will be ahead of most Canadian jurisdictions.
- Cons
  - Some Albertans may not be satisfied with the pace or sequencing of easings.
  - May not provide enough time for the health system to regain capacity and resume normal operations.

Option 3:

Measures to be removed	Step	Date
Businesses/Entities • Restrictions Exemption Program (REP). • Entertainment venue restrictions (liquor sales and operational hours, no food/beverage in seating, no interactive activities). • Capacity limits for entities that were out of scope for REP. • Work from home requirement.	• • • • •	
Masking in Public Places • Masking requirements for youth (17 and under) in public places. • Masking for all Albertans in public places.	• •	
Youth Specific Requirements • Mandatory masking for grades 4+. • Other school requirements (K-6 cohorting, physical distancing). • Screening prior to youth activities.	• •	
Private Social Gatherings • Limits for outdoor gatherings. • Limits for indoor gatherings (private dwellings).	• •	
Mandatory isolation.	•	
COVID-specific Continuing Care measures.	•	

Considerations for Option 3

- PICC selects individual measures which are in each of the three steps for easing.
- All existing public health measures will be lifted by step 3.
- Timing between steps depends on conditions.
- Pros
  - Steps are based on what is determined to be the most appropriate balance between public health and other policy considerations.
  - Potentially more responsive to public opinion.
- Cons
  - Legal and operational connections between some measures may constrain available options for sequencing.
  - Some Albertans may not be satisfied with the pace or sequencing of easings.
  - May not provide enough time for the health system to regain capacity and resume normal operations.

Decision: Approach for Easing of Measures

	Option 1	Option 2	Option 3

1	• Restrictions Exemption Program removed.
	  ○ Entertainment venue restrictions also removed (closing times, food/beverage in seating, interactive activities).
	• No capacity limits for entities that were out of scope for Restrictions Exemption Program.
	  ○ Physical distancing requirement removed.
	• Masking not required for youth (17 and under) in any setting.
	• Provincial school requirements removed (masking, K-6 cohorting, etc.).
	• Screening prior to youth activities removed.
	• No limits on indoor or outdoor gatherings.
		• Restrictions Exemption Program removed.
		  ○ Entertainment venue restrictions retained (closing times, no food/beverage in seating, no interactive activities).
		• Large venues capped at 50 percent capacity (status quo for previous REP venues; increase for previous out of scope venues).
		  ○ Physical distancing recommended, but not required.
		• Masking not required for 5 and under.
		• Screening prior to youth activities removed.
		• No limits on outdoor gatherings; indoor gathering limits remain.
			Specific measures in each step are chosen by PICC.

2	• Masking no longer required in all public places. • Shift to individual and family risk assessment. • Mandatory work from home removed.	• Capacity limits removed for large venues and entertainment. venue restrictions removed. • No limits on indoor gatherings. • Mandatory work from home lifted. • Provincial school masking requirement removed.	
3	• COVID-specific Continuing Care measures removed. • Mandatory isolation removed (becomes a recommendation only).	• COVID-specific Continuing Care measures removed. • Remaining school requirements removed (i.e., K-6 cohorting). • Mandatory isolation removed (becomes a recommendation only). • Masking no longer required.	

Public Communication of Approach

- Announce as a bold but prudent approach, highlighting the thresholds for each step of re-opening:
  - News conference, news release, social media, web update.
  - Support with advertising and later announcements.
  - Tele town halls with specific sectors (businesses, places of worship, etc.) to convey details and answer questions.
  - Messaging to highlight:
    - The importance of Albertans beginning to return to regular life.
    - The framework being gradual and dependant on reaching specific thresholds.
    - Clear details about each step and when they will happen.
    - Protections for the vulnerable and the health system continuing to be in place.

Endemic Planning Decisions

- Alberta Health will return to PICC in the coming weeks for direction on how the GOA should manage COVID-19 in the long term.
- In the meantime, using public health surveillance and indicators such as wastewater, Alberta Health will monitor the progress of the transition to endemic given the chosen approach to easing public health measures. If the situation worsens and the continued transition to endemic is not possible due to the level of strain on the acute care system, the reinstatement of public health measures may be recommended.
  - To stay in an endemic state, there would need to be sufficient health care capacity to respond to cyclical recurrence of COVID, and mandatory public health measures would not generally be used as long as severity is moderate to low. However, the health system has not yet returned to a baseline state, and acute care recovery, including surgical volume increases, will be slowed by the impact of rapid easing of measures.
- Future endemic planning decisions could include:
  - How will the GOA respond to COVID-19 outbreaks in the future?
  - What information will the GOA provide to the public on future COVID-19 case numbers, hospitalizations and deaths?
  - Given that it is extremely likely that new variants of concern will continue to emerge, how much surge capacity should the GOA maintain to address future waves of COVID-19?
  - What is the future approach to rapid test distribution?

Alberta Covid Records Considerations

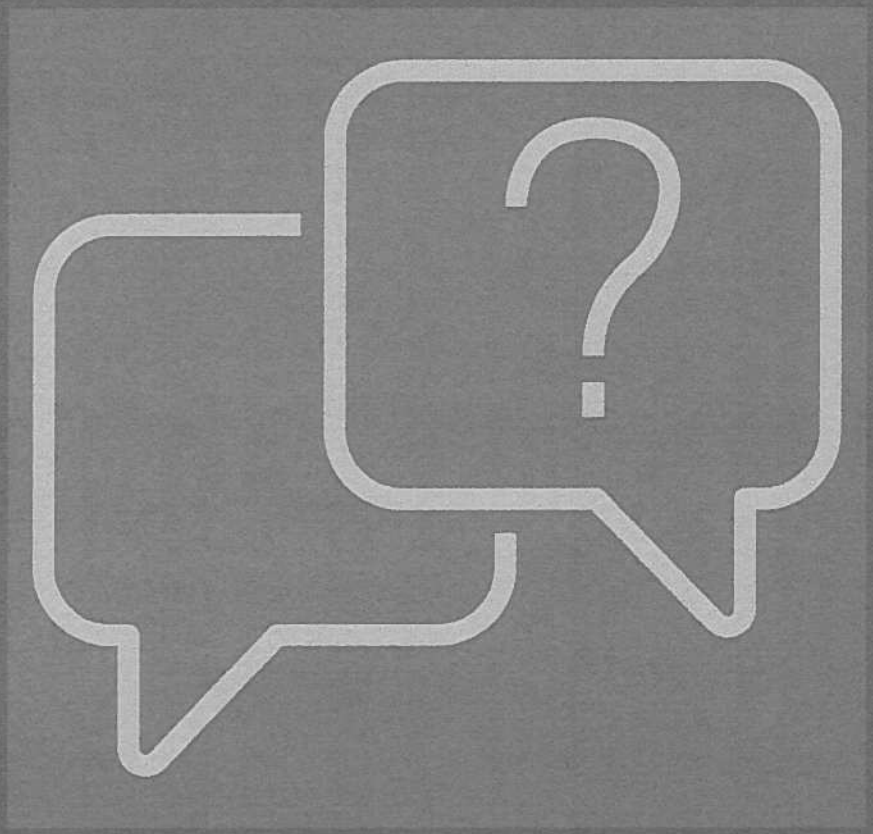
Alberta Covid Records – current Context

- Alberta Covid Records is currently comprised of two main components:
  - The website to generate proof of vaccination with QR code: alberta.ca/covidrecords.
  - Official verifier apps available on the Apple and Google stores that enable verification of Albertans' QR codes in support of REP.
- The availability of proof of vaccination QR code generation through alberta.ca/covidrecords is required for Albertans to support federal and international travel requirements.
  - When REP is discontinued, Alberta will need to maintain the Covid Records website to generate proof of vaccination with QR code to support these travel requirements.

Post REP options for Alberta Covid Records

1. Remove the official Alberta Covid Records verifier apps from the Google and Apple stores – **Recommended**.
   - Previously downloaded verifier apps could still be used. It is not possible to force removal from personal devices.
2. Provide explicit authority to permit voluntary use of Alberta Verifier App.
   - Those who choose to ask to validate vaccine status would need to obtain their own legal advice to confirm whether the organization has good legal authority to collect and use the information for its own purposes.
   - Employers may still be able to implement their own vaccine mandates and would benefit from being able to continue to use the validator app.
   - Through the QR code, the government makes Albertans' personal health information available to them, and it is up to Albertans to decide whether to provide that information to third parties.

Questions?



Appendix

Current Restrictions

Current Restrictions – Unchanged by REP

- Mandatory isolation (confirmed case or symptomatic; vaccinated vs unvaccinated).
- Mandatory masking in public places.
- Work from home.
- Private residences:
  - Up to 10 adults; no limit on youth under 18 (if with their parent/guardians); vaccinated or unvaccinated.
  - Limits on who can enter a private residence.
- Outdoor private social gatherings limited to 20 individuals.
- Measures for protests and similar activities.
- Attendance limited to 1/3 fire code for specific entities out-of-scope for REP:
  - Places of worship, retail, libraries.
  - Does not apply to health services, child care settings, schools, shelters, workplaces, personal and wellness services.
- Youth must be screened prior to undertaking an activity.
- School measures in place (e.g., masking, distancing, school buses).
- Operating and Outbreak standards for Continuing Care settings.

Current Restrictions – Without REP

- Physical distancing indoors and outdoors.
  - 3m for physical activity; 2m all other settings.
- Private social gatherings not permitted.
- Wedding and funerals.
  - Weddings and funeral services are permitted up to 50 people or 50% fire code, whatever is less.
  - No receptions permitted indoors; outdoor limit is 200.
- Attendance limited to 1/3 fire code for entities (at least 5 people permitted).
  - Can only attend with household/close contacts.
- Drive-ins permitted.
- Restaurants and similar:
  - Indoor dining not permitted.
  - Outdoor dining: limit 6 to a table; no mixing and mingling; liquor sales stop at 10 pm, consumption stops at 11pm.
- No indoor adult group physical activity/performance activity/recreation.
  - 1:1 or solo permitted.
  - Does not impact semi-professional/professional.

Alberta

Current Restrictions – With REP

- Individuals must be screened for proof of vaccination/negative COVID test/medical exception.
  - Mandatory masking and isolation requirements apply; mandatory physical distancing not required.
- Capacity limits:
  - Facilities with occupancy load 1,000+ - limit attendance to 50%.
  - Facilities with occupancy load 500 to 999 - limit attendance 500 attendees.
  - Facilities with occupancy load 499 or less – no capacity restriction.
- Food/beverage in audience settings
  - Permitted if stadium seating occupancy is 499 or less; concessions open.
  - Not permitted if stadium seating occupancy is 500 or more; restaurants/etc permitted in these settings if physically separate from stadium seating.
- Restaurants/events/etc:
  - Liquor sales and operating restrictions.
    - Class A, C and Special Events Licences: liquor sale stops at 11pm; close at 12:30am.
    - Facility, Gaming and Class B Licenses: liquor sale stops at 11pm; consumption stops at 12:30am.
  - Limit of 10 to a table, no mixing and mingling.
  - Interactive activities not permitted, exception for dancing at weddings.

Categories for Easing Measures

Category	Assessment
Gatherings	Outdoor – low risk • evidence indicates less likely for transmission. Indoor – high risk • household transmission still most likely source of COVID. • in private dwellings, individuals are not required to wear masks. • tend to be more social/intimate; less likely to maintain physical distancing.
Youth	• 0-4 ineligible for vaccination. • 5-11 eligible - timing for full vaccination variable. • increased exposure potential: o schools (adults still under Work From Home). o youth activities not required to be screened for vaccination/negative test. • may experience increased mental health impacts due to restrictions .
Considerations for businesses/entities	Medium risk • REP & Work From Home add a layer of protection to these settings. • may see breakthrough cases if not boosted. • may have implications for recommended masking at work stations if full staffing complement returns. • capacity restrictions: o reduce the number of people potentially exposed; o facilitates physical distancing. • Ventilation a factor.

Categories for Easing Measures

Category	Assessment
Continuing Care	Medium to High risk • vulnerable population; susceptible to infection and severe outcomes. • controlling entry into the space important for reducing transmission. • need to balance with overall mental health.
Masking	High risk • medical grade masking or greater quality has demonstrated impact on transmission. • low cost intervention; equitable and accessible. • physical and visual reminder of risk and potential for transmission.
Isolation	High risk • Infective individuals have limited interaction; reduces transmission potential.

Jurisdictional Scanning

Last Updated: Feb. 7, 10:30 am

Context – High-Level Approach

Provinces have started to accelerate their easings as Omicron hospitalizations have stabilized.

- British Columbia has reopened gyms and fitness centres and is allowing youth tournaments but many other restrictions remain. British Columbia suggested additional public restrictions may be lifted by Feb. 21. British Columbia plans to maintain its proof of vaccination requirement until June 30.
- Saskatchewan has released its 'Living with COVID Plan', which closes its online booking tool for PCR testing. It is shifting from daily reporting of COVID-19 data, to weekly reporting.
- Manitoba is allowing larger private gatherings, and increased capacity in public places starting on Feb. 8. Manitoba is planning to lift all public health measures by spring.
- Quebec eased some public health measures on Jan. 31, and will make further easings on Feb. 7 and Feb. 14. Quebec has scrapped plans to tax the unvaccinated. Quebec plans to expand its proof of vaccination program to require a booster shot.
- Ontario is easing its measures in three phases starting on Jan. 31, with each phase being 21 days apart. Ontario originally intended to maintain its proof of vaccination requirements through all three phases, but has since announced they plan to reassess the value of the program.

Last Update: Feb. 7, 10:30 am

J-Scan – General Strategy and Masking

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON –Significant Measures	QC –Significant Measures
General Strategy	• On Feb. 3, Premier indicated the government will announce a firm date for lifting restrictions the week of Feb 7.	• On Feb 1, BC said it has reached the peak of hospitalization for the Omicron wave. • BC has started easing some restrictions and intends to gradually ease further restrictions in the weeks ahead. • BC has decided to extended their Vaccination Card program to June 30.	• On Feb. 3, SK announced its Living with COVID plan. The plan will see SK restricting the availability of PCR testing to people at risk of sever outcomes and reducing COVID-19 public reporting to once a week starting on Feb. 7. • SK plans to lift the proof of vaccination requirement by end of February.	• On Feb. 3, MB announced that it was planning to lift all public health measures by spring. • On Feb. 8, MB will introduce new public health measures that are less restrictive than current restrictions.	• On Feb. 3, ON said they need to reassess the value of its vaccine passport system. • On Jan. 20, ON announced a three phase plan to ease its Omicron measures, starting on Jan. 31. Each step will be separated by 21 days.	• On Feb. 1 QC cancelled the proposed tax on the unvaccinated and announced additional easings for gyms to take place of Feb. 14.
Masking	• Masking is required in all indoor public spaces for everyone over 2.	• Masking is required in all indoor public spaces for everyone over 5.	• Masking is required in all indoor public spaces for everyone over 2.	• Masking is required in all indoor public spaces for everyone over 5.	• Masking is required in all indoor public spaces for everyone over 2.	• Masking is required in all indoor public spacesfor everyone over 10. QC recommends people from 2 to 9 wear masks.

Alberta

Last Updated: Feb. 7, 10:30 am

J-Scan – Vaccines

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON –Significant Measures	QC –Significant Measures
Vaccine Eligibility	• 18+ eligible for a booster after five months.	• 18+ eligible for a booster after six months. • Pregnant women can book a booster after eight weeks. • Immunocompromised individuals can get a 4th dose.	• 18+ eligible for a booster after three months.	• 18+ eligible for a booster after six months. • Interval can be shorted to five months for 60+, or those living in a First Nations Community.	• 18+ eligible for a booster after three months. • Immunocompromised individuals and residents of Long-Term Care can get a 4th dose after 84 days.	• 18+ eligible for a booster after three months. • People with chronic health conditions, pregnant women, health workers and people in remote areas also eligible. • QC plans to open pop-up vaccine clinics.
Proof of Vaccination	• Proof of vaccination, or negative test result, is required for everyone over 12 to enter all places participating in the Restrictions Exemption Program.	• Proof of vaccination is required for everyone over 12 to access some events, services and businesses.	• Proof of vaccination required for a list of establishments, businesses and event venues. • SK plans to lift the proof of vaccination requirement by the end of February.	• Proof of vaccination required for a list of establishments, businesses and event venues.	• Proof of vaccination required to access indoor dinning, theatres, gyms and other businesses. • ON not planning to require a third dose for people to be considered fully vaccinated.	• Proof of vaccination expanded to all large stores except grocery stores and pharmacies. • Proof of vaccination required for liquor and cannabis stores. • Booster will be required for vaccine passport once everyone has had an opportunity to get a booster.

Alberta

J-Scan – COVID Testing

Last Updated: Feb. 7, 10:30 am

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON –Significant Measures	QC –Significant Measures
Rapid Testing	• Providing free rapid test at select locations. • First come first serve. • Limit one kit per person every 14 days.	• BC offers rapid tests for organizations seeking a rapid test screening program for their workforce. • To be used for asymptomatic people. • BC residents can report a positive rapid test result to a rapid test using an eForm.	• SK provides free rapid tests to residents; available at 600 locations around the province.	• MB replacing most of its PCR tests with rapid tests at all COVID-19 testing sites. • Residents no longer need a PCR test to confirm a positive rapid test result. • MB has Fast Pass Testing Sites for teachers and other staff working with students.	• ON has a limited supply of rapid tests that are being prioritized for health care and highest risk settings. This includes testing asymptomatic staff in these sectors to allow them to return to work. • ON provides free rapid tests for high-risk communities, organizations and workplaces. • ON provided students with two rapid tests each when they returned to school.	• Used for symptomatic screening. • Providing free rapid tests at pharmacies. • Rapid screening tests provided for parents, students (pre-school, K-6).
PCR Testing	• Prioritizing PCR testing for individuals in high-risk settings and individuals at risk for severe outcomes.	• BC prioritizing PCR tests for healthcare workers, emergency responders and high risk people. • BC provides rapid tests for those of low risk of having a severe outcome. • BC can conduct 20,000 PCR tests per day.	• As of Feb. 7, PCR testing will be reserved for priority populations at risk of sever outcomes. SK will end its online booking system for PCR testing; appointments will be made by appointment only.	• MB will provide PCR testing to symptomatic people and who: o Are experiencing homelessness. o Are hospitalized. o Have travelled outside of Canada in the past 14 days. o Have a positive rapid test are working with high risk individuals.	• ON providing PCR tests to symptomatic individuals who o Reside in a First Nation; Inuit or Metis community. o Are symptomatic students or education staff, who receive a PCR kit through school. o people who work in a hospital or congregate living setting. o high risk contacts connected to a confirmed outbreak. o Pregnant people. o Unvaccinated people over 70. o First responders.	• PCR testing only for certain groups of people, including health and social care workers and a list of priority individuals including frontline and essential workers and the vulnerable.

Alberta

Last Updated: Feb. 7, 10:30 am

J-Scan – Isolation and Quarantine

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON – Significant Measures	QC –Significant Measures
Isolation requirements if diagnosed with COVID-19	• If fully vaccinated, self isolate five days from first date of symptoms; 10 days if unvaccinated. • Anyone leaving isolation prior to 10 days must wear a mask for an additional five for a total of 10 days.	• Vaccinated individuals and those 18 and younger need to self isolate five days from first date of symptoms; others must isolate for 10 days. • Anyone leaving isolation must wear a mask for an additional five days.	• Residents who receive a positive PCR or rapid antigen test will be required to isolate for five days, regardless of vaccination status.	• Self-isolation period for vaccinated people is five days from first date of symptoms; 10 days if unvaccinated. • Anyone leaving isolation must wear a mask and avoid high-risk settings for an additional five days.	• Self-isolation period for vaccinated people is five days from first date of symptoms; 10 days if unvaccinated or immunocompromised.	• If fully vaccinated must self isolate five days from first date of symptoms; 10 days if unvaccinated (5 days if under 12). • Anyone leaving isolation must wear a mask for an additional five days. • Health care workers to isolate for seven days.
Isolation requirements if a close contact	• Close contacts are not required to isolate. • If you are a household contact of a positive case, and not fully vaccinated you should stay home for 14 days, and monitor for symptoms.	• Close contacts do not have to self-isolate.	• Close contacts do not have to self isolate.	• Close contacts who do not have symptoms and are fully vaccinated (or tested positive in the past six months) do not need to self isolate. • Close contacts who are unvaccinated must self isolate for 10 days.	• Close contacts who are vaccinated and asymptomatic do not need to self-isolate. • Close contacts who are unvaccinated must self isolate for 10 days (5 days if under 12). • Individuals who work in high risk settings should not attend work for 10 days.	• High-risk contacts must self isolate five days if vaccinated. • High-risk contacts who are unvaccinated must self isolate for 10 days. • Low-risk contacts only need to watch for symptoms for 10 days.

Alberta

Last Updated: Feb. 7, 10:30 am

J-Scan – Private Gatherings

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON – Significant Measures	QC –Significant Measures
Private Gatherings	• Indoor personal gathering limited to 10 adults. • Outdoor gatherings limited to 20 people, with 2m physical distancing. • Youth aged 18- do not count to the limit.	• Indoor personal gathering limited to 10 people plus one household. 12+ must be fully vaccinated. • No restrictions for outdoor personal gatherings.	• No limits.	• As of Feb. 8, indoor private gathering limits will be increased to 25 people plus household if vaccinated. Limited to ten people plus household if everyone is vaccinated. • Outdoor private gathering limits will be increased to 50 people plus household if vaccinated. Limited to 20 plus household if anyone is unvaccinated. • Youth aged 12- do not count to the limit.	• On, Jan. 31, social gatherings limits were increased to 10 people indoors and 25 people outdoors.	• Up to four people from different addresses, or a maximum of two family bubbles will be allowed to gather indoors. • Outdoor gatherings limited to 20 people from three households.

Alberta

Last Updated: Feb. 7, 10:30 am

J-Scan – Organized Gatherings

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON – Significant Measures	QC –Significant Measures

Organized Gatherings	• Outdoor events that are fully outdoors have no capacity restrictions.
	• Places of worship:
	  ○ 1/3 capacity.
	  ○ 2 m physical distancing.
	• Weddings/funerals:
	  ○ Indoor wedding ceremonies and funeral services are capped at 50 people or 50% of capacity unless the facility implements REP.
	  ○ Indoor receptions are prohibited unless the facilities implements REP.
	  ○ Outdoor ceremonies, services and receptions are capped at 200 people unless the facility implements REP.
		• Indoor organized gatherings of any size are not allowed (this includes weddings and funeral receptions).
		• Outdoor organized seated gatherings can have a capacity of 5,000 or, 50%, capacity whichever is greater.
			• No limits.	• As of Feb. 8:
				  ○ Capacity limits on indoor events will be increased to 50% with proof of vaccination. If no proof of vaccination, limited to 25% capacity, or 250 people. Youth aged 12- do not count to the limit.
				  ○ Outdoor: must not exceed 50% capacity.
				  ○ Capacity limits on indoor weddings and funerals to stay the same: indoor limited to 50% capacity, or 250 people, if proof of immunization required; 25% or 25 people if proof of immunization not required.
					• On Jan. 31, indoor venues, including religious ceremonies/services were allowed to reopen at 50% capacity.
					• Outdoor events have no limits on numbers.
						• On Feb, 7, outdoor public events of up to 1,000 people will be allowed with vaccination passport (up from 250).
						• On Feb. 7, places of worship will be able to reopen at 50% capacity, with a maximum of 250 people with a vaccination passport. Funerals will be allowed with up to 50 people without a vaccination passport.
						• On Feb. 7, movies and theaters will be able to reopen at 50% capacity, with a maximum of 500 people (they are currently closed).

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J-Scan – Indoor Events

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON – Significant Measures	QC –Significant Measures
Indoor events at venues	• Indoor facilities must limit capacity to: o 50% capacity if the facility has an capacity over 1,000. o 500 attendees if the facility has a capacity between 500 and 1,000. o No food or drink allowed in seated audience settings with more then 500 attendees. • Outdoor facilities have no capacity restrictions.	• Indoor events at venues can only have 50% capacity, no matter the size (includes concerts, sports events, movies, lectures). o Everyone must be fully vaccinated to attend. o Everyone must wear masks indoors. o Dancing is not permitted. o Spectators must be seated.	• No limits.	• Same as organized gatherings.	• On Jan. 31, concert venues, theaters and cinemas were allowed to reopen at 50% capacity.	• On Feb. 7, movies, theaters, entertainment venues and arenas will be able to reopen at 50% capacity, with a maximum of 500 people. Outdoor venues will be allowed to reopen with up to 1000 people.

Alberta

Last Updated: Feb. 7, 10:30 am

J-Scan – Exercise and Sport

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON – Significant Measures	QC –Significant Measures
Exercise and fitness	• Unless the facilities has implemented REP: o Indoor group activities and competitions not permitted for 18+. • Outdoor activities can continue with no restrictions.	• Gyms allowed to be reopen with a space requirement of 7 square meters (7m²) per person. Individual and group fitness is allowed. • Programs for children and youth, activities that take place in pools and training for high performance athletes can continue. • Swimming pools can operate at 50% capacity.	• No limits.	• As of Feb. 8, gyms will be allowed to operate at to 50% capacity. This removes the 250 person limit.	• As of Jan. 31, gyms and sports facilities were allowed to reopen at 50% capacity. • Outdoor facilities able to operate at 50% capacity. • Proof of vaccination required for facilities with a capacity over 20,000.	• As of Feb. 14, gyms and spas that are currently closed may reopen at 50% capacity.
Sport	• Spectator attendance restricted to 1/3 fire code capacity; attendees limited to a single household or 2 close contacts if living alone. • Outdoor activities can continue with no restrictions.	• Adult indoor individual, group fitness and dance classes permitted – 25 max. per class, capacity limits 7m² per person, no drop-in. • Normal sport activities are allowed at 50% capacity. Non-employee supervisors, coaches and assistants for people 21 years or younger must be fully vaccinated. • Starting on Feb. 1, youth sports will be allowed for people 21 years or younger.	• No limits.	• As of Feb.8, indoor sport and recreational capacity at 50% capacity. No capacity limits for outdoor participants. This removes the 250 person limit. • Tournaments are allowed.	• As of Jan. 31, sporting arenas were allowed to open at 50% or 500 people, whichever is less. • Outdoor facilities open at 50% spectator capacity.	• As of Jan. 31, extracurricular sports allowed to resume for people under 18. Indoor tournaments not allowed. • Adult sports for groups of up to 25 people may resume on Feb 14. • Outdoor sports tournaments allowed with a health protocol and limited access to building.

Last Updated: Feb. 7, 10:30 am

J-Scan – Schools

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON – Significant Measures	QC –Significant Measures
Schools		• School staff are required to disclose vaccination status. School districts may apply a vaccine mandate. • Families will only be notified of school exposures when attendance drops to below typical rates (i.e. approximately 10% higher then normal).	• Starting on Jan. 29, parents and caregivers no longer have to tell schools if their child has COVID-19. Schools will no longer record and communicate cases.	• Starting Jan.24, schools will resume offering vaccines for children aged 5-17. • Families will not be notified of close contacts, instead will provide staff and students with absenteeism reports through regular channels.	• Families will be notified of school exposures when absenteeism reaches 30%.	• Classrooms will only be shut down if 60% of students are in isolation. • Students will also no longer be required to isolate if they are a close contact. Isolation only required if they are a household contact. • Installing CO_2 readers in classrooms. • As of Jan. 31, extracurricular activities will be allowed to resume with proof of vaccination for 13 and up. Tournaments not allowed.

Alberta

Last Updated: Feb. 7, 10:30 am

J-Scan – Restaurants, bars and nightclubs

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON – Significant Measures	QC –Significant Measures
Restaurants, bars and nightclubs	• Facilities that participate in REP: o Limit of 10 people per table. o No mingling between tables. o Liquor sales must end at 11pm, and must close at 12:30am. • Facilities that do not participate in REP: o No indoor dining. o Outdoor dining only for a maximum of 6 people per table. o Liquor sales must end at 10pm, and must close at 11pm.	• Places that do not offer full meal service must close (this includes bars, nightclubs and lounges that do not service meals). • Indoor and outdoor dining is allowed when: o A maximum of 6 people at a table. o Two metres physical barriers between tables. o Customers must stay seated. o No dancing. o Normal liquor service hours. o Masks are required when not seated at a table. • Restaurants and pubs must scan proof of vaccination.	• No limits.	• On Feb. 8: may operate at 50 percent capacity. o Limit of 10 people per table. o Individuals must provide proof of vaccination. o Liquor sales must end at 12pm. • On Feb. 8, individuals will no longer have to show proof of vaccination to pick up takeout.	• On Jan. 31, restaurants, bars without dancing were allowed to reopen at 50% capacity . o A maximum of 10 people at a table.	• On Jan. 31, restaurants were allowed to reopen at half capacity. Up to four people from different addresses, or two family bubbles will be allowed to share a table. • Complete closure of bars, taverns and casinos.

Alberta

Last Updated: Feb. 7, 10:30 am

J-Scan – Retail, Work From Home, Other

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON – Significant Measures	QC –Significant Measures
Retail Establishments	• Retail and shopping malls restricted to 1/3 capacity. • Attendees must be household members; or 2 close contacts if they live alone.	• Retail stores must have a COVID-19 Safety Plan.	• No limits.	• As of Feb. 8, retail establishments are allowed to operate at 100% capacity throughout Manitoba. Physical distancing measures and masks are still required.	• Retail settings, including shopping malls are permitted to operate at 50% capacity.	• 50% capacity limit and allow 20m² per person). • Vaccination passport required to enter stores with floor space greater than 1,500 m2.
Work From Home	• Mandatory work from home measures unless the employee has determined a physical presence is required.	• BC suggests businesses allow staff to work from home.		• As of Feb. 8, workplaces will be able to open without restrictions.	• Businesses and organizations will need to ensure their employees work remotely unless the nature of their work requires them to be on-site.	• Mandatory tele-work for any activity that can take place remotely.
Other		• BC requires businesses to reactivate their COVID Safety Plans.	• As of Feb 3, outbreaks related to public mass gatherings/events, places of worship, workplaces, daycares, and educational settings will no longer be investigated. • COVID-19 surveillance will be in alignment with reporting for other communicable diseases. The provincial COVID-19 dashboard will be discontinued and data updates will be provided on a weekly basis.		• Personal care services are required to operate at 50% capacity. • Public libraries limited to 50% capacity.	

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J-Scan – Long-Term Care and Surgeries

	AB – Moderate Measures	BC – Moderate Measures	SK –Minor Measures	MB - Moderate Measures	ON – Significant Measures	QC –Significant Measures
Long-Term Care	• All visiting family and friends must wear a mask while indoors and in resident rooms. • Family and friends that are not fully immunized are asked to reconsider their need to visit onsite. • Operators have the authority to implement other measures (including require proof of vaccination, or rapid testing). • Announced plans to rescind a public health order barring health-care workers from working at more than one continuing-care facility by mid-February.	• Residents allowed to have one social visitor, in addition to a designated essential visitor. All visitors must show proof of vaccination. • All visitors over 12 must complete a rapid test at the entrance. • On Feb. 3, BC released an updated outbreak management protocol for long-term care and acute care systems	• All family and visitors to a long term care are required to wear a mask at all times. • Long-term care residents are encouraged to mask when outside their rooms and in common areas. • No limits on number of essential family/support persons. • Outbreaks in long-term care will continue to be publicly reported.	• Residents are to wear masks if they are medically able. • Designated family caregivers must be fully vaccinated. • General visitors can be scheduled by appointment.	• All general visitors to a long-term care home will need to be fully vaccinated to enter. • All staff, students, volunteers and caregivers to be tested at least twice a week prior to entry into the home. • Requires a negative test upon entry. • Additional tests and isolation for residents returning from an overnight absence. • As of Feb. 7, residents who are triple vaccinated will be able to take part is social day trips. • As of Feb. 7, up to four designated indoor caregivers allowed (up from two).	• Only caregivers are allowed to these facilities. • Residents will have to identify a maximum of four caregivers able to visit. • Caregivers will need to show proof of vaccination. • Masks must be warn and social distancing measures respected.
Surgeries				• MB implementing steps to address surgical, diagnostic backlog.	• ON taking phased approach to resuming non-emergent and non-urgent surgeries and procedures (Jan 31).	• QC has started to reschedule medical appointments and operating room activities.

Alberta

Easing Plans

British Columbia

BC does not have a formal reopening plan but has announced they will be slowly easing restrictions over the coming weeks.

BC's latest changes include:

- Adult indoor individual, group fitness or exercise activities and adult dance classes and activities are allowed with:
  - Capacity based on 7m² per person.
  - Group fitness and exercise classes have a capacity limit of 25 people.
  - Pre-bookings for drop-in where operationally possible.
- All indoor venues at 50% capacity; nightclubs/bars closed.
- Indoor personal gatherings limited to 10 visitors or one other household; no restriction on outdoor gatherings.
- Isolation of under 18 age group and vaccinated adult is reduced to 5 days and until symptoms improve – if tested positive.
- Contact tracing ended on January 21, 2022.

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Saskatchewan

- Saskatchewan has released their 'Living with COVID' plan.
  - As of Feb. 7, PCR testing will be limited to people who are at a high risk of sever outcomes. Individuals will only be able to book PCR testing over the telephone.
  - Free rapid tests will continue to be available at 600 locations across the provinces.
  - Saskatchewan will no longer report COVID-19 information every day. Epidemiological information will be reported weekly, on Thursdays.

- Premier Moe has indicated that proof of vaccination requirement will be lifted by the end of February.

Last Updated: Feb. 7, 10:30 am

Manitoba

- Manitoba has announced easings effective February 8.
  - These easings will allow for larger private gatherings and higher capacity in public places for those who are fully vaccinated.
  - The 250-person maximum capacity for most venues will be lifted.

- Manitoba plans to end all public health measures by spring.

Last Updated: Feb. 7, 10:30 am

Ontario

- Ontario has announced a three-step easing starting on January 31, 2022 and lifting most measures by mid-March 2022. Ontario will be at roughly Alberta's level of measures by February 21.
  - Proof of vaccination requirement is currently being maintained during all three steps. However, the province has announced that it needs to reassess the value of its passport system.

- Phase 1: effective January 31
  - Increase social gathering limits to 10 indoors and 25 outdoors.
  - Increase/maintain capacity limits at 50% in most indoor public settings, including restaurants, bars, retailers, shopping malls, sports and recreational fitness facilities, gyms, cinemas, meeting and event spaces, recreational and amusement parks, museums, galleries, aquariums & zoos, casinos, bingo halls, gaming facilities, and religious services, rites, or ceremonies.

Ontario (continued)

- Phase 2: effective February 21
  - Increase social gathering limits to 25 indoors and 100 outdoors.
  - Lift capacity limits in indoor public settings where proof of vaccination is required (e.g. indoor sports and recreational facilities, cinemas).
  - Permit spectators at sporting events, concert venues, and theatres at 50% capacity.
  - Allow indoor public settings where proof of vaccination is not required to full capacity with 2 m physical distancing. Indoor religious services, rites or ceremonies may also operate at fully capacity with 2 m physical distance or no limit if proof of vaccination is required.
  - Increase indoor capacity limits to 25% in the remaining higher-risk settings where proof of vaccination is required (e.g. nightclubs, wedding receptions with dance, bathhouses and sex clubs).

- Phase 3: effective March 14
  - Lift capacity limits in all indoor public settings.
  - Increase social gathering limits to 50 indoors, no limits for outdoors.

Last Updated: Feb. 7, 10:30 am

Quebec

- Quebec plans to gradually lift public health measures.
  - Quebec has already ended its curfew and removed the requirement that non-essential stores close on Sunday.
  - Jan. 31:
    - Indoor private gatherings increased to a maximum of four people from different addresses, or two family bubbles.
    - Restaurants and dinning rooms may reopen at half capacity.
    - More people allowed to visit long-term care homes.
    - Extracurricular sports may resume for people under 18.

Quebec (continued)

- Feb. 7:
  - Movies theatres, entertainment venues and arenas may reopen at half capacity with a maximum of 500 people.
  - Places of worship may reopen at half capacity, with a maximum of 250 people.

- Feb. 14:
  - Gyms and spas may open at half capacity, along with sports and artistic activities for up to 25 people.

Last Updated: Feb. 7, 10:30 am

United Kingdom

- The UK (England) has announced that the 'Plan B' restrictions they implemented to address Omicron will be lifted by Jan. 27, 2022:
  - Jan 17: self-isolation duration reduced to five days; COVID positive individuals can end self-isolation on day six if tested negative in two lateral flow tests taken on two consecutive days (day five and six).
  - Jan 19: return to workplace.
  - Jan 20: secondary and college students are no longer required to wear mask in classrooms.
  - Jan 27: the masking mandate and vaccine pass requirement for events and venues will be lifted.
  - Feb 11: fully vaccinated travelers will no longer need to take a COVID-19 test either before or after they arrive in the UK. If not fully vaccinated, travelers will need to take a pre-departure test and a PCR test on or before day 2 after arrival; and they will need to quarantine if tested positive.

Last Updated: Feb. 7, 10:30 am

Ireland

Ireland lifted most restrictions on January 24, 2022 while maintaining masking mandate and school measures until Feb 28, 2022.

- Effective January 22, 2022, the following restrictions were removed:
  - guidance in relation to household visiting.
  - early closing time for hospitality and event venues.
  - capacity restrictions for outdoor events, including sporting fixtures.
  - capacity restrictions for indoor events, including weddings.
  - sectoral protective measures such as physical distancing and sitting cohorts.
  - restrictions on nightclubs.
  - requirements to have a valid Digital COVID Certificate to enter various premises.

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Ireland (continued)

- Effective January 24, 2022, the following restrictions were removed:
  - phased return to physical attendance in workplaces.

- Until February 28, 2022, the following measures will be required:
  - mask wearing in all settings where they are currently required.
  - protective measures in schools, early learning and long term care facilities.

Last Updated: Feb. 7, 10:30 am

Denmark

- Most restrictions were lifted on January 31, 2022.
- Denmark to no longer treating COVID-19 as a socially critical disease after February 5, 2022.
- Denmark's epidemic commission recommended the following:
  - Requirements for testing and isolation after entry into Denmark will continue for 4 weeks from Jan. 31, 2022.
  - Infection prevention measures will continue under the assumption that COVID-19 is a generally dangerous disease instead of a socially critical one.
  - Some special measures will be maintained to protect the elderly and vulnerable
  - Close monitoring and adaptation of measures will continue.

Rapid Testing

Last Updated: Feb. 7

Rapid Testing

- 77% of the tests have shipped for the second round of tests to schools as of end of day February 3, 2022.
  - AHS expects that all shipments will be out for delivery by end of day Monday, February 7 and all schools will receive their shipments by February 14, 2022.
- Alberta Health has shipped 1,775,520 tests to pharmacies in Calgary, Edmonton and Red Deer and 891,000 tests to AHS locations last week.
  - Albertans were able to start picking up tests at some pharmacies last Tuesdays and all shipments had been shipped by the end of last week.
- Alberta Health is shipping 930,000 tests to First Nations communities; providing two test kits for every individual living on-reserve.
- The plan remains to transition rapid test distribution from AHS sites to pharmacies outside of Edmonton, Calgary and Red Deer as supply and pharmaceutical distributor capacity permits.
  - Pharmacies outside of Edmonton, Calgary and Red Deer had the opportunity to order up to 648 kits per pharmacy (2,099,520 total tests) and shipments will begin later this week.

Last Updated: Feb. 4

Future Planning Considerations

As we plan for the shift from pandemic to endemic, there will need to be additional decisions made with respect to the rapid testing program. A plan to address the below considerations will be provided to PICC in the coming weeks:

- Alberta can expect to continue to receive rapid tests from Health Canada through March 2022.
- A transition of the rapid testing program needs to be considered.
  - User pay model?
  - Direct shipments from Health Canada to pharmacy distributor?
  - Strategic stockpile?
  - Community distribution model?
  - Future of the Employer and Service Provider program?

Endemic Planning Assumptions and Considerations

Indicators of Endemic Phase

- COVID-19 will be in an endemic state when it can be treated as a persistent yet manageable threat, similar to the seasonal flu. Some of the signs that COVID-19 is in an endemic state will include:
  - The health system is able to manage the volume of patients needing treatment for more severe outcomes without disrupting other care provision.
  - No known current threat of new variants with both significant immune escape and high severity characteristics.
  - Treatment options exist (i.e. anti-viral pills) to mitigate significant number of severe outcomes.
  - The public is increasingly tolerant of the disease.
- In an endemic state, there will no longer be the need for the GOA to mitigate the impacts of COVID-19 on an emergency basis. The GOA will respond to COVID-19 in a similar way to how it manages other communicable illnesses.

Endemic Planning Considerations

- Many of Alberta Health's past COVID-19 management activities were part of a pandemic approach where case identification and containment was the goal (e.g. widespread testing and case investigation). Interventions to manage COVID-19 can be divided into two groups: legal orders which mandate restrictions, and health system infrastructure to identify and respond to cases.
- In an endemic approach, where management is focused mainly on high risk settings, legal orders would no longer be necessary if vaccinations remain effective at preventing severe outcomes, and health system infrastructure could be recalibrated to support surveillance, individual clinical management and high risk outbreak response.
- However, once the transition starts and the operational 'ramp down' of health system infrastructure begins, it will not be possible to re-establish programs quickly. The system is complex with many co-dependencies. A coordinated de-escalation is required.
- With the removal of most restrictions, a small exit wave may occur. The risk of further burdening the health care system would be mitigated by waiting to remove restrictions until the acute care pressure has begun to ease from the fifth wave.

Endemic Planning Considerations

- In the future, new variants of concern of COVID will likely emerge. Their impact will be determined by how effectively they escape immunity from vaccines and previous infection as well as the severity of outcomes.
- Just as we must prepare for a future pandemic of any type, we should be prepared for a new variant that may be more severe; however, moving to an endemic state will mean that we would not pre-emptively respond to a new variant by moving back to a containment approach focused on case numbers. There will be ongoing acute care impacts as COVID continues to circulate.
- As Alberta de-escalates its response to COVID-19, it will be important to provide the public with timely and appropriate messaging. Different groups of Albertans have different levels of comfort with an endemic approach, and communication will need to be consistent and clear.

PCR Testing

- Through the transition, the GOA will continue to limit PCR testing to high risk settings and to those at risk of severe outcomes after the Omicron wave ends.
  - With high vaccination rates, case numbers are no longer the most important factor when considering public health measures.
  - It is expensive to offer widespread PCR tests to the public, and is not a strategic use of limited health system resources at a time when we are no longer striving for case containment.
  - However, Alberta will not be able to report accurate daily new case numbers or conduct case investigations and contact tracing in non-high risk settings, including schools.

TAB 14

PRIVATE

PRIORITIES IMPLEMENTATION CABINET COMMITTEE Minutes from February 8, 2022

9:00 a.m. to 12:30 p.m.
Chinook Room, McDougall Centre

MEMBERS PRESENT: Premier, Schweitzer, Copping, Toews, Nixon, McIver, Savage, Schulz

GUESTS:

Transition from Pandemic to Endemic

Hon. Adriana LaGrange, Minister, Education
Shannon Gill, Chief of Staff, Office of the Minister, Health
Nicole Williams, Chief of Staff, Office of the Minister, Education
Paul Wynnyk, Deputy Minister, Health
Andre Tremblay, Deputy Minister, Education
Bryce Stewart, Associate Deputy Minister, Health
Dr. Deena Hinshaw, Chief Medical Officer of Health, Health
Ethan Bayne, Assistant Deputy Minister, Incident Commander, Emergency Operations Centre, Health
Cameron Traynor, Assistant Deputy Minister, Strategic Communications, Communications and Public Engagement

Meeting called to order at 9:05 a.m.

I. STRATEGIC DISCUSSION

1. Transition from Pandemic to Endemic Framework — Copping (HLTH)

PICC RECEIVED options to ease public health measures as Alberta transitions from pandemic to endemic management of COVID-19.

PICC DIRECTED the Minister of Health to implement Option 2 to ease public health measures using a phased approach, specifically:

- **Step 1 – Effective at 11:59 p.m. on February 8, 2022:**
    - Entertainment venues:
        - Restrictions on food and beverages while seated are removed.
        - Restrictions Exemption Program (REP) removed along with all previous restrictions in these facilities with the exception of the following:
            - Restrictions on maximum people per table at restaurants, liquor service restrictions, closing times and interactive activities remain in force.

- Capacity limits for all facilities are as follows:
  - All facilities with a capacity of 499 or less are not limited;
  - All facilities with capacity of 500-1000 are limited to a capacity of 500; and,
  - All facilities with capacity of 1000+ are limited to 50% capacity.
- Effective at 11:59 p.m. on February 13, 2022:
  - Masking no longer required for children 12 years of age and younger, and no masking requirements for students in schools (masking requirements will remain in force for adults).

- **Step 2 – If COVID hospitalizations continue to trend downwards, then PICC will confirm the implementation of the following, effective at 11:59 p.m. on February 28, 2022:**
  - Remaining school requirements removed (i.e., K-6 cohorting).
  - Requirements for screening prior to youth activities removed.
  - Limits on gatherings removed.
  - Masking requirements removed.
  - Mandatory work from home requirements removed.
  - Capacity limits removed for large venues and entertainment removed.
  - Entertainment venues: Restrictions on closing times and interactive activities removed.

- **Step 3 – Timing to be determined, contingent on hospitalizations continuing to trend downward:**
  - COVID-specific continuing care measures removed.
  - Mandatory isolation requirement removed (becomes a recommendation only).

PICC DIRECTED the Minister of Health to expand booster shot availability for Albertans 12-17 years of age who have medical conditions that make them susceptible to COVID-19.

PICC DIRECTED the Minister of Health to work with the Minister of Service Alberta to remove the official Alberta COVID Records verifier apps from the Google and Apple stores.

PICC DIRECTED the Minister of Health to return to PICC with recommendations for the long-term management of COVID-19, timing to be determined by Executive Council.

PICC DIRECTED the Minister of Health to return to PICC with proposals for increasing the booster/third dose uptake among eligible Albertans, timing to be determined by Executive Council.

PICC DIRECTED the President of Treasury Board and Minister of Finance to work with the Minister of Education, the Minister of Advanced Education, and any other relevant ministers on correspondence to broader public sector organizations/agencies/boards/commissions encouraging alignment of their COVID-related policies with the Government of Alberta.

PICC NOTED that relevant legal instruments will be amended to reflect the above.

PICC DIRECTED the Minister of Health to work with the Premier's Office and Communications and Public Engagement to finalize this item for announcement.

II. EXECUTIVE DISCUSSION

Premier
(EXC)

Meeting adjourned at 2:02 p.m.

Christopher McPherson
Deputy Secretary to Cabinet

Laura Lowe
Executive Director,
Cabinet Coordination

POLITICS

Many COVID-19 mandates are in provincial jurisdiction: Health minister

Posted February 8 2022 01:09pm

Asked about Liberal MP Joel Lightbound's comments against COVID-19 mandates during Tuesday's session of question period in the House of Commons, Health Minister Jean-Yves Duclos made it clear that lockdowns and many COVID-19 vaccine mandates are within provincial jurisdiction.

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Politics

Trudeau calls on premiers and mayors to 'do the right thing' as COVID caseloads rise

PM urges provinces to bring back restrictions, targeted shutdowns

Catharine Tunney · CBC News · Posted: Nov 10, 2020 12:35 PM ET | Last Updated: November 10, 2020

Prime Minister Justin Trudeau listens to Canada's Chief Public Health Officer Theresa Tam as she speaks during a news conference in Ottawa, Tuesday, November 10, 2020. Trudeau publicly pleaded today for the country's premiers and mayors to "do the right thing" in their fight against rising COVID-19 cases. (Adrian Wyld/The Canadian Press)

comments

Prime Minister Justin Trudeau publicly called on the country's premiers and mayors today to "do the right thing" and impose restrictions to counter the recent rise in COVID-19 cases.

"We're seeing record spikes this morning across the country. So I'm imploring the premiers and our mayors to please do the right thing — act now to protect public health," Trudeau said during his regular morning briefing with public health officials.

"If you think something is missing in the support we're offering for your citizens — tell us."

Trudeau was asked by reporters to point out the provinces struggling with caseloads now, but he declined.

"I think it's extremely important to recognize that we are in a resurgence of COVID-19 and there are things that different regions can do to do more to fight COVID-19," he said.

"Our job as a federal government is to be there to make difficult decisions slightly less difficult."

WATCH | Trudeau calls on premiers and mayors to 'act now to protect public health:

Trudeau calls on premiers and mayors to 'act now to protect public health'

2 years ago | 2:25

Prime Minister Justin Trudeau tells reporters he worries that premiers may be easing restrictions to save businesses instead of following public health guidelines.

His sobering statement comes as health officials are reporting what the prime minister called a "concerning spike" in caseloads across the country.

The province of Ontario, which recently eased its strict restrictions on businesses and public activity in some regions, this morning reported 1,388 new cases of COVID-19 — a new daily high — and 15 additional deaths. Health Minister Christine Elliott said that number includes 520 new cases in Toronto and 395 in Peel Region.

- THE LATEST **Coronavirus: What's happening in Canada and around the world on Tuesday**
- **Ontario reports record-high 1,388 new COVID-19 cases**

"I don't know if he's speaking to me directly," said Premier Doug Ford when asked about Trudeau's warning.

"If he is, I want to thank him for his ongoing support, but we need more support for businesses. That's what we need."

Ford also used his own Tuesday briefing to call on the federal government to get money moving faster.

"By the way, any federal money that comes — even the prior commitments — we need to get that start flowing because it's not flowing as quickly as we'd like," he said. "That's on rent relief."

WATCH | Edmonton Mayor Tells Vassy Kapelos province best suited to enact stricter measures:

Edmonton Mayor says province best suited to enact stricter measures

2 years ago | 1:37

After Prime Minister Justin Trudeau urged mayors and premiers to act now to curb the spread of COVID-19, Edmonton Mayor Don Iveson says the Alberta government has more tools to enact tougher safety measures.

On Monday, a group of physicians in Alberta sent a letter to Premier Jason Kenney, his health minister and Dr. Deena Hinshaw, Alberta's chief medical officer of health, calling for swift moves to slow the spread of the virus.

"If the rate of COVID-19 spread continues, the consequences to the people of Alberta will be catastrophic," the letter said.

"The province should consider a two-week, short, sharp lockdown or 'circuit breaker' to drop the effective reproductive number and allow contact tracing to catch up."

'Regions can do more'

Trudeau said imposing targeted shutdowns and restrictions now could help prevent further problems down the line, and pointed out that the federal government has given billions of dollars in direct support to businesses affected by shutdown orders.

"With rising cases of COVID-19 here at home, there's an added pressure on all orders of government to keep people safe and to protect jobs," he said.

"But I would hope that no leader in our country is easing public health vigilance because they feel pressure not to shut down businesses or slow down our economy. I understand that worry, but let me tell you — that's how we end up with businesses going out of business, and the economy damaged even more. Beating COVID is the only way to protect our economy."

- UPDATED **Alberta physicians call for 'sharp' two-week lockdown to curb spread of COVID-19**
- **Social gatherings banned, non-critical businesses closed as all of Manitoba moves to red alert level**

Trudeau said he has seen no justification for invoking the Emergencies Act — never-before-used legislation that empowers Ottawa to do just about anything it thinks is necessary to cope with a national crisis.

"I've had over 20 conversations with the first ministers directly, 20 first ministers meetings since the beginning of this pandemic. The issue of the Emergencies Act has come up a number of times and I've continued to reassure them that I don't see it as being necessary right now," he said.

"I know that all premiers are thinking of the health of their citizens as well as they think of the health of their economy, and that's why I'm confident we're going to continue to work together well and do the right things."

Manitoba goes to 'code red'

As Trudeau was speaking in Ottawa, Manitoba Premier Brian Pallister took the step of announcing widespread shutdowns are coming, including a ban on social gatherings of any kind starting Thursday.

That move comes one day after his chief provincial public health officer announced 365 new cases, three deaths, a record provincial test positivity rate of 9.5 per cent and record numbers of COVID-19 patients in hospital and in intensive care.

Trudeau announced Tuesday his government is spending $61 million more on anti-COVID-19 efforts in First Nations in Manitoba, which are also seeing sharp increases in caseloads.

B.C. Premier John Horgan is urging his residents to "get with the program" and cut back on social interactions, warning that a return to tighter restrictions is possible if the province's COVID-19 case numbers don't come down.

"This is going to be challenging," Horgan said Monday.

"No one should be under any illusion based on what's happening in British Columbia, in Canada, in North America — around the world — that we're going to be out of this anytime soon."

With files from Jennifer Walter

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