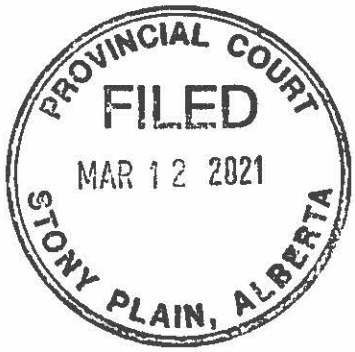
Docket Nos. 210161956-P-1
E12837926A

IN THE PROVINCIAL COURT OF ALBERTA
Sitting at Stoney Plain



BETWEEN:

HER MAJESTY THE QUEEN

- and –

JAMES COATES

(Accused/Applicant)

NOTICE OF INTENTION TO RAISE CONSTITUTIONAL ARGUMENT
Pursuant to *Constitutional Notice Regulation*, Alta Reg 102/1999

RE:	*R v Coates;* *Public Health Act*, s.73(1); Trial: May 3-5, 2021; Courtroom No. 003; Stony Plain, Alberta

WHEREAS THE ACCUSED STANDS CHARGED THAT:

COUNT 1: On or about the 20th day of December 2020, at or near Stoney Plain, Alberta, he did unlawfully contravene Section 73(1) of the *Public Health Act* by conducting a worship service at a place of worship at which the number of persons in attendance exceeded 15 percent of the total operational occupant load;

COUNT 2: On or about the 14th day of February 2021, at or near Stoney Plain, Alberta, did exceed capacity of 15 percent, contrary to Section 73(1) of the *Public Health Act*; and

COUNT 3: On or about the 14th day of February 2021, at or near Stoney Plain, Alberta, did not maintain 2 meters distance between persons, contrary to Section 73(1) of the *Public Health Act.*

(Collectively, the "Public Health Charges").

COUNT 4: On or about the 14th day of February 2021, at or near Stoney Plain, Alberta, being at large on an undertaking, did fail, without lawful excuse, to comply with a condition of that undertaking, to wit: must abide by provisions of the Public Health Act, contrary to section 145(4)(a) of the Criminal Code of Canada (the "Breach Charge").

TAKE NOTICE THAT counsel for the Accused will apply to the Court for the following orders:

1. A declaration pursuant to section 52(1) of the *Constitution Act, 1982* that section 18 of CMOH Order 02-2021 (previously section 16 of CMOH Order 42-2020, the "15% Capacity Restriction") infringes sections 2(a), 2(b), 2(c), and 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), is not saved by section 1, and is therefore void and of no force or effect;

2. A declaration pursuant to section 52(1) of the *Constitution Act, 1982* that section 2(1) of CMOH Order 26-2020 (the "Distancing Restriction") infringes sections 2(a), 2(b), 2(c), 2(d), and 7 of the *Charter*, is not saved by section 1, and is therefore void and of no force or effect;

3. A declaration pursuant to section 24(1) of the *Charter* that the purported undertaking imposed upon Pastor Coates on February 7, 2021 infringes sections 2(a) and 7 in a manner not justified under section 1;

4. A declaration pursuant to section 24(1) of the *Charter* that the release condition imposed upon James Coates following the February 16 show cause hearing infringes sections 2(a), 7, and 11(e) of the *Charter* in a manner not justified under section 1;

5. A dismissal of the Charges, or, in the alternative, to be acquitted of the Charges;

6. In the alternative, an order pursuant to section 24(1) of the *Charter* granting the Accused a stay of proceedings due to excessive punishment and the resulting irreparable prejudice to the integrity of the judicial system; and

7. In the further alternative, an order pursuant to section 24(2) of the *Charter* excluding all conscriptive and derivative evidence acquired from Pastor Coates. Reliance will be placed upon the decision in *R v Clark*, 2017 ABQB 643, and the leading decisions cited therein.

AND FURTHER TAKE NOTICE THAT the grounds for the application are as follows:

8. James Coates ("Pastor Coates") is a local Christian minister and lead pastor at Grace Life Church ("Grace Life"), located southwest of Edmonton. On December 20, 2020, a worship service occurred at Grace Life at which Pastor Coates preached by delivering a sermon from the pulpit of Grace Life. Pastor Coates was issued a summons in connection with the above worship service for allegedly breaching section 73(1) of the *Public Health Act* by failing to comply with the 15% Capacity Restriction.

9. On February 7, 2021, RCMP arrested Pastor Coates in his office at Grace Life following the Sunday morning worship service. The RCMP officers told Pastor Coates he was being released on an undertaking (the February 7 Undertaking). Pastor Coates explained to the officers he could not agree to or abide by the Undertaking and therefore would not be agreeing to it or signing it. The officers wrote "refused to sign" on the February 7 Undertaking. Pastor Coates understood that he was not bound by the Undertaking because he did not agree to it. The Undertaking required that Pastor Coates cease to, among other things, hold worship services in excess of 15% of the venue capacity of the Grace Life building.

10. On February 14, 2021, a worship service again occurred at Grace Life at which Pastor Coates preached by delivering a sermon from the pulpit of Grace Life. On February 15, 2021, the RCMP requested Pastor Coates attend at the Parkland RCMP station to face charges. Pastor Coates arrived at the Parkland RCMP station on the morning of February 16. Prior to a show cause hearing later that day, Pastor Coates was charged with allegedly breaching section 73(1) of the *Public Health Act* by failing to comply with the 15% Capacity Restriction, allegedly breaching section 73(1) of the *Public Health Act* by failing to comply with the Distancing Restrictions, and with allegedly breaching an undertaking contrary to section 145(4)(a) of the *Criminal Code*.

11. Pastor Coates has pled "not guilty" to all charges and contends that:

    a) the underlying 15% Capacity Restriction and Distancing Restriction (the "Impugned CMOH Provisions") are an unjustified infringement of the rights protected by sections 2(a), 2(b), 2(c), 2(d) and 7 of the *Charter*;

b) the February 7 Undertaking infringes sections 2(a), 2(b), and 7 of the *Charter* in a manner not justified under section 1;

c) the release condition imposed following the February 16 show cause hearing infringes sections 2(a), 7, and 11(e) of the *Charter* in a manner not justified under section 1; and

d) all evidence obtained regarding the Breach Charge were obtained in a manner that infringed his rights as protected by sections 2(a), 2(b), and 7 of the *Charter*.

SECTION 2(a) – FREEDOM OF RELIGION

12. An infringement of section 2(a) of the *Charter* will be made out where a claimant has a sincerely-held religious belief that has a nexus with religion and where the impugned government action interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.[1]

13. According to the Supreme Court of Canada:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, **the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination**.[2]

14. Pastor Coates has dedicated his life to obeying his Lord, Jesus Christ, not merely by being a follower of Christ, but also by being a pastor. Pastor Coates has pastored Grace Life by preaching the gospel and ministering to his congregants through, among other things:

a) in-person preaching and teaching;
b) leading worship in-person;
c) praying in-person;
d) counselling in-person;
e) physically presiding over the sacraments of baptism and communion; and
f) through fellowshipping and encouraging his congregants in-person.

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[1] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 32; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386 at para 122

[2] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 58 NR 81 at para 94.

15. Pastor Coates sincerely believes the above manifestations of religious belief must be done physically, in-person and without the Grace Life congregations being artificially and arbitrary divided and separated by government. Pastor Coates further believes that to comply with the Impugned CMOH Provisions, which severely restrict and interfere with religious worship services, is an act of disobedience to Christ, the Head of the Christian church. He believes he is called as a pastor to care for the whole health of his congregants: physical, spiritual, mental, emotional, and relational. He believes that the CMOH Orders generally, but especially the 15% Capacity and Distancing Restrictions, are hurting his congregants far more than COVID-19 ever could and is compelled by his conscience to minister to them through worship services that are not restricted to a small number that divides and separates his congregants, or interfered with by compelled masking and compelled avoidance of physical interaction.

16. Pastor Coates and the congregants of Grace Life sincerely believe in the spiritual and theological necessity of physically gathering together as the entire Grace Life church family for the purposes of edifying each other, listening to the preaching of the Word of God together, praising their Lord together, praying together, together partaking in the Lord's Supper, and witnessing baptisms in-person. They further believe in the spiritual and theological necessity of physical touch with each other, such as the laying on of hands for prayer and physically and emotionally comforting and ministering to each other through handshakes, hugs and other expressions of brotherly and sisterly affection.

17. The Impugned CMOH Provisions are an interference with the rights of Pastor Coates and Grace Life congregants to act in accordance with their religious beliefs in a manner that is more than trivial or insubstantial and therefore infringes their section 2(a) *Charter* rights. As is the February 7 Undertaking and the conduct of the officers in attempting to impose the undertaking.

SECTION 2(b) – FREEDOM OF EXPRESSION

18. The Supreme Court has established a three-part test for whether freedom of expression protected under section 2(b) of the *Charter* is engaged.[3] Adapted to the present context, the three-part test asks the following three questions:
    a) Is there protected expressive content captured by the 15% Capacity Restriction?
    b) Did the method or location of the expression remove that protection?
    c) If the expression is protected by section 2(b), is the effect of the 15% Capacity Restriction to infringe that protection? Further, and specifically, if the expressive content of Pastor Coates' December 20, 2020 and February 14, 2021 sermons, and Grace Life's public statement posted to its website the morning of February 7, 2021, is protected by section 2(b), was the purpose of the December 20 ticket, the February 7 arrest, and the February 16 arrest to censor Pastor Coates' criticism of the Alberta Government thereby infringing that protection?

19. Conducting a worship service necessarily includes expressive content, such as preaching, Scripture reading, the singing of praise and worship songs, and prayer. This content is not excluded from constitutional protection by means of the method or location of the expression.

20. The 15% Capacity Restriction severely limits the number of congregants that Pastor Coates can preach to in-person at any one time. If not complied with and enforced, the 15% Capacity Restriction would result in Pastor Coates being penalized for exercising his right to free expression, which includes protection from government restricting the size of his in-person audience. Considering free expression also protects the right to hear,[4] the free expression rights of Pastor Coates' in-person audience or would-be audience are also infringed.

21. The Distancing Restriction also infringes free expression, in effect, because it directly interferes with effective communication between individuals by compelling them to remain at least two meters apart from each other. The Distancing Restriction further limits free

[3] *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 [*Montreal*] at para 56; *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 37.
[4] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120, 150 CCC (3d) 1 at para 41.

expression by inevitably curtailing the number of Grace Life congregants that can exercise their right to hear the in-person preaching of Pastor Coates.

22. The sermons preached by Pastor Coates on December 20, 2020 and on February 14, 2021, and the February 7 public statement by Grace Life, explicitly criticized the actions of the Alberta Government regarding, among other things, its COVID-19 restrictions and resulting devastation to civil liberties, the economy, and mental health. All of the arrests and Charges faced by Pastor Coates followed immediately after the delivery of either of these two sermons or the posting of Grace Life's public statement.

SECTION 2(c) – FREEDOM OF PEACEFUL ASSEMBLY

23. Although largely undeveloped, an identified purpose of freedom of peaceful assembly is to protect the physical gathering together of people.[5] Further, the right of peaceful assembly is, by definition, a collectively held right: it cannot be exercised by an individual and requires a literal coming together of people.[6]

24. The right to peacefully assemble is separate and distinct from the other section 2 *Charter* rights, and it requires the state to refrain from interfering in such assembly. It may even require the state to facilitate such assembly.[7] Although freedom of assembly cases have typically been determined on other *Charter* grounds, most notably freedom of expression,[8] freedom of peaceful assembly is an independent constitutionally-protected right that is directly engaged by the Impugned CMOH Provisions.

25. Both the purpose and the effect of the 15% Capacity Restriction is to severely restrict the assembling together of the congregants of Grace Life. Although the scope of what collective activities section 2(c) of the *Charter* guarantees is not yet fully defined, there can be no doubt that assembling for religious purposes goes to the core of what 2(c) protects, on the same level of importance as assembling for political purposes.

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[5] *Roach v Canada (Minister of State for Multiculturalism and Citizenship),* [1994] 2 FC 406, 1994 CanLII 3453 (FCA) at para 69
[6] *Mounted Police Assn. of Ontario v Canada (*Attorney *General),* 2015 SCC 1 at para 64 [*MPAO*]
[7] See e.g. *Garbeau c Montreal (Ville de),* 2015 QCCS 5246 at paras 120-156
[8] Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8: I, UWO J Leg Stud 4 online: https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5715/4809

26. The effect of the Distancing Restriction is also to limit the exercise of the freedom of peaceful assembly as it inevitably constrains how many people can physically gather together in any one location. The Distancing Restriction also penalizes activities that are bound up with the exercise of free assembly, such as the collective holding of hands for purposes of prayer or worship.

SECTION 2(d) – FREEDOM OF ASSOCIATION

27. A purposive approach to freedom of association defines the content of this right by reference to its purpose: "to recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of his or her ends".[9] Freedom of association allows the achievement of individual potential through interpersonal relationships and collective action.[10]

28. The purpose of the right to freedom of association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict".[11]

29. The purpose and effect of the 15% Capacity Restriction is to severely limit the exercise of the collective right of the congregants of Grace Life, as a private religious association, to peacefully assemble together for the purposes of manifesting their religious beliefs, therefore engaging section 2(d). During a Sunday morning service at Grace Life, all four fundamental freedoms are exercised together, at both an individual and collective level.

30. The effect of the Distancing Restriction is also to limit freedom of association because it hinders the collective exercise of peaceful assembly, the effective communication between individuals, and because it limits the right of each individual to associate—physically, religiously, and relationally—with whom they will and how.

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[9] MPAO at para 54, citing from Reference re Public Service Employee Relations Act (Alta.), [1987] 1 SCR 313, 1987 CanLII 88 (SCC) at 365 [*Re Public Service*] [Emphasis added].
[10] *Dunmore v Ontario (Attorney General), 2001 SCC 94* at para 17
[11] MPAO, at para 54, citing from *Re Public Service,* at 366.

SECTION 7 – LIBERTY

31. Section 7 protects the triple individual interests of life, liberty and security of the person. The liberty interest protects the right of individuals to be free from state detainment and state restrictions upon the freedom of movement.[12] It also protects bodily autonomy, core lifestyle choices, and fundamental relationships.[13]

32. The effect of the Distancing Restriction is to limit the liberty of individuals to consensually come within two meters of each others' body for the purposes of interacting with each other, socially, emotionally, relationally, spiritually, and physically. Healthy social interaction and effective communication necessarily involves individuals being much closer to each other than two meters. Meaningful emotional, social and relational interaction requires close bodily proximity, at the least, and often forms of physical interaction such as handshakes, hugs, the holding of hands and pats on the back.

33. The Distancing Restriction penalizes congregants of Grace Life from exercising their right to liberty to care for each other, minister to each other and show affection for each other. Examples include the penalization of children playing together or adults physically assisting a child that is not their own, of physically assisting the frail, of friends giving each other hugs or handshakes, and of congregants praying with each other.

Section 7's Inherent limits – The Principles of Fundamental Justice

34. Limitations of the section 7 interests are only lawful so long as the infringements caused by government action or a law are in accordance with the principles of fundamental justice.[14] According to the Supreme Court of Canada, the principles of fundamental justice "are about the basic values underpinning our constitutional order."[15] The Court has recognized a number of principles of fundamental justice, but three have "emerged as central… 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."[16]

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[12] *R v Heywood*, [1994] 3 SCR 761, 1994 CanLII 34 (SCC) at 789
[13] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315 at paras 83-85; *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844 at para 66
[14] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 74-78 [*Bedford*]
[15] *Bedford* at para 96
[16] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 72 [*Carter*]

35. Regarding gross disproportionality, the Supreme Court has stated, “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”, the restriction will not be found to accord with the principles of fundamental justice.[17] The Court further found:

> 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.[18]

36. As for overbreadth, if an impugned law or government measure which limits section 7 rights “goes too far and interferes with some conduct that bears no connection to its objective,” it will be overbroad.[19]

37. Arbitrariness involves:

> …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. A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests.[20]

38. The Distancing Restriction is grossly disproportionate, wreaking havoc on individuals’ mental health and severely interfering with fundamental aspects of their identity and lifestyle, such as who they interact with and, most importantly, how. The Distancing Restriction strips social, emotional, relational, physical, and spiritual interaction of much of its meaningfulness. All in response to a flu-like illness that has resulted in ***below normal*** ICU admissions in 2020, has not resulted in excess death in 2020, and has not resulted an average age of death below that of life expectancy in Alberta (being 82 years of age). The ostensible “cure” that is the Distancing Restriction inflicts harm that is grossly disproportionate to any possibly derived benefits.

39. The Distancing Restriction is also arbitrary as there is no evidenced rational connection between the effects of the Distancing Restriction on individuals, and the resulting section 7 deprivation, and the purpose of the law.

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[17] *Carter*, at para 89.
[18] *Carter*, at para 89
[19] *Bedford* at para 101
[20] *Bedford* at para 111

40. The February 7 Undertaking and release condition also infringed Pastor Coates' liberty in a manner that is grossly disproportionate, arbitrary, and overbroad by purporting to restrict his liberty if he agreed to demands to effectively cease fulfilling his duties as a minister and by resulting in his incarceration.

SECTION 1: JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY

41. The limitations of sections 2(a), 2(b), 2(c), 2(d) and 7 of the *Charter* as a result of the Impugned CMOH Provisions are not justified in a free and democratic society. Due to the lack of scientific evidence in support of the effectiveness of the 15% Capacity and Distancing Restrictions, they are not rationally connected to any identifiable pressing and substantial objective of the Impugned CMOH Provisions. The 15% Capacity and Distancing Restrictions are categorically not minimally impairing, and the overall negative impacts of the Restrictions far outweigh any benefits achieved, especially in light of the lack of scientific evidence the Impugned CMOH Provisions produce any measurable impact.

REMEDY ANALYSIS

Section 52(1) of the *Constitution Act, 1982*

42. Pastor Coates seeks declarations pursuant to section 52(1) of the *Constitution Act, 1982* that the 15% Capacity Restriction infringes sections 2(a), 2(b), 2(c), and 2(d) of the *Charter*, that the Distancing Restriction infringes sections 2(a), 2(b), 2(c), 2(d), and 7, that neither are saved by section 1, and that the Restrictions are therefore void and of no force or effect;

43. Further, and on the basis the Impugned CMOH Provisions are unconstitutional, Pastor Coates seeks a dismissal of the Charges against him, or, in the alternative, to be acquitted of the Charges.

Section 24(1) of the *Charter*

44. Even in the event this Honourable Court finds that the Impugned CMOH Provisions are saved by section 1 of the *Charter*, the fact remains that a large number of *Charter* rights were breached in the ticketing, arresting and detaining of Pastor Coates. The limitations of his section 2(a), 2(b) and 7 rights are not caused merely by the CMOH Orders, but also flow from

the conduct of the RCMP, the nature of the February 7 Undertaking, and the nature of the release condition. The only just and appropriate remedy is a dismissal or stay of all Charges.

45. Where a *Charter* violation occurs as a result of government action, section 24(1) of the *Charter* permits this Court to provide an appropriate and just remedy.[21] The Supreme Court of Canada has stated:

> Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. … A superior court may craft any remedy that it considers appropriate and just in the circumstances.[22]

46. This Court has stated, "by application of s. 24(1), a court of competent jurisdiction may issue a judicial stay (or other *Charter* remedies) in respect of the criminal proceedings."[23] More specifically, this Court has unequivocally stated:

> The Provincial Court of Alberta is a court of competent jurisdiction to grant a judicial stay where a breach of s. 9 of the *Charter* or where a breach of other *Charter* rights has been established and the presiding judge determines that a judicial stay is the appropriate and just remedy under s. 24(1) of the *Charter*."[24]

47. In *R v Elliot*[25], this Court found that a just and appropriate remedy under s 24(1) of the *Charter* was to grant the accused an absolute discharge, due to a violation of the accused's right not to be arbitrarily detained, despite the fact that the accused was found guilty of the charge.[26] In addition, the Ontario Court of Appeal restored a trial judge's decision to dismiss charges against the accused because of an unlawful strip and search which violated the accused's *Charter* section 8 rights, even though it had no bearing on the driving offence for which the accused was charged.[27]

48. As for a stay of proceedings, the Supreme Court of Canada has stated:

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and

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[21] *R v 974649 Ontario Inc*, 2001 SCC 81 at para 14.
[22] *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at para 87.
[23] *R v Pringle*, 2003 ABPC 7 at para 95.
[24] *R v Pringle*, 2003 ABPC 7 at para 94.
[25] [1984] AJ No 940, 57 AR 49
[26] *R v Elliott*, [1984] AJ No 940, 57 AR 49 at paras 13-14.
[27] *R v Flintoff*, [1998] OJ No 2337, 111 OAC 305

defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.[28]

49. It has also been adopted by the Supreme Court of Canada that a stay of proceedings would be appropriate when two criteria are fulfilled:

    a) The prejudice caused by the abuse in question will be manifest, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

    b) No other remedy is reasonably capable of removing that prejudice.

50. These guidelines apply equally to prejudice to the accused or to the integrity of the judicial system.[29] The presence of either one of the criteria justifies the exercise of discretion in favour of a stay.[30]

51. In *R v Pringle*[31], this Court held that an appropriate remedy for a *Charter* section 9 violation includes a stay even if there is no nexus or temporal connection between the breach and the evidence that ultimately would lead to conviction.[32] In *R v Herter*[33], this Court stayed the proceedings of an accused based on his *Charter* section 9 rights having been breached.[34] Likewise, the Supreme Court of Canada has stayed proceedings against an accused due to a breach of their *Charter* section 7 and 11 rights.[35]

Section 24(2) of the Charter

52. Contrary to section 176(1)(b)(ii) of the *Criminal Code*, Pastor Coates was arrested in his office at Grace Life immediately following the Sunday morning worship service at Grace Life. Contrary to section 176(1)(a) of the *Criminal Code*, the arresting RCMP officers attempted to prevent and obstruct Pastor Coates from celebrating religious services or performing other functions in connection with his calling as a minister by threatening him with a criminal charge in connection with a breach of an undertaking, that undertaking being that he not perform his

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[28] *R v O'Connor*, [1995] 4 SCR 411, [1995] 4 RCS 411 at para 82.
[29] *R v O'Connor*, [1995] 4 SCR 411, 4 RCS 411 at para 75.
[30] *R v Carosella*, [1997] 1 SCR 80 at para 56.
[31] 2003 ABPC 7
[32] *R v Pringle*, 2003 ABPC 7 at para 95.
[33] 2006 ABPC 221, AJ No 1058
[34] *R v Herter*, 2006 ABPC 221, AJ No 1058 at para 45.
[35] *See R v Demers*, 2004 SCC 46, 2 SCR 489 and *R v Carosella*, [1997] 1 SCR 80.

religious functions as a minister. The above follows conduct by the RCMP officers earlier that morning that disrupted and interrupted Grace Life's Sunday morning worship service, contrary to section 176(2) of the *Criminal Code*.

53. All conscriptive and derivative evidence obtained in relation to the Breach Charge was obtained in a manner that arguably contravenes the *Criminal Code* itself and infringes Pastor Coates rights as protected by sections 2(a) and 7 of the *Charter*. The admission of this evidence would bring the administration of justice into further disrepute.

AND FURTHER TAKE NOTICE THAT in support of this application the Accused may rely on the following cases and such other authority as counsel may advise:

- *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37;
- *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315;
- *Canada (Attorney General) v Bedford*, 2013 SCC 72;
- *Carter v Canada (Attorney General*), 2015 SCC 5;
- *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62;
- *Dunmore v Ontario (Attorney General*), 2001 SCC 94;
- *Garbeau c Montreal (Ville de)*, 2015 QCCS 5246;
- *Godbout v Longueuil (City*), 1997 CanLII 335 (SCC), [1997] 3 SCR 844;
- *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31;
- *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54*;*
- *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120, 150 CCC (3d) 1;
- *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62;
- *Mounted Police Assn. of Ontario v Canada (Attorney General*), 2015 SCC 1;
- *R v 974649 Ontario Inc*, 2001 SCC 81;
- *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 58 NR 81;
- *R v Carosella*, [1997] 1 SCR 80;
- *R v Clark*, 2017 ABQB 643;

- *R v Demers*, 2004 SCC 46, 2 SCR 489;
- *R v Elliott*, [1984] AJ No 940, 57 AR 49;
- *R v Flintoff*, [1998] OJ No 2337, 111 OAC 305;
- *R v Herter*, 2006 ABPC 221;
- *R v Heywood*, [1994] 3 SCR 761, 1994 CanLII 34 (SCC);
- *R v O'Connor*, [1995] 4 SCR 411, 4 RCS 411;
- *R v Pringle*, 2003 ABPC 7;
- *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 1987 CanLII 88 (SCC); and
- *Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CanLII 3453 (FCA).

Secondary Sources

- Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8: I, UWO J Leg Stud 4 online: https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5715/4809

AND FURTHER TAKE NOTICE THAT the Accused expressly reserves the right to raise additional constitutional arguments that are disclosed by the evidence and that are not the subject of this notice.

AND FURTHER TAKE NOTICE THAT any statements of fact contained in this notice should not be interpreted as admissions of fact, but rather, merely as anticipated evidence based on disclosure provided by the Crown.

DATED at the City of Calgary in the Province of Alberta this 11th day of March 2021.

Leighton B. U. Grey, Q.C.

James S. M. Kitchen

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APPENDIX "A"

CITED SOURCES

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567

Supreme Court Reports

Supreme Court of Canada

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

Heard: October 7, 2008;

Judgment: July 24, 2009.

File No.: 32186.

[2009] 2 S.C.R. 567 | [2009] 2 R.C.S. 567 | [2009] S.C.J. No. 37 | [2009] A.C.S. no 37 | 2009 SCC 37 | 194 C.R.R. (2d) 12

Her Majesty The Queen in Right of the Province of Alberta, Appellant; v. Hutterian Brethren of Wilson Colony and Hutterian Brethren Church of Wilson, Respondents, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Canadian Civil Liberties Association, Ontario Human Rights Commission, Evangelical Fellowship of Canada and Christian Legal Fellowship, Interveners.

(203 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Freedom of religion — New regulation requiring photo for all Alberta driver's licences — Members of Hutterian Brethren sincerely believing that Second Commandment prohibits them from having their photograph willingly taken — Whether regulation infringed freedom of religion — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(a) — Operator Licensing and Vehicle Control Regulation, Alta. Reg. 320/2002, s. 14(1)(b) (am. Alta. Reg. 137/2003, s. 3).

Catchwords:

Constitutional law — Charter of Rights — Right to equality — Discrimination based on religion — New regulation requiring photo for all Alberta driver's [page568] licences — Members of Hutterian Brethren sincerely believing that Second Commandment prohibits them from having their photograph willingly taken — Whether regulation infringed right to equality — Canadian Charter of Rights and Freedoms, s. 15 — Operator Licensing and Vehicle Control Regulation, Alta. Reg. 320/2002, s. 14(1)(b) (am. Alta. Reg. 137/2003, s. 3).

Summary:

Alberta requires all persons who drive motor vehicles on highways to hold a driver's licence. Since 1974, each licence has borne a photograph of the licence holder, subject to exemptions for people who objected to having their photographs taken on religious grounds. Religious objectors were granted a non-photo licence called a Condition Code G licence, at the Registrar's discretion. In 2003, the Province adopted a new regulation and

made the photo requirement universal. The photograph taken at the time of issuance of the licence is placed in the Province's facial recognition data bank. There were about 450 Condition Code G licences in Alberta, 56 percent of which were held by members of Hutterian Brethren colonies. The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. They sincerely believe that the Second Commandment prohibits them from having their photograph willingly taken and objected to having their photographs taken on religious grounds. The Province proposed two measures to lessen the impact of the universal photo requirement but, since these measures still required that a photograph be taken for placement in the Province's facial recognition data bank, they were rejected by the members of the Wilson Colony. They proposed instead that no photograph be taken and that non-photo driver's licences be issued to them marked "Not to be used for identification purposes". Unable to reach an agreement with the Province, the members of the Wilson Colony challenged the constitutionality of the regulation alleging an unjustifiable breach of their religious freedom. The case proceeded on the basis that the universal photo requirement infringes s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. The claimants led evidence asserting that if members could not obtain driver's licences, the viability of their communal lifestyle would be threatened. The Province, for its part, led evidence that the adoption of the universal photo requirement was connected to a new system aimed at minimizing identity theft associated with driver's licences and that the new facial recognition data bank was aimed at reducing the risk of this type of fraud. Both the chambers judge and the majority of the Court of Appeal held that the infringement of [page569] freedom of religion was not justified under s. 1 of the *Charter*.

Held (LeBel, Fish and Abella JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, Deschamps and Rothstein JJ.: The regulation is justified under s. 1 of the *Charter*. Regulations are measures "prescribed by law" under s. 1, and the objective of the impugned regulation of maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft is clearly a goal of pressing and substantial importance, capable of justifying limits on rights. The universal photo requirement permits the system to ensure that each licence in the system is connected to a single individual, and that no individual has more than one licence. The Province was entitled to pass regulations dealing not only with the primary matter of highway safety, but also with collateral problems associated with the licensing system. [para. 39] [para. 42] [para. 45]

The regulation satisfies the proportionality test. First, the universal photo requirement is rationally connected to the objective. The Province's evidence demonstrates that the existence of an exemption from the photo requirement would materially increase the vulnerability of the licensing system and the risk of identity-related fraud. Second, the universal photo requirement for all licensed drivers minimally impairs the s. 2(*a*) right. The impugned measure is reasonably tailored to address the problem of identity theft associated with driver's licences. The evidence discloses no alternative measures which would substantially satisfy the government's objective while allowing the claimants to avoid being photographed. The alternative proposed by the claimants would significantly compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage. Without the licence-holder's photograph in the data bank, the risk that the identity of the holder can be stolen and used for fraudulent purposes is significantly increased. Although there are over 700,000 Albertans who do not hold driver's licences and whose pictures do not appear in the data bank, the objective of the driver's licence photo requirement is not to eliminate all identity theft in the province, but rather to maintain the integrity of the driver's licensing system so as to minimize identity theft associated with that system. Within that system, any exemptions, including those for [page570] religious reasons, pose real risk to the integrity of the licensing system. Lastly, where the validity of a law of general application is at stake, the doctrine of reasonable accommodation is not an appropriate substitute for a proper s. 1 *Oakes* analysis. The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects. [para. 50] [para. 52] [paras. 59-60] [paras. 62-63] [para. 71]

Third, the negative impact on the freedom of religion of Colony members who wish to obtain licences does not outweigh the benefits associated with the universal photo requirement. The most important of these benefits is the enhancement of the security or integrity of the driver's licensing scheme. It is clear that a photo exemption would have a tangible impact on the integrity of the licensing system because it would undermine the one-to-one and one-to-many photo comparisons used to verify identity. The universal photo requirement will also assist in

roadside safety and identification and, eventually, harmonize Alberta's licensing scheme with those in other jurisdictions. With respect to the deleterious effects, the seriousness of a particular limit must be judged on a case-by-case basis. While the impugned regulation imposes a cost on those who choose not to have their photographs taken -- the cost of not being able to drive on the highway -- that cost does not rise to the level of depriving the claimants of a meaningful choice as to their religious practice, or adversely impacting on other *Charter* values. To find alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency, but there is no evidence that this would be prohibitive. It is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion. When the deleterious effects are balanced against the salutary effects of the impugned regulation, the impact of the limit on religious practice associated with the universal photo requirement is proportionate. [para. 4] [paras. 79-80] [para. 82] [para. 91] [paras. 96-98] [para. 100] [para. 103]

The impugned regulation does not infringe s. 15 of the *Charter*. Assuming it could be shown that the regulation creates a distinction on the enumerated ground [page571] of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is therefore no discrimination within the meaning of s. 15. [para. 108]

Per Abella J. (dissenting): The government of Alberta did not discharge its burden of demonstrating that the infringement of the Hutterites' freedom of religion is justified under s. 1 of the *Charter*. [para. 176]

The purpose of the mandatory photo requirement and the use of facial recognition technology is to help prevent identity theft. An exemption to the photo requirement for the Hutterites was in place for 29 years without evidence that the integrity of the licensing system was harmed in any way. In addition, more than 700,000 Albertans have no driver's licence and are therefore not in the facial recognition database. The benefit to that system therefore, of adding the photographs of around 250 Hutterites who may wish to drive, is only marginally useful to the prevention of identity theft. While the salutary effects of the mandatory photo requirement are therefore slight and largely hypothetical, the mandatory photo requirement seriously harms the religious rights of the Hutterites and threatens their autonomous ability to maintain their communal way of life. The impugned regulation and the alternatives presented by the government involve the taking of a photograph. This is the very act that offends the religious beliefs of the Wilson Colony members. This makes the mandatory photo requirement a form of indirect coercion that places the Wilson Colony members in the untenable position of having to choose between compliance with their religious beliefs or giving up the self-sufficiency of their community, a community that has historically preserved its religious autonomy through its communal independence. [para. 148] [paras. 155-156] [para. 158] [paras. 162-164] [para. 170] [para. 174]

The harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. On the other hand, the benefits to the province of requiring the Hutterites to be photographed are, at best, marginal. This means that the serious harm caused by the infringing measure weighs far more heavily on the s. 1 scales than the benefits the province gains from its imposition on the Hutterites. The province has therefore not discharged its onus of justifying the imposition of a mandatory photo requirement on the members of the Wilson Colony. [paras. 114-116]

Per LeBel J. (dissenting): Abella J.'s comments on the nature of the guarantee of freedom of religion under s. 2(*a*) of the *Charter* and her opinion that the impugned regulation, which limits freedom of religion, [page572] has not been properly justified under s. 1 of the *Charter* are both agreed with. The regulatory measures in issue have an impact not only on the Hutterites' belief system, but also on the life of the community. The majority's reasons understate the nature and importance of this aspect of the guarantee of freedom of religion. [para. 178] [para. 182]

Under s. 1, courts have only rarely questioned the purpose of a law or regulation or found that it does not meet the rational connection requirement of the proportionality analysis, but this does not mean that courts will never or should never intervene at these earlier stages. It is generally at the minimal impairment and the balancing of effects stages that the means are questioned and their relationship to the law's purpose is challenged and reviewed. It is also where the purpose itself must be reassessed with regard to the means chosen by Parliament or the legislature. The proportionality analysis thus depends on a close connection between the final two stages of the *Oakes* test. The court's goal is essentially the same at both stages: to strike a proper balance between

state action on the one hand, and the preservation of *Charter* rights and the protection of rights or interests that may not be guaranteed by the Constitution but that may nevertheless be of high social value or importance on the other. The proportionality analysis reflects the need to leave some flexibility to government in respect of the choice of means. But the review of those means must also leave the courts with a degree of flexibility in the assessment of the range of alternatives that could realize the goal, and also in determining how far the goal ought to be attained in order to achieve the proper balance between the objective of the state and the rights at stake. The stated objective is not an absolute and should not be treated as a given and alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective. An alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity. A court must assess the objectives, the impugned means and the alternative means together, as necessary components of a seamless proportionality analysis. [para. 188] [paras. 190-191] [paras. 195-196] [para. 199]

In this case, the Government of Alberta has failed to demonstrate that the regulation is a proportionate response to the identified societal problem of identity theft. The driver's licence that it denies is not a privilege as it is not granted at the discretion of governments. Such a licence is often of critical importance in daily life and is certainly so in rural Alberta. Other approaches to identity fraud might be devised that would fall within [page573] a reasonable range of options and that could establish a proper balance between the social and constitutional interests at stake. This balance cannot be obtained by belittling the impact of the measures on the beliefs and religious practices of the Hutterites and by asking them to rely on transportation services to operate their farms and to preserve their way of life. Absolute safety is probably impossible in a democratic society. A limited restriction on the Province's objective of minimizing identity theft would not unduly compromise this aspect of the security of Alberta residents and might lie within the range of reasonable and constitutional alternatives. [paras. 200-201]

Per Fish J. (dissenting): For the reasons given by LeBel J., the disposition of the appeal as suggested by Abella J. and LeBel J. is agreed with. [para. 203]

Cases Cited

By McLachlin C.J.

Applied: *R. v. Oakes*, [1986] 1 S.C.R. 103; **referred to:** *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Therens*, [1985] 1 S.C.R. 613; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; Eur. Court H. R., *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641; *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[page574]

By Abella J. (dissenting)

regulating traffic safety and ensuring the integrity and reliability of the driver's licence system to the benefit of Albertans -- outweighed the deleterious effects on Colony members' freedom of religion. He observed that the Colony members object only to having their photos taken *voluntarily*, and suggested that the element of state compulsion implied by the photo requirement would "considerably diminish any disobedience to their religious tenets" (para. 126). For those reasons, he took the view that "[i]n a free and democratic society minor infringements of this kind on religious doctrine can be tolerated" (para. 126).

26 Slatter J.A. accordingly concluded that the appeal should be allowed.

IV. Issues

27 A. Freedom of religion

1. The nature of the limit on the s. 2(*a*) right;
2. Is the limit on the s. 2(*a*) right justified under s. 1 of the *Charter*?
   (a) Is the limit prescribed by law?
   (b) Is the purpose for which the limit is imposed pressing and substantial?

[page586]

   (c) Is the means by which the goal is furthered proportionate?
      (i) Is the limit rationally connected to the purpose?
      (ii) Does the limit minimally impair the right?
      (iii) Is the law proportionate in its effect?
   (d) Conclusion on justification

B. The claim under s. 15

V. Analysis

A. *Freedom of Religion*

(1) The Nature of the Limit on the Section 2(*a*) Right

28 Section 2(*a*) of the *Charter* states that "[e]veryone has ... freedom of conscience and religion".

29 The members of the Colony believe that permitting their photo to be taken violates the Second Commandment: "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4). They believe that photographs are "likenesses" within the meaning of the Second Commandment, and want nothing to do with their creation or use. The impact of having a photo taken might involve censure, such as being required to stand during religious services.

30 Given these beliefs, the effect of the universal photo requirement is to place Colony members who wish to obtain driver's licences either in the position of violating their religious commitments, or of foregoing driver's licences. Without the ability of some members of the Colony to obtain driver's licences, Colony members argue that they will not be able to drive to local centres to do business and obtain the goods and services necessary [page587] to the Colony. The regulation, they argue, forces members to choose between obeying the Second Commandment and adhering to their rural communal lifestyle, thereby limiting their religious freedom and violating s. 2(*a*) of the *Charter*.

31 My colleague Abella J. notes at para. 130 that "freedom of religion has 'both individual and collective aspects'". She asserts that "[b]oth ... are engaged in this case." While I agree that religious freedom has both individual and collective aspects, I think it is important to be clear about the relevance of those aspects at different stages of the analysis in this case. The broader impact of the photo requirement on the Wilson Colony community is relevant at the proportionality stage of the s. 1 analysis, specifically in weighing the deleterious and salutary effects of the impugned regulation. The extent to which the impugned law undermines the proper functioning of the community properly informs that comparison. Community impact does not, however, transform the essential claim -- that of the individual claimants for photo-free licences -- into an assertion of a group right.

32 An infringement of s. 2(*a*) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, and *Multani*. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct. As explained in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, *per* Dickson C.J.:

> The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern [page588] one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(*a*) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314. [Emphasis added.]

33 The Province concedes the first element of this s. 2(*a*) test, sincere belief in a belief or practice that has a nexus with religion. The chambers judge described the concession in the following terms:

> The Attorney General does not dispute that the Applicants hold sincere religious beliefs that conflict with the requirement that those who obtain or renew an Alberta operator's licence must permit a digital photograph to be taken and that those beliefs are honestly held. [para. 6]

34 The record does not disclose a concession on the second element of the test -- whether the universal photo requirement interferes with Colony members' religious freedom in a manner that is more than trivial or insubstantial. In order for such a determination to be made, it would need to be shown that the claimants' "religious beliefs or conduct might reasonably or actually be threatened" by the universal photo requirement: see *Edwards Books*, at p. 759. Evidence of a state-imposed cost or burden would not suffice; there would need to be evidence that such a burden was "capable of interfering with religious belief or practice": *Edwards Books*, at p. 759. In the present case, however, the courts below seem to have proceeded on the assumption that this requirement was met. Given this assumption, I will proceed to consider whether the limit is a reasonable one, demonstrably justified in a free and democratic society.

[page589]

(2) Is the Limit on the Section 2(*a*) Right Justified Under Section 1 of the *Charter*?

35 This Court has recognized that a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter.* Often, a particular problem or area of activity can reasonably be remedied or regulated in a variety of ways. The schemes are typically complex, and reflect a multitude of overlapping and conflicting interests and legislative concerns. They may involve the expenditure of government funds, or complex goals like reducing antisocial

behaviour. The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights.

36 Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community.

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 [page590] 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.

38 With this in mind, I turn to the question of whether the limit on freedom of religion raised in this case has been shown to be justified under s. 1 of the *Charter.*

(a) *Is the Limit Prescribed by Law?*

39 Section 1 requires that before a proportionality analysis is undertaken, the court must satisfy itself that the measure is "prescribed by law". If a limit on a *Charter* right is not "prescribed by law" it cannot be justified under s. 1. Rather, it is a government act, attracting a remedy under s. 24 of the *Charter.* Regulations are measures "prescribed by law" under s. 1 of the *Charter*: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 981; *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 645.

40 The majority of the Court of Appeal expressed concern that the challenged measure was adopted by regulation and therefore without [page591] any legislative debate, pursuant to an Act with very different objectives. The respondents take this position much further and advance a general proposition that *Charter*-infringing measures may only be adopted by primary legislation. Concern about overextension of regulatory authority is understandable. Governments should not be free to use a broad delegated authority to transform a limited-purpose licensing scheme into a *de facto* universal identification system beyond the reach of legislative oversight. However, that is not what has happened here. A photo requirement has been an accepted part of the motor vehicle licensing scheme for decades. It is not a stand-alone identification divorced from the public-safety purpose of the authorizing legislation. Moreover, hostility to the regulation-making process is out of step with this Court's jurisprudence and with the realities of the modern regulatory state: see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 71; D.J. Mullan, *Administrative Law: Cases, Text and Materials* (5th ed. 2003), at p. 948. Regulations, passed by Order in Council and applied in accordance with the principles of administrative law and subject to challenge for constitutionality, are the life blood of the administrative state and do not imperil the rule of law. Whether the impugned measure was passed into law by statute or regulation is usually of no consequence for the s. 1 analysis.

(b) *Is the Purpose for Which the Limit Is Imposed Pressing and Substantial?*

R.B. v. Children's Aid Society of Metropolitan Toronto

Supreme Court Reports

Supreme Court of Canada

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

Hearing and judgment on appeal: March 17, 1994.

Reasons and judgment on cross-appeal delivered: January 27,

1995.

File No.: 23298.

[1995] 1 S.C.R. 315 | [1995] 1 R.C.S. 315 | [1994] S.C.J. No. 24 | [1994] A.C.S. no 24

Richard B. and Beena B., appellants; v. Children's Aid Society of Metropolitan Toronto, the Official Guardian for Sheena B., an Infant, and the Attorney General for Ontario, respondents, and The Attorney General of Canada and the Attorney General of Quebec, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Parents objecting to blood transfusion for their infant for religious reasons — Children's Aid Society granted temporary wardship of infant under Child Welfare Act — Infant receiving blood transfusion — Whether provisions of Child Welfare Act infringe parents' right to choose medical treatment for their infant contrary to s. 7 of Canadian Charter of Rights and Freedoms — Child Welfare Act, R.S.O. 1980, c. 66, ss. 19(1)(b)(ix), 21, 27, 28(1), (10), (12), 30(1)2, 41.

Constitutional law — Charter of Rights — Freedom of religion — Parents objecting to blood transfusion for their infant for religious reasons — Children's Aid Society granted temporary wardship of infant under Child Welfare Act — Infant receiving blood transfusion — Whether provisions of Child Welfare Act infringe parents' freedom of religion — If so, whether infringement justified as reasonable limit — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Child Welfare Act, R.S.O. 1980, c. 66, ss. 19(1)(b)(ix), 21, 27, 28(1), (10), (12), 30(1)2, 41.

Costs — Judicial discretion — Parents objecting to blood transfusion for their infant for religious reasons — Children's Aid Society granted temporary wardship of infant under Child Welfare Act — District Court judge dismissing parents' appeal and awarding costs against intervening Attorney General — Whether costs order should be overturned.

S.B. was born four weeks prematurely. Within the first few weeks of her life she exhibited many physical ailments and received a number of medical treatments, to which her parents, the appellants, consented. At their request the attending physicians avoided the use of a blood transfusion because, as Jehovah's Witnesses, the appellants objected to it for religious reasons; they also claimed it was unnecessary. When S.B. was a month old, her haemoglobin level had dropped to such an extent that the attending physicians believed that her life was in danger and that she might require a blood transfusion to treat potentially life-threatening congestive heart failure. Following a hearing on short notice to the appellants, the Provincial Court (Family Division) granted the respondent Children's Aid Society a 72-hour wardship. At a status review two doctors testified that although the child's condition had improved, it was still marginal, and they wished to maintain the ability to transfuse in case of an emergency. The

head of ophthalmology at the hospital testified that he suspected the child had infantile glaucoma and needed to undergo exploratory surgery within the following week to confirm the diagnosis. This procedure had to be performed under general anaesthetic, and another doctor testified that a blood transfusion would be necessary. The wardship order was extended for a period of 21 days. S.B. received a blood transfusion as part of the examination and operation for the suspected glaucoma. A second Provincial Court order then terminated the respondent's wardship, and the child was returned to her parents. The appellants appealed both orders to the District Court, which dismissed the appeal and awarded costs against the Attorney General of Ontario, who had intervened in the proceedings. The Court of Appeal dismissed the appellants' appeal and the Attorney General of Ontario's cross-appeal on the issue of costs. This appeal is to determine whether s. 19(1)(b)(ix) of the Ontario Child Welfare Act, which defines "child in need of protection", together with the powers in ss. 30(1)2 and 41 and the procedures in ss. 21, 27, 28(1), (10) and (12), deny parents a right to choose medical treatment for their infants, contrary to s. 7 of the Canadian Charter of Rights and Freedoms, or infringe the appellants' freedom of religion as guaranteed under s. 2(a) of the Charter, and, if so, whether the infringement is justifiable under s. 1 of the Charter. The issue raised in the cross-appeal is whether the District Court erred in awarding costs against the Attorney General of Ontario.

Held (L'Heureux-Dubé J. dissenting on the cross-appeal): The appeal and the cross-appeal should be dismissed.

1. Appeal

Section 7

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The liberty protected by s. 7 of the Charter does not mean unconstrained freedom. Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

The right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being. This recognition was based on the presumption that parents act in the best interest of their child. Although the philosophy underlying state intervention has changed over time, most contemporary statutes dealing with child protection matters, and in particular the Ontario Act, while focusing on the best interest of the child, favour minimal intervention. In recent years, courts have expressed some reluctance to interfere with parental rights, and state intervention has been tolerated only when necessity was demonstrated, thereby confirming that the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.

While parents bear responsibilities toward their children, they must enjoy correlative rights to exercise them, given the fundamental importance of choice and personal autonomy in our society. Although this liberty interest is not a parental right tantamount to a right of property in children, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. While the state may intervene when it considers it necessary to safeguard the child's autonomy or health, such intervention must be justified.

While children undeniably benefit from the Charter, most notably in its protection of their rights to life and to the security of their person, they are unable to assert these rights, and our society accordingly presumes that parents will exercise their freedom of choice in a manner that does not offend the rights of their children. If one considers

the multitude of decisions parents make daily, it is clear that in practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases. The state can properly intervene in situations where parental conduct falls below the socially acceptable threshold, but in doing so it is limiting the constitutional rights of parents rather then vindicating the constitutional rights of children.

In the present case the application of the Act deprived the appellants of their right to decide which medical treatment should be administered to their infant and in so doing has infringed upon the parental "liberty" protected in s. 7 of the Charter. This deprivation, however, was made in accordance with the principles of fundamental justice. The common law has long recognized the power of the state to intervene to protect children whose lives are in jeopardy and to promote their well-being, basing such intervention on its parens patriae jurisdiction. The protection of a child's right to life and to health is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long as it also meets the requirements of fair procedure. Section 19(1)(b)(ix) of the Act, although broad in scope, is compatible with a modern conception of life that embodies the notion of quality of life. The general procedure under the Act also accords with the principles of fundamental justice. The parents must receive reasonable notice of the hearing in which their rights might be affected. Further, the wardship order depriving the parents of the right to refuse medical treatment for their infant is granted by a judge following an adversarial process where conflicting evidence may be presented. The onus of proof is on the Children's Aid Society, and it has been recognized by the courts that it must present a strong case. Finally, the initial order granting wardship to the Children's Aid Society must be reviewed before its expiry.

The notice the parents received of the wardship hearing in this case was reasonable in the circumstances, and the initial wardship order was limited to 72 hours, to enable the parties to come back with further evidence. As well, although the appellants were not able to present conflicting medical evidence at the initial hearing, they were nonetheless represented by counsel, who cross-examined the witnesses summoned by the Children's Aid Society and presented submissions.

Per Cory, Iacobucci and Major JJ.: An exercise of parental liberty which seriously endangers the survival of the child should be viewed as falling outside s. 7 of the Charter. While the right to liberty embedded in s. 7 may encompass the right of parents to have input into the education of their child, and in fact may very well permit parents to choose among equally effective types of medical treatment for their children, it does not include a parents' right to deny a child medical treatment that has been adjudged necessary by a medical professional and for which there is no legitimate alternative. The child's right to life must not be so completely subsumed to the parental liberty to make decisions regarding that child. Although an individual may refuse any medical procedures upon her own person, it is quite another matter to speak for another separate individual, especially when that individual cannot speak for herself. Parental duties are to be discharged according to the "best interests" of the child. The exercise of parental beliefs that grossly invades those best interests is not activity protected by the right to liberty in s. 7. There is simply no room within s. 7 for parents to override the child's right to life and security of the person. To hold otherwise would be to risk undermining the ability of the state to exercise its legitimate parens patriae jurisdiction and jeopardize the Charter's goal of protecting the most vulnerable members of society.

Per Lamer C.J.: The liberty interest protected by s. 7 of the Charter has not been infringed in this case because it includes neither the right of parents to choose (or refuse) medical treatment for their children nor, more generally, the right to bring up or educate their children without undue interference by the state. While this type of parental liberty is important and fundamental within the more general concept of the autonomy or integrity of the family unit, it does not fall within the ambit of s. 7. By including the expression "right to liberty" in s. 7, the framers of the Charter did not intend to protect "liberty" in its broadest sense or in all its dimensions. The right to liberty protected by s. 7 is not, within the meaning of the Charter, a fundamental freedom of the individual; rather it is a fundamental right which may be limited only in accordance with the principles of fundamental justice. The wording of the provision, its structure, the context in which it is found, the relationship there may be between it and the other provisions, as well as the historical context in which the Charter was adopted, are all factors that must be taken into consideration in seeking to identify the purpose of a protected right or freedom, in order to preserve the coherence of the entire constitutional text and maintain the integrity of the intention of Parliament. The principles of fundamental justice are a qualifier of the right not to be deprived of life, liberty and security of the person, and thus serve to establish the

parameters of the interests. Since the principles of fundamental justice are elements that are essentially within the domain of the justice system, the type of liberty to which s. 7 refers must be the liberty that may be taken away or limited by a court or by another agency on which the state confers a coercive power by which it may enforce the laws that it enacts. Accordingly, the subject matter of s. 7 must be the conduct of the state when the state calls on law enforcement officials to enforce and secure obedience to the law, or invokes the law to deprive a person of liberty through judges, magistrates, ministers, board members, etc.

The nature of the rights guaranteed by s. 7, taken as a whole, and the close connection established between those rights and the principles of fundamental justice, necessarily mean that this constitutional protection is connected with the physical dimension of the word "liberty", which can be lost through the operation of the legal system. In a majority of cases this protection is therefore specific to our criminal or penal justice system and is triggered primarily by the operation of that system. The freedoms that the Charter expressly recognizes and identifies as fundamental are found in s. 2. If s. 7 were to include any type of freedom whatever, provided that it could be described as fundamental, the need for and purpose of s. 2 might be seriously questioned. The nature of the other rights set out in s. 7 is another element of interpretation that militates in favour of a distinction between the scope of the words "freedom" and "liberty" as they are used in ss. 2 and 7. Since the right to life, liberty and security of the person are three distinct rights which the framers deliberately placed, in sequence, in a single provision, there must be a connection or linkage among them. This connection is found in the person himself or herself, as a corporeal entity, as opposed to the person's spirit, aspirations, conscience, beliefs, personality or, more generally, the expression or realization of what makes up the person's non-corporeal identity. The right to liberty, in this context, must therefore be set up against imprisonment, detention or any form of control or of constraint on freedom of movement. Moreover, extending the scope of the word "liberty" in s. 7 to include any type of freedom might mean that a large proportion of the legislative provisions in force could be challenged on the ground that they infringe this liberty interest. It would then be for the courts, in each case, to decide whether or not the freedom invoked was a fundamental freedom in our free and democratic society, whether the limit complied with the principles of fundamental justice, or whether the limit was reasonable and could be justified in a free and democratic society. In so doing the judiciary would inevitably be legislating, when this is not its function.

Per Sopinka J.: It is unnecessary to determine whether a liberty interest is engaged in this case because the threshold requirement of a breach of the principles of fundamental justice is not met. In all other respects La Forest J.'s reasons were agreed with.

Section 2(a)

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.: The right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is a fundamental aspect of freedom of religion, guaranteed by s. 2(a) of the Charter. While the purpose of the Act, the protection of children, does not infringe on the appellants' freedom of religion, the legislative scheme it implements, culminating in a wardship order depriving the parents of the custody of their child, seriously infringed on the appellants' freedom to choose medical treatment for their child in accordance with the tenets of their faith. This infringement was justified, however, under s. 1 of the Charter. The state interest in protecting children at risk is a pressing and substantial objective. The Act allows the state to assume parental rights when a judge has determined that a child is in need of treatment that his parents will not consent to. The process contemplated by the Act is carefully crafted, adaptable to a myriad of different situations, and far from arbitrary. The Act makes provision for notice to be given, for evidence to be called, for time limits to be imposed upon Crown wardship and other orders, as well as for procedural protections to be afforded to parents.

Per Lamer C.J. and Cory, Iacobucci and Major JJ.: A parent's freedom of religion, guaranteed under s. 2(a) of the Charter, does not include the imposition of religious practices which threaten the safety, health or life of the child. Although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, as it is subject to such limitations as are necessary to protect the fundamental rights and freedoms of others. Since S.B. has never expressed any agreement with the Jehovah's Witness faith or any religion, there is an impingement on her freedom of conscience, which arguably includes the right to live long enough to make one's own reasoned

choice about the religion one wishes to follow as well as the right not to hold a religious belief. "Freedom of religion" should not encompass activity that so categorically negates the "freedom of conscience" of another. While s. 1 of the Charter may be the appropriate forum for balancing the interests of the state against the rights violation of the aggrieved individual, such a balance is not required here, since the nexus of the balancing operates between the child's right to life and security of the person and her parents' right to freedom of religion.

2. Cross-appeal

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: While the awarding of costs against an intervening Attorney General acting in the public interest in favour of a party who raises the constitutionality of a statute appears highly unusual, this case appears to have raised special and peculiar problems. The District Court's exercise of discretion, which was supported by the Court of Appeal, should thus not be interfered with.

Per L'Heureux-Dubé J. (dissenting): The cross-appeal with respect to costs should be allowed. While it is true that appellate courts should not in general interfere with a trial court's exercise of discretion, a court of appeal can interfere where that discretion has not been exercised judicially and judiciously. Section 42(1) of the Supreme Court Act is aimed solely at preventing parties from bringing an appeal from a purely discretionary decision, and does not prevent this Court from interfering with a trial judge's discretion if he or she erred in formulating the principles upon which the discretion was exercised. Awards of costs, while within judicial discretion, can be reviewed by an appellate court on the basis that they were made, inter alia, on wrong principles, on a misapprehension of significant facts or in a non-judicial manner. Moreover, s. 47 of the Supreme Court Act specifically grants this Court a wide discretion with respect to lower courts' costs orders.

The long-standing rule regarding costs is that they are generally awarded to a successful party, absent misconduct on his or her part. This rule, however, is not absolute. Rule 57.01 of the Ontario Rules of Civil Procedure provides a list of factors (the amount claimed and the amount recovered in the proceeding, the complexity of the proceeding, the importance of the issues, etc.) for a judge to consider in the exercise of his or her discretion with respect to an order for costs. According to Rule 57.01, costs can even be ordered against a successful party in a "proper case". This case, however, was not such a "proper case", given all of the circumstances and in spite of the fact that it was a constitutional challenge based on a fundamental freedom guaranteed by the Charter.

The resources available to the parties should not generally be a relevant factor in awarding costs. It is contrary to public policy that an Attorney General be, as a matter of course, treated as having an unlimited source of funds and for that sole reason be required, even if successful, to pay the other party's costs. Such a result could open the floodgates and encourage marginal applications for constitutional challenges. While there are clearly cases where the government will be required to pay the costs of a particular litigation regardless of its outcome, these cases remain very limited exceptions and are not based on the relative resources of the parties but rather on the importance for the government or the public of having a particular issue decided by the courts. As well, generally in such cases there is a prior understanding that the costs will be borne by the government, independently of the result. Thus, the District Court judge was correct in not basing his order for costs on the relative resources of the parties.

The District Court judge was also correct in finding that there was no misconduct on the part of the Attorney General of Ontario. However, misconduct is only one criterion among many which a judge is entitled to consider in determining how costs should be awarded. Consequently, even in the absence of misconduct, a costs order against a successful party could be justified. That being said, under Rule 57.01, the court's discretion to depart from the general rule of awarding costs to the successful party must be exercised judiciously and judicially. It cannot be exercised arbitrarily, capriciously or for improper reasons.

None of the factors considered by the District Court judge and the Court of Appeal in support of the impugned costs order, in and of themselves or considered in totality, justify the costs order against the successful Attorney General

of Ontario in the case at hand. First, the District Court judge, in awarding costs against the Attorney General of Ontario, suggested that the "litigation was originally triggered by an act of the state". However, while the fact that a state action is the trigger for a particular litigation may warrant some consideration in determining how costs are allocated, it is not a factor which should be determinative with respect to the allocation of costs. Furthermore, in this case, it was the act of the appellant parents in refusing a blood transfusion for their daughter which originally triggered the litigation. The fact that the parents then challenged the constitutionality of the Child Welfare Act provides no basis for awarding costs against the Attorney General for Ontario, who intervened to defend the constitutionality of that statute. The fact that there was state action in answer to a constitutional challenge, whether as an intervener or a party to the litigation, absent any impropriety, as here, cannot be the basis for awarding costs against a successful party. Furthermore, there is a general rule that a party granted intervener status in the public interest is neither entitled to nor liable for the costs in the matter.

Second, the District Court judge erred when he stated that the particular importance of the case before him warranted the ordering of costs against the intervening Attorney General of Ontario. While Rule 57.01(1)(d) expressly states that "the importance of the issues" is a factor which can be considered by a court in awarding costs, this factor seems to be much more relevant with respect to whether costs should be awarded at all, rather than with respect to whether costs should be awarded against a successful party. Furthermore, it is not apparent that this case raises issues of sufficient national importance to justify awarding costs against a successful intervener. Moreover, it would not be in the interest of justice or in the interest of the administration of justice to hold that the fact that a case raises an issue of national importance is in and of itself sufficient to justify awarding costs against a successful party, in this case an intervener. Finally, the fact that the appellants raised a Charter issue does not in and of itself make their case one of particular importance.

Third, Tarnopolsky J.A.'s reasons at the Court of Appeal, suggesting that an award of costs against the Attorney General of Ontario might be justified by the fact that the appellants challenged the state on the basis of freedom of religion, a "fundamental freedom" guaranteed by s. 2(a) of the Charter, were not agreed with. The fact that an individual alleges an infringement of a right or a freedom guaranteed by the Charter is not in and of itself sufficient to attract an exception to the general rule as to costs. To hold otherwise would mean that all accused or individuals challenging a statute on Charter grounds would be entitled to an award of costs against the state.

Fourth, the District Court judge noted that this case "proceeded in a most unusual fashion and laborious manner". However, the fact that the proceedings in the District Court constituted a lengthy re-trial where fresh evidence was adduced cannot be a source of reproach to the Attorney General of Ontario and cannot serve as a basis for the impugned costs order. Besides, it is not evident that the present case was actually unusual in its proceedings.

Finally, even taken together, the factors considered by the District Court judge and Tarnopolsky J.A. of the Court of Appeal could not make this case a proper one to allow a departure from the general rule as to costs.

Cases Cited

By La Forest J.

Referred to: R. v. Jones, [1986] 2 S.C.R. 284; R. v. Chaulk, [1990] 3 S.C.R. 1303; R. v. Lyons, [1987] 2 S.C.R. 309; Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869; Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177; Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123; R. v. Oakes, [1986] 1 S.C.R. 103; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; R. v. Morgentaler, [1988] 1 S.C.R. 30; R. v. Beare, [1988] 2 S.C.R. 387; Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of South-Eastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992); Hepton v. Maat, [1957] S.C.R. 606; Re C.P.L. (1988), 70 Nfld. & P.E.I.R. 287; R. v. Keegstra, [1990] 3 S.C.R. 697; E. (Mrs.)

> to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

Although the English version of the Charter employs two different words, "freedom" and "liberty", both emanate from the same concept. In French, the term "liberté" is used in s. 2 as well as in s. 7.

80 The above-cited cases give us an important indication of the meaning of the concept of liberty. On the one hand, liberty does not mean unconstrained freedom; see Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 (per Wilson J., at p. 524); R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 (per Dickson C.J., at pp. 785-86). Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. In R. v. Morgentaler, [1988] 1 S.C.R. 30, Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being. She stated, at p. 166:

> 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.

81 While I was in dissent in that case, I agree with this statement, and, indeed, I later observed in R. v. Beare, [1988] 2 S.C.R. 387, at p. 412, that I was sympathetic to the view that s. 7 of the Charter included a right to privacy. On this point, the American experience can give us valuable guidance as to the proper meaning and limits of liberty. The United States Supreme Court has given a liberal interpretation to the concept of liberty, as it relates to family matters. It has elevated both the notion of the integrity of the family unit and that of parental rights to the status of constitutional values, through its interpretation of the Fifth and Fourteenth Amendments. Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), are the two landmark cases most often cited. In the former, the Supreme Court invalidated a statute that purported to limit the teaching of foreign languages. Its decision was grounded, in part at least, on a finding that the statute interfered with the right of the parents to control the education of their children. In Pierce v. Society of Sisters, the Supreme Court declared unconstitutional a statute that required that children attend public schools. McReynolds J. stated, at pp. 534-35:

> Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

82 Those two cases have survived the Lochner era, a much criticized period in which the Supreme Court engaged in substantive review of many economic and social statutes. Despite the lack of unanimity on the formulation of liberty and the role of the courts in reviewing legislation, the dicta on liberty, in so far as family matters are concerned, have been consistently broad. In Prince v. Massachusetts, 321 U.S. 158 (1944), although the Court upheld a statute prohibiting child labour, Rutledge J. stated, for the Court (at p. 166): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." These cases have often been reaffirmed by the

Supreme Court; see, for example, Stanley v. Illinois, 405 U.S. 645 (1972), Wisconsin v. Yoder, 406 U.S. 205 (1972), and Board of Regents of State Colleges v. Roth, supra. Roe v. Wade, 410 U.S. 113 (1973), which echoed this broad conception of liberty, was again recently reaffirmed in Planned Parenthood of South-Eastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992).

83 Where to draw the line between interests and regulatory powers falling within the accepted ambit of state authority will often raise difficulty. But much on either side of the line is clear enough. On that basis, I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. As observed by Dickson J. in R. v. Big M Drug Mart Ltd., supra, the Charter was not enacted in a vacuum or absent a historical context. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being. In Hepton v. Maat, [1957] S.C.R. 606, our Court stated (at p. 607): "The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents". This recognition was based on the presumption that parents act in the best interest of their child. The Court did add, however, that "when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties" (pp. 607-8). Although the philosophy underlying state intervention has changed over time, most contemporary statutes dealing with child protection matters, and in particular the Ontario Act, while focusing on the best interest of the child, favour minimal intervention. In recent years, courts have expressed some reluctance to interfere with parental rights, and state intervention has been tolerated only when necessity was demonstrated. This only serves to confirm that the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.

84 The respondents have argued that the "parental liberty" asserted by the appellants is an obligation owed to the child which does not fall within the scope of s. 7 of the Charter. Some decisions seem to give credit to this thesis. In Re C.P.L. (1988), 70 Nfld. & P.E.I.R. 287 (Nfld. U.F.C.), for example, a case similar to the present one, Riche J. observed, at p. 303:

> The parents have individual rights which they hold as members of society. With respect to their children, they have obligations or responsibilities. The parents have a right to custody of their children while they are children and for as long as they discharge their obligations to those children. The parents maintain a right to attempt to raise their children in the same religious faith as their's [sic]. As between the parents and the children, the parents have few rights and many obligations.

Riche J. concluded that the right of the child to parental care, rather than the rights of the parents, had been breached in a manner that did not conform to the principles of fundamental justice.

85 While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society. As already stated, the common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. This liberty interest is not a parental right tantamount to a right of property in children. (Fortunately, we have distanced ourselves from the ancient juridical conception of children as chattels of their parents.) The state is now actively involved in a number of areas traditionally conceived of as properly belonging to the private sphere. Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep

personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision-making must receive the protection of the Charter in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the Charter.

86 The respondents also argued that the infant's rights were paramount to those of the appellants and, on that basis alone, state intervention was justified. This was the conclusion reached by Whealy Dist. Ct. J. Children undeniably benefit from the Charter, most notably in its protection of their rights to life and to the security of their person. As children are unable to assert these, our society presumes that parents will exercise their freedom of choice in a manner that does not offend the rights of their children. If one considers the multitude of decisions parents make daily, it is clear that in practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases. In fact, we must accept that parents can, at times, make decisions contrary to their children's wishes -- and rights -- as long as they do not exceed the threshold dictated by public policy, in its broad conception. For instance, it would be difficult to deny that a parent can dictate to his or her child the place where he or she will live, or which school he or she will attend. However, the state can properly intervene in situations where parental conduct falls below the socially acceptable threshold. But in doing so, the state is limiting the constitutional rights of parents rather then vindicating the constitutional rights of children. On this point, N. Bala and J. D. Redfearn, supra, observe, at. p. 301:

> . . . while the state may be justified in limiting parental rights, it is wrong to conceive of this as a situation where the court or state is somehow protecting constitutional rights of the child. Rather this should be viewed as a situation in which the state limits the constitutional rights of parents, and sometimes those of a child, to promote the welfare of the child. . . . However, it seems inappropriate to allow an agency of the state to invoke the Charter of Rights to limit the rights of a citizen. The Charter is intended to protect individuals from the state, not to justify state interference. [Emphasis in original.]

A similar approach, albeit in a different context, was taken in R. v. Keegstra, [1990] 3 S.C.R. 697, where a majority of this Court agreed that it would be inappropriate to limit the scope of an individual's freedom of expression under s. 2(b) by reference to the conflicting s. 15 and s. 27 rights of others.

87 Once it is decided that the parents have a liberty interest, further balancing of parents' and children's rights should be done in the course of determining whether state interference conforms to the principles of fundamental justice, rather than when defining the scope of the liberty interest. Even assuming that the rights of children can qualify the liberty interest of their parents, that interest exists nonetheless. In the case at bar, the application of the Act deprived the appellants of their right to decide which medical treatment should be administered to their infant. In so doing, the Act has infringed upon the parental "liberty" protected in s. 7 of the Charter. I now propose to determine whether this deprivation was made in accordance with the principles of fundamental justice.

Principles of Fundamental Justice

88 This Court has on different occasions stated that the principles of fundamental justice are to be found in the basic tenets and principles of our judicial system, as well as in the other components of our legal system; see Re B.C. Motor Vehicle Act, supra; R. v. Beare, supra. The state's interest in legislating in matters affecting children has a long-standing history. In R. v. Jones, supra, for example, I acknowledged the compelling interest of the province in maintaining the quality of education. More particularly, the common law has long recognized the power of the state to intervene to protect children whose lives are in jeopardy and to promote their well-being, basing such intervention on its parens patriae jurisdiction; see, for example, Hepton v. Maat, supra; E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388. The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure. Section 19 of the Act is but one of the numerous legislative expressions of the parens patriae power. It contemplates different situations where state intervention is mandated in order to ensure the protection of children. Only one of those is of interest here. It appears in s.

19(1)(b)(ix), which reads:

> 19. -- (1) In this Part and Part IV,
>
> . . .
>
> (b) "child in need of protection" means,
>
> (ix) a child where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for the child's health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified medical practitioner, or otherwise fails to protect the child adequately, [Emphasis added.]

I note at the outset that this section is not limited to situations where the life of the child may be in jeopardy. It encompasses situations where treatments might be warranted to ensure his or her health or well-being. Although broad in scope, the section is compatible with a modern conception of life that embodies the notion of quality of life.

89 The appellants do not really contest the legitimacy of the principle that the state may intervene to protect children. Rather, they take issue with the procedure for intervention provided in the Act, and seek a declaratory judgment setting out guidelines that should be read into the Act for overriding parental choices. In light of the disposition of this appeal, there is no need to address in detail the availability of the remedy or the merits of the guidelines. Suffice it to say that the appellants propose that in a true emergency situation, there would be no need for a court order, as the common law permits doctors to provide treatment despite parental refusal. In a non-emergency situation, doctors would need a court order to override parental refusal, which could only be granted if the treatment was found by the court to be necessary, there was no alternative medical management, no doctor to provide alternative medical care, and 48 hours notice and full disclosure to the parents.

90 While the pleadings have been centred mostly on the constitutionality of s. 19(1)(b)(ix) of the Act, it is necessary to examine briefly the powers conferred on the courts in ss. 30(1) and 41, as well as the procedure established in ss. 21, 27 and 28. This will enable us to have a better understanding of the scheme devised by the legislature, and to address the appellants' arguments relating to the conformity of the deprivation of their rights to the principles of fundamental justice.

91 When the Children's Aid Society has reasonable and probable grounds to believe that a child is in need of protection within the meaning of s. 19(1)(b)(ix) of the Act, it can apprehend the child without a warrant and take or confine him or her to a designated place of safety (s. 21). Upon such apprehension, s. 27 requires that the matter be brought before a court within five days for a determination of whether the child is in need of protection. Section 28 governs the procedure to be followed at the court hearing, and allows a judge to summon and compel witnesses, and to hear evidence from parents and other interested parties. Section 28(6) requires that a parent or other person with custody of the child must be given "reasonable notice" of the hearing. Section 28(10) allows the court to dispense with notice when it cannot be served and "any delay might endanger the health or safety of the child". If, at the s. 28 hearing, the court determines that the child is in need of protection, then it may make an order under s. 30(1) that the child be returned to its parents subject to society supervision, or that it be committed as a ward of the relevant Children's Aid Society. Only when the latter order is made is the Children's Aid Society, pursuant to s. 41 of the Act, vested with all rights and responsibilities of a legal guardian, including the right to consent to medical treatment. Finally, the Children's Aid Society must apply to the court to have the child's status reviewed before the expiry of the wardship order (s. 37).

92 The appellants attack the general procedure under the Child Welfare Act, and in particular the specific way in which it was carried out in the present case. As for the constitutionality of the procedure under the Act, there is no need to discuss it at length, since I am of the opinion that the scheme designed by the legislature accords with the principles of fundamental justice. The parents must receive reasonable notice of the hearing in which their rights

Canada (Attorney General) v. Bedford

Supreme Court Reports

Supreme Court of Canada

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

Heard: June 13, 2013;

Judgment: December 20, 2013.*

File No.: 34788.

[2013] 3 S.C.R. 1101 | [2013] 3 R.C.S. 1101 | [2013] S.C.J. No. 72 | [2013] A.C.S. no 72 | 2013 SCC 72

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 [page1102] 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.

(169 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Subsequent History:

* A judgment was issued on January 17, 2014, amending para. 164 of both versions of the reasons. The amendments are included in these reasons.

Catchwords:

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).

[page1103]

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.

Summary:

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.

[page1104]

Held: The appeals should be dismissed and the cross-appeal allowed. Sections 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, [page1105] 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 [page1106] 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 [page1107] 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.

Cases Cited

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. 486; [page1108] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555; *R. v. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57; *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735; *Rockert v. The Queen*, [1978] 2 S.C.R. 704; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 7.

Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1) "common bawdy-house", 210, 212(1)(*j*), 213(1)(*c*).

Criminal Code, S.C. 1953-54, c. 51, Part V, s. 182.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 14.05(3)(g.1).

Authors Cited

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.

65 I conclude, therefore, that the bawdy-house provision negatively impacts the security of [page1136] 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.)).

[page1137]

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 [page1138] 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 [page1139] 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.

[page1140]

(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.

[page1141]

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 [page1142] 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 [page1143] 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 [page1144] 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.).

[page1145]

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 [page1146] *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 [page1147] 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))

[page1148]

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 [page1149] 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 [page1150] 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 [page1151] 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 [page1152] 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.

(b) *The Relationship Between Section 7 and Section 1*

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.

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

Carter v. Canada (Attorney General)

Supreme Court Reports

Supreme Court of Canada

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

Heard: October 15, 2014;

Judgment: February 6, 2015.

File No.: 35591.

[2015] 1 S.C.R. 331 | [2015] 1 R.C.S. 331 | [2015] S.C.J. No. 5 | [2015] A.C.S. no 5 | 2015 SCC 5

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, [page332] 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.

(148 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Constitutional law — Division of powers — Interjurisdictional 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 [page333] 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.

Summary:

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.

[page334]

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*.

[page335]

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 [page336] 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 [page337] 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. 256; [page338] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *R. v. Parker* (2000), 49 O.R. (3d) 481; *Fleming v. Reid* (1991), 4 O.R. (3d) 74; *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 72 O.R. (2d) 417; *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Swain*, [1991] 1 S.C.R. 933; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *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; *Polglase v. Polglase* (1979), 18 B.C.L.R. 294.

Statutes and Regulations Cited

Act respecting end-of-life care, CQLR, c. S-32.0001 [not yet in force].

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15.

Constitution Act, 1867, ss. 91, 92.

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 [page369] 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 [page370] (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 [page371] 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 [page372] 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.

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.

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.

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.

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 [page373] 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. [page374] 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 [page375] 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 [page376] 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.

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.

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)).

[page377]

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).

(3) Gross Disproportionality

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).

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 [page378] 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.

(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*, [page379] 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 [page380] 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 [page381] 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.

(2) Minimal Impairment

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.

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.

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 [page382] have been necessary if the evidence showed that physicians were unable to reliably

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: October 4, 2002;

Judgment: November 6, 2003.

File No.: 28807.

[2003] 3 S.C.R. 3 | [2003] 3 R.C.S. 3 | [2003] S.C.J. No. 63 | [2003] A.C.S. no 63 | 2003 SCC 62

Glenda Doucet-Boudreau, Alice Boudreau, Jocelyn Bourbeau, Bernadette Cormier-Marchand, Yolande Levert and Cyrille Leblanc, in their name and in the name of all Nova Scotia parents who are entitled to the right, under Section 23 of the Canadian Charter of Rights and Freedoms, to have their children educated in the language of the minority, namely the French language, in publicly funded French-language school facilities, and Fédération des parents acadiens de la Nouvelle-Écosse Inc., appellants; v. Attorney General of Nova Scotia, respondent, and Attorney General of Canada, Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of Newfoundland and Labrador, Commissioner of Official Languages for Canada, Fédération nationale des conseillères et conseillers scolaires francophones, Fédération des associations de juristes d'expression française de Common Law Inc. (FAJEFCL) and Conseil scolaire acadien provincial (CSAP), interveners.

(147 paras.)

Case Summary

[page4]

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Catchwords:

Constitutional law — Charter of Rights — Enforcement — Remedy available for realization of minority language education rights — Trial judge ordering province to make best efforts to provide homogeneous French-language facilities and programs by particular dates — Order further requiring parties to appear before same judge periodically to report on status of those efforts — Whether trial judge had authority to retain jurisdiction to hear reports from Province on the status of those efforts as part of his remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Whether reporting order was "appropriate and just in the circumstances" — Canadian Charter of Rights and Freedoms, ss. 23, 24(1).

Catchwords:

Appeals — Mootness — Appropriate and just remedy — Minority language education rights — Appeal raising important question about jurisdiction of superior courts to order what may be an effective remedy in some classes of cases — Moot appeal should be heard to provide guidance in similar cases.

Summary:

The appellants are Francophone parents living in five school districts in Nova Scotia. They applied for an order directing the Province and the Conseil scolaire acadien provincial to provide, out of public funds, homogeneous French-language facilities and programs at the secondary school level. The trial judge noted that the government did not deny the existence or content of the parents' rights under s. 23 of the *Canadian Charter of Rights and Freedoms* but rather failed to prioritize those rights and delayed fulfilling its obligations, despite clear reports showing that assimilation was "reaching critical levels". He found a s. 23 violation and ordered the Province and the Conseil to use their "best efforts" to provide school facilities and programs by particular dates. He retained jurisdiction to hear reports on the status of the efforts. The Province appealed the part of the order in which the trial judge retained his jurisdiction to hear reports. The majority of the Court of Appeal allowed the appeal and struck down the impugned portion of the order. On the basis of the common law principle of *functus officio*, the majority held that the trial judge, having decided the issue between the parties, had no further jurisdiction to remain seized of the case. They also held that, while [page5] courts have broad ranging powers under s. 24(1) of the *Charter* to fashion remedies, the *Charter* does not extend a court's jurisdiction to permit it to enforce its remedies.

Held (Major, Binnie, LeBel and Deschamps JJ. dissenting): The appeal should be allowed and the trial judge's order restored.

Per McLachlin C.J. and Gonthier, Iacobucci, Bastarache and Arbour JJ.: This appeal involves the nature of remedies available under s. 24(1) of the *Charter* for the realization of the minority language education rights protected by s. 23. A purposive approach to remedies in a *Charter* context requires that both the purpose of the right being protected and the purpose of the remedies provision be promoted. To do so, courts must issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms.

Section 23 of the *Charter* is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing. While the rights are granted to individuals, they apply only if the "numbers warrant". For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to "warrant". If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23. The affirmative promise contained in s. 23 and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected.

Under s. 24(1) of the *Charter*, a superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, it must exercise a discretion based on its careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. The court must also be sensitive to its role as judicial arbiter and not fashion remedies which usurp the role of the other [page6] branches of governance. The boundaries of the courts' proper role will vary according to the right at issue and the context of each case.

The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself and must be read in harmony with the rest of our Constitution. While it would be unwise at this point to attempt to define the expression "appropriate and just", there are some broad considerations that judges should bear in mind in evaluating the appropriateness and justice of a potential remedy. An appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants and employs means that are legitimate within the framework of our constitutional democracy. It is a judicial one which vindicates the right while invoking the function and powers of a court. An appropriate and just remedy is also fair to the party against whom the order is made. Since s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*, the judicial approach to remedies must remain flexible and responsive to the needs of a given case. The meaningful protection of *Charter* rights, and in

particular the enforcement of s. 23 rights, may thus in some cases require the introduction of novel remedies. Lastly, the remedial power in s. 24(1) cannot be strictly limited by statutes or rules of the common law. However, insofar as the statutory provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances", they may be helpful to a court choosing a remedy under s. 24(1).

Here, the remedy ordered by the trial judge was appropriate and just in the circumstances. He exercised his discretion to select an effective remedy that meaningfully vindicated the s. 23 rights of the appellants in the context of serious rates of assimilation and a history of delay in the provision of French-language education. The order is a creative blending of remedies and processes already known to the courts in order to give life to the rights in s. 23. Given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. The remedy took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy. The remedy vindicated the rights of the parents while leaving the detailed choices of means largely to the executive. The reporting order was judicial in the sense that it called on the functions and powers [page7] known to courts. The range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts. Further, although the common law doctrine of *functus officio* cannot strictly pre-empt the remedial discretion in s. 24(1), an examination of the *functus* question indicates that the trial judge issued an order that is appropriately judicial. The retention of jurisdiction did not include any power to alter the disposition of the case and did nothing to undermine the provision of a stable basis for launching an appeal. Finally, in the context, the reporting order was not unfair to the government. While, in retrospect, it would certainly have been advisable for the trial judge to provide more guidance to the parties as to what they could expect from the reporting sessions, his order was not incomprehensible or impossible to follow. It was not vaguely worded so as to render it invalid.

Per Major, Binnie, LeBel and Deschamps JJ. (dissenting): While superior courts' powers to craft *Charter* remedies may not be constrained by statutory or common law limits, they are nonetheless bound by rules of fundamental justice and by constitutional boundaries. Such remedies should be designed keeping in mind the canons of good legal drafting, the fundamental importance of procedural fairness, and a proper awareness of the nature of the role of courts in our democratic political regime. In the context of constitutional remedies, courts fulfill their proper function by issuing orders precise enough for the parties to know what is expected of them, and by permitting the parties to execute those orders. Such orders are final. A court purporting to retain jurisdiction to oversee the implementation of a remedy, after a final order has been issued, will likely be acting inappropriately on two levels: (1) by attempting to extend the court's jurisdiction beyond its proper role, it will breach the separation of powers principle; (2) by acting after exhausting its jurisdiction, it will breach the *functus officio* doctrine.

[page8]

Here, the drafting of the reporting order was anything but clear. The order gave the parties no clear notice of their obligations, the nature of the reports or even the purpose of the reporting hearings. The uncertainty engendered by the order amounted to a breach of procedural fairness. For this reason alone, the order can be found to be inappropriate under s. 24(1) and therefore void. In addition, the reporting order assumed that the judge could retain jurisdiction at will, after he had finally disposed of the matter of which he had been seized. As a general rule, courts should avoid interfering in the management of public administration. Once they have rendered judgment, they should resist the temptation to directly oversee or supervise the administration of their orders and operate under a presumption that judgments of courts will be executed with reasonable diligence and good faith. In this case, the trial judge assumed jurisdiction over a sphere traditionally outside the province of the judiciary, and also acted beyond the jurisdiction with which he was legitimately charged as a trial judge, thereby breaching the constitutional principle of separation of powers and the *functus officio* doctrine. His remedy undermined the proper role of the judiciary within our constitutional order and unnecessarily upset the balance between the three branches of government. Since no part of the Constitution can conflict with another, the trial judge's order for reporting hearings cannot be interpreted as appropriate and just under s. 24(1).

The proper development of the law of constitutional remedies requires that courts reconcile their duty to act within proper jurisdictional limits with the need to give full effect to the rights of a claimant. The intrusiveness of the trial judge's order was in no way necessary to secure the appellants' s. 23 *Charter* interests. In the present

case, refusing superior courts the power to order reporting hearings clearly would not deny claimants' access to a recognized *Charter* remedy and, more importantly, to that which they are guaranteed by s. 23 -- namely, the timely provision of minority language instruction facilities. If, as suggested by the appellants, the reporting hearings were an incentive for the government to comply with the best efforts order, it is difficult to see how they could have been more effective than the construction deadline coupled with the possibility of a contempt order. Moreover, at the level of constitutional principles, because this incentive is legal in nature, it would not have led to the improper politicization of the relationship between the judiciary and the executive. While a trial judge's decisions with respect to remedies are owed deference, this must be tempered when, as here, fundamental [page9] legal principles are threatened. Proper consideration of the principles of procedural fairness and the separation of powers is required to establish the requisite legitimacy and certainty essential to an appropriate and just remedy under s. 24(1) of the *Charter*.

Cases Cited

By Iacobucci and Arbour JJ.

Referred to: Mills v. The Queen, [1986] 1 S.C.R. 863; Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342; International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, [1967] S.C.R. 628; New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; Reference re Prov. Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158; Vriend v. Alberta, [1998] 1 S.C.R. 493; R. v. Gamble, [1988] 2 S.C.R. 595; R. v. Sarson, [1996] 2 S.C.R. 223; R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575, 2001 SCC 81; Mahe v. Alberta, [1990] 1 S.C.R. 342; Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839; Arsenault-Cameron v. Prince Edward Island, [2000] 1 S.C.R. 3, 2000 SCC 1; R. v. Beaulac, [1999] 1 S.C.R. 768; Marchand v. Simcoe County Board of Education (1986), 29 D.L.R. (4th) 596; Marchand v. Simcoe County Board of Education (No. 2) (1987), 44 D.L.R. (4th) 171; Lavoie v. Nova Scotia (Attorney-General) (1988), 47 D.L.R. (4th) 586; Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel v. Ontario (Ministre de l'Éducation et de la Formation) (1996), 136 D.L.R. (4th) 704, aff'd (1996), 30 O.R. (3d) 681; Conseil Scolaire Fransaskois de Zenon Park v. Saskatchewan, [1999] 3 W.W.R. 743, aff'd [1999] 12 W.W.R. 742; Assoc. Française des Conseils Scolaires de l'Ontario v. Ontario (1988), 66 O.R. (2d) 599; Assn. des parents francophones de la Colombie-Britannique v. British Columbia (1998), 167 D.L.R. (4th) 534; Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714; Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570; Reference re Secession of Quebec, [1998] 2 S.C.R. 217; Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House [page10] of Assembly), [1993] 1 S.C.R. 319; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148; Schachter v. Canada, [1992] 2 S.C.R. 679; Nelles v. Ontario, [1989] 2 S.C.R. 170; MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725; Reference re Young Offenders Act (P.E.I.), [1991] 1 S.C.R. 252; Mooring v. Canada (National Parole Board), [1996] 1 S.C.R. 75; Weber v. Ontario Hydro, [1995] 2 S.C.R. 929; R. v. Rahey, [1987] 1 S.C.R. 588; R. v. Smith, [1989] 2 S.C.R. 1120; Mareva Compania Naviera S.A. v. International Bulkcarriers S.A., [1975] 2 Lloyd's Rep. 509; Anton Piller KG v. Manufacturing Processes Ltd., [1976] 1 Ch. 55; Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Re Manitoba Language Rights Order, [1985] 2 S.C.R. 347; Re Manitoba Language Rights Order, [1990] 3 S.C.R. 1417; Reference re Manitoba Language Rights, [1992] 1 S.C.R. 212; British Columbia (Association des parents francophones) v. British Columbia (1996), 139 D.L.R. (4th) 356; Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50 (1983), 48 N.B.R. (2d) 361; Attorney-General v. Birmingham, Tame, and Rea District Drainage Board, [1910] 1 Ch. 48, aff'd [1912] A.C. 788; Kennard v. Cory Brothers and Co., [1922] 1 Ch. 265, aff'd [1922] 2 Ch. 1; Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848; Reekie v. Messervey, [1990] 1 S.C.R. 219.

continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal. Applying that aspect of the *functus* doctrine to s. 23(1), we face the question of whether the ordering of progress reports denied the respondents a stable basis from which to appeal.

80 In our view, LeBlanc J.'s retention of jurisdiction to hear reports did nothing to undermine the provision of a stable basis for launching an appeal. He did not purport to retain a power to change the decision as to the scope of the s. 23 rights in question, to alter the finding as to their violation, or to modify the original injunctions. The decision, including the best efforts order and the order to appear at reporting sessions, was final and appealable.

81 In any case, the rules of practice in Nova Scotia and other provinces allow courts to vary or add to their orders so as to carry them into operation or even to provide other or further relief than originally granted (Nova Scotia *Civil Procedure Rules*, Rule 15.08(d) and (e); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 59.06(2)(c) and (d); *Alberta Rules of Court*, Alta. Reg. 390/68, Rule 390(1)). This shows that the practice of providing further direction on remedies in support of a decision is known to our courts, and does not undermine the availability of appeal. Moreover, the possibility of such proceedings may facilitate the process of putting [page49] orders into operation without requiring resort to contempt proceedings.

82 The respondent relies on the Nova Scotia's *Judicature Act* to support its argument that the ordered reporting hearings were improper. However, even if that Act could have the effect of limiting the jurisdiction granted by s. 24(1) of the *Charter*, nothing in the *Judicature Act* appears to remove from a trial judge the power to hear reports on the implementation of his or her order . Section 33 of the *Judicature Act* provides that proceedings in the Supreme Court of Nova Scotia shall be "heard, determined and disposed of" by a single judge, but this does not limit the powers of the court to order reporting hearings. Section 34(d) of the *Judicature Act* allows a presiding judge to reserve judgment for a maximum of six months, but in our view, judgment was not reserved in this case since LeBlanc J. delivered his judgment within the six-month period. Section 38 of the *Judicature Act* provides that "an appeal lies to the Court of Appeal from any decision, verdict, judgment or order" of a judge of the Supreme Court of Nova Scotia. LeBlanc J. did nothing that would preclude the appeal of his decision or choice of remedy.

(d) *The Reporting Order Vindicated the Right by Means that Were Fair*

83 In the context, the reporting order was one which, after vindicating the entitled parents' rights, was not unfair to the respondent government. The respondent argues that it was subject to an overly vague remedy. In our opinion, the reporting order was not vaguely worded so as to render it invalid. While, in retrospect, it would certainly have been advisable for LeBlanc J. to provide more guidance to the parties as to what [page50] they could expect from the reporting sessions, his order was not incomprehensible or impossible to follow. In our view, the "reporting" element of LeBlanc J. remedy was not unclear in a way that would render it invalid.

84 Doubtless, as LeBel and Deschamps JJ. point out, the initial retention of jurisdiction by LeBlanc J. could have been more specific in its terms so as to give parties a precise understanding of the procedure at reporting sessions. Nonetheless, the respondent knew it was required to present itself to the court to report on the status of its efforts to provide the facilities as ordered by LeBlanc J. LeBlanc J.'s written order is satisfactory and clearly communicates that the obligation on government was simply to report. The fact that this was the subject of questions later in the process suggests that future orders of this type could be more explicit and detailed with respect to the jurisdiction retained and the procedure at reporting hearings.

85 It should be remembered that LeBlanc J. was crafting a fairly original remedy in order to provide flexibility to the executive while vindicating the s. 23 right. It may be expected that in future cases judges will be in a better position to ensure that the contents of their orders are clearer. In addition, the reporting order chosen by LeBlanc J. is not the only tool of its kind. It may be more helpful in some cases for the trial judge to seek submissions on whether to specify a timetable with a right of the government to seek variation where just and appropriate to do so.

86 Once again, we emphasize that s. 24(1) gives a court the discretion to fashion the remedy that it considers just and appropriate in the circumstances. The trial judge is not required to identify the single best remedy, even if that were possible. In our view, [page51] the trial judge's remedy was clearly appropriate and just in the circumstances.

(5) Conclusion

87 Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

88 The remedy crafted by LeBlanc J. meaningfully vindicated the rights of the appellant parents by encouraging the Province's prompt construction of school facilities, without drawing the court outside its proper role. The Court of Appeal erred in wrongfully interfering with and striking down the portion of LeBlanc J.'s order in which he retained jurisdiction to hear progress reports on the status of the Province's efforts in providing school facilities by the required dates.

V. Disposition

89 In the result, we would allow the appeal, set aside the judgment of the Court of Appeal, and restore the order of the trial judge.

90 We would award full costs to the appellants on a solicitor-client basis throughout, including the costs for the reporting hearings. The appellants are parents who have, despite their numerous efforts, been [page52] consistently denied their *Charter* rights. The Province failed to meet its corresponding obligations to the appellant parents despite its clear awareness of the appellants' rights. Accordingly, in looking at all the circumstances, our view is that solicitor-client costs should be awarded.

The reasons of Major, Binnie, LeBel and Deschamps JJ. were delivered by

LeBEL and DESCHAMPS JJ. (dissenting)

I. Introduction

91 The devil is in the details. Awareness of the critical importance of effectively enforcing constitutional rights should not lead to forgetfulness about the need to draft pleadings, orders and judgments in a sound manner, consonant with the basic rules of legal writing, and with an understanding of the proper role of courts and of the organizing principles of the legal and political order of our country. Court orders should be written in such a way that parties are put on notice of what is expected of them. Courts should not unduly encroach on areas which should remain the responsibility of public administration and should avoid turning themselves into managers of the public service. Judicial interventions should end when and where the case of which a judge is seized is brought to a close.

92 In our respectful view, without putting in any doubt the desire of the trial judge to fashion an effective remedy to address the consequences of a long history of neglect of the rights of the Francophone minority in Nova Scotia, the drafting of his so-called reporting order was seriously flawed. It gave the parties no clear notice of their obligations, the nature of the reports or even the purpose of the reporting hearings. In addition, the reporting order assumed that the judge could retain jurisdiction at will, after he had finally disposed of the matter of which he had been seized, thereby breaching the constitutional principle of separation of powers. The order did so [page53] by reason of the way it was framed and the manner in which it was implemented. In our opinion, the reporting order was void, as the Court of Appeal of Nova Scotia found, and the appeal should be dismissed.

II. The Nature of the Issues

[para93 This appeal raises the sole question of the validity of the reporting order made by LeBlanc J. ((2000), 185 N.S.R. (2d) 246). In this context, we do not intend to engage in a full review of the factual background and of the judicial history of this case. For the purposes of our reasons, we are content to rely on their extensive review in the reasons of our colleagues. We will only add such details about the reporting order and its implementation as might be of assistance to our analysis of the legal questions at stake in this appeal.

94 At the outset, we wish to emphasize that we fully agree with our colleagues in their analysis of the nature and fundamental importance of language rights in the Canadian Constitution, as well as on the need for efficacy and imagination in the development of constitutional remedies. Indeed, we dissent because we believe that constitutional remedies should be designed keeping in mind the canons of good legal drafting, the fundamental importance of procedural fairness, and a proper awareness of the nature of the role of courts in our democratic political regime, a key principle of which remains the separation of powers. This principle protects the independence of courts. It also flexibly delineates the domain of court action, particularly in the relationship of courts not only with legislatures but also with the executive branch of government or public administration.

95 As to the other issues such as mootness, immunities and mandatory injunctions, we are in broad agreement with our colleagues and do not intend to comment any further on them. We turn now to an [page54] analysis of the issues which lie at the root of our disagreement with the majority as to the final disposition of this appeal.

96 In this analysis, we will first review the nature of the reporting order and we will determine whether it can be considered consistent with the principle of procedural fairness. We will then discuss the principles of separation of powers and *functus officio*; we will demonstrate that the question of whether the trial judge had jurisdiction to issue the order is germane to the determination of whether the trial judge breached the separation of powers. In both discussions, the appropriateness of the remedy will be called into question. In the former, we will assess the appropriateness of the order for reporting hearings from the perspective of the parties subject to it, while in the latter, we will analyse the appropriateness of the order, by taking into consideration the proper role of courts within our constitutional order.

III. The Drafting of the Order and the Principle of Procedural Fairness

97 The drafting of applications asking for injunctive relief, or of orders granting such remedies, can be a serious challenge for counsel and judges. The exercise of the court power to grant injunctions may lead, from time to time, to situations of non-compliance where it may be necessary to call upon the drastic exercise of courts' powers to impose civil or criminal penalties, including imprisonment (R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at p. 6-7). Therefore, proper notice to the parties of the obligations imposed upon them and clarity in defining the standard of compliance expected of them must be essential requirements of a court's intervention. Vague or ambiguous language should be strictly avoided (*Sonoco Ltd. v. Local 433* (1970), 13 D.L.R. (3d) 617 (B.C.C.A.), at p. 621; *Sporting Club du Sanctuaire Inc. v. 2320-4365 Québec Inc.*, [1989] R.D.J. 596 (Que. C.A.)).

98 Unfortunately, the drafting of the present reporting order was anything but clear. Its brevity and [page55]

Dunmore v. Ontario (Attorney General)

Supreme Court Reports

Supreme Court of Canada

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

2001: February 19 / 2001: December 20.

File No.: 27216.

[2001] 3 S.C.R. 1016 | [2001] 3 R.C.S. 1016 | [2001] S.C.J. No. 87 | [2001] A.C.S. no 87 | 2001 SCC 94

Tom Dunmore, Salame Abdulhamid, Walter Lumsden and Michael Doyle, on their own behalf and on behalf of the United Food and Commercial Workers International Union, appellants; v. Attorney General for Ontario and Fleming Chicks, respondents, and Attorney General of Quebec, Attorney General for Alberta, Canadian Labour Congress and Labour Issues Coordinating Committee ("LICC"), interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (216 paras.)

[Quicklaw note: An application for an extension of time was granted. The motion for re-hearing was dismissed. Costs on the appeal were to the appellants in this Court and in the courts below.]

Case Summary

Constitutional law — Charter of Rights — Freedom of association — Exclusion of agricultural workers from statutory labour relations regime — Whether exclusion infringes freedom of association — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, s. 80 — Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, s. 3(b).

In 1994, the Ontario legislature enacted the Agricultural Labour Relations Act, 1994 ("ALRA"), which extended trade union and collective bargaining rights to agricultural workers. Prior to the adoption of this legislation, agricultural workers had always been excluded from Ontario's labour relations regime. A year later, by virtue [page1017] of s. 80 of the Labour Relations and Employment Statute Law Amendment Act, 1995 ("LRESLAA"), the legislature repealed the ALRA in its entirety, in effect subjecting agricultural workers to s. 3(b) of the Labour Relations Act, 1995 ("LRA"), which excluded them from the labour relations regime set out in the LRA. Section 80 also terminated any certification rights of trade unions, and any collective agreements certified, under the ALRA. The appellants brought an application challenging the repeal of the ALRA and their exclusion from the LRA, on the basis that it infringed their rights under ss. 2(d) and 15(1) of the Canadian Charter of Rights and Freedoms. Both the Ontario Court (General Division) and the Ontario Court of Appeal upheld the challenged legislation.

Held (Major J. dissenting): The appeal should be allowed. The impugned legislation is unconstitutional.

Per McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.: The purpose of s. 2(d) of the Charter is to allow the achievement of individual potential through interpersonal relationships and collective action. This purpose commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? While the traditional four-part formulation of the content of freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(d). In some cases s. 2(d) should be extended to protect activities that are inherently collective in nature, in that they cannot be performed by individuals acting alone. Trade unions develop needs and priorities that are distinct from those of their members individually and cannot function if the law protects exclusively the lawful

activities of individuals. The law must thus recognize that certain union activities may be central to freedom of association even though they are inconceivable on the individual level.

Ordinarily, the Charter does not oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms. There is no constitutional right to protective legislation per se. However, history has shown and Canada's legislatures have recognized that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade. In order to make the freedom to organize meaningful, in this very particular context, s. 2(d) of the Charter may impose a positive obligation on the state to extend protective legislation to unprotected groups. The distinction [page1018] between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime contributes substantially to the violation of protected freedoms.

Several considerations circumscribe the possibility of challenging underinclusion under s. 2 of the Charter: (1) claims of underinclusion should be grounded in fundamental Charter freedoms rather than in access to a particular statutory regime; (2) the evidentiary burden in cases where there is a challenge to underinclusive legislation is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(d) activity; and (3), in order to link the alleged Charter violation to state action, the context must be such that the state can be truly held accountable for any inability to exercise a fundamental freedom. The contribution of private actors to a violation of fundamental freedoms does not immunize the state from Charter review.

In order to establish a violation of s. 2(d) of the Charter, the appellants must demonstrate that their claim relates to activities that fall within the range of activities protected by s. 2(d) of the Charter, and that the impugned legislation has, either in purpose or effect, interfered with these activities. In this case, insofar as the appellants seek to establish and maintain an association of employees, their claim falls squarely within the protected ambit of s. 2(d). Moreover, the effective exercise of the freedoms in s. 2(d) require not only the exercise in association of the constitutional rights and freedoms and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one's employer. Conflicting claims concerning the meaning of troubling comments in the legislature make it impossible to conclude that the exclusion of agricultural workers from the LRA was intended to infringe their freedom to organize, but the effect of the exclusion in s. 3(b) of the LRA is to infringe their right to freedom of association.

The LRA is clearly designed to safeguard the exercise of the freedom to associate rather than to provide a limited statutory entitlement to certain classes of citizens. Through the right to organize inscribed in s. 5 of the LRA and the protection offered against unfair labour practices, the legislation recognizes that without a statutory vehicle employee associations are, in many cases, impossible. Here, the appellants do not claim a constitutional right to general inclusion in the LRA, but simply a constitutional freedom to organize a trade association. This freedom to [page1019] organize exists independently of any statutory enactment, although its effective exercise may require legislative protection in some cases. The appellants have met the evidentiary burden of showing that they are substantially incapable of exercising their fundamental freedom to organize without the LRA's protective regime. While the mere fact of exclusion from protective legislation is not conclusive evidence of a Charter violation, the evidence indicates that, but for the brief period covered by the ALRA, there has never been an agricultural workers' union in Ontario and agricultural workers have suffered repeated attacks on their efforts to unionize. The inability of agricultural workers to organize can be linked to state action. The exclusion of agricultural workers from the LRA functions not simply to permit private interferences with their fundamental freedoms, but to substantially reinforce such interferences. The inherent difficulties of organizing farm workers, combined with the threat of economic reprisal from employers, form only part of the reason why association is all but impossible in the agricultural sector in Ontario. Equally important is the message sent by the exclusion of agricultural workers from the LRA, which delegitimizes their associational activity and thereby contributes to its ultimate failure. The most palpable effect of the LRESLAA and the LRA is, therefore, to place a chilling effect on non-statutory union activity.

With respect to the s. 1 analysis, the evidence establishes that many farms in Ontario are family-owned and operated, and that the protection of the family farm is a pressing enough objective to warrant the infringement of s.

2(d) of the Charter. The economic objective of ensuring farm productivity is also important. Agriculture occupies a volatile and highly competitive part of the private sector economy, experiences disproportionately thin profit margins and, due to its seasonal character, is particularly vulnerable to strikes and lockouts.

There is also a rational connection between the exclusion of agricultural workers from Ontario's labour relations regime and the objective of protecting the family farm. Unionization leads to formalized labour-management relationships and gives rise to a relatively formal process of negotiation and dispute resolution. It is reasonable to speculate that unionization will threaten the flexibility and cooperation that is characteristic of the family farm. Yet this concern is only as great as the extent of the family farm structure in Ontario and does not necessarily apply to the right to form an agricultural association. The notion that employees should sacrifice their freedom to associate in order to maintain a flexible employment relationship should be carefully [page1020] circumscribed, as it could, if left unchecked, justify restrictions on unionization in many sectors of the economy.

The wholesale exclusion of agricultural workers from Ontario's labour relations regime does not minimally impair their right to freedom of association. The categorical exclusion of agricultural workers is unjustified where no satisfactory effort has been made to protect their basic right to form associations. The exclusion is overly broad as it denies the right of association to every sector of agriculture without distinction. The reliance on the family farm justification ignores an increasing trend in Canada towards corporate farming and complex agribusiness and does not justify the unqualified and total exclusion of all agricultural workers from Ontario's labour relations regime. More importantly, no justification is offered for excluding agricultural workers from all aspects of unionization, in particular those protections that are necessary for the effective formation and maintenance of employee associations. Nothing in the record suggests that protecting agricultural workers from the legal and economic consequences of forming an association would pose a threat to the family farm structure. Consequently, the total exclusion of agricultural workers from Ontario's labour relations regime is not justifiable under s. 1 of the Charter.

The appropriate remedy in this case is to declare the LRESLAA unconstitutional to the extent that it gives effect to the exclusion clause found in s. 3(b) of the LRA, and to declare s. 3(b) of the LRA unconstitutional. The declarations should be suspended for 18 months, thereby allowing amending legislation to be passed if the legislature sees fit to do so. Section 2(d) of the Charter only requires the legislature to provide a statutory framework that is consistent with the principles established in this case. At a minimum, these principles require that the statutory freedom to organize in s. 5 of the LRA be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, freedom from interference, coercion and discrimination and freedom to make representations and to participate in the lawful activities of the association. The appropriate remedy does not require or forbid the inclusion of agricultural workers in a full collective bargaining regime, whether it be the LRA or a special regime applicable only to agricultural workers.

It is unnecessary to consider the status of occupational groups under s. 15(1) of the Charter.

[page1021]

Per L'Heureux-Dubé J.: The purpose of s. 80 of the LRESLAA and s. 3(b) of the LRA is to prevent agricultural workers from unionizing, and this purpose infringes s. 2(d) of the Charter. In the record, there is clear evidence of intent on the part of the government of Ontario to breach the s. 2(d) rights of agricultural workers, including repeated instances where government officials indicated that the impugned legislation's intent was to hinder union-related activities in the agricultural sector. On a balance of probabilities, the evidence demonstrates that the legislature's purpose in enacting the exclusion was to ensure that persons employed in agriculture remained vulnerable to management interference with their associational activities, in order to prevent the undesirable consequences which it had feared would result from agricultural workers' labour associations. Furthermore, the evidence does not reveal any positive effects upon the associational freedom of agricultural workers stemming from their exclusion from the LRA. The reality of the labour market, which has led to the development of protective labour legislation, indicates that when the protection is removed without any restriction or qualification, associational rights are often infringed, or have the potential to be infringed, to an extent not confined to unionization activities. Consequently, it was in the reasonable contemplation of the government at the time of the enactment of the

impugned legislation that the effect of the exclusion clause would be to affect associational freedoms beyond the realm of unionization, thus breaching s. 2(d) Charter rights.

In the present case, there is a positive obligation on the government to provide legislative protection against unfair labour practices. A positive duty to assist excluded groups generally arises when the claimants are in practice unable to exercise a Charter right. In the case of agricultural workers in Ontario, the freedom to associate becomes meaningless in the absence of a duty of the State to take positive steps to ensure that this right is not a hollow one. The government has breached the s. 2(d) rights of agricultural workers because it has enacted a new labour statute which leaves them perilously vulnerable to unfair labour practices. The absolute removal of LRA protection from agricultural workers has created a situation where employees have reason to fear retaliation against associational activity by employers. In light of the reality of the labour market, the failure of the Ontario legislature to spell out a regime defining which associational activities are to be protected from management retaliation has a chilling effect on freedom of association for agricultural workers. The chilling effect of the impugned provision has forced agricultural workers to abandon associational efforts and restrain themselves from further associational initiatives. The freedom of association of agricultural workers under the LRA can be [page1022] characterized as a hollow right because it amounts to no more than the freedom to suffer serious adverse legal and economic consequences. In a constitutional democracy, not only must fundamental freedoms be protected from State action, they must also be given "breathing space".

Since the impugned legislation infringes s. 2(d), it is necessary to make but a single observation with respect to whether the exclusion of agricultural workers from the LRA constitutes discrimination under s. 15(1) of the Charter. The occupational status of agricultural workers constitutes an "analogous ground" for the purposes of an analysis under s. 15(1). There is no reason why an occupational status cannot, in the right circumstances, identify a protected group. Employment is a fundamental aspect of an individual's life and an essential component of identity, personal dignity, self-worth and emotional well-being. Agricultural workers generally suffer from disadvantage and the effect of the distinction made by their exclusion from the LRA is to devalue and marginalize them within Canadian society. Agricultural workers, in light of their relative status, low levels of skill and education, and limited employment and mobility, can change their occupational status only at great cost, if at all.

The impugned legislation is not justifiable under s. 1 of the Charter. While labour statutes, such as the LRA, fulfill important objectives in our society, s. 3(b) does not pursue a pressing and substantial concern justifying the breach of the appellants' Charter rights. It cannot be argued that Ontario agriculture has unique characteristics which are incompatible with legislated collective bargaining. It is also difficult to accept that none of the LRA's purposes, enumerated at s. 2 of the LRA, which speak to the basic characteristics required for the operation of a modern business, are inapplicable in the agricultural sector. At the very least, the expressions of intent found in s. 2 of the LRA would apply to factory-like agricultural enterprises. Without enunciating a constitutionally valid reason, one cannot countenance a breach of a Charter guaranteed fundamental freedom on grounds which appear to be based on a policy geared to enhance the economic well-being of private enterprises. The government is entitled to provide financial and other support to agricultural operations, including family farms. However, it is not open to the government to do so at the expense of the Charter rights of those who are employed in such activities, if such a policy choice cannot be demonstrably justified.

[page1023]

Even if the impugned legislation pursued a valid objective, the absoluteness of the exclusion clause, barring all persons employed in agriculture from all components of the LRA, speaks to the lack of proportionality between the perceived ills to be avoided and their remedy. First, a rational connection between the objective of securing the well-being of the agricultural sector in Ontario and the exclusion of persons employed in agriculture from all associational protections contained in the LRA has not been established. If the good labour management principles outlined in s. 2 of the LRA have a basis in fact, then barring all persons employed in agriculture from all the benefits under the LRA may have the opposite effect. Second, the complete exclusion of agricultural workers from the LRA does not minimally impair their Charter rights. Such a blunt measure can hardly be characterized as achieving a delicate balance among the interests of labour and those of management and the public. It weakens the case for

deference to the legislature. This is further aggravated because those affected by the exclusion are not only vulnerable as employees but are also vulnerable as members of society with low income, little education and scant security or social recognition. The current law is not carefully tailored to balance the Charter freedoms of persons employed in agriculture in Ontario and the societal interest in harmonious relations in the labour market. While the important role that family farms play in Ontario agriculture must be recognized, such a role is not unique to Ontario. Further, both families and farms have evolved. There is no obvious connection between the exclusion of agricultural workers from the LRA and farmers or family farms. A city-based corporation could be operating an agricultural entity and benefit from the restrictions on the freedoms of association of its agricultural workers. Labour statutes in other provinces contain agricultural exemptions that are narrower than the one contained in the LRA. The objective of securing the well-being of the agricultural sector in Ontario can be achieved through a legislative mechanism that is less restrictive of free association than the existing complete exclusion of agricultural workers from the LRA.

Per Major J. (dissenting): The appellants failed to demonstrate that the impugned legislation has, either in purpose or effect, infringed activities protected by s. 2(d) of the Charter. In particular, s. 2(d) does not impose a positive obligation of protection or inclusion on the state in this case. Prior to the enactment of the LRA, agricultural workers had historically faced significant difficulties organizing and the appellants did not establish that the state is causally responsible for the inability of agricultural workers to exercise a fundamental freedom.

[page1024]

Agricultural workers are not an analogous group for the purposes of s. 15(1) of the Charter and, as a result, the exclusion of agricultural workers from the LRA does not violate their equality rights.

Cases Cited

By Bastarache J.

Referred to: Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Ferrell v. Ontario (Attorney General) (1997), 149 D.L.R. (4th) 335; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; PSAC v. Canada, [1987] 1 S.C.R. 424; RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460; Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367; Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157; Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211; R. v. Advance Cutting & Coring Ltd., [2001] 3 S.C.R. 209, 2001 SCC 70; R. v. Skinner, [1990] 1 S.C.R. 1235; Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée, [1959] S.C.R. 206; McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718; R. v. Beaulac, [1999] 1 S.C.R. 768; Haig v. Canada, [1993] 2 S.C.R. 995; Native Women's Assn. of Canada v. Canada, [1994] 3 S.C.R. 627; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; Vriend v. Alberta, [1998] 1 S.C.R. 493; Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497; McKinney v. University of Guelph, [1990] 3 S.C.R. 229; Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701; R. v. Oakes, [1986] 1 S.C.R. 103; Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; Wellington Mushroom Farm, [1980] O.L.R.B. Rep. May 813; Calvert-Dale Estates Ltd., [1971] O.L.R.B. Rep. Feb. 58; Spruceleigh Farms, [1972] O.L.R.B. Rep. Oct. 860; Cuddy Chicks Ltd., [1988] O.L.R.B. Rep. May 468, application for judicial review dismissed (1988), 66 O.R. (2d) 284, aff'd (1989), 70 O.R. (2d) 179, aff'd [1991] 2 S.C.R. 5; Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232; South Peace Farms and Oil, Chemical and Atomic Workers International Union, Local No. 9-686, [1977] 1 Can. L.R.B.R. 441; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519.

[page1025]

By L'Heureux-Dubé J.

in Alberta Reference, supra, at p. 395, the unique power of associations to accomplish the goals of individuals:

> While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes." (L. J. MacFarlane, [page1039] The Theory and Practice of Human Rights (1985), p. 82.)

This conception of freedom of association, which was supported by Dickson C.J. in his dissenting judgment (at pp. 334 and 365-66), has been repeatedly endorsed by this Court since the Alberta Reference (see PIPSC, supra, per Sopinka J., at pp. 401-2, per Cory J. (dissenting), at p. 379; R. v. Skinner, [1990] 1 S.C.R. 1235, per Dickson C.J., at p. 1243; Lavigne, supra, per La Forest J., at p. 317, per Wilson J., at p. 251; per McLachlin J. (as she then was), at p. 343). In Lavigne, Wilson J. (writing for three of seven judges on this point) conducted an extensive review of this Court's s. 2(d) jurisprudence, concluding that "this Court has been unanimous in finding on more than one occasion and in a variety of contexts that the purpose which s. 2(d) is meant to advance is the collective action of individuals in pursuit of their common goals" (p. 253). Wilson J. added that the Court has remained steadfast in this position despite numerous disagreements about the application of s. 2(d) to particular practices.

16 As these dicta illustrate, the purpose of s. 2(d) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in PIPSC, supra, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the Alberta Reference, supra, such activities may be collective in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(d) (at p. 367):

[page1040]

> There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights... . The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature. [Emphasis added.]

This passage, which was not explicitly rejected by the majority in the Alberta Reference or in PIPSC, recognizes that the collective is "qualitatively" distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot. For example, a "majority view" cannot be expressed by a lone individual, but a group of individuals can form a constituency and distill their views into a single platform. Indeed, this is the essential purpose of joining a political party, participating in a class action or certifying a trade union. To limit s. 2(d) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives. At best, it would encourage s. 2(d) claimants to contrive individual analogs for inherently associational activities, a process which this Court clearly resisted in the labour trilogy, in Egg Marketing, supra, and in its jurisprudence on union security clauses and the right not to associate (see Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée, [1959] S.C.R. 206 ("[t]he union is ... the representative of all the employees in the unit for the purpose of negotiating the labour agreement", hence "[t]here is no room left for private negotiation between employer and employee" (per Judson J., at p. 212)); McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718 ("[t]he reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only

at the hiring stage" (per Laskin C.J., at p. 725)); I. Hunter, "Individual and Collective Rights in Canadian Labour Law" (1993), 22 Man. L.J. 145, at p. 147 ("[i]ndividual rights vis-à-vis their employer are replaced by rights in respect of their [page1041] union, which, in turn, is mandated to advance the interests of bargaining-unit members"); D. Beatty and S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988), 67 Can. Bar Rev. 573, at pp. 587-88). The collective dimension of s. 2(d) is also consistent with developments in international human rights law, as indicated by the jurisprudence of the Committee of Experts on the Application of Conventions and Recommendations and the ILO Committee on Freedom of Association (see, e.g., International Labour Office, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (4th ed. 1996)). Not only does this jurisprudence illustrate the range of activities that may be exercised by a collectivity of employees, but the International Labour Organization has repeatedly interpreted the right to organize as a collective right (see International Labour Office, Voices for Freedom of Association (Labour Education 1998/3, No. 112): "freedom is not only a human right; it is also, in the present circumstances, a collective right, a public right of organisation" (address delivered by Mr. Léon Jouhaux, workers' delegate)).

17 As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak (see R. v. Beaulac, [1999] 1 S.C.R. 768, at para. 20). Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are [page1042] distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities -- making collective representations to an employer, adopting a majority political platform, federating with other unions -- may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d) (see Alberta Reference, supra, per Le Dain J., at p. 390 (excluding the right to strike and collectively bargain), per McIntyre J., at pp. 409-10 (excluding the right to strike); PIPSC, supra, per Dickson C.J., at pp. 373-74 (excluding the right to collectively bargain), per La Forest J., at p. 390 (concurring with Sopinka J.), per L'Heureux-Dubé J., at p. 392 (excluding both the right to strike and collectively bargain), per Sopinka J., at p. 404 (excluding both the right to strike and collectively bargain)). It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning. As one author puts it, the per se exclusion of collective action reduces employee collectives to mere "aggregate[s] of economically self-interested individuals" rather than "co-operative undertakings where individual flourishing can be encouraged through membership in and co-operation with the community of fellow workers" (see L. Harmer, "The Right to Strike: Charter Implications and Interpretations" (1988), 47 U.T. Fac. L. Rev. 420, at pp. 434-35). This would surely undermine the purpose of s. 2(d), which is to allow the achievement of individual potential through interpersonal relationships and collective action (see, e.g., Lavigne, supra, per McLachlin J., at pp. 343-44, per La Forest J., at pp. 327-28).

18 In sum, a purposive approach to s. 2(d) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the Alberta Reference [page1043] (see Egg Marketing, supra, per Iacobucci and Bastarache JJ., at para. 111). Such an approach begins with the existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association per se (see Alberta Reference, supra, per Dickson C.J., at p. 367). Where this burden cannot be met, however, it may still be open to a claimant to show, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature.

(b) State Responsibility Under Section 2(d)

19 The content of the freedom to organize having been discussed, the next question that arises is the scope of state responsibility in respect of this freedom. This responsibility is generally characterized as "negative" in nature, meaning that Parliament and the provincial legislatures need only refrain from interfering (either in purpose or effect) with protected associational activity. Conversely, the Charter does not oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms.

20 However, history has shown, and Canada's legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade. Knowing this would foreclose the effective exercise of the freedom to organize, Ontario has provided a statutory freedom to organize in its LRA (s. 5), as well as protections against denial of access to property (s. 13), employer interference with trade union activity (s. 70), discrimination against trade unionists (s. 72), intimidation and coercion (s. 76), alteration of working conditions during the certification process (s. 86), coercion of witnesses (s. 87), and removal of Board notices (s. 88). In this context, it must be asked whether, in order to make the freedom to organize meaningful, s. 2(d) of the Charter imposes a positive obligation on the state to extend protective [page1044] legislation to unprotected groups. More broadly, it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime substantially contributes to the violation of protected freedoms.

21 This precise question was raised in Delisle, supra, in which the appellant failed to establish that exclusion from a protective regime violated s. 2(d). The Delisle case involved RCMP officers who were employed by the Canadian government, so it is arguable that the Court's decision was not intended to apply where private employers are involved. However, Justice L'Heureux-Dubé recognized at para. 7 of a concurring judgment that s. 2(d) may require protection against unfair labour practices in certain circumstances:

> I recognize that in cases where the employer does not form part of government, there exists no Charter protection against employer interference. In such a case, it might be demonstrated that the selective exclusion of a group of workers from statutory unfair labour practice protections has the purpose or effect of encouraging private employers to interfere with employee associations. It may also be that there is a positive obligation on the part of governments to provide legislative protection against unfair labour practices or some form of official recognition under labour legislation, because of the inherent vulnerability of employees to pressure from management, and the private power of employers, when left unchecked, to interfere with the formation and administration of unions. [Emphasis added.]

This dictum was not rejected by the Delisle majority, which focused instead on the fact that an interference with associational activity had not been made out on the facts of the case. Indeed, in making this finding, I deferred judgment on the appellant's argument that underinclusion could have "an important chill on freedom of association because it clearly indicates to its members that unlike all other employees, they cannot unionize, and what is more, that they must not get together to defend [page1045] their interests with respect to labour relations" (see Delisle, supra, at para. 30). In addition, I left open the possibility that s. 2 of the Charter may impose "a positive obligation of protection or inclusion on Parliament or the government ... in exceptional circumstances which are not at issue in the instant case" (para. 33).

22 Even before Delisle, Le Dain J. recognized in the Alberta Reference, supra, that s. 2(d) protected workers' freedom to organize "without penalty or reprisal", making no distinction between workers employed by government or private entities (p. 391). What this dictum recognized, in my view, is that without the necessary protection, the freedom to organize could amount "to no more than the freedom to suffer serious adverse legal and economic consequences" (see H. W. Arthurs et al., Labour Law and Industrial Relations in Canada (4th ed. 1993), at para. 431). Perhaps more importantly for this appeal, this dictum implies that total exclusion from a regime protecting the freedom to organize could engage not only s. 15(1) of the Charter, but also s. 2(d) of the Charter. Where a group is denied a statutory benefit accorded to others, as is the case in this appeal, the normal course is to review this denial under s. 15(1) of the Charter, not s. 2(d) (see Haig v. Canada, [1993] 2 S.C.R. 995; Native Women's Assn. of

Garbeau c. Montréal (Ville de)

Jugements du Québec

Cour supérieure du Québec

District de Montréal

L'honorable Guy Cournoyer J.C.S.

Entendu : 23 et 24 mars 2015.

Observations écrites supplémentaires : 30 mars, 7 et 22 avril

2015.

Début du délibéré : 7 avril 2015.

Suspension du délibéré : 22 au 29 avril 2015.

Rendu : 12 novembre 2015.

No : 500-36-007212-148

[2015] J.Q. no 7456 | 2015 QCCS 5246 | 2015EXP-3353 | J.E. 2015-1850 | EYB 2015-258584

GABRIELLA GARBEAU, Appelante, et VILLE DE MONTRÉAL, Intimée, et PROCUREURE GÉNÉRALE DU QUÉBEC, Mise en cause, et LIGUE DES DROITS ET LIBERTÉS, Intervenante

(498 paragr.)

Résumé

Droit constitutionnel — Charte canadienne des droits et libertés — Restrictions aux droits garantis dans les limites raisonnables — Justification dans le cadre d'une société libre et démocratique — Test de l'arrêt Oakes — Atteinte minimale — Proportionnalité — Libertés fondamentales — Liberté de croyance, d'opinion et d'expression — Liberté d'expression — Liberté de réunion — Manifestation — L'article 500.1 du Code de la sécurité routière porte atteinte aux libertés d'expression et de réunion pacifique protégées par les chartes québécoise et canadienne — Cet article n'est pas une limite raisonnable qui se justifie dans le cadre d'une société libre et démocratique, car le pouvoir d'autoriser une manifestation ou un défilé qui est prévu à cet article n'est pas encadré par une norme précise et compréhensible pour le public et pour ceux qui l'applique — L'autorité gouvernementale qui choisit de mettre en place un mécanisme d'autorisation préalable avant la tenue d'une manifestation doit définir les facteurs que les autorités doivent appliquer en prenant leur décision — Ce n'est pas le cas de l'article 500.1 — L'article 500.1 doit être invalidé — Toutefois, le Tribunal suspend l'effet de la déclaration d'invalidité pour une période de 6 mois — Verdict d'acquittement.

Le tribunal doit statuer sur la constitutionnalité de l'article 500.1 du Code de la sécurité routière (CSR), qui interdit toute action concertée destinée à entraver de quelque manière la circulation des véhicules routiers sur un chemin public, en occuper la chaussée, l'accotement, une autre partie de l'emprise ou les abords ou y placer un véhicule ou un obstacle de manière à entraver la circulation des véhicules routiers sur ce chemin ou l'accès à un tel chemin. Garbeau a été accusée d'avoir entravé la circulation des véhicules routiers lors d'une manifestation dénonçant la brutalité policière, commettant ainsi une infraction à l'article 500.1. Dans le cadre de l'instruction de la poursuite pénale intentée contre elle devant la Cour municipale de Montréal, Garbeau a soulevé l'invalidité de l'article 500.1, pour les motifs que cette disposition porterait atteinte à la liberté d'expression protégée par l'alinéa 2b) de la Charte canadienne des droits et libertés et l'article 3 de la Charte des droits et libertés de la personne, et à la liberté de réunion pacifique protégée par l'alinéa 2c) de la Charte canadienne et l'article 3 de la Charte québécoise.

DISPOSITIF : Verdict d'acquittement.

Le débat porte uniquement sur la question de savoir si l'article 500.1 porte atteinte à la liberté d'expression et à la liberté de réunion pacifique et si le mécanisme d'autorisation préalable prévu à cet article peut se justifier dans le cadre d'une société libre et démocratique. Il ne fait aucun doute que la liberté d'expression et la liberté de réunion pacifique protègent le droit de s'exprimer sur la voie publique même si la destination première de ces lieux n'est certes pas la communication de messages, mais leur utilisation historique à des fins expressives démontre que leurs caractéristiques ou fonctions ne les rendent pas impropres à l'exercice de la liberté d'expression. L'exercice du droit de manifester sur un chemin public est assujetti à une autorisation préalable. Un tel régime porte atteinte à l'exercice des libertés d'expression et de réunion pacifique et sa justification doit être démontrée selon les exigences de l'article premier de la Charte canadienne et l'article 9.1 de la Charte québécoise. L'objectif de l'article 500.1 est urgent et réel. L'article 500.1 peut contribuer à la réalisation des objectifs de sécurité et de libre circulation des personnes et des marchandises. Le défaut de présenter une demande d'autorisation ne prive pas Garbeau de la qualité pour agir et soulever la constitutionnalité de l'article 500.1 pour contester sa culpabilité. La preuve n'établit pas que le mécanisme d'autorisation préalable d'une manifestation a été mis en place et qu'il soit souple. Le premier juge a commis une erreur manifeste et dominante lorsqu'il a tiré la conclusion que les pouvoirs conférés par le troisième alinéa de l'article 500.1 sont exercés dans les faits par les corps policiers des villes ou municipalités en cause, car aucun processus formel d'autorisation des manifestations n'a été mis en place. Le juge d'instance a commis une erreur de droit en concluant qu'un corps policier peut agir comme mandataire d'une ville ou d'une municipalité pour les fins de l'article 500.1. L'article 500.1 enfreint les libertés d'expression et de réunion pacifique protégés par les chartes québécoise et canadienne. Cette limitation n'est pas justifiée dans le cadre d'une société libre et démocratique, car il est possible de mettre en place un système d'autorisation préalable qui encadre le pouvoir discrétionnaire d'autoriser une manifestation. L'effet de la déclaration d'invalidité de l'article 500.1 doit être suspendu en raison des dangers en matière de sécurité routière et de circulation des marchandises qui seraient susceptibles de se poser si son effet était immédiat.

Législation citée :

Charte canadienne des droits et libertés 1982, art. 1, art. 2(b), art. 2(c), art. 7

Charte des droits et libertés de la personne, art. 3, art. 9.1

Code criminel

Code de la sécurité routière, RLRQ c. C-24.2, art. 60.1-146.1, art. 180-209.26 art. 210-287.2, art. 288-318, art. 319-519, art. 331, art. 382, art. 384, art. 444-453.1, art. 444, art. 445, art. 446, art. 447, art. 450, art. 451, art. 452, art. 453, art. 500, art. 500.1, art. 511.1, art. 512.0.1, art. 633

Convention européenne des droits de l'homme, art. 11

Déclaration universelle des droits de l'homme, art. 20

Loi sur la justice administrative, RLRQ, c. J-3, art. 5

Loi sur les drogues et les autres substances, art. 4, art. 56

Pacte relatif aux droits civils et politiques, art. 21

Règlement sur l'accès à la marijuana à des fins médicales

107 Par ailleurs, on ne doit pas perdre de vue que le droit de manifester publiquement sa dissidence est protégé tant dans l'intérêt de ceux qui l'exercent que dans celui de la société en général.

108 Dans son ouvrage *Why Societies Need Dissent*, le professeur américain Cass Sunstein l'explique ainsi:

> It is usual to think that those who conform are serving the general interest and that dissenters are antisocial, even selfish. In a way this is true. Sometimes conformists strengthen social bonds, whereas dissenters endanger those bonds or at least introduce a degree of tension. But in an important respect, the usual thought has things backwards. Much of the time, it is in the individual's interest to follow the crowd, but in the social interest for the individual to say and do what he thinks best. Well-functioning societies take steps to discourage conformity and to promote dissent. They do this partly to protect the rights of dissenters, but mostly to protect interests of their own[38].

109 Quant à la liberté de réunion pacifique et le droit de manifester, le professeur Cutler écrit ceci dès l'année de la proclamation de la *Charte canadienne*:

> Les groupes qui n'ont pas suffisamment d'argent pour se payer de la publicité se sentent souvent obligés de recourir aux manifestations. Si on leur refuse le droit de manifester, on leur enlève les moyens de communiquer. Les manifestations garantissent l'accès aux médias et dans la société occidentale, un tel accès est essentiel à la communication d'un point de vue et à la réalisation des objectifs de groupes[39].

110 Ainsi, "l'importance de la manifestation découle de l'absence de moyen efficace pour se faire entendre"[40].

111 La Cour suprême a reconnu la dimension collective de la liberté de réunion pacifique.

112 Dans l'arrêt *Association de la police montée de l'Ontario c. Canada (Procureur général)*[41], la juge en chef McLachlin et le juge LeBel écrivent:

> [64] [...] [L]a *Charte* n'exclut pas les droits collectifs. Bien que les titulaires de droit auxquels elle renvoie soient en général des particuliers, les garanties prévues par l'art. 2 s'appliquent également aux groupes. La liberté de réunion pacifique vise, par définition, une activité collective qui n'est pas susceptible d'être accomplie par une seule personne. [...]

113 C'est en ayant à l'esprit ces principes fondamentaux qu'il faut maintenant aborder la question de savoir si le droit de manifester sur un chemin public est protégé par la liberté d'expression et la liberté de réunion pacifique garanties par les chartes québécoise et canadienne.

3.3 - Est-ce que les chartes québécoise et canadienne protègent le droit de manifester sur un chemin public?

114 La Procureure générale caractérise erronément le droit revendiqué par l'appelante comme étant le droit d'entraver la circulation alors qu'il s'agit du droit de manifester sur un chemin public.

115 La position selon laquelle le droit de manifester sur un chemin public n'est pas protégé par les chartes québécoise et canadienne est sans fondement.

116 Premièrement, elle ne tient pas compte de la protection accordée à ce droit en droit canadien, en droit international et en droit américain.

117 Deuxièmement, elle est contraire aux conclusions factuelles du juge d'instance.

118 Troisièmement, la protection du droit de manifester sur le chemin public ressort explicitement du texte même de l'article 500.1.

119 Examinons ces motifs, un à un.

3.3.1. La protection de la liberté d'expression et de la liberté de réunion pacifique en droit canadien, en droit international et en droit américain

3.3.1.1. Le droit canadien

120 Dans son mémoire et lors de l'audition, la Procureure générale se livre à un développement laborieux visant à démontrer que le droit de manifester sur la voie publique n'est pas protégé par les chartes québécoise et canadienne, car son exercice est fondamentalement incompatible avec la fonction d'un chemin public.

121 Or, cette question a été définitivement résolue par la Cour suprême dans l'arrêt *Société Radio-Canada c. Canada (Procureur général)*[42], s'il existait même quelque doute que ce soit avant celui-ci.

122 Voici comment s'exprime la juge Deschamps au nom de la Cour:

> [37] Pour que le mode ou lieu de communication d'un message soit exclu de la protection de la *Charte*, le tribunal doit arriver à la conclusion que l'un ou l'autre est en dissonance avec les valeurs protégées par l'al. 2*b*), c'est-à-dire l'épanouissement personnel, le débat démocratique et la recherche de la vérité (*Ville de Montréal*, [2005] 3 R.C.S. 141, par. 72). Pour trancher cette question, les facteurs suivants sont suggérés : a) la fonction historique ou réelle du lieu de l'activité ou du mode d'expression; b) les autres caractéristiques du lieu de l'activité ou du mode d'expression qui tendent à indiquer que le fait de s'exprimer à cet endroit ou d'utiliser ce mode d'expression minerait les valeurs sous-jacentes de la liberté d'expression (*Ville de Montréal*, par. 74). L'analyse ne doit toutefois pas seulement s'attacher à la fonction première du mode d'expression ou du lieu de l'activité. Par exemple, 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, *Ville de Montréal* et *Greater Vancouver*, [2009] 2 R.C.S. 295, notre Cour a jugé qu'un aéroport, un poteau électrique, une voie publique et un autobus sont des lieux où l'exercice de certaines activités expressives n'est pas incompatible avec les autres valeurs que l'al. 2*b*) est censé favoriser, en dépit du fait que leur fonction première n'est pas l'expression. En effet, la destination première de ces lieux n'était certes pas la communication de messages, mais leur utilisation historique à des fins expressives démontrait que leurs caractéristiques ou fonctions ne les rendraient pas impropres à l'exercice de la liberté d'expression.
>
> [Le soulignement est ajouté]

123 Deux ans plus tôt, dans l'arrêt *Greater Vancouver Transportation Authority c. Fédération canadienne des étudiantes et étudiants - Section Colombie-Britannique* ("*Greater Vancouver*")[43], la juge Deschamps formule la même opinion au sujet de la protection accordée au droit de s'exprimer sur la voie publique :

> [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).
>
> [Le soulignement et les caractères gras sont ajoutés]

124 La Cour d'appel de l'Ontario a récemment conclu en ce sens. Dans l'affaire *Figueiras c. Toronto Police Services Board*[44], la Cour devait considérer la conduite des autorités policières en marge des manifestations tenues lors du sommet du G-20 en juin 2010. Le juge Rouleau écrit:

> [71] The second step of the test is satisfied because nothing about Mr. Figueiras' conduct would remove his intended expressive activity from the scope of s. 2(*b*) protection: see *2952-1366 Québec Inc.*, at paras. 62-81. Neither the method nor the location of Mr. Figueiras' intended activity conflicts with the values protected by s. 2(*b*) (*i.e.*, self-fulfillment, democratic discourse and truth finding): *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19, [2011] S.C.J. No. 2, 2011 SCC 2, at para. 37. In particular, public streets are "clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted": *2952-1366 Québec Inc.*, at para. 81. Demonstrating around the G20 site, including the area adjacent to the security fence, was a perfectly lawful -- and indeed reasonably expected -- activity.

125 Comme l'affirment les professeurs Roach et Schneiderman :

> Streets and parks seem to be paradigmatic of the sorts of public places available for the conduct of expressive activity[45].

126 C'est aussi l'avis de l'auteur Gabriel Babineau qui, après avoir considéré l'arrêt *Greater Vancouver*, écrit ce qui suit:

> Suivant ce cadre d'analyse, il semble évident qu'une manifestation qui se déroule sur une route publique, ou dans un endroit public, tel un parc, tombera normalement sous la protection de l'article 2 (b) de la *Charte*. Ce serait particulièrement le cas, puisque, comme le remarque l'auteur Patrick Forget, "[l]es nombreuses manifestations qui se déroulent pacifiquement année après année témoignent que l'évènement manifestant n'est pas incompatible avec les fonctions principales assumées par les voies et les parcs publics"[46].

127 De l'avis du Tribunal, il ne fait aucun doute que la liberté d'expression et la liberté de réunion pacifique protègent le droit de s'exprimer sur la voie publique même "si la destination première de ces lieux n'[est] certes pas la communication de messages, mais leur utilisation historique à des fins expressives démontr[e] que leurs caractéristiques ou fonctions ne les rend[ent] [...] pas impropres à l'exercice de la liberté d'expression"[47].

128 Cette reconnaissance est conforme à certaines décisions judiciaires rendues dans d'autres contextes[48].

129 Au sujet plus spécifiquement de la liberté de réunion pacifique, il est utile de préciser que les tribunaux canadiens ont souvent interprété la protection accordée à celle-ci en parallèle avec l'analyse dévolue à la liberté d'expression[49].

130 Par contre, les commentaires de l'ancien juge en chef adjoint Morden au sujet de la formation reçue par les

policiers avant la tenue du G-20 à Toronto en juin 2010 témoignent de l'existence d'un consensus au sujet de la protection accordée à la liberté de réunion pacifique par la *Charte canadienne* :

> The substance of the training administered to officers covered a broad range of topics related to policing the G20 Summit, with a particular focus on crowd dynamics and management. Crowd management skills are a critical component of safety planning for any major event and were essential in the case of the G20 Summit given its unprecedented size, the thousands of police and security personnel involved, and the security requirements for the event. While the training materials developed were clearly presented and highly relevant to maximizing safety in mass protest situations, the training was lacking in several respects.
>
> First, the training would have benefitted from a more detailed discussion of the relationship between the exercise of police powers, such as arrest, and the relevant *Charter* rights and freedoms engaged in policing mass public demonstrations, such as the freedom of peaceful assembly. There should have been a greater emphasis in training on the police officers' responsibility to protect and facilitate the public's exercise of their fundamental rights and freedoms under the *Charter*.
>
> Second, many of the images and much of the language used in the training materials to depict protestors was unbalanced. Representations of rioting crowds, violent protestors, and anarchists left the impression that all protestors at the G20 Summit would engage in destructive protest activity and that police officers would be required to respond with aggressive crowd control measures.
>
> Third, given the increased potential for violence and civil disorder in a mass protest situation, all officers deployed to the G20 Summit should have received more practical skills' training than was offered. This should have included simulated scenario training with groups of non-violent and violent protestors that focus on the powers of police to detain or arrest, as well as the legal rights an individual has when the police engage in such conduct[50].
>
> [Le soulignement est ajouté]

131 L'auteur Babineau met en relief la dimension collective de la liberté de réunion pacifique en ces termes:

> La liberté de réunion pacifique se distinguerait donc de la liberté d'expression puisqu'elle a pour objet la protection d'une activité collective plutôt qu'individuelle. Par contre, cela ne veut pas dire que la liberté de réunion pacifique est, à proprement parler, une liberté collective. Il s'agirait plutôt, comme le précise l'auteur Yannick Lécuyer, d'un "droit individuel de dimension collective" parce que c'est une liberté individuelle qui ne peut être exercée que collectivement[51].

132 Comme on l'a souligné plus tôt, la dimension collective de la liberté de réunion pacifique a été récemment reconnue par la Cour suprême dans l'arrêt *Association de la police montée de l'Ontario c. Canada (Procureur général)*[52].

133 Quelques mots maintenant au sujet de l'arrêt *Dupond c. Ville de Montréal*[53] que la Procureure générale du Québec invoque.

134 Dans cette affaire, la Cour suprême devait décider de la constitutionnalité d'un règlement de la Ville de Montréal qui interdisait les manifestations. Le juge Beetz écrit ce qui suit:

> 3. Les libertés d'expression, de réunion et d'association, ainsi que la liberté de la presse et la liberté de religion, sont distinctes et indépendantes de la faculté de tenir des assemblées, des défilés, des attroupements, des manifestations, des processions dans le domaine public d'une ville. Cela est particulièrement vrai pour la liberté d'expression et la liberté de la presse dont traitait le *Renvoi relatif aux lois de l'Alberta*, [1938] R.C.S. 100 (précité). Une manifestation n'est pas une forme de discours

> mais une action collective. C'est plus une démonstration de force qu'un appel à la raison; la confusion propre à une manifestation l'empêche de devenir une forme de langage et d'atteindre le niveau du discours.
>
> 4. Le droit de tenir des réunions publiques sur un chemin public ou dans un parc est inconnu en droit anglais. Loin d'être l'objet d'un droit, la tenue d'une réunion publique dans une rue ou dans un parc peut constituer une atteinte aux droits des pouvoirs municipaux qui sont propriétaires de la rue, même si aucun tiers n'est gêné et qu'aucun préjudice n'en résulte; elle peut également constituer une nuisance [...][54].

135 En se fondant sur l'arrêt *Dupond*, la Procureure générale fait valoir que les tribunaux n'ont jamais reconnu qu'il existait un droit d'entraver la circulation des véhicules routiers sur les chemins publics. Elle affirme que l'appelante ne peut prétendre que ce droit lui a été historiquement reconnu et qu'il n'entrave pas l'activité pour laquelle ces chemins sont destinés.

136 D'une part, la qualification du droit invoqué par l'appelante dans la présente affaire est erronée. Il s'agit du droit de manifester sur un chemin public et non du droit d'entraver la circulation. D'autre part, l'arrêt *Dupond* est rendu avant l'adoption de la *Charte*.

137 Dans l'arrêt *Comité pour la République*[55], la juge L'Heureux-Dubé note le fait que l'arrêt *Dupond* a été rendu avant la proclamation de la *Charte*:

> Dans l'arrêt *Dupond c. Ville de Montréal*, [1978] 2 R.C.S. 770, le juge Beetz a émis l'opinion, à la p. 797, au nom de la majorité, que "[l]oin d'être l'objet d'un droit, la tenue d'une réunion publique dans une rue ou dans un parc peut constituer une atteinte aux droits des pouvoirs municipaux qui sont propriétaires de la rue" et que la libre expression ne saurait servir de fondement à l'annulation d'un règlement municipal interdisant toute manifestation pendant un mois. Cet arrêt a toutefois été rendu avant la proclamation de la *Charte* et offre tout au moins la preuve qu'on peut comprendre que les règles de droit relatives à la violation de propriété peuvent constituer une restriction légale de la liberté d'expression.
>
> Mais le caractère distinct de la propriété gouvernementale restreint l'application des règles de droit relatives à la violation de propriété. Comme l'a affirmé la Cour suprême des États-Unis dans *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), aux pp. 515 et 516:
>
> > [TRADUCTION] Peu importe qui détient le titre de propriété afférent aux rues et aux parcs, ces lieux ont de façon immémoriale fait l'objet d'une propriété en fiducie pour l'usage du public et ont été utilisés, depuis toujours, dans le but de tenir des assemblées et de permettre l'échange d'idées entre les citoyens et la discussion de questions d'intérêt public. Depuis les temps anciens, cette utilisation des rues et des lieux publics fait partie des privilèges, des immunités, des droits et des libertés des citoyens. Le droit qu'a un citoyen des États-Unis de se servir des rues et des parcs aux fins de communiquer ses points de vue sur des questions nationales peut être réglementé dans l'intérêt collectif; il s'agit d'un droit non pas absolu mais relatif dont l'exercice doit être subordonné à la convenance et à l'agrément généraux et être en harmonie avec la paix et l'ordre. Il ne doit toutefois pas sous le couvert d'une réglementation être restreint ou supprimé.
>
> Et selon Harry Kalven, Jr. dans "The Concept of the Public Forum: Cox v. Louisiana", [1965] *Sup. Ct. Rev.* 1, aux pp. 11 et 12:
>
> > [TRADUCTION] ... dans une société ouverte et démocratique les rues, les parcs et d'autres endroits publics sont des lieux importants pour la discussion publique et pour le processus politique. Ils constituent en somme un forum public que le citoyen peut réquisitionner; la générosité et la compréhension avec lesquelles ces lieux sont mis à la disposition des citoyens sont un indice de liberté.

Cependant, même le droit à l'expression de ses opinions politiques n'est pas absolu comme l'a expliqué la Cour suprême des États-Unis dans *Cox v. Louisiana*, 379 U.S. 536 (1965), à la p. 554:

> [TRADUCTION] Même si les droits de parole et de réunion sont fondamentaux dans notre société démocratique, il ne faut quand même pas conclure que toute personne désireuse d'exprimer des opinions ou des croyances peut prendre la parole en public n'importe où et n'importe quand. La liberté garantie par la constitution suppose l'existence d'une société organisée, capable de maintenir l'ordre public sans lequel cette même liberté serait perdue dans les excès de l'anarchie. [Je souligne.][56]

138 Dans l'affaire *Ontario (A.G.) c. Dieleman*[57], le juge Adams de la Cour supérieure de l'Ontario avait délivré une injonction interdisant à certaines personnes d'exhiber des pancartes de protestation à proximité de certaines cliniques d'avortement[58].

139 Dans son jugement, le juge Adams explore plusieurs questions qui concernent la portée de la protection accordée par la *Charte canadienne* à la liberté d'expression et à la liberté de réunion pacifique. Il trace un portrait historique de la protection constitutionnelle accordée au droit de manifester avant l'adoption de la *Charte canadienne* et il aborde, naturellement, la décision de la Cour suprême dans l'arrêt *Dupond*.

140 Il écrit ce qui suit au sujet de cette décision:

> The passage of the *Charter of Rights and Freedoms* has radically altered this perspective, bringing Canadian law and practice more into tune with the fundamental nature of public speech in its various democratic manifestations. It is now recognized that speaking out on public property is an important aspect of political participation, particularly for individuals and groups who lack access to the official press or media or even to mainstream political life: see Stoykewych, "Street Legal", *supra*, at p. 45, *Committee for the Commonwealth of Canada v. Canada*, *supra*; and *Ramsden v. Peterborough (City)*, *supra*[59].

141 Le Tribunal adopte l'analyse du juge Adams et estime qu'il n'est pas lié par l'arrêt *Dupond*, particulièrement si on considère la jurisprudence récente de la Cour suprême qui reconnaît l'exercice de la liberté d'expression sur la voie publique.

142 Cette reconnaissance est d'ailleurs conforme au droit international.

3.3.1.2. Le droit international

143 Dans l'arrêt *Saskatchewan Federation of Labour c. Saskatchewan*[60], la juge Abella rappelle l'importance des obligations internationales du Canada lorsqu'on interprète la *Charte canadienne*:

> [64] Dans *R. c. Hape*, [2007] 2 R.C.S. 292, le juge LeBel confirme que, en interprétant la *Charte*, la Cour "a tenté d'assurer la cohérence entre son interprétation de la *Charte*, d'une part, et les obligations internationales du Canada et les principes applicables du droit international, d'autre part" (par. 55). Puis, dans *Divito c. Canada (Sécurité publique et Protection civile)*, [2013] 3 R.C.S. 157, par. 23, la Cour confirme qu'"il faut présumer que la *Charte* accorde une protection au moins aussi grande que les instruments internationaux ratifiés par le Canada en matière de droits de la personne".

144 Le Canada a ratifié le *Pacte international relatif aux droits civils et politiques*[61] qui protège, à son article 21, le droit de réunion pacifique. Les libertés fondamentales protégées par les chartes québécoise et canadienne s'inspirent des instruments de protection des droits internationaux[62].

145 À cet égard, il est intéressant de consulter l'analyse contenue dans la deuxième édition des lignes directrices relatives la liberté de réunion pacifique publiée en 2010 conjointement par le Bureau des institutions démocratiques et des droits de l'homme de l'Organisation pour la sécurité et la coopération en Europe ("OSCE") et la Commission de Vienne: *Guidelines on Freedom of Peaceful Assembly*[63].

146 Ces lignes directrices sont publiées à l'intention des États membres de l'OSCE afin de les aider à s'assurer que leur législation nationale est respectueuse de leurs obligations internationales, européennes et en tant qu'état membre de l'OSCE.

147 Elles s'appuient notamment sur l'analyse des instruments internationaux et européens pertinents qui accordent une protection à la liberté de réunion pacifique.

148 L'analyse contenue dans ces lignes directrices et dans les notes explicatives qui les accompagnent est un résumé utile des principes de base de la portée de la protection accordée à la liberté de réunion pacifique en droit international et en droit européen[64].

149 Les lignes directrices abordent toutes les questions pertinentes au respect de la liberté de réunion pacifique et à sa mise en oeuvre : 1) la notion de réunion pacifique; 2) les principes directeurs; 3) les restrictions à cette liberté; 4) les questions procédurales et 5) la mise en oeuvre du droit à la liberté de réunion pacifique.

150 La liberté de réunion pacifique est définie largement:

> **1.1 Freedom of peaceful assembly** is a fundamental human right that can be enjoyed and exercised by individuals and groups, unregistered associations, legal entities and corporate bodies. Assemblies may serve many purposes, including the expression of diverse, unpopular or minority opinions. The right can be an important strand in the maintenance and development of culture, such as in the preservation of minority identities. The protection of the freedom to peacefully assemble is crucial to creating a tolerant and pluralistic society in which groups with different beliefs, practices or policies can exist peacefully together.
>
> **1.2 Definition of assembly.** For the purposes of the Guidelines, an assembly means the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose. This definition recognizes that, although particular forms of assembly may raise specific regulatory issues, all types of peaceful assembly - both static and moving assemblies, as well as those that take place on publicly or privately owned premises or in enclosed structures - deserve protection.
>
> **1.3 Only peaceful assemblies are protected.** An assembly should be deemed peaceful if its organizers have professed peaceful intentions and the conduct of the assembly is non-violent. The term "peaceful" should be interpreted to include conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties[65].

151 La légitimité de l'utilisation des chemins publics pour l'exercice de la liberté de réunion pacifique est ainsi décrite:

> **3.2 Public space.** Assemblies are as legitimate uses of public space as commercial activity or the movement of vehicular and pedestrian traffic. This must be acknowledged when considering the necessity of any restrictions[66].

152 Au sujet de l'utilisation temporaire des chemins publics pour l'exercice de la liberté de réunion pacifique, les

notes explicatives fournissent les précisions suivantes:

> 19. These Guidelines apply to assemblies held in public places that everyone has an equal right to use (including, but not limited to, public parks, squares, streets, roads, avenues, sidewalks, pavements and footpaths). In particular, the state should always seek to facilitate public assemblies at the organizers' preferred location, where this is a public place that is ordinarily accessible to the public (see paras. 39-45, in relation to proportionality).
>
> 20. Participants in public assemblies have as much a claim to use such sites for a reasonable period as anyone else. Indeed, public protest, and freedom of assembly in general, should be regarded as equally legitimate uses of public space as the more routine purposes for which public space is used (such as commercial activity or for pedestrian and vehicular traffic)[67].

153 Comme on peut le constater, l'accès temporaire au chemin public pour l'exercice de la liberté de réunion pacifique est consacré en droit international.

3.3.1.3. Le droit américain

154 Le droit américain est au même effet.

155 Dans son ouvrage *Why Societies Need Dissent*, le professeur Sunstein résume succinctement le droit américain au sujet de l'exercice du droit de manifester sur un chemin public. Il confirme que l'accès aux rues et aux parcs est protégé afin d'exercer le droit à la liberté d'expression et de réunion pacifique :

> In short, governments are obliged to allow speech to occur freely on public streets and in public parks. This is so even if many citizens would prefer to have peace and quiet, and even if people find it annoying, or worse, to come across protesters and dissidents when simply walking home or driving to a local grocery or restaurant[68].

156 L'accès aux chemins publics afin d'exercer la liberté d'expression et la liberté de réunion pacifique est donc protégé en droit canadien, en droit international et en droit américain.

3.3.2. Le texte de l'article 500.1 et l'intention législative

157 La position que fait valoir la Procureure générale au sujet de la protection de la liberté d'expression et de la liberté de réunion pacifique est contredite par le texte même de l'article 500.1 qui autorise l'accès temporaire aux chemins publics lorsque que certaines modalités sont satisfaites.

158 L'objet et l'intention législative ayant conduit à l'adoption de cet article est d'autoriser l'accès aux chemins publics pour les fins de la tenue de manifestations et de défilés moyennant le respect de certaines conditions.

159 L'article 500.1 ne fait que confirmer que les libertés d'expression et de réunion pacifique protègent le droit de manifester, du moins temporairement, sur un chemin public.

3.3.3. Les conclusions du juge d'instance

160 Dans un jugement soigné et clair, le juge d'instance tire certaines conclusions de nature factuelle au sujet de l'utilisation historique des chemins publics pour exercer le droit de manifester.

161 Par exemple, le juge résume et évalue le témoignage rendu par le professeur de sociologie à l'Université

McGill, Marcos Ancelovici. Il s'exprime ainsi:

> [22] Marcos Ancelovici, sociologue qui enseigne à l'Université McGill, s'intéresse aux mouvements sociaux. Il a été qualifié à titre d'expert capable d'informer le Tribunal sur la notion de manifestation, son développement et son utilisation, et en particulier l'utilisation de la manifestation comme moyen d'expression.
>
> [23] À la lumière du témoignage et du rapport d'expertise de Marcos Ancelovici, le Tribunal retient qu'une manifestation est une activité expressive et un phénomène collectif. Ceux et celles qui y participent, souvent marginalisés, véhiculent un message.
>
> [24] D'ailleurs, un objectif de la manifestation est d'attirer l'attention médiatique afin de communiquer ce message et d'influencer les politiques publiques. La perturbation de l'ordre public est une façon d'attirer cette attention médiatique. De plus, la manifestation se tient souvent dans la rue ou sur les chemins publics et son trajet peut être investi d'un sens particulier. La manifestation peut être une fin en elle-même. Entre autres, elle permet à un mouvement social de "prendre corps". Finalement, la manifestation peut prendre plusieurs formes : par exemple, elle peut être spontanée et ne pas avoir d'organisateur.
>
> [25] M. Ancelovici témoigne à l'effet que plusieurs groupes, souvent marginalisés, dépendent de la perturbation de l'ordre public pour se faire entendre. De plus, même si le Tribunal retenait l'hypothèse qu'il y a une "routinisation" des manifestations en Occident, celui-ci ne retient cependant pas les conclusions du témoin quant à cette "routinisation" au Canada. Selon lui, les Canadiens (incluant les Québécois) sont de plus en plus favorables à l'idée de manifester. Or, la façon dont il interprète les études qu'il présente est peu fiable et l'application des conclusions de ces études au contexte canadien, spéculative.
>
> [26] Le Tribunal ne retient pas non plus ses conclusions à l'effet que les Canadiens (incluant les Québécois) participent de plus en plus à des manifestations. Plusieurs données qu'il présente sont partielles et la méthodologie qu'il utilise pour le faire, peu fiable. De plus, il n'attache pas d'importance au fait que les manifestations auxquelles il se réfère ou auxquelles les études qu'il mentionne se réfèrent, soient autorisées ou non. Finalement, le Tribunal ne retient pas ses conclusions à l'effet que les rapports entre les manifestants et les policiers se soient "normalisés" car il ne présente aucune donnée pour étayer cette affirmation.
>
> [Le soulignement est ajouté]

162 De plus, le juge d'instance est "convaincu sur la base de la preuve entendue que les chemins publics de Montréal sont des lieux de rencontres publics et non privés, où la manifestation de rue est une forme d'expression acceptée depuis longtemps"[69].

163 Il souligne aussi qu'il "est satisfait que la Cour Suprême et des cours d'appel ont reconnu que les rues sont manifestement des lieux où diverses formes d'expression incluant des manifestations, sont acceptées depuis longtemps"[70].

164 Lors d'un débat constitutionnel, la norme de contrôle à l'égard des faits en litige, des faits sociaux et des faits législatifs est celle de l'erreur manifeste et dominante[71].

165 La Procureure générale ne fait voir aucune erreur de cette nature à l'égard des conclusions du juge d'instance dans son jugement.

166 Ce faisant, il lui est difficile de prétendre que la fonction historique des rues et des chemins publics est incompatible avec l'exercice de la liberté d'expression et de la liberté de réunion pacifique alors que la preuve présentée l'établit et que le juge d'instance retient cette preuve.

3.4 - Est-ce que l'article 500.1 porte atteinte aux libertés d'expression et de réunion pacifique?

Godbout v. Longueuil (City)

Supreme Court Reports

Supreme Court of Canada

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

1997: May 28 / 1997: October 31.

File No.: 24990.

[1997] 3 S.C.R. 844 | [1997] 3 R.C.S. 844 | [1997] S.C.J. No. 95 | [1997] A.C.S. no 95

City of Longueuil appellant/respondent on cross-appeal; v. Michèle Godbout, respondent/appellant on cross-appeal, and Attorney General of Quebec, mis en cause.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Case Summary

Civil rights — Right to privacy — Residence requirement — Municipality adopting resolution requiring all new permanent employees to reside within its territorial limits — Whether right to choose where to establish one's home falls within scope of right to privacy — Whether residence requirement infringes employee's right to privacy — If so, whether infringement justifiable — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 5, 9.1.

Municipal law — Resolution — Residence requirement — Municipality adopting resolution requiring all new permanent employees to reside within its territorial limits — Whether municipal resolution valid — Whether residence requirement infringing "right to privacy" in Quebec Charter and "right to liberty" in Canadian Charter — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 5, 9.1 — Canadian Charter of Rights and Freedoms, s. 7.

Judgments and orders — Rectificatory judgment — Damages — Court of Appeal ordering employee reinstated and awarding her damages from time of her dismissal until time of trial — Court of Appeal's reasons indicating that no damages were awarded for period between trial and appeal because they had not been properly quantified — No holding to that effect in formal judgment — Whether Court of Appeal erred in issuing rectificatory judgment.

Civil procedure — Appeal — Court of Appeal ordering employee reinstated and awarding her damages from time of her dismissal until time of trial — No damages awarded for period between trial and appeal because they had not been properly quantified — Whether Court of Appeal erred in not permitting employee to introduce evidence at appeal hearing in respect of damages between trial and appeal — Whether Court of Appeal erred in not requesting parties to submit additional argument on that issue — Whether Court of Appeal erred in not remanding issue of damages to Superior Court — Code of Civil Procedure, R.S.Q., c. C-25, art. 523.

The appellant city adopted a resolution requiring all new permanent employees to reside within its boundaries. As a condition of obtaining permanent employment as a radio operator for the city police force, the respondent signed a declaration promising that she would establish her principal residence in the city and that she would continue to live there for as long as she remained in the city's employ. The declaration also provided that if she moved out of the city for any reason, she could be terminated without notice. The respondent's position became permanent and, approximately one year later, she moved into a new house she had purchased in a neighbouring municipality.

When she refused to move back within the city's limits, her employment was terminated. The Superior Court dismissed the respondent's action for damages and reinstatement, holding that the city's residence requirement did not contravene the Quebec Charter of Human Rights and Freedoms and that the Canadian Charter of Rights and Freedoms did not apply in this case. The Court of Appeal allowed the respondent's appeal, concluding that the residence requirement was invalid mainly because it was contrary to public order. It granted the respondent's request for reinstatement and awarded damages for the financial losses she suffered from the time of her dismissal until the time of trial. The court noted that the damages in respect of the income lost by the respondent during the period between the trial and the appeal ("interim damages") had not been properly quantified and should not be awarded, but no specific holding to this effect was included in the formal judgment. The respondent brought a motion for rectification, asking that the court amend its formal judgment and award the "interim damages". The Court of Appeal granted the motion and amended the formal judgment, but did not accede to the respondent's request to recover the "interim damages". The city appealed on the substantive issues, and the respondent cross-appealed on the damages issue.

Held: The appeal and cross-appeal should be dismissed. The city's residence requirement unjustifiably infringes s. 5 of the Quebec Charter.

(1) Appeal

Per La Forest, L'Heureux-Dubé and McLachlin JJ.: The ambit of s. 32 of the Canadian Charter is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments. As well, under s. 32, particular entities will be subject to Charter scrutiny in respect of certain governmental activities they perform, even if the entities themselves cannot accurately be described as "governmental" per se. Since municipalities cannot but be described as "governmental entities", they are subject to the Canadian Charter. First, municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent. Second, municipalities possess a general taxing power that, for the purposes of determining whether they can rightfully be described as "government", is indistinguishable from the taxing powers of the Parliament or the provinces. Third, and importantly, municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction. Finally, and most significantly, municipalities derive their existence and law-making authority from the provinces. As the Canadian Charter clearly applies to the provincial legislatures and governments, it must also apply to entities upon which they confer governmental powers within their authority. Otherwise, provinces could simply avoid the application of the Charter by devolving powers on municipal bodies. Further, since a municipality is governmental in nature, all its activities are subject to Charter review. The Canadian Charter is therefore applicable to the residence requirement at issue in this case. The particular modality a municipality chooses to adopt in advancing its policies cannot shield its activities from Charter scrutiny. All the municipality's powers are derived from statute and all are of a governmental character. An act performed by an entity that is governmental in nature is thus necessarily "governmental" and cannot properly be viewed as "private".

The right to choose where to establish one's home falls within the scope of the liberty interest guaranteed by s. 7 of the Canadian Charter. The right to liberty in s. 7 goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. The autonomy protected by the s. 7 right to liberty, however, encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. Choosing where to establish one's home is a quintessentially private decision going to the very heart of personal or individual autonomy and the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so. Support for this view is found in the fact that the right to choose where to establish one's home is afforded explicit protection in the International Convenant on Civil and Political Rights to which Canada is a party. The respondent's Charter claim did not implicate any notion of a constitutional "right to employment" or any other "economic right".

The respondent did not waive her right to choose where to establish her home by signing the residence declaration or by failing to move back within the city's limits. The respondent had no opportunity to negotiate the mandatory residence stipulation and, consequently, cannot be taken to have freely given up her right to choose where to live. Similarly, the respondent's attempt to assert her right to choose where to live by refusing to conform with the terms of the residence requirement cannot amount to a renunciation of that right.

Under s. 7, a deprivation by the state of an individual's right to life, liberty or security of the person will not violate the Canadian Charter unless it contravenes the "principles of fundamental justice". Deciding whether the infringement of a s. 7 right is fundamentally just may, in certain cases, require that the right at issue be weighed against the interests pursued by the state in causing that infringement. This balancing is both eminently sensible and perfectly consistent with the aim and import of s. 7, since the notion that individual rights may, in some circumstances, be subordinated to substantial and compelling collective interests is itself a basic tenet of our legal system lying at or very near the core of our most deeply rooted juridical convictions. As well, this balancing process will necessarily be contextual, insofar as the particular right asserted, the extent of its infringement, and the state interests implicated in each particular case will depend largely on the facts. Here, the residence requirement infringes the respondent's right to liberty in a manner that does not conform to the principles of fundamental justice. As justifications for the requirement, the city relied upon three "public interests": (1) the maintenance of a high standard of municipal services, (2) the stimulation of local business and municipal taxation revenue, and (3) the need to ensure that workers performing essential public services are physically proximate to their place of work. The first two cannot provide a sufficiently compelling basis upon which to override the respondent's right to decide where she wishes to live. As for the third one, while in certain circumstances a municipality might well be justified in imposing a residence requirement on employees occupying certain essential positions, the residence requirement at issue is too broad to be upheld on that ground since it applies not only to employees whose functions require that they be proximate to their place of work, but also to all permanent employees of the city hired after the municipal resolution was adopted. Moreover, even if the residence requirement were restricted to emergency workers, the respondent would not fall within that class of employees.

There is no need to examine the violation of s. 7 under s. 1 of the Canadian Charter, given that all the considerations pertinent to such an inquiry have already been canvassed in the discussion dealing with fundamental justice. Furthermore, a violation of s. 7 will normally only be justified under s. 1 in the most exceptional of circumstances, if at all. Such circumstances do not exist here.

The residence requirement also infringed s. 5 of the Quebec Charter by depriving the respondent of the ability to choose where to establish her home. Section 5 protects, among other things, the right to take fundamentally personal decisions free from unjustified external interference. The scope of decisions falling within the sphere of autonomy protected by s. 5 is limited to those choices that are of a fundamentally private or inherently personal nature. The right to be free from unjustified interference in making the decision as to where to establish and maintain one's home falls squarely within the scope of the Quebec Charter's guarantee of "respect for [one's] private life". Since the residence requirement imposed by the city essentially precluded the respondent from making that choice freely, it violates s. 5. Further, for the reasons given in relation to waiver under the Canadian Charter, the respondent did not waive her right to privacy under s. 5 of the Quebec Charter.

Section 9.1 of the Quebec Charter, assuming that it properly applies here, is to be interpreted and applied in the same manner as s. 1 of the Canadian Charter. Thus, the party seeking to justify a limitation on a plaintiff's Quebec Charter rights under s. 9.1 must bear the burden of proving both that such a limitation is imposed in furtherance of a legitimate and substantial objective and that the limitation is proportional to the end sought, inasmuch as (a) it is rationally connected to that end, and (b) the right is impaired as little as possible. Essentially for the reasons given in the discussion of fundamental justice in the context of s. 7 of the Canadian Charter, the first two objectives suggested by the city as the basis for imposing the residence requirement at issue are not so significant or pressing as to justify overriding the respondent's s. 5 right. As regards the third objective, it cannot be concluded that the very broad residence requirement at issue is either rationally connected to the end sought to be achieved, or that it is proportional to it. Moreover, the specific evidence advanced by the city in respect of the justifications it offered

was scant and is incapable of permitting the city to discharge its burden of proof. The infringement of the respondent's s. 5 right is thus not justified under s. 9.1.

Per Gonthier, Cory and Iacobucci JJ.: For the reasons given by La Forest J., the city's resolution requiring its employees to reside within its boundaries was invalid because it unjustifiably violated s. 5 of the Quebec Charter. The infringement of s. 5 provides a good and sufficient basis for dismissing this appeal and there is thus no need to consider the application of s. 7 of the Canadian Charter. The application of s. 7 may have a significant effect upon municipalities and, before reaching a conclusion on an issue that need not be considered in determining the appeal, it would be preferable to hear further argument with regard to it, including the submissions of interested parties and intervening Attorneys General.

Per Lamer C.J. and Sopinka and Major JJ.: The city's residence requirement infringes the respondent's right to privacy under s. 5 of the Quebec Charter and is not justified under s. 9.1. This is sufficient to dispose of the appeal. It is unnecessary and perhaps imprudent to consider whether the residence requirement infringes s. 7 of the Canadian Charter in the absence of submissions from interested parties.

Section 5 of the Quebec Charter protects an employee's decision where to live as an aspect of his or her right to privacy. A municipality that seeks to uphold a residence requirement that infringes that section under s. 9.1 of the Quebec Charter must demonstrate that the requirement is imposed to advance a legitimate and substantial objective, and that the requirement is proportional to this objective, in that it is both rationally connected to the objective and constitutes a minimal impairment of the right protected by s. 5. These criteria must be applied flexibly and in a manner that is sensitive to the particular context and factual circumstances of each case. The objectives of improving the quality of services by fostering loyalty, of supporting the local economy, and of ensuring that certain essential employees be readily available are often invoked by municipalities to support a residence requirement. Under s. 9.1, these objectives may, depending on the circumstances of a case, be sufficiently compelling to justify an infringement of the employee's right to privacy. In the particular circumstances of this case, however, none of these objectives were sufficiently compelling to justify such an infringement.

(2) Cross-appeal

The issuance of the rectificatory judgment did not amount to re-examining a matter that was already res judicata. The reasons of the rectificatory judgment constituted nothing more than an attempt by the Court of Appeal to formalize with precision the conclusion it had reached in its previous judgment. Moreover, the issuance of the rectificatory judgment did not have any detrimental effect on the city's legal position. The phrase "without prejudice to any of the [respondent's] rights or remedies arising from this judgment" did not confer upon her a right to pursue further recourses to recover the "interim damages", but confirmed that in formalizing its refusal to award the "interim damages", the Court of Appeal did not want to be taken as having altered any findings it had made in its previous judgment.

The Court of Appeal's refusal to permit the respondent to introduce evidence with respect to the quantum of the "interim damages" during the oral hearing itself did not constitute reversible error. To allow this evidence to be introduced at that stage would not have given the city ample opportunity to verify the figures the respondent claimed represented her losses. Moreover, under art. 199 C.C.P., the respondent could have presented evidence in respect of the "interim damages" claim not only as part of the appeal itself but also at any time before judgment. No attempt to quantify the "interim damages" in accordance with the appropriate procedure was made. The Court of Appeal's refusal to grant the "interim damages" was thus not based on some procedural error on its part. Rather, it was based on the fact that no evidence as to quantum had ever been properly placed before it.

Finally, the Court of Appeal did not err in failing to request that the parties submit additional argument in respect of the "interim damages" claim, or to remand the matter to the Superior Court. Article 523 C.C.P. confers a discretion on the Court of Appeal to act in the interests of justice and to make whatever orders it deems necessary in order to safeguard the rights of the parties. Here, the Court of Appeal simply chose not to exercise that discretion. Given the

clear opportunities the respondent had to present evidence in respect of her "interim damages", this Court should not interfere with that decision.

Cases Cited

By La Forest J.

Applied: Brasserie Labatt ltée v. Villa, [1995] R.J.Q. 73; not followed: Ector v. City of Torrance, 514 P.2d 433 (1973); Kennedy v. City of Newark, 148 A.2d 473 (1959); McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976); referred to: McDermott v. Nackawic (Town) (1988), 53 D.L.R. (4th) 150; McKinney v. University of Guelph, [1990] 3 S.C.R. 229; Harrison v. University of British Columbia, [1990] 3 S.C.R. 451; Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570; Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211; Re Klein and Law Society of Upper Canada (1985), 50 O.R. (2d) 118; Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084; Re McCutcheon and City of Toronto (1983), 41 O.R. (2d) 652; Montréal (City of) v. Arcade Amusements Inc., [1985] 1 S.C.R. 368; R. v. Sharma, [1993] 1 S.C.R. 650; R. v. Greenbaum, [1993] 1 S.C.R. 674; Kruse v. Johnson, [1898] 2 Q.B. 91; Halifax (City of) v. Read, [1928] S.C.R. 605; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Oakes, [1986] 1 S.C.R. 103; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Morgentaler, [1988] 1 S.C.R. 30; R. v. Beare, [1988] 2 S.C.R. 387; Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Rahey, [1987] 1 S.C.R. 588; R. v. Richard, [1996] 3 S.C.R. 525; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; R. v. Jones, [1986] 2 S.C.R. 284; Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711; Cunningham v. Canada, [1993] 2 S.C.R. 143; Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter, 360 N.E.2d 708 (1975), certiorari denied, 424 U.S. 977 (1976); Detroit Police Officers Ass'n v. City of Detroit, 190 N.W.2d 97 (1971), appeal dismissed for want of substantial federal question, 405 U.S. 950 (1972); Hanson v. Unified School Dist. No. 500, Wyandotte County, Kan., 364 F. Supp. 330 (1973); Andre v. Board of Trustees of the Village of Maywood, 561 F.2d 48 (1977); Salem Blue Collar Workers Ass'n v. City of Salem, 33 F.3d 265 (1994); Donnelly v. City of Manchester, 274 A.2d 789 (1971); Frenette v. Metropolitan Life Insurance Co., [1992] 1 S.C.R. 647; Reid v. Belzile, [1980] C.S. 717; Centre local de services communautaires de l'Érable v. Lambert, [1981] C.S. 1077; Cohen v. Queenswear International Ltd., [1989] R.R.A. 570; The Gazette (Division Southam Inc.) v. Valiquette, [1997] R.J.Q. 30; Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; Construction Gilles Paquette ltée v. Entreprises Végo ltée, [1997] 2 S.C.R. 299.

By Cory J.

Applied: Brasserie Labatt ltée v. Villa, [1995] R.J.Q. 73; referred to: Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084.

By Major J.

Referred to: Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712.

Statutes and Regulations Cited

62 Having accepted the respondent's view that the right she seeks to invoke is, in fact, a right to choose where to establish her home, I must still address the appellant's second contention; namely, that even a right of this nature -- quite apart from any notion of economic rights -- does not fall within the ambit of the liberty guarantee enshrined in s. 7. Once again, I am unable to agree with this submission. Indeed, in my view, a proper understanding of the scope of the s. 7 right to liberty militates strongly toward the opposite conclusion. Let me explain.

63 In the recent case of B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, this Court was called upon to decide, inter alia, whether the s. 7 right to liberty included within its scope a right of parents to take decisions respecting the medical care of their children. More specifically, and in addition to a claim raised under s. 2(a) of the Canadian Charter, we were asked to decide whether the appellant parents (who were Jehovah's Witnesses) could properly invoke a constitutional right to make definitive choices in respect of their daughter's medical treatment, in order to preclude health care officials from ordering -- pursuant to powers granted to them by the Child Welfare Act, R.S.O. 1980, c. 66 -- that the daughter undergo a blood transfusion. Writing for a plurality consisting of myself and L'Heureux-Dubé, Gonthier and McLachlin JJ., I undertook a detailed discussion of the various principles I think should guide the interpretation of s. 7, noting particularly that s. 7 must (as was first enunciated in R. v. Lyons, [1987] 2 S.C.R. 309, and repeatedly followed by this Court) be read in light of the values reflected in the Charter as a whole, and not just those embodied by the other provisions described as "legal rights". I then referred specifically to the decisions of Dickson C.J. in R. v. Oakes, [1986] 1 S.C.R. 103, and R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, in which the meaning of the term "freedom" in ss. 1 and 2(a) was discussed, and found as follows, at p. 368:

> The above-cited cases give us an important indication of the meaning of the concept of liberty. On the one hand, liberty does not mean unconstrained freedom. . . . Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. [Emphasis added; citations omitted.]

On the facts of B. (R.) itself, I found that the right asserted by the appellant parents fell within this protected sphere of individual autonomy but that, in the circumstances, the deprivation of the right was in accordance with the principles of fundamental justice. As a consequence, I held that no violation of s. 7 occurred.

64 I note parenthetically that the joint reasons of Iacobucci and Major JJ. in B. (R.) (in which Cory J. concurred) do not, as I see it, appear to take issue with my view of the ambit of the s. 7 liberty guarantee. While, on the facts of B. (R.), my colleagues disagreed with the finding that the appellant parents possessed a constitutional right to decide what constitutes appropriate medical care for their child (since, in their view, the purview of such a right must be delineated with specific reference to the competing rights of the child to life and security of the person), they did not explicitly question the idea that the right to liberty in s. 7 goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein the state is, in normal circumstances, precluded from entering. Indeed, at p. 431, they stated:

> We note that La Forest J. holds that "liberty" encompasses the right of parents to have input into the education of their child. In fact, "liberty" may very well permit parents to choose among equally effective types of medical treatment for their children, but we do not find it necessary to determine this question in the instant case. We say this because, assuming without deciding that "liberty" has such a reach, it certainly does not extend to protect the appellants in the case at bar. There is simply no room within s. 7 for parents to override the child's right to life and security of the person. [Underlining in original; italics added.]

Sopinka J., too, did not explicitly disagree with my understanding of the scope of the liberty interest protected by s.

7. Rather, he took the position that the matter did not need to be addressed in B. (R.) since, on the facts, there was no violation of the principles of fundamental justice.

65 I should point out that the view I have expounded regarding the scope of the right to liberty draws considerable support from the reasons of Wilson J. in R. v. Morgentaler, [1988] 1 S.C.R. 30. In that case, my former colleague succinctly expressed her opinion that the s. 7 liberty interest is concerned not only with physical liberty, but also with fundamental concepts of human dignity, individual autonomy, and privacy. Indeed, at p. 166, she stated:

> [A]n 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 v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177], 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.

Speaking for the plurality, I explicitly endorsed this passage in B. (R.), at pp. 368-69, pointing out that I have long supported the views expressed in it. Indeed, shortly after Morgentaler was decided, I stated in R. v. Beare, [1988] 2 S.C.R. 387, at p. 412, that I had "considerable sympathy" for the proposition that s. 7 includes within it a right to privacy. Moreover, the view that the right to liberty encompasses more than just physical freedom is, as I explained in B. (R.), supported by the vast preponderance of American case law dealing with the subject; see, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

66 The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in B. (R.) should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in B. (R.), that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in B. (R.) that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

67 The soundness of this position can be appreciated most readily, I think, by reflecting upon some of the intensely personal considerations that often inform an individual's decision as to where to live. Some people choose to establish their home in a particular area because of its nearness to their place of work, while others might prefer a different neighbourhood because it is closer to the countryside, to the commercial district, to a particular religious institution with which they are affiliated, or to a medical centre whose services they require. Similarly, some people may, for reasons dearly important to them, value the historical significance or cultural make-up of a given locale, others again may want to ensure that they are physically proximate to family or to close friends, while others still might decide to reside in a particular place in order to minimize their cost of living, to care for an ailing relative or, as in the case at bar, to maintain a personal relationship. In my opinion, factors such as these vividly reflect the idea that choosing where to live is a fundamentally personal endeavour, implicating the very essence of what each individual values in ordering his or her private affairs; that is, the kinds of considerations I have mentioned here serve to highlight the inherently private character of deciding where to maintain one's home. In my view, the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so.

68 Moreover, not only is the choice of residence often informed by intimately personal considerations, but that choice may also have a determinative effect on the very quality of one's private life. The respondent put this point succinctly in her factum:

> [Translation] Residence determines the human and social environment in which an individual and his or her family evolve: the type of neighbourhood, the school the children attend, the living environment, services, etc. In this sense, therefore, residence affects the individual's entire life and development.

To my mind, the ability to determine the environment in which to live one's private life and, thereby, to make choices in respect of other highly individual matters (such as family life, education of children or care of loved ones) is inextricably bound up in the notion of personal autonomy I have been discussing. To put the point plainly, choosing where to live will be influenced in each individual case by the particular social and economic circumstances of the person making the choice and, even more significantly, by his or her aspirations, concerns, values and priorities. Based on all these considerations, then, I conclude that choosing where to establish one's home falls within that narrow class of decisions deserving of constitutional protection.

69 Support for this view is found in the fact that the right to choose where to establish one's home is afforded explicit protection in the International Convenant on Civil and Political Rights, Can. T.S. 1976 No. 47, to which Canada became a party in 1976. As the respondent informed us, Article 12(1) of that convention reads as follows:

article 12

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

While subsection (3) of that provision provides that the right at issue can be limited by states for certain stipulated reasons, the fact remains that the right to choose where to reside is itself enshrined as one of the Covenant's fundamental guarantees. Given this Court's previous recognition of the persuasive value of international covenants in defining the scope of the rights guaranteed by the Charter (see, e.g., Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, at p. 348, per Dickson C.J. (dissenting), cited with approval in Slaight, supra, at pp. 1056-57), I regard Article 12 as strengthening my conclusion that the right to decide where to establish one's home forms part of the irreducible sphere of personal autonomy protected by the liberty guarantee in s. 7.

70 Having made clear why I find the right asserted by the respondent is indeed comprised within the right to liberty, all that remains to be considered as regards s. 7 of the Canadian Charter is whether the deprivation of the respondent's right to choose where to live -- through the imposition of the residence requirement -- conforms to the principles of fundamental justice. I will examine this issue in detail in the next section of these reasons. Before doing so, however, I should state that I do regard the imposition of the residence requirement as a "deprivation", in the sense required by s. 7, despite an argument to the contrary raised by the appellant. While it did not frame its submission in precisely this manner, the appellant essentially contended that even if a right to choose where to establish one's home existed under s. 7, there could be no "deprivation" on the facts of this case because the respondent waived that right when she signed the residence declaration. Put another way, the imposition of the residence requirement did not, in the appellant's view, "deprive" the respondent of her right to decide where to live because she chose to sign the residence declaration and, thereby, renounced any right of that nature that she might otherwise have enjoyed.

71 If it could be sustained on the facts, the appellant's argument would raise the issue of whether it is even possible to waive a constitutional right to choose where to live, as an aspect of the right to liberty. Waiver of certain constitutional rights has, of course been recognized by this Court in other contexts; see, e.g., Mills v. The Queen, [1986] 1 S.C.R. 863, and R. v. Rahey, [1987] 1 S.C.R. 588, both dealing with s. 11(b); and R. v. Richard, [1996] 3 S.C.R. 525, dealing with s. 11(d). I do not consider it necessary to deal with that issue here, however, since even

Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component, [2009] 2 S.C.R. 295

Supreme Court Reports

Supreme Court of Canada

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

Heard: March 25, 2008;

Judgment: July 10, 2009.

[page296]

File No.: 31845.

[2009] 2 S.C.R. 295 | [2009] 2 R.C.S. 295 | [2009] S.C.J. No. 31 | [2009] A.C.S. no 31 | 2009 SCC 31

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.

(139 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Subsequent History:

* Bastarache J. took no part in the judgment.

Catchwords:

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.

Catchwords:

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).

Catchwords:

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.

Catchwords:

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.

Summary:

The appellant transit authorities, the Greater Vancouver Transportation Authority ("TransLink") and British Columbia Transit ("BC Transit"), operate [page297] 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. [para. 14] [para. 17] [para. 21] [paras. 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 [page298] interference with the content of their expression. [para. 26] [para. 32] [para. 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. [paras. 36-38] [para. 42] [para. 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 [page299] authorities' advertising policies are both accessible and worded precisely enough to enable potential advertisers to understand what is prohibited. [para. 65] [para. 67] [paras. 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*. [paras. 76-77] [para. 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 [page300] of no force or effect to the extent of their inconsistency. [paras. 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*). [para. 93] [para. 100]

[para. 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". [paras. 95-98] [para. 103] [para. 105] [paras. 130-131]

[page301]

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. [para. 97] [paras. 116-117] [para. 121] [para. 123]

Cases Cited

By Deschamps J.

Applied:*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; **distinguished:** *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; **referred to:** *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Therens*, [1985] 1 S.C.R. 613; *B.C.G.E.U. v.*

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 [page317] 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 [page318] 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 [page319] 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 [page320] 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 [page321] 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 [page322] 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*.

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)

Supreme Court Reports

Supreme Court of Canada

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

Heard: December 1, 2016;

Judgment: November 2, 2017.

File No.: 36664.

[2017] 2 S.C.R. 386 | [2017] 2 R.C.S. 386 | [2017] S.C.J. No. 54 | [2017] A.C.S. no 54 | 2017 SCC 54

Ktunaxa Nation Council and Kathryn Teneese, on their own behalf and on behalf of all citizens of the Ktunaxa Nation Appellants; v. Minister of Forests, Lands and Natural Resource Operations and Glacier Resorts Ltd. Respondents and Attorney General of Canada, Attorney General of Saskatchewan, Canadian Muslim Lawyers Association, South Asian Legal Clinic of Ontario, Kootenay Presbytery (United Church of Canada), Evangelical Fellowship of Canada, Christian Legal Fellowship, Alberta Muslim Public Affairs Council, Amnesty International Canada, Te'mexw Treaty Association, Central Coast Indigenous Resource Alliance, Shibogama First Nations Council, Canadian Chamber of Commerce, British Columbia Civil Liberties Association, Council of the Passamaquoddy Nation at Schoodic, Katzie First Nation, West Moberly First Nations and Prophet River First Nation Interveners

(156 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Freedom of religion — First Nation alleging that ski resort project would drive spirit central to their religious beliefs from their traditional territory — Provincial government approving ski resort despite claim by First Nation that development would breach right to freedom of religion — Whether Minister's decision violates s. 2(a) of Canadian Charter of Rights and Freedoms.

Constitutional law — Aboriginal rights — Crown — Duty to consult — Provincial government approving ski resort despite claim by First Nation that development would breach constitutional right to protection of Aboriginal interests — Whether Minister's decision that Crown had met duty to consult and accommodate was reasonable — Constitution Act, 1982, s. 35.

Summary:

The Ktunaxa are a First Nation whose traditional territories include an area in British Columbia that they call Qat'muk. Qat'muk is a place of spiritual significance for them because it is home to Grizzly Bear Spirit, a principal

spirit within Ktunaxa religious beliefs and cosmology. Glacier Resorts sought government approval to build a year-round ski resort in Qat'muk. The Ktunaxa were consulted and raised concerns about the impact of the project, and as a result, the resort plan was changed to add new protections for Ktunaxa interests. The Ktunaxa remained unsatisfied, but committed themselves to further consultation. Late in the process, the Ktunaxa adopted the position that accommodation was impossible because the project would drive Grizzly Bear Spirit from Qat'muk and therefore irrevocably impair their religious beliefs and practices. After efforts to continue consultation failed, the respondent Minister declared that reasonable consultation had occurred and approved the project. The Ktunaxa brought a petition for judicial review of the approval decision on the grounds that the project would violate their constitutional right to freedom of religion, and that the Minister's decision breached the Crown's duty of consultation and accommodation. The chambers judge dismissed the petition, and the Court of Appeal affirmed that decision.

Held: The appeal should be dismissed.

[page388]

Per McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ.: The Minister's decision does not violate the Ktunaxa's s. 2(*a*) *Charter* right to freedom of religion. In this case, the Ktunaxa's claim does not fall within the scope of s. 2(*a*) because neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister's decision to approve the project.

To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief. In this case, the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place.

The second part of the test, however, is not met. The Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. Yet the Ktunaxa are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect the presence of Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. This is a novel claim that would extend s. 2(*a*) beyond its scope and would put deeply held personal beliefs under judicial scrutiny. The state's duty under s. 2(*a*) is not to protect the object of beliefs or the spiritual focal point of worship, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination.

In addition, the Minister's decision that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* was reasonable. The Minister's decision is entitled to deference. A court reviewing an administrative decision under s. 35 does not decide the constitutional issue *de novo* raised in isolation on a standard of correctness, and therefore does not decide the issue for itself. Rather, it must ask whether the decision maker's finding on the issue was reasonable.

[page389]

The constitutional guarantee of s. 35 is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests. This obligation flows from the honour of the Crown and is constitutionalized by s. 35.

In this case, the Ktunaxa's petition asked the courts, in the guise of judicial review of an administrative decision, to pronounce on the validity of their claim to a sacred site and associated spiritual practices. This declaration cannot be made by a court sitting in judicial review of an administrative decision. In judicial proceedings, such a declaration

can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence, and submissions. Nor can administrative decision makers themselves pronounce upon the existence or scope of Aboriginal rights without specifically delegated authority. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes. In the interim, while claims are resolved, consultation and accommodation are the best available legal tools for achieving reconciliation.

The record here supports the reasonableness of the Minister's conclusion that the s. 35 obligation of consultation and accommodation had been met. The Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset. Negotiations spanning two decades and deep consultation had taken place. Many changes had been made to the project to accommodate the Ktunaxa's spiritual claims. At a point when it appeared all major issues had been resolved, the Ktunaxa adopted a new, absolute position that no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk. The Minister sought to consult with the Ktunaxa on the newly formulated claim, but was told that [page390] there was no point in further consultation. The process protected by s. 35 was at an end.

The record does not suggest, conversely, that the Minister mischaracterized the right as a claim to preclude development, instead of a claim to a spiritual right. The Minister understood that this right entailed practices which depended on the continued presence of Grizzly Bear Spirit in Qat'muk, which the Ktunaxa believed would be driven out by the development. Spiritual practices and interests were raised at the beginning of the process and continued to be discussed throughout. Nor did the Minister misunderstand the Ktunaxa's secrecy imperative, which had contributed to the late disclosure of the true nature of the claim: an absolute claim to a sacred site, which must be preserved and protected from permanent human habitation. The Minister understood and accepted that spiritual beliefs did not permit details of beliefs to be shared with outsiders. Nothing in the record suggests that the Minister had forgotten this fundamental point when he made his decision that adequate consultation had occurred. In addition, the Minister did not treat the broader spiritual right as weak. The Minister considered the overall spiritual claim to be strong, but had doubts about the strength of the new, absolute claim that no accommodation was possible because the project would drive Grizzly Bear Spirit from Qat'muk. The record also does not demonstrate that the Minister failed to properly assess the adverse impact of the development on the spiritual interests of the Ktunaxa.

Ultimately, the consultation was not inadequate. The Minister engaged in deep consultation on the spiritual claim. This level of consultation was confirmed by both the chambers judge and the Court of Appeal. Moreover, the record does not establish that no accommodation was made with respect to the spiritual right. While the Minister did not offer the ultimate accommodation demanded by the Ktunaxa -- complete rejection of the ski resort project -- the Crown met its obligation to consult and accommodate. Section 35 guarantees a process, not a particular result. There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. Section 35 does not give unsatisfied claimants a veto. Where adequate consultation has occurred, a development may proceed without consent.

[page391]

Per Moldaver and Côté JJ.: The Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 of the *Constitution Act, 1982* was met; however, the Minister's decision to approve the ski resort infringed the Ktunaxa's s. 2(*a*) *Charter* right to religious freedom.

The first part of the s. 2(*a*) test is not at issue in this case. The second part focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. Where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her religious beliefs, constituting an infringement of s. 2(*a*).

This kind of state interference is a reality where individuals find spiritual fulfillment through their connection to the physical world. To ensure that all religions are afforded the same level of protection, courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices. In many Indigenous religions, land is not only the site of spiritual practices; land itself can be sacred. As such, state action that impacts land can sever the connection to the divine, rendering beliefs and practices devoid of spiritual significance. Where state action has this effect on an Indigenous religion, it interferes with the ability to act in accordance with religious beliefs and practices.

In this case, the Ktunaxa sincerely believe that Grizzly Bear Spirit inhabits Qat'muk, a body of sacred land in their religion, and that the Minister's decision to approve the ski resort would sever their connection to Qat'muk and to Grizzly Bear Spirit. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. Their religious beliefs in Grizzly Bear Spirit would become entirely devoid of religious significance, and accordingly, their prayers, ceremonies, and rituals associated with Grizzly Bear Spirit would become nothing more than empty words and hollow gestures. Moreover, without their spiritual connection to Qat'muk and to Grizzly Bear Spirit, the Ktunaxa would be unable to pass on their beliefs and practices to future generations. Therefore, the Minister's decision approving the proposed development interferes with the Ktunaxa's [page392] ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial.

The Minister's decision is reasonable, however, because it reflects a proportionate balancing between the Ktunaxa's s. 2(*a*) *Charter* right and the Minister's statutory objectives: to administer Crown land and dispose of it in the public interest. A proportionate balancing is one that gives effect as fully as possible to the *Charter* protections at stake given the particular statutory mandate. When the Minister balances the *Charter* protections with these objectives, he must ensure that the *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives.

In this case, the Minister did not refer to s. 2(*a*) explicitly in his reasons for decision; however, it is clear from his reasons that he was alive to the substance of the Ktunaxa's s. 2(*a*) right. He recognized that the development put at stake the Ktunaxa's spiritual connection to Qat'muk.

In addition, it is implicit from the Minister's reasons that he proportionately balanced the Ktunaxa's s. 2(*a*) right with his statutory objectives. The Minister tried to limit the impact of the development on the substance of the Ktunaxa's s. 2(*a*) right as much as reasonably possible given these objectives. He provided significant accommodation measures that specifically addressed the Ktunaxa's spiritual connection to the land. Ultimately, however, the Minister had two options before him: approve the development or permit the Ktunaxa to veto the development on the basis of their freedom of religion. Granting the Ktunaxa a power to veto development over the land would effectively give them a significant property interest in Qat'muk -- namely, a power to exclude others from constructing permanent structures on public land. This right of exclusion would not be a minimal or negligible restraint on public ownership. It can be implied from the Minister's reasons that permitting the Ktunaxa to dictate the use of a large tract of land according to their religious belief was not consistent with his statutory mandate. Rather, it would significantly undermine, if not completely compromise, this mandate. In view of the options open to the Minister, his decision was reasonable, and amounted to a proportionate balancing.

[page393]

Cases Cited

By McLachlin C.J. and Rowe J.

Applied: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **referred to:** *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613; *Mouvement laique*

113 The Ktunaxa say these changes were inadequate: "Changes to the ski resort were measures required by economic, environmental and wildlife protection concerns and, while they do set out some limited protection for grizzly bears, there was no accommodation to address the ability of the Ktunaxa to carry on their spiritual practices dependent upon Grizzly Bear Spirit": A.F., at para. 133; see generally paras. 133-38.

114 In point of fact, there was no evidence before the Minister of "specific spiritual practices". It is true, of course, that the Minister did not offer the ultimate accommodation demanded by the Ktunaxa - complete rejection of the ski resort project. It does not follow, however, that the Crown failed to meet its obligation to consult and accommodate. The s. 35 right to consultation and accommodation is a right to a process, not a right to a particular outcome: *Haida Nation*. While the goal of the process is reconciliation of the Aboriginal and state interest, in some cases this may not be possible. The process is one of "give and take", and outcomes are not guaranteed.

[page437]

VI. Conclusion

115 The Minister's decision did not violate the Ktunaxa's freedom of religion as their claim does not fall within the scope of s. 2(*a*) of the *Charter*. The Minister's conclusion that consultation sufficient to satisfy s. 35 of the *Constitution Act, 1982* had occurred has not been shown to be unreasonable. For these reasons, we would dismiss the appeal.

The reasons of Moldaver and Côté JJ. were delivered by

MOLDAVER J.

I. Overview

116 The Ktunaxa are an Aboriginal people who inhabit parts of southeastern British Columbia. They claim that the decision by the provincial Minister of Forests, Lands and Natural Resource Operations ("Minister") to approve a ski resort development infringes their right to religious freedom under s. 2(*a*) of the *Canadian Charter of Rights and Freedoms* and constitutes a breach of the Crown's duty to consult pursuant to s. 35 of the *Constitution Act, 1982*.

117 I agree with the Chief Justice and Rowe J. that the Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 was met. Respectfully, however, I disagree with my colleagues' s. 2(*a*) analysis. In my view, the Ktunaxa's right to religious freedom was infringed by the Minister's decision to approve the development of the ski resort proposed by the respondent Glacier Resorts Ltd. The Ktunaxa hold as sacred several sites within their traditional lands, and they revere multiple spirits in their religion. The Ktunaxa believe that a very important spirit in their religious tradition, Grizzly Bear Spirit, inhabits Qat'muk, a body of sacred land that lies at the heart of the proposed ski resort. The development of the ski resort would desecrate Qat'muk and cause Grizzly Bear Spirit to leave, thus severing the Ktunaxa's connection to the [page438] land. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. All songs, rituals and ceremonies associated with Grizzly Bear Spirit would become meaningless.

118 In my respectful view, where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her *religious* beliefs, constituting an infringement of s. 2(*a*). That is exactly what happened in this case. The Minister's decision to approve the ski resort will render all of the Ktunaxa's religious beliefs related to Grizzly Bear Spirit devoid of any spiritual significance. Accordingly, the Ktunaxa will be unable to perform songs, rituals or ceremonies in recognition of Grizzly Bear Spirit in a manner that has any religious significance for them. In my view, this amounts to a s. 2(*a*) breach.

119 That being said, I am of the view that the Minister proportionately balanced the Ktunaxa's s. 2(*a*) right with the relevant statutory objectives: to administer Crown land and dispose of it in the public interest. The Minister was faced with two options: approve the development of the ski resort or grant the Ktunaxa a right to exclude others from constructing permanent structures on over 50 square kilometres of Crown land. This placed the Minister in a difficult, if not impossible, position. If he granted this right of exclusion to the Ktunaxa, this would significantly hamper, if not prevent, him from fulfilling his statutory objectives. In the end, it is apparent that he determined that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa the veto right that they were seeking.

120 In view of the options open to the Minister, I am satisfied that his decision was reasonable. [page439] It limited the Ktunaxa's right "as little as reasonably possible" given these statutory objectives (*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 40), and amounted to a proportionate balancing. I would therefore dismiss the appeal.

II. Analysis

A. *Section 2(a) of the Charter*

(1) The Scope of Section 2(*a*)

121 All *Charter* rights - including freedom of religion under s. 2(*a*) - must be interpreted in a broad and purposive manner (*Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 20; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 179, per McLachlin J. (as she then was)). As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, the interpretation of freedom of religion must be 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" (emphasis added). The interpretation of s. 2(*a*) must therefore be guided by its purpose, which is to "ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759).

122 In light of this purpose, this Court has articulated a two-part test for determining whether s. 2(*a*) has been infringed. The claimant must show: (1) that he or she sincerely believes in a belief or practice that has a nexus with religion; and (2) that the impugned conduct interferes with the claimant's ability to act in accordance with that belief or practice "in a manner that is more than trivial or insubstantial" (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 59 (emphasis deleted); *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 34; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 32).

[page440]

123 The first part of the test is not at issue in this case. None of the parties dispute that the Ktunaxa sincerely believe that Grizzly Bear Spirit lives in Qat'muk, and that any permanent development would drive Grizzly Bear Spirit out, desecrate the land and sever the Ktunaxa's spiritual connection to it. The central issue raised by this appeal concerns the second part of the test. The Chief Justice and Rowe J. maintain that the Minister's decision does not interfere with the Ktunaxa's ability to act in accordance with their religious beliefs or practices. With respect, I disagree. As I will explain, in my view, the Minister's decision interferes with the Ktunaxa's ability to act in accordance with their religious beliefs and practices in a manner that is more than trivial or insubstantial, and the Ktunaxa's claim therefore falls within the scope of s. 2(*a*).

(2) The Ability to Act in Accordance With a Religious Belief or Practice

124 As indicated, the s. 2(*a*) inquiry focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. This Court has recognized that religious beliefs are "deeply held personal convictions ... integrally linked to one's self-definition and spiritual fulfilment", while religious practices are those that "allow individuals to foster a connection with the divine" (*Amselem*, at para. 39). In my view, where a person's religious belief no longer provides spiritual fulfillment, or where the person's religious practice no longer allows him or her to foster a connection with the divine, that person cannot act in accordance with his or her *religious* beliefs or practices, as they have lost all religious significance. Though an individual could still publicly profess a specific belief, or act out a given ritual, it would hold no religious significance for him or her.

125 The same holds true of a person's ability to pass on beliefs and practices to future generations. This Court has recognized that the ability of a religious community's members to pass on their beliefs to their children is an essential aspect of religious [page441] freedom protected under s. 2(*a*) (*Loyola*, at paras. 64 and 67). Where state action has rendered a certain belief or practice devoid of spiritual significance, this interferes with one's ability to pass on that tradition to future generations, as there would be no reason to continue a tradition that lacks spiritual significance.

126 Therefore, where the spiritual significance of beliefs or practices has been taken away by state action, this interferes with an individual's ability to act in accordance with his or her religious beliefs or practices - whether by professing a belief, engaging in a ritual, or passing traditions on to future generations.

127 This kind of state interference is a reality where individuals find spiritual fulfillment through their connection to the physical world. The connection to the physical world, specifically to land, is a central feature of Indigenous religions. Indeed, as M. L. Ross explains, "First Nations spirituality and religion are rooted in the land" (*First Nations Sacred Sites in Canada's Courts* (2005), at p. 3 (emphasis added)). In many Indigenous religions, land is not only the site of spiritual practices in the sense that a church, mosque or holy site might be; land may *itself* be sacred, in the sense that it is where the divine manifests itself. Unlike in Judeo-Christian faiths, for example, where the divine is considered to be supernatural, the spiritual realm in the Indigenous context is inextricably linked to the physical world. For Indigenous religions, state action that impacts land can therefore sever the connection to the divine, rendering beliefs and practices devoid of their spiritual significance. Where state action has this effect on an Indigenous religion, it interferes with a believer's ability to act in accordance with his or her religious beliefs and practices.

128 Taking this feature of Indigenous religions into account is therefore critical in assessing whether there has been a s. 2(*a*) infringement. The principle of state neutrality requires that the state not favour or [page442] hinder one religion over the other (see *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 32; *Mouvement laique québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 72). To ensure that all religions are afforded the same level of protection under s. 2(*a*), courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices.

(3) The Chief Justice and Rowe J.'s Position on the Scope of Section 2(*a*)

129 McLACHLIN C.J. and Rowe J. take a different approach. They maintain that the *Charter* protects the "freedom to worship", but not what they call the "spiritual focal point of worship" (para. 71). If I understand my colleagues' approach correctly, s. 2(*a*) of the *Charter* protects *only* the freedom to hold beliefs and manifest them through worship and practice (para. 71). In their view, even where the effect of state action is to render beliefs and practices devoid of all spiritual significance, claimants still have the freedom to hold beliefs and manifest those beliefs through practices, and there is therefore no interference with their ability to act in accordance with their beliefs. Thus, under my colleagues' approach, as long as a Sikh student can carry a kirpan into a school (*Multani*), Orthodox Jews can erect a personal succah (*Amselem*), or the Ktunaxa have the ability to conduct ceremonies and rituals, there is no infringement of s. 2(*a*), even where the effect of state action is to reduce these acts to empty gestures.

Little Sisters Book and Art Emporium v. Canada (Minister of Justice)

Supreme Court Reports

Supreme Court of Canada

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

2000: March 16 / 2000: December 15.

File No.: 26858

[2000] 2 S.C.R. 1120 | [2000] 2 R.C.S. 1120 | [2000] S.C.J. No. 66 | [2000] A.C.S. no 66 | 2000 SCC 69

Little Sisters Book and Art Emporium, B.C. Civil Liberties Association, James Eaton Deva and Guy Allen Bruce Smythe, appellants; v. The Minister of Justice and Attorney General of Canada, the Minister of National Revenue and the Attorney General of British Columbia, respondents, and The Attorney General for Ontario, the Canadian AIDS Society, the Canadian Civil Liberties Association, the Canadian Conference of the Arts, EGALE Canada Inc., Equality Now, PEN Canada and the Women's Legal Education and Action Fund (LEAF), interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (283 paras.)

Case Summary

Constitutional law — Charter of Rights — Freedom of expression — Customs and excise — Importation of obscene goods — Customs legislation providing for interception and exclusion of obscene goods and setting out administrative review process — Legislation placing onus on importer to establish that goods are not obscene — Gay and lesbian bookstore importing erotica from United States — Customs officials wrongly delaying, confiscating or prohibiting materials imported by bookstore on numerous occasions — Whether Customs legislation infringes freedom of expression — If so, whether infringement justifiable — Canadian Charter of Rights [page1121] and Freedoms, ss. 1, 2(b) — Customs Act, R.S.C., 1985, c. 1 (2nd Supp.), ss. 58, 71, 152(3) — Customs Tariff, R.S.C., 1985, c. 41 (3rd Supp.), Schedule VII, Code 9956(a).

Constitutional law — Charter of Rights — Equality rights — Customs and excise — Importation of obscene goods — Customs legislation providing for interception and exclusion of obscene goods and setting out administrative review process — Gay and lesbian bookstore importing erotica from United States — Customs officials wrongly delaying, confiscating or prohibiting materials imported by bookstore on numerous occasions — Whether Customs legislation infringes equality rights — Canadian Charter of Rights and Freedoms, s. 15.

Customs and excise — Importation of obscene goods — Customs legislation providing for interception and exclusion of obscene goods and setting out administrative review process — Gay and lesbian bookstore importing erotica from United States — Customs officials wrongly delaying, confiscating or prohibiting materials imported by bookstore on numerous occasions — Whether Customs legislation infringes freedom of expression or equality rights — Customs Act, R.S.C., 1985, c. 1 (2nd Supp.), ss. 58, 71 — Customs Tariff, R.S.C., 1985, c. 41 (3rd Supp.), Schedule VII, Code 9956(a).

The appellant bookstore, of which the individual appellants are the directors and controlling shareholders, carried a specialized inventory catering to the gay and lesbian community which consisted largely of books that included gay and lesbian literature, travel information, general interest periodicals, academic studies related to homosexuality, AIDS/HIV safe-sex advisory material and gay and lesbian erotica. Since its establishment in 1983, the store has imported 80 to 90 percent of its erotica from the United States. Code 9956(a) of Schedule VII of the Customs Tariff prohibits the importation of "[b]ooks, printed paper, drawings, paintings, prints, photographs or representations of

any kind that ... are deemed to be obscene under subsection 163(8) of the Criminal Code". At the entry level, Customs inspectors determine the appropriate tariff classification, pursuant to s. 58 of the Customs Act. The classification exercise under Code 9956 largely consists of the Customs inspector making a comparison of the imported materials with the illustrated manual accompanying [page1122] Memorandum D9-1-1, which describes the type of materials deemed obscene by Customs. At the relevant time, an item considered "obscene" and thus prohibited was subject (under s. 60 of the Act) to a re-determination upon request, by a specialized Customs unit, and upon a further appeal subject to a further re-determination by the Deputy Minister or designate. Once these administrative measures have been exhausted, an importer may appeal the prohibition under s. 67 of the Act to a judge of the superior court of the province where the material was seized, with a further appeal on a question of law to the Federal Court of Canada, and then with leave to the Supreme Court of Canada. Section 152(3) provides that in any proceeding under the Act the burden of proof in any question in relation to the compliance with the Act or the regulations in respect of any goods lies on the importer.

After a lengthy trial the trial judge found not only that the Customs officials had wrongly delayed, confiscated, destroyed, damaged, prohibited or misclassified materials imported by the appellant bookstore on numerous occasions, but that these errors were caused by the "systemic targeting" of the store's importations. He concluded that the Customs legislation infringed s. 2(b) of the Canadian Charter of Rights and Freedoms, but was justified under s. 1. Although he denied a remedy under s. 52(1) of the Constitution Act, 1982, the trial judge issued a declaration under s. 24(1) of the Charter that the Customs legislation had at times been construed and applied in a manner contrary to ss. 2(b) and 15(1) of the Charter. The Court of Appeal, in a majority judgment, dismissed the appellants' appeal.

Held (Iacobucci, Arbour and LeBel JJ. dissenting in part): The appeal should be allowed in part. The "reverse onus" provision under s. 152(3) of the Customs Act cannot constitutionally apply to put on the importer the onus of disproving obscenity. An importer has a Charter right to receive expressive material unless the state can justify its denial.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Bastarache and Binnie JJ.: The interpretation given to s. 163(8) of the Criminal Code in Butler does [page1123] not discriminate against the gay and lesbian community. The national community standard of tolerance relates to harm, not taste, and is restricted to conduct which society formally recognizes as incompatible with its proper functioning. While it is true that under s. 163(8) the "community standard" is identified by a jury or a judge sitting alone, a concern for minority expression is one of the principal factors that led to adoption of the national community test in Butler in the first place. The Canadian community specifically recognized in the Charter that equality (and with it, the protection of sexual minorities) is one of the fundamental values of Canadian society. The standard of tolerance of this same Canadian community for obscenity cannot reasonably be interpreted as seeking to suppress sexual expression in the gay and lesbian community in a discriminatory way. Butler validates a broad range of sexually explicit expression as non-harmful.

The Constitution does not prohibit border inspections. Any border inspection may involve detention and, because Customs officials are only human, erroneous determinations. If Parliament can prohibit obscenity, and Butler held that it had validly done so, the prohibitions can be imposed at the border as well as within the country. The only expressive material that Parliament has authorized Customs to prohibit as obscene is material that is, by definition, the subject of criminal penalties for those who are engaged in its production or trafficking (or have possession of it for those purposes). The concern with prior restraint operates in such circumstances, if at all, with much reduced importance. It was open to Parliament in creating this type of government machinery to lay out the broad outline in the legislation and to leave its implementation to regulation by the Governor in Council or departmental procedures established under the authority of the Minister. A failure at the implementation level, which clearly existed here, can be addressed at the implementation level. There is no constitutional rule that requires Parliament to deal with Customs treatment of constitutionally protected expressive material by legislation rather than by way of regulation or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the [page1124] basis that its enactments will be applied constitutionally by the public service.

If Customs does not make a tariff classification within 30 days the importer's classification applies. The 30-day

decision period was an important protection inserted in the Customs Act for the benefit of importers. The evidence demonstrated that Customs, because of scarce resources or otherwise, failed to carry out the classification exercise sometimes for many months. These deficiencies could clearly have been addressed by regulatory provisions made under s. 164(1)(j) of the Customs Act or ministerial directions to Customs officials.

The requirement in s. 60(3) of the Act that a re-determination of a tariff classification be made with "all due dispatch" must be given content. The original determination must be made within 30 days and there is no evidence that the re-determination should take longer. The trial judge found that some requests for re-determination under s. 63 took more than a year for decision. Such a delay is not in accordance with the Act.

A court is the proper forum for resolution of an allegation of obscenity. The department at that stage has had the opportunity to determine whether it can establish on a balance of probabilities that the expressive material is obscene. The court is equipped to hear evidence, including evidence of artistic merit, and to apply the law. The absence of procedures for taking evidence at the departmental level requires the appeal to the court in obscenity matters to be interpreted as an appeal by way of a trial de novo.

It was clearly open to the trial judge to find, as he did, that the appellants suffered differential treatment when compared to importers of heterosexually explicit material, let alone more general bookstores that carried at least some of the same titles as the appellant bookstore. Moreover, while sexual orientation is not mentioned explicitly in s. 15 of the Charter, it is clearly an analogous ground to the listed personal characteristics. The appellants were entitled to the equal benefit of a fair and open customs procedure, and because they imported gay and lesbian erotica, which was and is perfectly lawful, they were adversely affected in comparison to other individuals importing comparable publications of a heterosexual [page1125] nature. On a more general level, there was no evidence that homosexual erotica is proportionately more likely to be obscene than heterosexual erotica. It therefore cannot be said that there was any legitimate correspondence between the ground of alleged discrimination (sexual orientation) and the reality of the appellants' circumstances (importers of books and other publications including, but by no means limited to, gay and lesbian erotica). There was ample evidence to support the trial judge's conclusion that the adverse treatment meted out by Canada Customs to the appellants violated their legitimate sense of self-worth and human dignity. The Customs treatment was high-handed and dismissive of the appellants' right to receive lawful expressive material which they had every right to import.

While here it is the interests of the gay and lesbian community that were targeted, other vulnerable groups may similarly be at risk from overzealous censorship. The appellant bookstore was targeted because it was considered "different". On a more general level, it is fundamentally unacceptable that expression which is free within the country can become stigmatized and harassed by government officials simply because it crosses an international boundary, and is thereby brought within the bailiwick of the Customs department. The appellants' constitutional right to receive perfectly lawful gay and lesbian erotica should not be diminished by the fact their suppliers are, for the most part, located in the United States. Their freedom of expression does not stop at the border.

The source of the s. 15(1) Charter violation is not the Customs legislation itself. There is nothing on the face of the Customs legislation, or in its necessary effects, which contemplates or encourages differential treatment based on sexual orientation. The definition of obscenity operates without distinction between homosexual and heterosexual erotica. The differentiation was made here at the administrative level in the implementation of the legislation. A large measure of discretion is granted in the administration of the Act, from the level of the Customs official up to the Minister, but it is well established [page1126] that such discretion must be exercised in accordance with the Charter. Many of the systemic problems identified by the trial judge in the department's treatment of potentially obscene imports might have been dealt with by institutional arrangements implemented by regulation, but this was not done. However, the fact that a regulatory power lies unexercised provides no basis in attacking the validity of the statute that conferred it.

As conceded by the Crown, the Customs legislation infringes s. 2(b) of the Charter. With the exception of the reverse onus provision in s. 152(3) of the Customs Act, however, the legislation constitutes a reasonable limit prescribed by law which the Crown has justified under s. 1 of the Charter. The Customs Tariff prohibition is not void

for vagueness or uncertainty, and is therefore validly "prescribed by law". Parliament's legislative objective, which is to prevent Canada from being inundated with obscene material from abroad, is pressing and substantial, and Customs procedures are rationally connected to that objective. Moreover, the basic statutory scheme set forth in the Customs legislation, properly implemented by the government within the powers granted by Parliament, was capable of being administered with minimal impairment of the s. 2(b) rights of importers, apart from the reverse onus provision. Customs officials have no authority to deny entry to sexually explicit material unless it comes within the narrow category of pornography that Parliament has validly criminalized as obscene. With respect to lawful publications, the interference sanctioned by Parliament was limited to the delay, cost and aggravation inherent in inspection, classification and release procedures.

Per Iacobucci, Arbour and LeBel JJ. (dissenting in part): The majority's conclusion that the Butler test does not distinguish between materials based on the sexual orientation of the individuals involved or characters depicted is agreed with. The Butler test applies equally to heterosexual, homosexual and bisexual materials. The use of national community standards as the arbiter of what materials are harmful, and therefore obscene, remains the proper approach. There is also agreement [page1127] with the majority's conclusions that the harm-based approach is not merely morality in disguise and that the Butler test does apply to written materials, although it will be very difficult to make the case of obscenity against a book.

The application of the Customs legislation has discriminated against gays and lesbians in a manner that violated s. 15 of the Charter. The Customs legislation does not itself violate s. 15(1), however, for the reasons given by the majority. While it is arguable that pornographic materials play a more important role in the gay and lesbian communities, gays and lesbians remain able to access pornographic materials that do not create a substantial risk of harm. Therefore legislation banning obscenity alone has no adverse effects, and it is unnecessary to proceed with the rest of the analysis prescribed under Law.

As properly conceded by the respondents, the Customs legislation, as applied to books, magazines, and other expressive materials, violates the appellants' rights under s. 2(b) of the Charter. The legislation has been administered in an unconstitutional manner, but it is the legislation itself, and not only its application, that is responsible for the constitutional violations. Given the extensive record of Charter violations, there must be sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights. The issue is not solely whether the Customs legislation is capable of being applied constitutionally. Instead, the crucial consideration is that the legislation makes no reasonable effort to ensure that it will be applied constitutionally to expressive materials. The government has provided little reason to believe that reforms at the implementation level will adequately protect the expressive rights involved or that any such reforms will not be dependent on exemplary conduct by Customs officials to avoid future violations of constitutional rights. Furthermore, it is not just the rough and ready border screening procedure that has been responsible for these constitutional infirmities, but the entire system by which these screening decisions are reviewed.

[page1128]

The government's burden under s. 1 of the Charter is to justify the actual infringement on rights occasioned by the impugned legislation, not simply that occasioned by some hypothetical ideal of the legislation. Examining such a hypothetical ideal runs the risk of allowing even egregious violations of Charter rights to go unaddressed. Obviously any substantive standard for obscenity will have difficulties in application, regardless of the institutional setting in which it is applied. This will not necessarily be cause for concern. Where, however, the challenge is to the procedures by which the law is enforced, the fact that far more materials are prohibited than intended is extremely relevant. Many of the items seized in this case were eventually determined not to be obscene. These wrongfully detained items clearly engaged the values underlying the guarantee of free expression in s. 2(b). While a more deferential approach is appropriate where, as here, the government is mediating between competing groups as a social policy maker, the Court cannot abdicate its duty to demand that the government justify legislation limiting Charter rights.

The substantive standard for obscenity set out in s. 163(8) of the Criminal Code, as applied by Customs, is an

intelligible standard, and the limit on Charter rights is thus prescribed by law. The objective of the Customs legislation, which is to limit the importation of obscene materials into the country, is pressing and substantial. Preventing obscene materials from ever entering the country is a rational means of protecting society from harm. In light of the Customs legislation's failure to acknowledge effectively the unique Charter concerns raised by expressive materials, however, it is not minimally intrusive. The only accommodation made for expressive materials is that their review under s. 67 is done by a superior court rather than by the Canadian International Trade Tribunal. This is insufficient to safeguard the fundamental Charter rights at stake. The sheer number of contested prohibitions, and the cost of challenging them through the various levels of administrative review, makes it completely impracticable for the appellants to contest each one of them up to the s. 67 level.

[page1129]

The protection of expressive freedom is central to the social and political discourse in our country. If such a fundamental right is to be restricted, it must be done with care. This is particularly the case when the nature of the interference is one of prior restraint, not subsequent silencing through criminal sanction. The flaws in the Customs regime are not the product of simple bad faith or maladministration, but rather flow from the very nature of prior restraint itself. Given the inherent dangers in a scheme of prior restraint at the border it is obviously important to have procedural protections in the legislation itself that can minimize these dangers. The Customs legislation fails the s. 1 analysis primarily because it lacks any such protections.

A minimally intrusive scheme would ensure that those enforcing the law actually obey its dictates. To determine whether something is obscene, it must be seen in its entirety, with close attention to context, tone, and purpose. Customs officers have consistently failed to apply Butler's command to consider the context and artistic merit of items under consideration. While procedural safeguards might alleviate many of these problems, their complete absence from the Customs legislation simply confirms the inadequacy of the current scheme. Absolute discretion rests in a bureaucratic decision-maker, who is charged with making a decision without any evidence or submissions, without any requirement to render reasons for decision, and without any guarantee that the decision-maker is aware of or understands the legal test he or she is applying. Such a system cannot be minimally intrusive.

Moreover, the deleterious effects of the existing Customs regime outweigh its benefits. The first obvious deleterious effect of the current system is the extraordinarily high rate of error. The detentions have had a dramatic, tangible effect on the lives of countless Canadians. Alternative bookstores have had their viability threatened by the constant delays and outright prohibitions. Authors and artists have suffered the indignity of having their works condemned as obscene, and not fit to enter the country. Perhaps most important of all, ordinary Canadians have been denied important pieces of literature. Weighed against these costs are the benefits of a Customs regime that makes almost no special accommodations for the free expression rights at stake. The benefits of the present legislation are primarily monetary, as the reforms sought by the appellants [page1130] will require public expenditures. However, it is important not to overestimate those costs. In the absence of any evidence that a scheme with more procedural safeguards would be impossible, it should not be assumed that Parliament is completely incapable of devising a cost-effective legislative scheme that better protects the constitutional rights in question.

The appropriate remedy for this violation of the appellants' constitutional rights is to strike down Code 9956(a) of the Customs Tariff. Given the fact that there were grave systemic problems in the administration of the law, the primarily declaratory remedy relied on by the majority is simply inadequate. Systemic problems call for systemic solutions. Customs' history of improper censorship, coupled with its inadequate response to the declarations of the courts below, confirms that only striking down the legislation will guarantee vindication of the appellants' constitutional rights. There are a number of options available to Parliament to remedy the current flaws in the Customs legislation. First, it could enact new legislation which properly safeguards the expressive rights at stake. Second, it could establish a specialized administrative tribunal to expeditiously review obscenity determinations made by front-line Customs officers. Finally, it could rely on the criminal law to deal with the importation of obscene materials into the country in lieu of a prior restraint regime.

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By Binnie J.

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By Iacobucci J. (dissenting in part)

R. v. Butler, [1992] 1 S.C.R. 452; Brodie v. The Queen, [1962] S.C.R. 681; R. v. C. Coles Co., [1965] 1 O.R. 557; A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966); Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; R. v. Keegstra, [1990] 3 S.C.R. 697; Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123; Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Morgentaler, [1988] 1 S.C.R. 30; R. v. Bain, [1992] 1 S.C.R. 91; Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203; Egan v. Canada, [1995] 2 S.C.R. 513; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Oakes, [1986] 1 S.C.R. 103; Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69; Entick v. Carrington (1765), 2 Wils. K.B. 275, 95 E.R. 807; Near v. Minnesota, 283 U.S. 697 (1931); Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892; Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); R. v. Lucas, [1998] 1 S.C.R. 439; Freedman v. Maryland, 380 U.S. 51 (1965); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); M. v. H., [1999] 2 S.C.R. 3; [page1132] Vriend v. Alberta, [1998] 1 S.C.R. 493; Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624; Schachter v. Canada, [1992] 2 S.C.R. 679; Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22; Mahe v. Alberta, [1990] 1 S.C.R. 342; R. v. Mills, [1999] 3 S.C.R. 668; Luscher v. Deputy Minister, Revenue Canada, Customs and Excise, [1985] 1 F.C. 85; West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); R. v. Lippé, [1991] 2 S.C.R. 114; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Dell Publishing Co. v. Deputy Minister of National Revenue for Customs and Excise (1958), 2 T.B.R. 154.

Statutes and Regulations Cited

Canada Post Corporation Act, R.S.C., 1985, c. C-10, s. 42 [rep. & sub. c. 1 (2nd Supp.), s. 171]. Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 15(1), 24(1). Constitution Act, 1982, s. 52(1). Criminal Code, R.S.C., 1985, c. C-46, s. 163(8). Customs Act, R.S.C., 1985, c. 1 (2nd Supp.), ss. 2, 58, 60, 63, 64 [am. c. 47 (4th Supp.), s. 52 (Sch., item 2(1)); am. 1992, c. 28, s. 15], 67 [rep. & sub. c. 47 (4th Supp.), s. 52 (Sch., item 2(2))], 68, 71 [am. c. 41

33 On the threshold question as to whether the Customs legislation imposes a limitation that is "prescribed by law", Finch J.A. found the trial judge to be in error. He held that Memorandum D9-1-1 was not "law", and he noted the trial judge's conclusion that the prohibition on obscenity was difficult to administer, requiring "appropriate and consistent training" and the aid of the interpretive memo. With these facts established, he held that such a legislative scheme could not be said to "meet the constitutionally-mandated standard of precision" (para. 217). In the context of a criminal trial, matters are only deemed to be obscene after acceptance by the trier of fact of proof beyond a reasonable doubt. In the context of the Customs regime, the same standard is not sufficiently intelligible.

34 Finch J.A. would have allowed the appeal and declared the Customs legislation to be of no force and effect to the extent that it applies to "the importation of homosexual books, printed paper, drawings, paintings, prints, photographs or representations of any kind that are alleged to be obscene" (para. 257).

VI. Constitutional Questions

35 The following constitutional questions were stated by the Chief Justice:

1. Do ss. 58 and 71 of the Customs Act, R.S.C., 1985, c. 1 (2nd Supp.), and s. 114 and Code 9956(a) of Schedule VII of the Customs Tariff, R.S.C., 1985, c. 41 (3rd Supp.) (now s. 136(1) and tariff item 9899.00.00 of the List of Tariff Provisions set out in the schedule to the Customs Tariff, S.C. 1997, c. 36) [the "Customs legislation"] in whole or in part, insofar as they authorize customs officials to detain and prohibit material deemed to be obscene, or in their application to either textual or gay and lesbian material [page1152] or to both, infringe s. 2(b) of the Canadian Charter of Rights and Freedoms?
2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the Canadian Charter of Rights and Freedoms?
3. Do ss. 58 and 71 of the Customs Act, R.S.C., 1985, c. 1 (2nd Supp.), and s. 114 and Code 9956(a) of Schedule VII of the Customs Tariff, R.S.C., 1985, c. 41 (3rd Supp.) (now s. 136(1) and tariff item 9899.00.00 of the List of Tariff Provisions set out in the schedule to the Customs Tariff, S.C. 1997, c. 36), in whole or in part, in their application to gay and lesbian material, infringe s. 15(1) of the Canadian Charter of Rights and Freedoms?
4. If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the Canadian Charter of Rights and Freedoms?

VII. Analysis

36 Government interference with freedom of expression in any form calls for vigilance. Where, as here, a trial judge finds that such interference is accompanied "by the systemic targeting" of a particular group in society (in this case individuals who were seen as standard bearers for the gay and lesbian community), the issue takes on a further and even more serious dimension. Sexuality is a source of profound vulnerability, and the appellants reasonably concluded that they were in many ways being treated by Customs officials as sexual outcasts.

37 The appellants were put in the position of supplicants to the government in a 15-year crusade to obtain the entry into Canada of expressive material. Whereas Customs aims to examine approximately eight per cent of goods coming across the border, the trial judge found that "virtually all [page1153] imported mail addressed to Little Sisters is examined" (para. 52) and that "the federal Crown led no evidence of any principled basis upon which such [look-out] procedures are instituted" (para. 271). His conclusion, supported by numerous examples, was that untrained Customs officials were too quick to equate homosexuality with obscenity.

38 In this Court the Crown acknowledged that errors were made in the classification of the appellants' imported materials, but says that such errors were only to be expected given the huge volume of cross-border mail handled

at the Vancouver Customs Mail Centre each day. The Crown went on to say that the problems encountered by the appellants and dealt with in the trial evidence have been addressed by amendments to the Customs Act and changes in procedure. This is partly true, but I do not myself think it is open to the Crown to contest the two-month trial that resulted in the judgment of January 19, 1996, which was very critical of the Customs department and then to turn around and explain that "that was then, and this is now". The appellants are entitled to a determination of their rights on the basis of the evidence called before the trial judge, and to relief that goes beyond registering an act of faith in the continuance of the department's expressed good intentions.

39 I propose first to deal with the relationship between the Customs legislation and the obscenity provisions of the Criminal Code as interpreted in Butler. My conclusion is that the Customs legislation violates the appellants' freedom of expression, as the Crown is prepared to concede, but with the exception of the reverse onus provision in s. 152(3) of the Customs Act, it constitutes a reasonable limit prescribed by law which the Crown has justified under s. 1 of the Charter.

[page1154]

40 The administration of the Act, however, was characterized by conduct of Customs officials that was oppressive and dismissive of the appellants' freedom of expression. Its effect -- whether intended or not -- was to isolate and disparage the appellants on the basis of their sexual orientation. The declaratory relief granted by the courts in British Columbia fell short of giving specific guidance to Customs in respect of future action. The appellants, however, did not pursue more structured relief under s. 24(1) of the Charter in their appeal to the British Columbia Court of Appeal or to this Court. Their primary objective was and is to have the Customs legislation declared unconstitutional under s. 52(1) of the Constitution Act, 1982, either generally or in relation to importations by the gay and lesbian community. In my view, the appellants' attack on the legislation is correct only in part, that is to say in relation to the application of the reverse onus provision, but as to that part the appeal must be allowed.

A. The Appellants' Attack on the Customs Tariff Act and the Customs Act

41 The appellants allege, and the Crown agrees, that the Customs legislation constitutes a prima facie limitation on their s. 2(b) freedom of expression which must be justified under s. 1 of the Charter. The Constitution protects the right to receive expressive material as much as it does the right to create it: Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at pp. 1339-40. Section 2(b) "protects listeners as well as speakers": Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, at p. 767.

42 Beyond this common ground, however, the appellants attack the constitutionality of the Customs legislation on two more specific grounds. First the appellants argue that the "harm-based" interpretation given to s. 163 of the Criminal Code in Butler, supra, does not apply to gay and lesbian erotica in the same way as it does to heterosexual [page1155] erotica, or perhaps at all. Because the prohibition against importation of obscene goods contained in the Customs legislation is rooted explicitly in s. 163 of the Criminal Code, acceptance of this argument would mean that gay and lesbian publications would not be subject to the ordinary border regime applicable to other forms of expression.

43 Secondly, the appellants say that the procedure laid down in the Customs legislation is so cumbersome and procedurally defective that it is incapable of being administered consistently with the protection of their Charter rights. They analogize the multi-tier internal review process and its attendant complexities and delays to the procedural requirements struck down in R. v. Morgentaler, [1988] 1 S.C.R. 30, where Dickson C.J. held that the source of the unconstitutional delay in access to therapeutic abortions was the impugned Criminal Code provision itself. He said, at p. 60:

> 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. [Emphasis added.]

44 My conclusion on the first branch of the appellants' attack is that the Butler analysis does not discriminate against the gay and lesbian community. Butler is directed to the prevention of harm, and is indifferent to whether such harm arises in the context of heterosexuality or homosexuality. Nor in my view is the gay and lesbian community discriminated against in the Customs legislation, which is quite capable of being administered in a manner that respects Charter rights. The government is entitled to impose border inspections of expressive material. The obstacles experienced by the appellants and detailed at length by the trial judge were not inherent in the statutory scheme. [page1156] The obstacles were, however, very real and in the end quite unjustified.

B. The Tariff Definition of Obscenity

45 The classification of imported "expressive material" is referred to in Code 9956(a) of Schedule VII of the Customs Tariff, which prohibits the importation of goods described as:

> Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that
>
> (a) are deemed to be obscene under subsection 163(8) of the Criminal Code. [Emphasis added.]

46 The incorporation by reference of s. 163(8) in the Customs Tariff requires Customs officials to apply that definition of obscenity, which provides as follows:

> 163....
>
> (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene. [Emphasis added.]

C. The Butler Definition

47 Section 163(8) of the Criminal Code was authoritatively interpreted by this Court in Butler, supra. Parliament, it was held, had distanced itself from the old common law Hicklin test which defined obscenity in terms of whether the material in question would result in the "corruption of morals". See R. v. Hicklin (1868), L.R. 3 Q.B. 360. "The prevention of 'dirt for dirt's sake'", Sopinka J. for the majority, said at pp. 492-93, "is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the Charter". For ease of analysis, Sopinka J. divided potentially obscene material into three categories at p. 484:

[page1157]

(1) explicit sex with violence,

(2) explicit sex without violence, but which subjects participants to treatment that is degrading or dehumanizing if the material creates a substantial risk of harm,

(3) explicit sex without violence among adults that is neither degrading nor dehumanizing.

48 In applying the community standard of tolerance to each of these categories, Butler concluded (at p. 485) that the first category -- the depiction of explicit sex coupled with violence -- will "almost always" constitute the undue exploitation of sex. The second category -- explicit sex that is "degrading or dehumanizing" -- may be undue "if the risk of harm is substantial". The third category -- explicit sex that is not violent and is neither degrading nor dehumanizing -- is "generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production".

49 The key word in the statutory definition -- "undue" -- was interpreted to incorporate an assessment of the

Montréal (City) v. 2952-1366 Québec Inc.

Supreme Court Reports

Supreme Court of Canada

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

Heard: October 14, 2004;

Judgment: November 3, 2005.

File No.: 29413.

[2005] 3 S.C.R. 141 | [2005] 3 R.C.S. 141 | [2005] S.C.J. No. 63 | [2005] A.C.S. no 63 | 2005 SCC 62

City of Montréal, appellant; v. 2952-1366 Québec Inc., respondent, and Attorney General of Ontario, intervener.

(177 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Case Summary

Catchwords:

Municipal law — By-laws — Validity — Nuisances — Loudspeaker set up by business in entrance to its club so that passers-by would hear sound of show under way inside — Business convicted under municipal by-law prohibiting noise produced by sound equipment that can be heard from outside — Scope of by-law — Whether by-law exceeding jurisdiction conferred on municipality by its enabling legislation — Charter of the city of Montreal, 1960, S.Q. 1959-60, c. 102, arts. 516, 517(l), 520(72) — By-law concerning noise, R.B.C.M. 1994, c. B-3, art. 9(1).

Catchwords:

Constitutional law — Charter of Rights — Freedom of expression — Municipal by-law prohibiting noise produced by sound equipment that can be heard from outside — Whether by-law infringing freedom of expression — If so, whether infringement can be justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — By-law concerning noise, R.B.C.M. 1994, c. B-3, art. 9(1).

Catchwords:

Constitutional law — Charter of Rights — Freedom of expression — Public property — Approach for application of s. 2(b) of Canadian Charter of Rights and Freedoms to public property.

[page142]

Summary:

A business operating a club featuring female dancers in downtown Montréal set up, in the entrance to its establishment, a loudspeaker that amplified the music and commentary accompanying the show under way inside so that passers-by would hear them. The business was found guilty in the Municipal Court of an offence under s.

9(1) of the City of Montréal's *By-law concerning noise*, which provides that "the following noises, where they can be heard from the outside, are specifically prohibited: (1) noise produced by sound equipment, whether it is inside a building or installed or used outside". The Superior Court quashed the conviction on the basis that the By-law infringed the respondent's freedom of expression and that this infringement could not be justified. The Court of Appeal upheld that decision. It held that the City could not define an activity as a nuisance if it was not a nuisance and that the prohibition constituted an unjustified violation of the right to freedom of expression.

Held (Binnie J. dissenting): The appeal should be allowed. The municipal by-law is valid.

Per McLachlin C.J. and Bastarache, LeBel, Deschamps, Abella and Charron JJ.: Article 9(1) of the By-law is not overbroad, and it applies only to sounds that stand out over the environmental noise. Although this provision, drafted using general language, is ambiguous, a contextual interpretation resolves the ambiguity and enables the scope of art. 9(1) to be determined. The history of the By-law shows that the lawmakers' purpose was to control noises that interfere with peaceful enjoyment of the urban environment. It is clear from the legislative purpose that the scope of art. 9(1) does not include sounds resulting solely from human activity that is peaceable and respectful of the municipal community. The immediate context of art. 9 supports this interpretation. It indicates that the concept of noise that adversely affects the enjoyment of the environment is implicit in art. 9 and that the activities prohibited under it are activities that produce noises that can be detected as separate from the environmental noise. [para. 11] [para. 16] [para. 26] [para. 34]

The City has the power to adopt art. 9(1) of the By-law by virtue of its power to define and regulate nuisances pursuant to arts. 517(*l*) and 520(72) of the *Charter of the city of Montreal, 1960*. Only an exercise of this regulatory power in bad faith or for improper or unreasonable purposes will justify judicial review. To control noise, the City did not establish an absolute prohibition, but chose to target certain types of sounds that are more likely to stand out over other environmental noise. This choice is of course consistent with its delegated power and in no way constitutes an [page143] unreasonable or improper exercise of that power. [para. 41] [para. 45] [para. 48] [para. 54]

Article 9(1) infringes s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The noise emitted by a loudspeaker onto the public street had expressive content, and the method and location of the expression did not exclude it from the scope of s. 2(*b*). The form of the expression is non-violent and the evidence did not establish that the method or location of the expression impedes the function of city streets or fails to promote the values that underlie the free expression guarantee. The ban on emitting amplified noise onto public streets constitutes a limit on free expression because it has the effect of restricting expression which promotes the value of self-fulfilment and human flourishing. [para. 58] [paras. 60-68] [paras. 84-85]

While the conclusion that the expression on public property at issue in this case falls within the protected sphere of s. 2(*b*) is consistent with the divergent approaches set out in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, the test for the application of s. 2(*b*) to public property should be clarified and the following approach adopted. The basic question 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 s. 2(*b*) is intended to serve -- namely democratic discourse, truth finding and self-fulfilment. To answer this question, one should consider the historical or actual function of the place and whether other aspects of the place suggest that expression within it would undermine the values underlying free expression. Applying this approach confirms the conclusion that the expression at issue falls within the scope of s. 2(*b*). [para. 70] [para. 74] [para. 81]

Article 9(1) is justified under s. 1 of the *Canadian Charter*. The objective of combatting pollution of the environment by noise is pressing and substantial, and the impugned measure also meets the proportionality test. First, the limit on noise produced by sound equipment is rationally connected to the City's objective. Second, the measure impairs freedom of expression in a reasonably minimal way. Elected officials must be accorded a measure of latitude, particularly on environmental issues, where views and interest conflict and precision is elusive. Here, the City contended there was no other practical way to deal with the complex problem the City was facing. To regulate the volume of noise [page144] measurable by sound level meter would be unrealistic and would not achieve the City's

goal of eliminating, subject to exception, a certain type of sound. Lastly, the prejudicial effects on free expression flowing from the regulation of noise produced by sound equipment that interferes with the peaceful use and enjoyment of the urban environment are proportionate to the beneficial effects of reducing noise pollution on the street and in the neighbourhood. [paras. 89-99]

Per Binnie J. (dissenting): Article 9(1), when construed in accordance with the modern "contextual" rules of statutory interpretation, still means what it says. It imposes a general ban on "noise produced by sound equipment". Anti-noise by-law measures are of three types. The first prohibits noise that exceeds objective measurable limits (e.g., a set level of decibels). The second prohibits noise by subjective criteria (e.g., noise that interferes with the quality of life). The third prohibits noise by source (e.g., sounding car horns in a hospital zone). The majority judgment converts a type 3 provision into a type 2 provision, an interpretation that contradicts the City's intent both as expressed in the By-law and as submitted to this Court in written and oral argument. Interpreted as the City intended it to be interpreted, art. 9(1) is *ultra vires*. [paras. 102-103]

On a grammatical reading, art. 9(1) imposes a general ban on noise classified only by source and includes noise which is not a nuisance. In this case, the context reinforces the ordinary grammatical meaning of the words used by the legislators and shows that there is no ambiguity in art. 9(1), latent or otherwise. While the courts cannot insist on a greater level of drafting precision than the subject matter permits, such indulgence is not applicable to this By-law, which shows in its own provisions other than art. 9(1) that a sensible level of precision can be achieved. The City could have employed level, place, type and source limitations, as well as qualitative standards in art. 9(1). There is a massive amount of municipal experience in Quebec crafting anti-noise by-laws which the City of Montréal must be taken to have known about. The City obviously intended to strike out in a new direction. The legislators clearly state that the prohibitions in art. 9(1) are "[i]n addition to the noise referred to in article 8" which prohibits, with respect to inhabited places, "disruptive noise whose sound pressure level is greater than the [page145] maximum standardized noise level determined by ordinance". This can only mean that in art. 9(1) the "noise produced by sound equipment" need not be disruptive, need not rise to the level fixed by ordinance and need not occur in an inhabited place. The City is entitled to have the validity of that new direction considered by the Court, rather than have its enactment essentially modified to reflect the legislative model the City evidently wished to depart from. [para. 115] [para. 117] [para. 122] [para. 124] [para. 139] [para. 143]

To read words into art. 9(1), and then to read other words out, then to read up a phrase to require an "essential connexion with a building" and finally to read down the effect of s. 9(1), goes beyond what a court is authorized to do by way of interpretation and amounts to impermissible judicial amendment. While such radical surgery is sometimes done as a matter of constitutional remedy in a proper case, here it is being imposed at the prior stage of statutory interpretation when the Court's mandate is simply to ascertain the intention of the legislators, not to remedy wrongs. [para. 110] [para. 147]

Article 9(1) is *ultra vires* and oppressive. The legislative power to define and prohibit nuisances conferred to City Hall by the *Charter of the city of Montréal, 1960* does not extend to defining some activity or thing as a nuisance "if it has no harmful qualities, causes no injury and hurts no one". Noise is not by nature a nuisance. There must therefore be a specification of abuse. Even if art. 9(1) were *intra vires* the City's legislative power to define and prohibit nuisances, it would be a patently unreasonable exercise of it. Instead of declaring that the legislators cannot mean what they said in art. 9(1), it would be more respectful of the Court's place in the constitutional scheme to send the defective provision back to the legislators for consideration and possible re-enactment in modified form. [para. 150] [paras. 157-158] [paras. 160-161] [para. 165]

Article 9(1) infringes freedom of expression under s. 2(*b*) of the *Canadian Charter* and this infringement is not justified. Reliance on prosecutorial discretion is not a solution to the problem of overbreadth and overinclusiveness of art. 9(1) because such discretion is not governed by criteria "prescribed by law". Article 9(1) [page146] is also a disproportionate response to the legitimate problem of noise pollution because it goes beyond what could be considered minimal impairment of the expressive rights of Montrealers. The status of the defence of *de minimis* from which potential offenders might hope to benefit is not clear in Canada and the permit procedure does little to relieve from the bad effects of the prohibition. Article 9(1) cannot be justified just because there are other ways in

which the accused could have advertised its wares. The key issue is not the effects of the infringing law in relation to a particular accused, but whether applied to Montrealers generally the means chosen by the legislators are proportionate to the City's legislative objective. [paras. 166-174]

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by McLachlin C.J. and Deschamps J.

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by Binnie J. (dissenting)

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or installed or used outside, that can be heard from the outside does not [page164] exceed the City's regulatory power and in no way constitutes an unreasonable or improper exercise of that power.

49 The City also submitted that the By-law could be based on its power to ensure peace and public order. In light of our conclusion, it is unnecessary to turn to that provision to find that the By-law is valid. A few comments are in order, though.

50 It is well established that a municipal by-law may have more than one aspect and more than one purpose. Consequently, a by-law may have more than one enabling provision (*Arcade Amusements*, at p. 382). It is also possible for a single enabling provision, in particular a general provision such as art. 516 of the Charter of the City, to authorize provisions with multiple purposes.

51 This being said, to restate the Court's words in *R. v. Greenbaum*, [1993] 1 S.C.R. 674, at p. 693, there are many limits on a municipality's general power to adopt by-laws to ensure peace, order and the welfare of its citizens. In particular, when specific powers have been provided for, the general power should not be used to extend the clear scope of the specific provisions. In *Greenbaum* (at p. 693), the Court agreed with Middleton J.A. of the Ontario Court of Appeal in *Morrison v. Kingston* (1937), 69 C.C.C. 251. At p. 255 of that decision, Middleton J.A. had given a general description of the limits on a municipality's regulatory powers:

> The first and most obvious limitation is found in the limitations imposed upon the power of the Province itself by the *B.N.A. Act*. The Province has not itself universal power of legislation, and its creature the municipality can have no higher power. A second and for many purposes a limitation of equally practical importance is that where the Provincial Legislature has itself undertaken to deal with a certain subject-matter in the interest of the inhabitants of the Province all legislation by the municipality must be subject to the provincial enactment. A third limitation is I think to be found in the express enactments of the *Municipal Act*. Very few [page165] subjects falling within the ambit of local government are left to the general provisions of s. 259 [now s. 130]. Almost every conceivable subject proper to be dealt with by a municipal council is specifically enumerated in the detailed provisions in the Act, and in some instances there are distinct limitations imposed on the powers of the municipal council. <u>These express powers are, I think, taken out of any power included in the general grant of power</u> by s. 259. [Emphasis added.]

52 The Court's remarks in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 22, also support this principle. In that case, the Court upheld the validity of a provision regulating the use of pesticides on the basis of a general power. However, the majority, *per* L'Heureux-Dubé J., stated that while such general powers may apply where no specific power has been granted (para. 21), they "do not confer an unlimited power" (para. 20). The Court thus recognized that the purpose of such provisions is to "allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation" (para. 19). It seems clear that there is no need to resort to a general power if a specific power exists.

53 In the case at bar, the Charter of the City has two specific provisions -- one relating to nuisances and the other to public order, peace and safety -- in addition to the general residual power.

54 Thus, the City may base the By-law on its power to define and regulate nuisances pursuant to arts. 517(*l*) and 520(72) of the Charter of the City. The general power under art. 516 to ensure peace, order and good government and the welfare of citizens cannot be used to justify the exercise of its regulatory power, because there is a specific provision that applies.

55 Having concluded that arts. 9(1) and 11 of the By-law are within the delegated power of the City, [page166] we must consider the second issue: whether these provisions violate the *Canadian Charter*. We must first decide whether the provisions of the By-law violate s. 2(*b*) of the *Canadian Charter*. If they do, we must then consider whether this violation is justified under s. 1 of the *Canadian Charter*.

3. *Does Article 9(1) of the By-law Infringe Section 2(b) of the Canadian Charter?*
2

56 Does the City's prohibition on amplified noise that can be heard from the outside infringe s. 2(*b*) of the *Canadian Charter*? Following the analytic approach of previous cases, the answer to this question depends on the answers to three other questions. First, did the noise have *expressive content*, thereby bringing it within s. 2(*b*) protection? Second, if so, does the *method or location* of this expression remove that protection? Third, if the expression is protected by s. 2(*b*), does the By-law *infringe* that protection, either in purpose or effect? See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

57 The first two questions relate to whether the expression at issue in this case falls within the protected sphere of s. 2(*b*). They are premised on the distinction made in *Irwin Toy* between content (which is always protected) and "form" (which may not be protected). While this distinction may sometimes be blurred (see, e.g., *Irwin Toy*, p. 968; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 748), it is useful in cases such as this, where method and location are central to determining whether the prohibited expression is protected by the guarantee of free expression.

3.2.1 Expressive Content

58 The first question is whether the noise emitted by a loudspeaker from inside the club had expressive content. The answer must be yes. The loudspeaker sent a message into the street about the show going [page167] on inside the club. The fact that the message may not, in the view of some, have been particularly valuable, or may even have been offensive, does not deprive it of s. 2(*b*) protection. Expressive activity is not excluded from the scope of the guarantee because of its particular message. Subject to objections on the ground of method or location, as discussed below, all expressive activity is presumptively protected by s. 2(*b*): see *Irwin Toy*, at p. 969; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 729.

59 It is clear that noise emitted by loudspeakers from buildings onto the street can have expressive content, and in this case it did. Therefore, the first part of the test in *Irwin Toy* is met and a *prima facie* case for s. 2(*b*) protection is established.

3.2.2 Excluded Expression

60 Expressive activity may fall outside the scope of s. 2(*b*) protection because of how or where it is delivered. While all expressive *content* is worthy of protection (see *Irwin Toy*, at p. 969), the *method or location* of the expression may not be. For instance, this Court has found that violent expression is not protected by the *Canadian Charter*: *Irwin Toy*, at pp. 969-70. Violence is not excluded because of the message it conveys (no matter how hateful) but rather because the method by which the message is conveyed is not consonant with *Charter* protection.

61 This case raises the question of whether the *location* of the expression at issue causes the expression to be excluded from the scope of s. 2(*b*): see *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, *per* Lamer C.J. Property may be private or public. Public property is government-owned. In this case, although the loudspeaker was located on the respondent's private property, the sound issued onto the street, a public space

owned by the government. One aspect [page168] of free expression is the right to express oneself in certain public spaces. Thus, the public square and the speakers' corner have by tradition become places of protected expression. The question here is whether s. 2(*b*) of the *Canadian Charter* protects not only what the appellants were doing, but their right to do it *in the place where they were doing it*, namely a public street.

62 Section 2(*b*) protection does not extend to all places. Private property, for example, will fall outside the protected sphere of s. 2(*b*) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*. Public property, however, may be more problematic since, by definition, it implicates the state. Two countervailing arguments, both powerful, are pitted against each other where the issue is expression on public property.

63 The argument for s. 2(*b*) protection on all public property focuses on ownership. It says the critical distinction is between government-owned places and other places. The government as the owner of property controls it. It follows that restrictions on the use of public property for expressive purposes are "government acts". Therefore, it is argued, the government is limiting the right to free expression guaranteed by s. 2(*b*) of the *Canadian Charter* and must justify this under s. 1.

64 The argument against s. 2(*b*) protection on at least some government-owned property, by contrast, focuses on the distinction between public use of property and private use of property. Regardless of the fact that the government owns and hence controls its property, it is asserted, many government places are essentially private in use. Some areas of government-owned property have become recognized as public spaces in which the public has a right to express itself. But other areas, like private offices and diverse places of public business, [page169] have never been viewed as available spaces for public expression. It cannot have been the intention of the drafters of the *Canadian Charter*, the argument continues, to confer a *prima facie* right of free expression in these essentially private spaces and to cast the onus on the government to justify the exclusion of public expression from places that have always and unquestionably been off-limits to public expression and could not effectively function if they were open to the public.

65 In *Committee for the Commonwealth of Canada*, six of seven judges endorsed the second general approach, although they adopted different tests for determining whether the government-owned property at issue was public or private in nature. Lamer C.J., supported by Sopinka and Cory JJ., advocated a test based on whether the primary function of the space was compatible with free expression. McLachlin J., supported by La Forest and Gonthier JJ., proposed a test based on whether expression in the place at issue served the values underlying the s. 2(*b*) free speech guarantee. L'Heureux-Dubé J. opted for the first approach and went directly to s. 1.

66 In this case, as in *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, we are satisfied that on any of the tests proposed in *Committee for the Commonwealth of Canada*, the emission of noise onto a public street is protected by s. 2(*b*). The activity is expressive. The evidence does not establish that the method and location at issue here -- a building-mounted amplifier emitting noise onto a public street -- impede the function of city streets or fail to promote the values that underlie the free expression guarantee.

67 This method of expression is not repugnant to the primary function of a public street, on the test [page170] of Lamer C.J. Streets provide means of passing and accessing adjoining buildings. They also serve as venues of public communication. However one defines their function, emitting noise produced by sound equipment onto public streets seems not in itself to interfere with it. If sound equipment were being used in a way that prevented people from using the street for passage or communication, the answer might be different: see, e.g., *MacMillan Bloedel Ltd. v. Simpson* (1994), 89 C.C.C. (3d) 217 (B.C.C.A.). However, the evidence here does not establish this.

68 The method and location of the expression also arguably serve the values that underlie the guarantee of free expression, on the approach advocated by McLachlin J. Amplified emissions of noise from buildings onto a public street could further democratic discourse, truth finding and self-fulfillment. Again, if the evidence showed that the amplification inhibited passage and communication on the street, the situation might be different. The argument that the emissions of noise onto a public street in this case did not serve the values underlying the freedom of

Mounted Police Association of Ontario v. Canada (Attorney General)

Supreme Court Reports

Supreme Court of Canada

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

Heard: February 18, 2014;

Judgment: January 16, 2015.

File No.: 34948.

[2015] 1 S.C.R. 3 | [2015] 1 R.C.S. 3 | [2015] S.C.J. No. 1 | [2015] A.C.S. no 1 | 2015 SCC 1

Mounted Police Association of Ontario and British Columbia Mounted Police Professional Association, on their own behalf and on behalf of all members and employees of the Royal Canadian Mounted Police, Appellants; v. Attorney General of Canada, Respondent, and Attorney General of Ontario, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Association des membres de la Police Montée du Québec Inc., Mounted Police Members' Legal Fund, Confédération des syndicats nationaux, Canadian Police Association, Canadian Labour Congress, Canadian Civil Liberties Association, Public Service Alliance of Canada and British Columbia Civil Liberties Association, Interveners.

(270 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Freedom of association — Right to collective bargaining — Scope of constitutional protection — Private associations of RCMP members challenging constitutionality of legislation excluding RCMP members from public service labour relations regime and imposing non-unionized regime — Legislatively imposed regime not independent from management and not providing for employee choice [page4] of association or input into selection of collective goals — Whether impugned legislation substantially interferes with right to meaningful process of collective bargaining and thereby infringes constitutional guarantee of freedom of association — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, s. 96 — Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2(1) "employee" (d).

Summary:

RCMP members are not permitted to unionize or engage in collective bargaining. They have been excluded from the labour relations regime governing the federal public service since collective bargaining was first introduced in the federal public service, first, under the *Public Service Staff Relations Act* ("*PSSRA*") and now under the *Public Service Labour Relations Act* ("*PSLRA*"). Instead, members of the RCMP are subject to a non-unionized labour relations scheme. At the time of the hearing of this appeal, that scheme was imposed upon them by s. 96 of the *Royal Canadian Mounted Police Regulations, 1988* ("*RCMP Regulations*"), since repealed and replaced by the substantially similar s. 56 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

The core component of the current RCMP labour relations regime is the Staff Relations Representative Program ("SRRP"). The SRRP is the primary mechanism through which RCMP members can raise labour relations issues (excluding wages), and the only form of employee representation recognized by management. The SRRP is governed by a National Executive Committee and is staffed by member representatives from various RCMP divisions and regions elected for a two-year term by both regular and civilian members of the RCMP. Two of its representatives act as the formal point of contact with the national management of the RCMP. The aim of the program is that, at each level of the hierarchy, members' representatives and management consult on human resources initiatives and policies, with the understanding that the final word always rests with management.

A little over 15 years ago, the Court held that the exclusion of RCMP members from collective bargaining under the *PSLRA*'s predecessor legislation did not infringe s. 2(*d*) of the *Charter*: *Delisle v. Canada (Deputy [page5] Attorney General)*, [1999] 2 S.C.R. 989. That case did not involve a direct challenge to the sufficiency of the entire RCMP labour relations scheme. Since that decision was rendered, the RCMP labour relations regime has undergone a number of changes that have increased the independence afforded to the SRRP, but none of those changes has substantially altered its purpose, place or function within the RCMP chain of command.

In May 2006, a constitutional challenge was initiated by two private associations of RCMP members whose goal is to represent RCMP members in Ontario and British Columbia on work-related issues, but who have never been recognized for the purpose of collective bargaining or consultation on workplace issues by RCMP management or the federal government. They sought a declaration that the combined effect of the exclusion of RCMP members from the application of the *PSLRA* and the imposition of the SRRP as a labour relations regime unjustifiably infringes members' freedom of association. A judge of the Ontario Superior Court of Justice concluded that s. 96 of the *RCMP Regulations*, which imposed the SRRP as a labour relations regime, substantially interfered with freedom of association and could not be justified under s. 1 of the *Charter*. However, the judge also held that the exclusion of RCMP members from the federal public service labour relations regime did not infringe s. 2(*d*) of the *Charter*. The Court of Appeal allowed the Attorney General of Canada's appeal and held that the current RCMP labour relations scheme does not breach s. 2(*d*) of the *Charter*.

Held (Rothstein J. dissenting): The appeal should be allowed. Section 96 of the *RCMP Regulations*, which was in effect at the time of the hearing of this appeal, infringed s. 2(*d*) of the *Charter*. Similarly, para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes s. 2(*d*). Neither infringement is justified under s. 1 of the *Charter*. Had s. 96 of the *RCMP Regulations* not been repealed, it would have been declared to be of no force or effect. The offending provision of the *PSLRA* is of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*. This declaration of invalidity is suspended for a period of 12 months.

[page6]

Per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.: The s. 2(*d*) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. However, the current labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence.

Section 2(*d*) 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. Viewed purposively, s. 2(*d*) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals. This guarantee includes a right to collective bargaining. Collective bargaining is a necessary precondition to the meaningful exercise of the constitutional guarantee of freedom of association. It is not a derivative right protected only if state action makes it effectively impossible to associate for workplace matters. That said, however, the right to collective bargaining is one that guarantees a process rather than an outcome or a particular model of labour relations.

The government cannot enact laws or impose a labour relations process that substantially interferes with the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. Just as a ban on employee association impairs freedom of association, so does a labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters. Similarly, a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(*d*) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.

[page7]

A meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them. But choice and independence are not absolute: they are limited by the context of collective bargaining.

The degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. Moreover, accountability to the members of the association plays an important role in assessing whether employee choice is present to a sufficient degree in any given labour relations scheme. A scheme that holds representatives accountable to the employees who chose them ensures that the association works towards the purposes for which the employees joined together.

In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members. Although the function of collective bargaining is not served by a process which is dominated by or under the influence of management, like choice, independence in the collective bargaining context is not absolute. The degree of independence required is one that permits the activities of the association to be aligned with the interests of its members.

What is required to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2(*d*) inquiries, the required analysis is contextual. Choice and independence do not require adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. However, whatever the labour relations model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining.

This is not a case of a complete denial of the constitutional right to associate. Rather, it is a case of substantial interference with the right to associate for the purpose of addressing workplace goals through a meaningful process of collective bargaining, free from employer control. [page8] The flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(*d*) of the *Charter*. That process fails to respect RCMP members' freedom of association in both its purpose and its effects.

Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members for the purpose of preventing collective bargaining through an independent association. Not only are members represented by an organization they did not choose and do not control, they must work within a structure that is part of the management organization of the RCMP and thus lacks independence from management. The SRRP process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.

The SRRP also infringes s. 2(*d*) in its effects. The relevant inquiry is directed at whether RCMP members can genuinely advance their own interests through the SRRP, without interference by RCMP management. On the record here, they cannot. Simply put, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP

members by management. The element of employee choice is almost entirely missing and the structure has no independence from management.

The second issue raised by the present constitutional challenge concerns the exclusion of RCMP members from the application of the *PSLRA* by para. (*d*) of the definition of "employee" in s. 2(1). This Court, in *Delisle*, held that the exclusion of the RCMP from the *PSSRA*, the *PSLRA*'s predecessor legislation, did not violate s. 2(*d*) of the *Charter*. Overturning precedents of this Court is not a step to be lightly taken. However, *Delisle* was decided before this Court's shift to a purposive and generous approach to labour relations and *Delisle* considered a different question and narrower aspects of the labour relations regime than those at issue here. It follows that the result in *Delisle* must be revisited.

The purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*, viewed in its historical context, violates s. 2(*d*) of the *Charter*. The *PSSRA* and, [page9] later, the *PSLRA* established the general framework for labour relations and collective bargaining in the federal public sector. A class of employees, the members of the RCMP, has, since the initial enactment of this regime, been excluded from its application in order to prevent them from exercising their associational rights under s. 2(*d*). The purpose of excluding a specific class of employees from the labour relations regime in order to deny them the exercise of their freedom of association impermissibly breaches the constitutional rights of the affected employees.

Section 2(*d*) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s. 1 of the *Charter* provides additional room to tailor a labour relations regime to achieve pressing and substantial objectives, provided it can show that these are justified. In the present case, the infringement of the guarantee of freedom of association cannot be justified under s. 1 of the *Charter*.

Although the government's objective of maintaining an independent and objective police force constitutes a pressing and substantial objective, the infringing measures are not rationally connected to their objective. First, it is not apparent how the exclusion of RCMP members from a statutorily protected collective bargaining process ensures the neutrality, stability or even reliability of the Force. Second, it is not established that permitting meaningful collective bargaining for RCMP members would disrupt the stability of the police force or affect the public's perception of its neutrality.

While this conclusion is sufficient to dispose of the s. 1 analysis, denying RCMP members any meaningful process of collective bargaining is also more restrictive than necessary to maintain the Force's neutrality, stability and reliability. The RCMP is the only police force in Canada without a collective agreement to regulate the working conditions of its officers. It has not been shown how or why the RCMP is materially different from the police forces that have the benefit of collective bargaining regimes that provide basic bargaining protections. A material difference between the forces having not been shown, it is clear that total exclusion of RCMP members from meaningful collective bargaining cannot be minimally impairing.

[page10]

Having found that s. 96 of the *RCMP Regulations* and para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringe the freedom guaranteed to RCMP members under s. 2(*d*) of the *Charter*, and that these provisions cannot be saved under s. 1, the appropriate remedy is to strike down the offending provision of the *PSLRA* under s. 52 of the *Constitution Act, 1982*. This declaration of invalidity is suspended for a period of 12 months. We would similarly strike down s. 96 of the *RCMP Regulations* were it not repealed. This conclusion does not mean that Parliament must include the RCMP in the *PSLRA* scheme. Section 2(*d*) of the *Charter* does not mandate a particular model of labour relations. Should it see fit to do so, Parliament remains free to enact any labour relations model it considers appropriate to address the specific context in which members of the RCMP discharge their duties, within the constitutional limits imposed by the guarantee enshrined in s. 2(*d*) and s. 1 of the *Charter*.

Per Rothstein J. (dissenting): The language used by the majority creates greater rights, and imposes greater restrictions on the government, than either a plain or generous reading of s. 2(*d*) of the *Charter* can logically

provide. The interpretation of a *Charter* right must be principled and must not be so divorced from the text of the provision as to depart from the foundation of the right. When, in *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, this Court recognized a derivative right to collective bargaining stemming from the purpose of s. 2(*d*) of the *Charter*, it extended constitutional rights beyond what had previously been accepted.

Now, less than four years after *Fraser* was decided, the majority further expands freedom of association and retreats from the effective impossibility test stated in that case. It also enshrines an adversarial model of labour relations as a *Charter* right, reversing this Court's findings in *Health Services* and in *Fraser* that s. 2(*d*) does not guarantee a particular model of collective bargaining or a particular outcome.

[page11]

Section 2(*d*) of the *Charter* protects the right to associate to make collective representations and to have employers consider those representations in good faith. The majority in *Fraser* unambiguously held that the test to find an infringement of s. 2(*d*) in the labour relations context is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals. The language in *Fraser* does not support the majority's revised -- and lowered -- s. 2(*d*) standard. There is no doubt that the majority in *Fraser* firmly established a high threshold for infringement of the derivative right to collective bargaining. Fairness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about.

The essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness. Representativeness is the constitutional imperative required in order to ensure that s. 2(*d*) rights are protected in the collective bargaining context and it is only where legislation impairs the right of employees to have their interests advanced honestly and fairly that legislation will be constitutionally deficient.

Neither the choice of the organization representing employees for bargaining purposes nor the independence of that association are necessary to ensure that meaningful collective bargaining can occur. Choice and independence are central to Wagner-style labour relations and, by selecting choice and independence as constitutional requirements for meaningful collective bargaining, the majority mandates an adversarial model of labour relations and precludes others which may be just as or more effective in contributing to meaningful collective bargaining.

A statutorily designated bargaining model can ensure that employees' interests will be effectively represented to management even where the employees do not choose their individual representatives or the system in which this representation takes place. Section 2(*d*) requires that [page12] the voice with which employees communicate with their employer as a collective be representative of their interests. Provided that the spokespersons through whom employees make representations to their employer have a duty to represent the interests of all employees and that there is a means to hold those representatives to account, the workers' constitutional right to make collective representations and to have their collective representations considered in good faith is met. Representativeness is what *Fraser* mandates and there is no justification to embark upon the imposition of unnecessary constitutional constraints.

As with choice, the notion of independence is not an inherent aspect of collective bargaining. Where concerns are raised with respect to the independence of a legislatively prescribed employee association, the relevant question is not whether the association or process is independent in the sense that it segregates employees from management, but whether the process prevents employees, such as RCMP members, from associating to advance their collective workplace goals. To reiterate, the touchstone is representativeness. So long as employees have recourse to ensure that their views are put forward to management and that their representatives are working in their interests, the labour relations process will not be dominated by management and employees will have the means to work towards their collective workplace goals. Any representative who limits representation based on

what management permits or who places their own employment interests above the interests of all employees will be held accountable for his or her own actions.

In the case at bar, the context of a national police force led to the adoption of a statutory collaborative labour relations model, the SRRP. The correct standard against which the SRRP should be evaluated is whether the process renders meaningful collective bargaining effectively impossible. Whether the *Fraser*-mandated effective impossibility test or the majority's new substantial interference test is applied, it is clear that the SRRP does not infringe s. 2(*d*) of the *Charter*.

That Parliament chose a collaborative model like the SRRP as a means of facilitating employer-employee engagement for the national police force does not mean that that model has rendered it effectively impossible for RCMP members to achieve collective workplace goals. [page13] Although RCMP members did not choose their associational framework for bargaining purposes, they are able to democratically elect their representatives and those representatives have a statutory duty to represent employee interests. They can be replaced if they fail to uphold that duty. Management also has a constitutional obligation to consider in good faith the representations made on behalf of RCMP members. In short, the evidence before this Court is that Staff Relations Representatives fairly advance employee interests to RCMP management and thus the SRRP meets the constitutional requirement of representativeness mandated under this Court's interpretation of s. 2(*d*).

The purpose of excluding RCMP members from the *PSLRA* is not to interfere with collective bargaining, but is driven by a legitimate concern that the model imposed under that legislation is ill suited to the national police force. The evolution in the legal understanding of s. 2(*d*) since *Delisle* bears no relation to the majority's finding in that case as to the purpose of the exclusion of RCMP members from the *PSLRA*'s predecessor legislation, and thus cannot be used to support revisiting the issues settled in *Delisle*. Although *Delisle* was decided before *Health Services* and *Fraser* ushered in a more expansive approach to labour relations, the jurisprudential developments since do not allow this Court to conclude that the purpose of the exclusion is to deny RCMP members' associational rights. In fact, changes to the SRRP since *Delisle* have reinforced the understanding that the program's goal is to enhance representation of the interests of RCMP members without the imposition of an adversarial model.

Even if *Delisle* had been incorrectly decided and the purpose of the exclusion contained in the *PSSRA* in 1967 was to deny RCMP members meaningful collective bargaining, it does not follow that this continues to be the purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* today. By 2003, when the *PSSRA* was replaced by the *PSLRA*, the RCMP labour relations scheme was considerably changed from that which existed in 1967. The decision to continue the exclusion was made with the knowledge that doing so did not deny members collective bargaining rights. These individuals were subject to a parallel labour relations regime -- the [page14] SRRP. To ignore the significantly different context in which the exclusion of RCMP members was re-enacted in the *PSLRA* disregards the current legislative reality.

Had para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* been found to breach s. 2(*d*) of the *Charter*, it would nonetheless constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society and would therefore be justified under s. 1 of the *Charter*. Parliament is entitled to address concerns that an adversarial RCMP members' association might order its members to refuse to intervene in certain circumstances involving the labour disputes of others or that belonging to such associations could inhibit members from responding to such situations impartially. The RCMP is materially different from other Canadian police forces. The government must be permitted to organize the Force's labour relations in view of its distinctive and essential role as our national police force.

Cases Cited

By McLachlin C.J. and LeBel J.

Overruled: *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; **applied:** *Health Services and*

45 Finally, in *Fraser*, this Court reaffirmed that s. 2(*d*) confers the right to a process of collective bargaining, understood as meaningful association in pursuit of workplace goals. This process includes the employees' rights to join together, to make collective representations to the employer, and to have those representations considered in good faith:

> What s. 2(*d*) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process... . Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. [para. 42]

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, [page39] 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.

B. *Defining the Scope of the Section 2(d) Guarantee*

(1) A Purposive, Generous and Contextual Approach

47 As is the case with other *Charter* rights, the jurisprudence establishes that s. 2(*d*) must be interpreted in a purposive and generous fashion, having regard to "the larger objects of the *Charter* ..., to the language chosen to articulate the ... 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*": *Big M Drug Mart*, at p. 344. In a phrase, in order to determine whether a restriction on the right to associate violates s. 2(*d*) by offending its purpose, we must look at the associational activity in question in its full context and history. Neither the text of s. 2(*d*) nor general principles of *Charter* interpretation support a narrow reading of freedom of association.

48 This interpretative approach to freedom of association is consistent with the approach to other basic rights connected with human activities and needs. The scope of freedom of religion, for example, is derived from its history and the range of activities to which it applies - holding, proclaiming and transmitting beliefs in the bosom of a secular state (R. Moon, "Freedom of Conscience and Religion", in Mendes and Beaulac, 339). Similarly, the scope of freedom of expression is defined by the different forms it takes and the different interests it protects - including, notably, "the quest for truth, self-fulfillment, and an embracing marketplace of ideas": *Saskatchewan (Human Rights Commission) [page40] v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 171, per Rothstein J. for the Court; see also *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 766; P. B. Schabas, "The Ups and Downs of Freedom of Expression - Section 2(b)", in R. Gilliland, ed., *The Charter at Thirty* (2012), 1; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 1060. An activity-based contextual approach is equally essential for freedom of association. Freedom of association, like the other s. 2 freedoms - freedom of expression, conscience and religion, and peaceful assembly - protects rights fundamental to Canada's liberal democratic society.

49 Freedom of association is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.

50 The purposes underlying *Charter* rights and freedoms may be framed at varying levels of abstraction. At the broadest level, a purposive interpretation must be consistent with the "larger objects of the *Charter*", including

"basic beliefs about human worth and dignity" and the maintenance of "a free and democratic political system": *Big M Drug Mart*, at pp. 344 and 346; see also *Health Services*, at para. 81. At the same time, however, while *Charter* rights and freedoms should be given a broad and liberal interpretation, a purposive analysis also requires courts to consider the most concrete purpose or set of purposes that underlies the right or freedom in question, based on its history and full context. That is the task to which we now turn with respect to s. 2(*d*).

[page41]

(2) The Content of Section 2(*d*) Protection

51 In his dissenting reasons in the *Alberta Reference*, Dickson C.J. identified three possible approaches to the interpretation of s. 2(*d*) - constitutive, derivative and purposive. We conclude that s. 2(*d*) protects each of the aspects of freedom of association with which these approaches are concerned.

52 The narrowest approach, the "constitutive", would protect only the bare right to belong to or form an association. The state would thus be prohibited from interfering with individuals meeting or forming associations, but would be permitted to interfere with the *activities* pursued by the associations people form. This protection, while narrow, is not trivial; history is replete with examples of states that have banned associations or prevented people from associating, either absolutely or in terms of restrictions on the number of people who can associate for a particular purpose.

53 The "derivative" approach would protect not only the right to associate, but also the right to associational *activity* that specifically relates to other constitutional freedoms. This approach prevails in the United States, where freedom of association is recognized insofar as it supports other constitutional rights, like freedom of religion and the political rights. Beyond this, however, associational activities would not be constitutionally protected.

54 The purposive approach, adopted by Dickson C.J. in the *Alberta Reference*, defines the content of s. 2(*d*) by reference to the purpose of the guarantee of freedom of association: "... to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends" (*Alberta Reference*, at p. 365). The object of Dickson C.J.'s words is a concrete one, not an abstract expression of a desire for a better life. Elaborating on this interpretive approach, Dickson C.J. states that the purpose [page42] of the freedom of association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict": *Alberta Reference*, at p. 366.

55 The purposive approach thus recognizes that freedom of association is empowering, and that we value the guarantee enshrined in s. 2(*d*) because it empowers groups whose members' individual voices may be all too easily drowned out. This conclusion is rooted in "the historical origins of the concepts enshrined" in s. 2(*d*) (*Big M Drug Mart*, at p. 344).

56 The historical emergence of association as a fundamental freedom - one which permits the growth of a sphere of civil society largely free from state interference - has its roots in the protection of religious minority groups: M. Walzer, "The Concept of Civil Society", in M. Walzer, ed., *Toward a Global Civil Society* (1995), 7, at p. 20. More recent history also illustrates how the freedom to associate has contributed to the women's suffrage and gay rights movements: J. D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (2012), at p. 45; and D. Carpenter, "Expressive Association and Anti-Discrimination Law After *Dale*: A Tripartite Approach" (2001), 85 Minn. L. Rev. 1515.

57 Historically, those most easily ignored and disempowered as individuals have staked so much on freedom of

association precisely because association was the means by which they could gain a voice in society. As Dickson C.J. put it in the *Alberta Reference*:

[page43]

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. [Emphasis added; pp. 365-66.]

58 This then is a fundamental purpose of s. 2(*d*) - to protect the individual from "state-enforced isolation in the pursuit of his or her ends": *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.

59 The flip side of the purposive approach to freedom of association under s. 2(*d*) is that the guarantee will not necessarily protect all associational activity. Section 2(*d*) of the *Charter* is aimed at reducing social imbalances, not enhancing them. For this reason, some collective activity lies outside the *Charter*'s protection. For example, associational activity that constitutes violence is not protected by s. 2(*d*): *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 107.

60 Whether there are other categories of activity in addition to violence that are by their very nature entirely excluded from s. 2(*d*) protection need not be canvassed here. It suffices to note that a purposive interpretation of s. 2(*d*) confers *prima facie* protection on a broad range of associational activity, subject to limits justified pursuant to s. 1 of the *Charter*.

[page44]

61 The nature of a given associational activity and its relation to the underlying purpose of s. 2(*d*) may also be relevant to the s. 1 analysis, in the same way that the nature of particular expression is relevant in s. 2(*b*) cases. For instance, as Rothstein J. explains in *Whatcott*, at paras. 112 and 114:

> Violent expression and expression that threatens violence does not fall within the protected sphere of s. 2(*b*) of the *Charter*: *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 70. However, apart from that, not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.
>
> ...
>
> Hate speech is at some distance from the spirit of s. 2(*b*) because it does little to promote, and can in fact impede, the values underlying freedom of expression. As noted by Dickson C.J. in *Keegstra*, expression can be used to the detriment of the search for truth (p. 763). As earlier discussed, hate speech can also distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group. It can achieve the self-fulfillment of the publisher, but often at the expense of that of the victim. These are important considerations in balancing hate speech with competing *Charter* rights ... . [Emphasis added.]

62 Section 2(*d*), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2(*d*) are not [page45] merely a bundle of individual rights, but collective rights that inhere in associations. L'Heureux-Dubé J. put it well in *Advance Cutting*:

> In society, there is an element of synergy when individuals interact. The mere addition of individual goals will not suffice. Society is more than the sum of its parts. Put another way, a row of taxis do not a bus make. An arithmetic approach to *Charter* rights fails to encompass the aspirations imbedded in it. [para. 66]

63 It has been suggested that collective rights should not be recognized because they are inconsistent with the *Charter*'s emphasis on individual rights, and because this would give groups greater rights than individuals. In our view, neither criticism is well founded.

64 First, the *Charter* does not exclude collective rights. While it generally speaks of individuals as rights holders, its s. 2 guarantees extend to groups. The right of peaceful assembly is, by definition, a group activity incapable of individual performance. Freedom of expression protects both listeners and speakers: *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 28. The right to vote is meaningless in the absence of a social context in which voting can advance self-government: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 31. The Court has also found that freedom of religion is not merely a right to hold religious opinions but also an individual right to establish communities of faith (see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567). And while this Court has not dealt with the issue, there is support for the view that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection" of freedom of religion (*Hutterian Brethren*, at para. 131, per Abella J., dissenting, citing *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII (First Section), at para. 118). See also [page46] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

65 It has also been suggested that recognition of a collective aspect to s. 2(*d*) rights will somehow undermine individual rights and the individual aspect of s. 2(*d*). We see no basis for this contention. Recognizing group or collective rights complements rather than undercuts individual rights, as the examples just cited demonstrate. It is not a question of *either* individual rights *or* collective rights. Both are essential for full *Charter* protection.

66 In summary, s. 2(*d*), viewed purposively, 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.

C. *The Right to a Meaningful Collective Bargaining Process*

67 Applying the purposive approach just discussed to the domain of labour relations, we conclude that s. 2(*d*) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, affirming the central holdings of *Health Services* and *Fraser*. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations.

[page47]

68 Just as a ban on employee association impairs freedom of association, so does a labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters. Without the right to pursue workplace goals collectively, workers may be left essentially powerless in dealing with their employer or influencing their employment conditions. This idea is not new. As the United States Supreme Court stated in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), at p. 33:

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment ... . [Emphasis added.]

69 Similarly, this Court recently affirmed the importance of freedom of expression in redressing the imbalance inherent in the employer-employee relationship in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at paras. 31-32:

> A person's employment and the conditions of their workplace can inform their identity, emotional health, and sense of self-worth ... .
>
> Free expression in the labour context can also play a significant role in redressing or alleviating the presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker ... . It is through their expressive activities that unions are able to articulate and promote their common interests, and, in the event of a labour dispute, to attempt to persuade the employer. [Citations omitted.]

70 The same reasoning applies to freedom of association. As we have seen, s. 2(*d*) functions to [page48] prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(*d*) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

71 The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees ..." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*).

72 The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(*d*) seeks to achieve, [page49] so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.

73 Against this conception, the Attorney General of Canada, relying on *Fraser*, argues that collective bargaining is at best a "derivative right" from the basic or "core" right to associate (the constitutive approach). It follows, according to the Attorney General, that collective bargaining is protected only if state action makes it *effectively impossible* to associate for workplace matters. Here that impossibility is lacking, the Attorney General asserts, because the SRRP process is a means by which RCMP members can associate for workplace purposes. The Court of Appeal accepted this position. We disagree. We will address the terms "effectively impossible" and "derivative right" in turn.

74 The reference in *Fraser* to the effective impossibility of achieving workplace goals must be understood with reference to the legislative schemes at issue. For instance, in discussing *Dunmore*, the majority in *Fraser* explained

R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575

Supreme Court Reports

Supreme Court of Canada

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

2000: December 6 / 2001: December 6.

File No.: 27084

[2001] 3 S.C.R. 575 | [2001] 3 R.C.S. 575 | [2001] S.C.J. No. 79 | [2001] A.C.S. no 79 | 2001 SCC 81

Her Majesty The Queen in Right of Ontario, appellant; v. 974649 Ontario Inc. c.o.b. as Dunedin Construction (1992) and Bob Hoy, respondents, and The Attorney General of Canada, the Attorney General of British Columbia, the Attorney General for Alberta and the Criminal Lawyers' Association of Ontario, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (98 paras.)

Case Summary

Constitutional law — Charter of Rights — Court of competent jurisdiction — Provincial offences courts — Whether justice of the peace acting under provincial offences legislation has power to order costs against Crown for Charter breach — Canadian Charter of Rights and Freedoms, s. 24(1) — Provincial Offences Act, R.S.O. 1990, c. P.33.

The respondents were charged under the Ontario Occupational Health and Safety Act with failing to comply with safety requirements on a construction project. The respondents requested that the appellant Crown disclose, among other items, a copy of the Prosecution Approval Form. The Crown twice refused to disclose the form on the ground that it was protected by solicitor-client privilege. A justice of the peace acting as a trial justice under the Provincial Offences Act ("POA") held that the Crown's failure to disclose this form amounted to a violation of the respondents' rights under the Canadian Charter of Rights and Freedoms. The justice of the peace [page576] ordered the Crown to disclose the form and to pay the costs of the respondents' disclosure motion. The Crown disclosed the form, but successfully applied to the Ontario Court (General Division) to have the order for costs quashed on the basis that a provincial offences court is not a "court of competent jurisdiction" to direct such an order under s. 24(1) of the Charter. The Court of Appeal held that a justice operating under the POA does have the power to issue such an order and allowed the appeal. It remanded the case to the General Division to determine whether in the circumstances of the case he erred in granting costs.

Held: The appeal should be dismissed. A justice of the peace presiding at a trial under the POA has power to order legal costs against the Crown for a Charter breach.

If a government action is inconsistent with the Charter, s. 24 provides remedies for the inconsistency. Section 24(1) permits a "court of competent jurisdiction" to provide "such remedy as the court considers appropriate and just in the circumstances". A "court of competent jurisdiction" is one that possesses (1) jurisdiction over the person; (2) jurisdiction over the subject matter; and (3) jurisdiction to grant the remedy. The court should interpret s. 24 of the Charter to facilitate direct access to appropriate and just Charter remedies, while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals.

A legislative grant of remedial power under s. 24 may be either express or implied. A "functional and structural" approach to determining whether a tribunal is competent to grant Charter remedies under s. 24(2) accords with the approach to discerning the implied powers of statutory bodies; with the test established for determining

whether a tribunal has jurisdiction to consider Charter issues under s. 52(1) of the Constitution Act, 1982; and with the principles underlying s. 24. It strikes a balance between meaningful access to Charter relief and deference to the role of the legislatures, and promotes direct and early access to Charter remedies in forums competent to issue such relief. At the same time, Parliament and the legislatures, subject to constitutional constraints, may expressly or impliedly withhold the power to grant any or all Charter remedies. Whether Parliament or [page577] a legislature intended to exclude a particular remedial power is determined by reference to the function the legislature has asked the tribunal to perform and the powers and processes with which it has furnished it.

Applying this approach to the POA suggests that provincial offences courts have power to award costs under s. 24(1). As quasi-criminal courts, they are the preferred forum, in terms of information, for issuing Charter remedies in cases before them, particularly where the Charter violation relates to the conduct of the trial. The legislature has given them a full complement of criminal law remedies to fill gaps in statutory jurisdiction, and to ensure that the remedy that ultimately flows is in fact both appropriate and just. Costs awards to discipline untimely disclosure are integrally connected to the function of the provincial offences court as a quasi-criminal trial court. Fracturing the availability of Charter remedies between provincial offences courts and superior courts could, in some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdiction. The provincial offences court has detailed procedural rules, and abides by the standard rules of evidence. Judicial independence is required of justices of the peace. They receive legal training. The court's rulings are subject to appellate review, and there can be interveners on this appeal. Various considerations suggest that the fashioning of costs orders as a Charter remedy may be safely entrusted to provincial offences courts.

In sum, the function and structure of the POA indicate that the legislature intended the POA court to deal with Charter issues incidental to its process that it is suited to resolve. POA justices may thus be assumed, absent a contrary indication, to possess the power to order payment of legal costs by the Crown as a remedy for Charter violations arising from untimely disclosure.

[page578]

Cases Cited

Followed: Mills v. The Queen, [1986] 1 S.C.R. 863; Weber v. Ontario Hydro, [1995] 2 S.C.R. 929; Mooring v. Canada (National Parole Board), [1996] 1 S.C.R. 75; referred to: R. v. Mardave Construction (1990) Ltd., Ont. Ct. (Prov. Div.), January 10, 1994; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114; British Columbia Development Corp. v. Friedmann, [1984] 2 S.C.R. 447; Toronto Area Transit Operating Authority v. Dell Holdings Ltd., [1997] 1 S.C.R. 32; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357; Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177; Doyle v. The Queen, [1977] 1 S.C.R. 597; R. v. Pang (1994), 95 C.C.C. (3d) 60; Tataryn v. Tataryn Estate, [1994] 2 S.C.R. 807; Symes v. Canada, [1993] 4 S.C.R. 695; Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570; Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1989] 2 F.C. 245; Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623; Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3; Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722; National Energy Board Act (Can.) (Re), [1986] 3 F.C. 275; Interprovincial Pipe Line Ltd. v. National Energy Board, [1978] 1 F.C. 601; Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22; Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5; Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854; R. v. Rahey, [1987] 1 S.C.R. 588; R. v. O'Connor, [1995] 4 S.C.R. 411; R. v. Ouellette, [1980] 1 S.C.R. 568; R. v. Pawlowski (1993), 12 O.R. (3d) 709; R. v. Stinchcombe, [1991] 3 S.C.R. 326; R. v. Regan (1999), 137 C.C.C. (3d) 449; Canada (Minister of Citizenship and

(b) any variance between the charge set out in the summons, warrant, parking infraction notice, offence notice, undertaking to appear or recognizance and the charge set out in the information or certificate.

(2) Where it appears to the court that the defendant has been misled by any irregularity, defect or variance mentioned in subsection (1), the court may adjourn the hearing and may make such order as the court considers appropriate, including an order under section 60 for the payment of costs.

[page582]

III. Judgments

A. Ontario Court (Provincial Division) (March 23, 1995)

7 Justice of the peace Harris found that the Crown had failed in its duty of disclosure by withholding the requested Prosecution Approval Form, but refused to stay the proceedings or quash the charges. Instead, he ordered production of the document to the respondents and awarded costs in the amount of $2000. In reaching this conclusion, he relied on R. v. Mardave Construction (1990) Ltd., Ont. Ct. (Prov. Div.), January 10, 1994, which held that the disclosure of the Prosecution Approval Form by the Ministry of Labour is an essential element of the Crown's duty of full and complete disclosure.

B. Ontario Court (General Division) (1995), 25 O.R. (3d) 420

8 McRae J. of the Ontario Court (General Division) quashed this order on the ground that a provincial offences court does not have jurisdiction under s. 24(1) of the Charter to award costs against the Crown for violations of an accused's Charter rights. Citing Mills v. The Queen, [1986] 1 S.C.R. 863, McRae J. held that a POA trial court could constitute a "court of competent jurisdiction" to issue such an award under s. 24(1) only if it enjoyed jurisdiction over the person, jurisdiction over the offence or subject matter, and power to grant the remedy sought. Since the first two elements of this test were clearly satisfied, his analysis addressed the final issue of whether a trial justice operating under the POA is empowered, independently of the Charter, to issue an award of costs.

9 McRae J. concluded that the POA does not confer jurisdiction to award legal fees; in fact, he observed that the history and structure of the POA evinced a [page583] clear legislative intention to preclude such awards. Further, he concluded that the Provincial Division, as a statutory court, has no inherent or additional jurisdiction with respect to the award of costs against the Crown in provincial offences proceedings. Absent statutory or inherent jurisdiction to order costs under the POA, McRae J. held that such jurisdiction could not flow under s. 24(1). In this regard, he distinguished a series of cases where such jurisdiction was found in provincial courts operating under the Criminal Code, R.S.C. 1985, c. C-46, noting that these cases involved the expansion of existing statutory authority to order costs against the Crown. Since the provincial offences court lacked this original jurisdiction, it could not constitute a "court of competent jurisdiction" to order the remedy sought in this case.

C. Ontario Court of Appeal (1998), 42 O.R. (3d) 354

10 The Ontario Court of Appeal, per O'Connor J.A., allowed the appeal on the basis that s. 90(2) of the POA empowers a provincial offences court to order costs against the Crown, albeit in limited circumstances, and that this sufficed to establish jurisdiction under s. 24(1) to make an award of costs for a Charter breach.

11 O'Connor J.A. noted that the discretion conferred by s. 90(2) on POA justices to "make such order as the court considers appropriate" is exceedingly broad on its face. Moreover, he found nothing in the language or scheme of s. 90(2), or the POA as a whole, that indicated an intention to limit or restrict the ordinary meaning of this provision. Consequently, he concluded at p. 360 that s. 90(2), unlike the other costs provisions in the POA, "confers a broad and general power that includes, but ... is not limited to, ordering the payment of witness costs". This power extends

to the award of legal [page584] costs against the Crown where the court is satisfied that the defendant has been misled by certain procedural irregularities, as set out under s. 90(1).

12 The remaining question was whether this narrow remedial jurisdiction under the POA satisfies the requirement of "power to grant the remedy sought" necessary to constitute a court of competent jurisdiction under s. 24(1). O'Connor J.A. concluded that it did. Even a narrowly prescribed authority to issue a remedy, in his opinion, suffices to enable the court to make the same type of remedial order for a Charter breach. Where, as here, a court has the power to make the type of order sought (i.e. for legal costs) independently of the Charter, even in very limited circumstances, it also has the power to make the same order for a Charter breach under s. 24(1). Having concluded that justice of the peace Harris had jurisdiction to make the costs award for the Charter breach, the Court of Appeal remanded the case to the General Division to determine whether in the circumstances of the case he erred in granting costs.

IV. Issue

13 The sole issue is whether a trial justice acting under the Ontario Provincial Offences Act has the power to award costs for a Charter breach.

V. Analysis

14 The Charter guarantees the fundamental rights and freedoms of all Canadians. It does this through two kinds of provisions. The first are provisions describing the rights and freedoms guaranteed. The second are provisions providing remedies or sanctions for breaches of these rights. If a law is inconsistent with the Charter, s. 52 of the Constitution Act, 1982 provides that it is invalid to the extent of [page585] the inconsistency. On the other hand, if a government action is inconsistent with the Charter, s. 24 provides remedies for the inconsistency. If the violation produced evidence that the Crown seeks to use against the accused, s. 24(2) provides that the court must exclude the evidence if its admission would bring the administration of justice into disrepute. In other cases, s. 24(1) permits a "court of competent jurisdiction" to provide "such remedy as the court considers appropriate and just in the circumstances". If a remedy is to be had in the instant case, it must issue under s. 24(1).

15 The essential issue is whether the trial justice who ordered the Crown to pay costs is a "court of competent jurisdiction" under s. 24(1) to make such an award. This Court has considered the attributes of a "court of competent jurisdiction" on a number of occasions, commencing with its seminal decision in Mills, supra. In that case, Lamer J. (as he then was), with whom all agreed on this point, defined a "court of competent jurisdiction" as one that possesses (1) jurisdiction over the person; (2) jurisdiction over the subject matter; and (3) jurisdiction to grant the remedy (p. 890). Subsequent decisions of this Court have affirmed this three-tiered test for identifying the courts and tribunals competent to issue Charter remedies under s. 24: Weber v. Ontario Hydro, [1995] 2 S.C.R. 929; Mooring v. Canada (National Parole Board), [1996] 1 S.C.R. 75. Only where a court or tribunal possesses all three attributes is it considered a "court of competent jurisdiction" for the purpose of ordering the desired Charter relief under s. 24.

16 In the present case, the jurisdiction of the provincial offences court over the parties and the subject matter is uncontested. The dispute between the parties centres on the third and final attribute of a court of competent jurisdiction: the power to grant the remedy sought. In determining whether the POA justice in this case possessed the "power to grant the remedy sought", namely legal costs, we are guided [page586] by the principles set out in previous decisions, and the approach these decisions mandate to interpreting s. 24 of the Charter.

A. Section 24: Principles of Interpretation

17 In interpreting the phrase "court of competent jurisdiction", we must keep in mind four related propositions. These propositions have informed the Court's approach to s. 24 since it first considered this provision in Mills.

18 First, s. 24(1), like all Charter provisions, commands a broad and purposive interpretation. This section forms a vital part of the Charter, and must be construed generously, in a manner that best ensures the attainment of its objects: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344; Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 155; Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, at p. 1134. Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a "large and liberal" interpretation: British Columbia Development Corp. v. Friedmann, [1984] 2 S.C.R. 447, at p. 458; Toronto Area Transit Operating Authority v. Dell Holdings Ltd., [1997] 1 S.C.R. 32, at para. 21. Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of Charter rights. In Mills, McIntyre J. observed at p. 965 that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion". This broad remedial mandate for s. 24(1) should not be frustrated by a "[n]arrow and technical" reading of the provision (see Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, at p. 366).

19 The second proposition flows from the first: s. 24 must be interpreted in a way that achieves its [page587] purpose of upholding Charter rights by providing effective remedies for their breach. If the Court's past decisions concerning s. 24(1) can be reduced to a single theme, it is that s. 24(1) must be interpreted in a manner that provides a full, effective and meaningful remedy for Charter violations: Mills, supra, at pp. 881-82 (per Lamer J.), p. 953 (per McIntyre J.); Mooring, supra, at paras. 50-52 (per Major J.). As Lamer J. observed in Mills, s. 24(1) "establishes the right to a remedy as the foundation stone for the effective enforcement of Charter rights" (p. 881). Through the provision of an enforcement mechanism, s. 24(1) "above all else ensures that the Charter will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians" (p. 881).

20 Section 24(1)'s interpretation necessarily resonates across all Charter rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach. From the outset, this Court has characterized the purpose of s. 24(1) as the provision of a "direct remedy" (Mills, supra, p. 953, per McIntyre J.). As Lamer J. stated in Mills, "[a] remedy must be easily available and constitutional rights should not be 'smothered in procedural delays and difficulties'" (p. 882). Anything less would undermine the role of s. 24(1) as a cornerstone upon which the rights and freedoms guaranteed by the Charter are founded, and a critical means by which they are realized and preserved.

21 The third proposition guiding the interpretation of s. 24 is that subs. (1) and (2) must be read together to create a harmonious interpretation. The conjunction of the two subsections, one dealing with remedies in general and the other dealing with exclusion of evidence that would bring the administration of justice into disrepute, suggests that both are concerned with providing remedies for Charter breaches. Moreover, the remedies under each of the two subsections are confined to "court[s] of competent jurisdiction". Thus this phrase must be [page588] interpreted in a way that produces just and workable results for both the grant of general remedies and the exclusion of evidence in particular.

22 The final proposition is that s. 24 should not be read so broadly that it endows courts and tribunals with powers that they were never intended to exercise. The jurisdictions of Canada's various courts and tribunals are fixed by Parliament and the legislatures, not by judges: Mills, supra, at p. 952 (per McIntyre J.). It is Parliament or the legislature that determines if a court or tribunal is a "court of competent jurisdiction": Weber, supra, at para. 65. Legislative intention is the guiding light in identifying courts of competent jurisdiction.

23 As McIntyre J. cautioned in Mills, supra, at p. 953, the Charter was not intended to "turn the Canadian legal system upside down". The task facing the court is to interpret s. 24(1) in a manner that provides direct access to Charter remedies while respecting, so far as possible, "the existing jurisdictional scheme of the courts": Mills, at p. 953 (per McIntyre J.); see also the comments of La Forest J. (at p. 971) and Lamer J. (at p. 882) in the same case; and Weber, supra, at para. 63. The framers of the Charter did not intend to erase the constitutional distinctions between different types of courts, nor to intrude on legislative powers more than necessary to achieve the aims of the Charter.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295

Supreme Court Reports

Supreme Court of Canada

Present: Ritchie *, Dickson, Beetz, McIntyre, Chouinard, Lamer and Wilson JJ.

1984: March 6, 7 / 1985: April 24.

File No.: 18125.

[1985] 1 S.C.R. 295 | [1985] 1 R.C.S. 295 | [1985] S.C.J. No. 17 | [1985] A.C.S. no 17

Her Majesty The Queen, appellant; and Big M Drug Mart Ltd., respondent; and The Attorney General of Canada, the Attorney General of New Brunswick and the Attorney General of Saskatchewan, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

* Ritchie J. took no part in the judgment.

Case Summary

Constitutional law — Canadian Charter of Rights and Freedoms — Freedom of conscience and religion — Lord's Day Act and Sunday observance — Whether or not Lord's Day Act in violation of Charter guarantee of freedom of conscience and religion — Whether or not Act a reasonable limit demonstrably justifiable in a free and democratic society — Whether or not Act enacted pursuant to criminal law power — Canadian Charter of Rights and Freedoms, ss. 1, 2(a), 24(1), 27, 32(1) — Constitution Act, 1867, ss. 91, 92, 93 — Constitution Act, 1982, s. 52(1) — Lord's Day Act, R.S.C. 1970, c. L-13, s. 4.

The respondent, Big M Drug Mart Ltd. was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the Lord's Day Act. Respondent was acquitted at trial. The Court of Appeal dismissed the appeal. The constitutional questions before this Court were whether the Lord's Day Act, and especially s. 4, (i) infringed the right to freedom of conscience and religion guaranteed in the Charter; (ii) were justified by s. 1 of the Charter; and (iii) were enacted pursuant to the criminal law power (s. 91(27)) of the Constitution Act, 1867.

Held: The appeal should be dismissed.

Per Dickson, Beetz, McIntyre, Chouinard and Lamer JJ.: Respondent is entitled to challenge the validity of the Lord's Day Act on the basis that it violates the Charter guarantee of freedom of conscience and religion. Recourse to s. 24 is unnecessary where the challenge [page296] is based on the unconstitutionality of the legislation. The supremacy of the Constitution declared in s. 52 dictates that no one can be convicted under an unconstitutional law. Any accused, whether corporate or individual, may defend a criminal charge by arguing the constitutional invalidity of the law under which the charge is brought.

The initial test of constitutionality must be whether or not the legislation's purpose is valid; the legislation's effects need only he considered when the law under review has passed the purpose test. The effects test can never he relied on to save legislation with an invalid purpose.

The Lord's Day Act cannot be found to have a secular purpose on the basis of changed social conditions. Legislative purpose is the function of the intent of those who draft and then enact the legislation at the time and

not of any shifting variable.

Since the acknowledged purpose of the Lord's Day Act, on long-standing and consistently maintained authority, is the compulsion of religious observance, that Act offends freedom of religion and it is unnecessary to consider the actual impact of Sunday closing upon religious freedom. Legislation whose purpose is found to violate the Charter cannot be saved even if its effects were found to be inoffensive. Robertson and Rosetanni, which considered freedom of religion under s. 1 of the Canadian Bill of Rights, is of no assistance since the application and not the constitutionality of the legislation was in issue.

The Lord's Day Act to the extent that it binds all to a sectarian Christian ideal, works a form of coercion inimical to the spirit of the Charter. The Act gives the appearance of discrimination against non-Christian Canadians. Religious values rooted in Christian morality are translated into a positive law binding on believers and non-believers alike. Non-Christians are prohibited for religious reasons from carrying out otherwise lawful, moral and normal activities. Any law, purely religious in purpose, which denies non-Christians the right to work on Sunday denies them the right to practise their religion and infringes their religious freedom. The protection of one religion and the concomitant non-protection of others imports a disparate impact destructive of the religious freedom of society.

[page297]

The power to compel, on religious grounds, the universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multi-cultural heritage of Canadians recognized in s. 27 of the Charter.

The appellant did not establish that the Lord's Day Act constituted a reasonable limit, demonstrably justifiable in a free and democratic society, and therefore it cannot be saved pursuant to s. 1 of the Charter.

The Lord's Day Act is enacted pursuant to the criminal law power under s. 91(27) of the Constitution Act, 1867. It compels the observance of a religious duty by means of prohibitions and penalties, and is therefore directed towards the maintenance of public order and the safeguarding of public morality.

Per Wilson J.: The approach of the courts to the constitutional validity of legislation in alleged violation of the Charter is different from the approach to the constitutional validity of legislation impugned under the division of powers. Since the Charter is first and foremost an effects-oriented document, the first stage of any analysis must be to inquire whether the legislation has the effect of violating an entrenched right. If it has, then it is not necessary to consider the purpose behind the enactment at this stage.

Section 1, however, will entail an analysis and evaluation of the purpose underlying the impugned legislation if the government seeks to justify a limitation on the citizen's right under that section. The government policy objective must then be assessed and a determination made as to whether this interest is sufficiently important to override a Charter right and whether the means chosen to achieve that objective were reasonable. The objective asserted as a reasonable limit under s. 1 will necessarily reflect the purpose of the enactment in the division of powers analysis.

Cases Cited

Attorney-General for Ontario v. Hamilton Street Railway Co., [1903] A.C. 524; Ouimet v. Bazin (1912), 46 S.C.R. 502; Saumur v. Quebec (City of), [1953] 2 S.C.R. 299; Henry Birks & Sons (Montreal) Ltd. v. City of Montreal, (1955] S.C.R. 799; Hamilton (City of) v. Canadian Transport Commission, [1978] 1 S.C.R. 640; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, considered; Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651; McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld [page298] v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582

> the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

84 I would note that this approach would seem to have been taken by this Court, in its unanimous decision in Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66. When the Court looked for an obvious example of legislation that constituted a total negation of a right guaranteed by the Charter, and [page333] therefore one to which the limitation in s. 1 of the Charter could not apply, it recited the following hypothetical at p. 88:

> An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the Charter, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1.

85 If the acknowledged purpose of the Lord's Day Act, namely, the compulsion of sabbatical observance, offends freedom of religion, it is then unnecessary to consider the actual impact of Sunday closing upon religious freedom. Even if such effects were found inoffensive, as the Attorney General of Alberta urges, this could not save legislation whose purpose has been found to violate the Charter's guarantees. In any event, I would find it difficult to conceive of legislation with an unconstitutional purpose, where the effects would not also be unconstitutional.

86 Robertson and Rosetanni, supra, cannot be of assistance for the simple reason that, in applying an interpretive standard of statutory weight, the application and not the constitutionality of the legislation was in issue. This was recognized by the majority when, at p. 657, it held that the effect rather than the purpose of legislation fell to be assessed, because it was testing not the vires of the legislation, but whether its "application" offended religious freedom.

87 Furthermore, the reliance upon effect to the exclusion of purpose in Robertson and Rosetanni, supra, has been severely criticized: see for example, Laskin, "Freedom of Religion and the Lord's Day Act" (1964), 42 Can. Bar Rev. 147; Finkelstein, "The Relevance of Pre-Charter Case Law for Post-Charter Adjudication" (1982), 4 Supreme Court L.R. 267; Cotler, "Freedom of Assembly Association, Conscience and Religion" in The Canadian Charter of Rights and Freedoms: Commentary, Tarnopolsky and Beaudoin eds., supra, 123, at pp. 201-207. Many of these criticisms are telling.

[page334]

88 In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

89 A second related submission is made by the Attorney General of Saskatchewan with respect to the characterization of the Lord's Day Act. Both Stevenson, Prov. Ct. J., at trial, and the American Supreme Court, in its quartet on Sunday observance legislation, suggest that the purpose of legislation may shift, or be transformed over time by changing social conditions. This submission is related to the argument that the emphasis should be on "effects" rather than "purposes". It is urged that courts, in ignoring the religious motivation for the legislation as well as its religious terminology are implicitly assessing the legislation's effects rather than the purposes which originally underlay its enactment. (See, for example, Frankfurter J. in McGowan v. Maryland, supra, at p. 466.) A number of objections can be advanced to this "shifting purpose" argument.

90 First, there are the practical difficulties. No legislation would be safe from a revised judicial assessment of

purpose. Laws assumed valid on the basis of persuasive and powerful authority could, at any time, be struck down as invalid. Not only would this create uncertainty in the law, but it would encourage re-litigation of the same issues and, it could be argued, provide the courts with a [page335] means by which to arrive at a result dictated by other than legal considerations. It could effectively end the doctrine of stare decisis in division of power cases. This concern underlay the judgment of Viscount Simon in Attorney- General for Ontario v. Canada Temperance Foundation, [1946] A.C. 193, at p. 206, wherein he refused to re-characterize the Canada Temperance Act, R.S.C. 1927, c. 196:

> ... on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects. In the present case the decision now sought to be overruled has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered.

91 Furthermore, the theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of "Parliamentary intention". Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.

92 As Laskin C.J. has suggested in R. v. Zelensky, [1978] 2 S.C.R. 940, at p. 951, "new appreciations" and "re-assessments" may justify a re-interpretation of the scope of legislative power. While this may alter over time the breadth of the various heads of power and thereby affect the classification of legislation, it does not affect the characterization of the purpose of legislation, in this case the Lord's Day Act. As the Law Reform Commission of Canada observed in its Report on Sunday Observance (1978) at p. 42:

[page336]

> While the Supreme Court has never said so explicitly, it would seem apparent that any recharacterization of the Lord's Day Act in a modern context so as to provide a clarification of the province's role with respect to Sunday legislation is a task the Parliament of Canada and the provincial legislatures will have to take up directly.

93 While the effect of such legislation as the Lord's Day Act may be more secular today than it was in 1677 or in 1906, such a finding cannot justify a conclusion that its purpose has similarly changed. In result, therefore, the Lord's Day Act must be characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance.

VII

Freedom of Religion

94 A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

95 Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which

determine or limit [page337] alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

96 What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".

97 To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.

98 Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal. The arm of the state requires all to remember the Lord's day of the Christians and to keep it holy. The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.

99 I agree with the submission of the respondent that to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural [page338] heritage of Canadians. To do so is contrary to the expressed provisions of s. 27, which as earlier noted reads:

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

As Mr. Justice Laycraft wrote at p. 642:

> Whatever the origins of the division of belief, it is indisputable that there can now be seen among Canadians different deeply held beliefs of religion and conscience on this subject. One group, probably the majority, accepts Sunday as the Lord's Day. Another group consisting of those of the Jewish faith, and Sabbatarians whose religious beliefs do not accept Sunday as the Lord's Day distinct from Sabbath on the seventh day of the week, believe in Saturday as their holy day. Canadians of the Muslim religion observe Friday as their holy day. Some Canadians who have no theistic belief, while perhaps accepting the concept of a day for rest and recreation, object to the enforcement of a Christian Sunday.

100 If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.

101 Professor Barron, in the Harvard Law Review article to which I have referred, speaks, at p. 53, of the dissent of Cartwright J. in Robertson and Rosetanni:

> For the Justice, Sunday has a very special and ceremonial significance in our culture, because of the religious meaning that has historically attached to the day. It is enforced homage to that religious Sunday of history that constitutes a forced abandonment of one of the precepts of the Sabbatarian's religion: the belief that only the Sabbath is a day of rest proclaimed by God. It is this homage that constitutes a burden on the free exercise of his religion. The Sabbatarian, the agnostic, and the indifferent Christian may not be

R. v. Carosella, [1997] 1 S.C.R. 80

Supreme Court Reports

Supreme Court of Canada

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

1996: June 19 / 1997: February 6.

File No.: 24974.

[1997] 1 S.C.R. 80 | [1997] 1 R.C.S. 80 | [1997] S.C.J. No. 12 | [1997] A.C.S. no 12

Nick Carosella, appellant; v. Her Majesty The Queen, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Constitutional law — Charter of Rights — Fundamental justice — Full answer and defence — Disclosure — Destruction of evidence by third party — Complainant interviewed by sexual assault crisis centre social worker — Accused later charged with gross indecency — Notes made by social worker during interview with complainant destroyed by centre prior to court ordering production of complainant's file — Whether failure to produce notes breached accused's right to full answer and defence — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Remedy — Destruction of evidence by third party — Complainant interviewed by sexual assault crisis centre social worker — Accused later charged with gross indecency — Notes made by social worker during interview with complainant destroyed by centre prior to court ordering production of complainant's file — Accused's right to full answer and defence breached — Whether stay of proceedings appropriate remedy — Canadian Charter of Rights and Freedoms, s. 24(1).

In 1992, the complainant went to a sexual assault crisis centre for advice as to how to lay charges against the accused for sexual abuse that she alleged occurred in 1964 when she was a student in a school in which the accused was a teacher. The centre is provided with government funding pursuant to the terms of a comprehensive agreement which requires the centre, inter alia, to develop a close liaison with justice agencies and to maintain as confidential and secure all material that is under the centre's control, which is not to be disclosed except where required by law. The complainant was interviewed by a social worker for about an hour and forty-five minutes. During the interview, the social worker took notes and informed the complainant that whatever she said could be subpoenaed to court. The complainant said that was quite all right. Following the interview, the complainant contacted the police and shortly thereafter the accused was charged with gross indecency. After the preliminary inquiry, at which the complainant testified and was cross-examined, the accused was ordered to stand trial. In October 1994, prior to the commencement of the trial, the defence brought an application for production of the centre's file concerning the complainant. The Crown, the complainant and the centre consented to the order. When the file was produced, it did not contain the notes of the complainant's interview. A voir dire was held which indicated that the notes had been destroyed in April 1994 pursuant to the centre's policy of shredding files with police involvement before being served in relation to criminal proceedings. The social worker who had conducted the interview and later shredded the notes had no recollection of the contents of the destroyed notes. By consent, the case to meet was tendered by the Crown. It included the police officer's notes of his interview with the complainant made one day after she attended the centre, the complainant's police statement, her testimony at the preliminary inquiry, and other evidence. Based on this

material, the trial judge ruled on the defence's application for a stay of proceedings. He found that the destroyed notes were relevant and material and that they would more likely than not tend to assist the accused. He concluded that their destruction had seriously prejudiced the accused by depriving him of the opportunity to cross-examine the complainant as to her previous statements relating to the allegations she made and that, as a result, the accused's Charter right to make full answer and defence had been breached. Since it would be unfair, in such circumstances, to permit the prosecution to proceed, the trial judge ordered a stay of proceedings. The Court of Appeal set aside the order and directed the matter to proceed to trial. The court stated that the evidence must disclose something more than a "mere risk" to a Charter right and that in this case no realistic appraisal of the probable effect of the lost notes could support the conclusion that the accused's right to make full answer and defence was compromised.

Held (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting): The appeal should be allowed.

Per Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: An accused who alleges a breach of his right to make full answer and defence as a result of non-disclosure or non-production is not required to show that the conduct of his defence was prejudiced. The question of the degree of prejudice suffered by an accused is not a consideration to be addressed in the context of determining whether a substantive Charter right has been breached. The extent to which the Charter violation caused prejudice to the accused falls to be considered only at the remedy stage of a Charter analysis.

The foundation for the Crown's obligation to produce material which may affect the conduct of the defence is that failure to do so would breach the accused's constitutional right to make full answer and defence. The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice. The breach of this principle of fundamental justice is in itself prejudicial. It is immaterial that the right to disclosure is not explicitly listed as one of the components of the principles of fundamental justice. The components of the right cannot be separated from the right itself. The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the Charter. It follows that if the material which was destroyed meets the threshold test for disclosure or production, the accused's Charter right was breached without the requirement of showing additional prejudice.

In this case, the complainant consented to the application for production and it is clear, given the circumstances, that the file would have been disclosed to the Crown. As material in the possession of the Crown, only the Stinchcombe standard would have applied; however, even if the higher O'Connor standard relating to production from third parties was applicable, both standards were met in this case. There was abundant evidence before the trial judge to enable him to conclude that there was a reasonable possibility that the information contained in the notes that were destroyed was logically probative to an issue at the trial as to the credibility of the complainant. Once the material satisfied the O'Connor relevance test, the balancing required in the second stage of the test would have inevitably resulted in an order to produce since confidentiality had been waived and since the complainant and the Crown consented to production. The destruction of this material and its consequent non-disclosure resulted in a breach of the accused's constitutional right to full answer and defence.

The trial judge did not err in finding that a stay of proceedings was the appropriate remedy in the circumstances of this case. He instructed himself in accordance with the appropriate standard that the power to grant a stay is one that should only be exercised in the clearest of cases. Noting that credibility was a major issue in the case, the trial judge found that the destruction of the notes was significant and had seriously prejudiced the accused, depriving him of his basic right of the opportunity to cross-examine the complainant on previous statements made by her as to the incidents, and, as a result, had substantially impaired the accused's ability to make full answer and defence. The notes represented the first detailed account of the alleged incidents and constituted the only written record which was not created as a result of an investigation. Since the complainant would not likely admit that what was said was inconsistent with her testimony, any possibility of contradiction of the complainant by reference to her previous account was destroyed.

The presence of either one of the following two factors justifies the exercise of discretion in favour of a stay: no alternative remedy would cure the prejudice to the accused's ability to make full answer and defence, and

irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued. The presence of the first factor cannot be denied. With respect to the second, the complete absence of any remedy to redress or mitigate the consequences of a deliberate destruction of material in order to deprive the court and the accused of relevant evidence would damage the image of the administration of justice. Confidence in the system would be undermined if the court condoned conduct designed to defeat the processes of the court by an agency that receives public money and whose actions are scrutinized by the provincial government.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. (dissenting): This case is not about disclosure. Disclosure is a concept which is binding solely upon the Crown. This duty to disclose does not extend to third parties. Nor does it impose an obligation upon the Crown to comb the world for information which might be of possible relevance to the defence. The centre is a third party, a party which has no obligation to preserve evidence for prosecutions or otherwise. Its policy decisions are for itself to determine and not for the Crown, the accused or the courts to interfere with, so long as it acts within the confines of the law. As well, this case is not, strictly speaking, about the production of records since the material requested is no longer available to be produced. The key issue is in what circumstances the unavailability of material previously held by a third party translates into a violation of an accused's rights. Although there would appear to be no government action which would trigger the Charter's application in this case -- the accused's allegation concerns the actions of the centre -- the Charter is engaged by the fact of the prosecution itself. Where the Crown pursues a prosecution which would result in an unfair trial, this constitutes state action for the purposes of the Charter.

While the production of every relevant piece of evidence might be an ideal goal from the accused's point of view, it is inaccurate to elevate this objective to a right, the non-performance of which leads instantaneously to an unfair trial. Where evidence is unavailable, the accused must demonstrate that a fair trial, and not a perfect one, cannot be had as a result of the loss. He must establish a real likelihood of prejudice to his defence; it is not enough to speculate that there is the potential for harm. Materials can be easily lost and setting too low a threshold for finding a breach of the right to full answer and defence would bring the justice system to a halt. While it is true that, with regard to certain rights, a court can infer the necessary degree of prejudice, this is not uniformly so. Where an accused alleges a violation of ss. 7 and 11(d) of the Charter, he will often have to demonstrate harm to his interests before a breach can be established. This is so because ss. 7 and 11(d) encompass extremely broad and multifaceted concerns, and not every action by the state will automatically trigger a violation. To demonstrate that a breach has actually occurred often demands a finding and measuring of the prejudice suffered. Given the nature of the action which is being challenged in the present case - the actual pursuing of the prosecution - it seems quite appropriate to require a demonstration of a real likelihood of prejudice. There are ample legal and policy reasons for placing this onus upon the accused. The burden is not an unmanageable one and is consistent with established jurisprudence. For missing evidence to cause a violation of the Charter, therefore, the accused must demonstrate upon a balance of probabilities that the absence of the evidence denies him a fair trial. For this to happen, there must be a real likelihood of prejudice to the right to full answer and defence, in that the evidence if available would have been more likely than not to assist the accused. It is not proper to state that a Charter right has been violated and that a fair trial cannot be had based on pure speculation.

In this case, the trial judge erred in not properly considering whether or not the accused had actually suffered a violation of his Charter rights by measuring the prejudice caused by the absence of the impugned material. Any loss was no more than a mere speculative risk to the accused's rights. Furthermore, if a proper inquiry into the need for the documents had been held, these notes would not even have met the standard for production to the trial judge set out in O'Connor since there is no basis to conclude that they were "likely relevant", aside from the bare assertion of the defence that the material could somehow have been used to cross-examine the complainant. If this lower standard is not met, the more difficult onus of showing prejudice to the accused's fair trial interest will also not be satisfied. The defence's request for production amounted to no more than a fishing expedition in the hopes of uncovering a prior inconsistent statement. Despite the finding of the trial judge, nothing on the record suggests that there was any discussion between the complainant and the social worker about the actual details of the events themselves. More importantly, the defence never asked a question about the details of the conversations to the complainant -- the one person who could have answered whether they were relevant or not. While there was some evidence indicating that the complainant spoke of the offence, this is a long way

from saying that there were details given which could have impacted upon her credibility on a material issue if she were to be cross-examined. Finally, it should not be inferred from the sheer length of the conversations between the complainant and the social worker that there were notes made which could have been of assistance.

Since the notes were not "likely relevant", to accept the trial judge's finding that there was undoubtedly prejudice occasioned by their loss would involve a major "leap of logic". Moreover, these notes were merely a summary, and not a detailed recounting of the interview, and it is highly likely that anything which did appear inconsistent would have been of such low value given the circumstances that the prejudice from allowing the complainant to be cross-examined upon them would have outweighed any potential probative value. Even if the defence could have cross-examined the complainant on the destroyed notes, or laid a foundation for such cross-examination, their absence does not demonstrate prejudice in the context of this case. The defence had no shortage of material upon which to test the complainant's credibility and there is no indication that the notes made at the centre would have been materially different from the two detailed statements given to the police. In addition, the complainant was subject to cross-examination at the preliminary inquiry, in which the defence probed deeply into the details of the alleged offence. In light of the multitude of evidence which was available to the accused, it is purely speculative to suggest that anything the complainant said to the social worker may have been materially inconsistent, and even if it was, that it was not duplicated by what was available to the defence. The accused did not demonstrate a real likelihood of prejudice to his ability to make full answer and defence and, therefore, there was no breach of his rights in this regard.

Before coming to a concrete assessment of the appropriate remedy in a case where missing evidence is shown to affect the accused's right to full answer and defence, the trial judge must consider all the evidence and the assessment must be done in its proper context. A stay of proceedings should continue to be a remedy of last resort, and should come into play only in the "clearest of cases" where the prejudice suffered is irreparable, and no other remedy will suffice. The key factor in assessing whether other remedies are possible will be an examination of how the evidence could have potentially impacted upon the Crown's case.

The centre's conduct was not an abuse of process by virtue of being an affront to the judicial system. First, this "residual category" of abuse of process focuses on the motives and conduct of the prosecution, not on the motives of third parties. The question is whether the prosecution undermines the moral integrity of the system. The conduct of a third party cannot, unless it affects the fairness of the trial, disentitle the Crown to proceed with a case which it believes in good faith to be suitable for prosecution. Here, whatever the motives of the centre, the Crown was not abusing the court's process. The suggestion that the centre can be considered an arm of the Attorney General, or even a government agency, because it receives funding from the government and must follow certain guidelines in the process, cannot be seriously entertained. Second, even if third parties' conduct were relevant, the centre's conduct was not such an affront to the judicial system that it could be characterized as an abuse of process. The centre was not acting out of generalized animus against persons accused of sexual assault or at the instigation of the Crown. Rather, the centre was implementing a general policy designed to protect its clients' privacy. It was also under no obligation to create or maintain records. To suggest that a court should be able to enforce an obligation maintenance to property which might one day be needed by the courts is a hefty burden. The procedure set out in O'Connor does not impose a special obligation on therapists and counsellors to create or retain records.

Cases Cited

By Sopinka J.

Referred to: R. v. Osolin, [1993] 4 S.C.R. 595; R. v. Young (1984), 46 O.R. (2d) 520; R. v. Stinchcombe, [1991] 3 S.C.R. 326; R. v. Stinchcombe (No. 2) (1994), 149 A.R. 167, aff'd [1995] 1 S.C.R. 754; R. v. O'Connor, [1995] 4

49 In Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at pp. 76-77, La Forest J. cited with approval the following passage from Charles Osenton & Co. v. Johnston, [1942] A.C. 130, at p. 138:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

These principles were reaffirmed by this Court in Reza v. Canada, [1994] 2 S.C.R. 394, at pp. 404-5.

50 It is only after reaching the conclusion that the discretion has not been exercised in accordance with these principles that an appellate court is entitled to exercise a discretion of its own. See Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110.

51 The Court of Appeal was of the view that the trial judge erred in finding that the appellant's right to make full answer was breached. This was the basis for the intervention by the Court of Appeal in reversing the exercise by the trial judge of his discretion under s. 24(1). I have concluded that the Court of Appeal erred in this regard and that therefore this is not a valid reason for review of the trial judge's decision. Moreover, I am of the view that the trial judge did not misdirect himself nor is his decision clearly wrong. Indeed, I am of the view that he reached the right result.

52 A judicial stay of proceedings has been recognized as being an extraordinary remedy that should only be granted in the "clearest of cases". In her reasons in O'Connor, L'Heureux-Dubé J. stated (at para. 82) that:

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

53 The trial judge, in determining that a stay of proceedings was an appropriate remedy in the circumstances of this case, instructed himself in accordance with the standard in Young, supra, that the power to grant a stay is one that should only be exercised in the clearest of cases. That is the standard adopted by this Court. He further noted that credibility was a major issue in the case, and that as a result, the destruction of the documents was very significant. The trial judge stated (at pp. 308-9) that:

> Here the alleged incidents with which the accused is confronted occurred some 30 years ago and I find that the accused has been seriously prejudiced, being deprived of his basic right of the opportunity to cross-examine the complainant on previous statements made by her as to the very incidents of sexual misconduct between her and the accused which are the subject matter of the indictment. That deprivation was caused by the deliberate actions of employees of the Sexual Assault Crisis Centre in destroying the complainant's file without her consent, solely for the purpose of presenting [sic] the opportunity for cross-examination by the accused in this trial and which would more than likely have assisted the accused in his defence. The accused has had his ability to make full answer and defence substantially impaired by the destruction of the complainant's file and, therefore, I find that his rights have been infringed under ss. 7 and 11(d) of the Charter and it would be unfair to allow the prosecution to proceed where the accused has been deprived of that opportunity to cross-examine the complainant on statements previously made when

> substantially the whole of the Crown's case is based on the credibility of the complainant. [Emphasis added.]

54 In addition to the factors mentioned by the trial judge in considering the propriety of a stay of proceedings, there are other factors in this case which, in my view, merit consideration. As noted above, the notes taken by the Centre worker represented the first detailed account of the alleged incidents. The notes constituted the only written record of the alleged incidents which were not created as a result of an investigation. The only other statements by the complainant were to the police and at the preliminary inquiry. The social worker Romanello had no recollection whatever of what was said to her. As for the complainant, even if she could recall she would not likely admit that what was said was inconsistent with her present testimony. As a result, any possibility of contradiction of the complainant by reference to her previous account was destroyed.

55 An additional important factor is the absence of any alternative remedy that would cure the prejudice to the ability of the accused to make full answer and defence. No alternative remedy was suggested by the Court of Appeal. This is one of the two factors mentioned by L'Heureux-Dubé J. in the portion of her reasons to which I have referred. The other factor is irreparable prejudice to the integrity of the judicial system if the prosecution were continued.

56 These two factors are alternatives. The presence of either one justifies the exercise of discretion in favour of a stay. The presence of the first factor cannot be denied. With respect to the second, in my opinion, the complete absence of any remedy to redress or mitigate the consequences of a deliberate destruction of material in order to deprive the court and the accused of relevant evidence would damage the image of the administration of justice. In this regard, the Court can take into account that the destruction of documents was carried out by an agency that not only receives public money but whose activities are scrutinized by the provincial government. The agency is required to develop a close liaison with justice agencies and secure material under its control which is not to be disclosed except where required by law. The justice system functions best and instils public confidence in its decisions when its processes are able to make available all relevant evidence which is not excluded by some overriding public policy. Confidence in the system would be undermined if the administration of justice condoned conduct designed to defeat the processes of the court. The agency made a decision to obstruct the course of justice by systematically destroying evidence which the practices of the court might require to be produced. This decision is not one for the agency to make. Under our system, which is governed by the rule of law, decisions as to which evidence is to be produced or admitted is for the courts. It is this feature of the appeal in particular that distinguishes this case from lost evidence cases generally.

57 I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment at trial staying the proceedings.

The reasons of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting)

58 This appeal puts into question the limitations of the criminal justice system.

59 The criminal justice system, being very much a human enterprise, possesses both the strengths and frailties of humanity. Lacking a flawless method for uncovering the truth, or a crystal ball which can magically recreate events, the court attempts to determine an accused's guilt or innocence based on the evidence before it. This search for justice does not operate perfectly, and in every trial there is likely to be some evidence bearing upon the case which does not appear before the trier of fact. Still, society expects courts of law to ascertain that person's guilt or innocence by way of a trial, and, subject to the uncertainties inherent in any human enterprise, to render a verdict that is true and just. It is a crucial role which should not be abdicated except in the most extreme cases.

60 In this case, a third party has destroyed documents which the appellant alleges are crucial to his defence, and which he cannot proceed without. He maintains that, as a result of such destruction, his rights under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms have been violated. The issue to be addressed in this case, therefore, is in what circumstances a court should intervene to halt a prosecution because of the actions of a third party which lead to materials being unavailable at trial.

61 My colleague has recounted the facts and judgments below and I need not repeat them in detail. In a nutshell, the third party in this case, the Sexual Assault Crisis Centre (the "Centre"), as a matter of policy, decided to destroy notes taken from sexual assault complainants in order to prevent their divulgation to anyone, including the courts, in an effort to guarantee their confidentiality. There is not one iota of evidence suggesting that such destruction was instigated by the Crown in any way.

62 After the preliminary inquiry, at which the complainant testified and was extensively cross-examined, the appellant was ordered to stand trial. Prior to trial, counsel for the appellant made a successful motion for production of the Centre's file on the complainant. When the file was produced, however, it became apparent that most of the material contained therein had been removed. A voir dire was held which indicated that notes of the complainant's interview with the counsellors at the Centre had been destroyed, and it was not possible to ascertain their content. By consent, the case to meet was tendered in evidence by the Crown, including the notes and written transcript of the complainant's interview with the police and other evidence including the complainant's testimony at the preliminary inquiry. Based upon this material, the trial judge ruled that the missing notes were relevant and that their unavailability rendered the trial unfair. For those reasons, he ordered a stay of proceedings: (1994), 35 C.R. (4th) 301. The Court of Appeal reversed this finding and ordered the continuation of the trial: (1995), 26 O.R. (3d) 209. This appeal comes to this Court as of right.

63 My colleague has concluded that the stay was in fact the proper result. Essentially, he treats this case as analogous to one of non-disclosure by the Crown. In his view, the destroyed material was relevant, and in not being available for production, the accused's right to make full answer and defence was impaired. As he puts it (at paras. 37 and 40):

> The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.
>
> . . .
>
> It follows from the foregoing that if the material which was destroyed meets the threshold test for disclosure or production, the appellant's Charter rights were breached without the requirement of showing additional prejudice.

64 With regard to the proper remedy, Sopinka J. concludes that the only possible way to repair the loss is to enter a stay of proceedings. In his view, this is one of the "clearest of cases" requiring a stay. He agrees with the trial judge that the documents were extremely significant to the case and concludes that their destruction irreparably prejudiced the appellant. In the alternative, he would institute a stay because there is no way of repairing the harm done to the appellant's rights. As the notes had been destroyed, no other remedy could rectify the situation.

65 I disagree with the result reached by my colleague and would dismiss the appeal. I also take a very different approach to the issues raised. For this reason, it seems appropriate at this point to clarify a few matters, in light of the assertions about this case made by Sopinka J.

66 First, in my view, this case has absolutely nothing to do with disclosure. While Sopinka J. speaks at great length of the "right to disclosure" and the obligation which rests to disclose, I feel constrained to point out that disclosure is

R. v. Clark

Alberta Judgments

Alberta Court of Queen's Bench

W.N. Renke J.

Heard: September 20 and 21, 2017.

Judgment: October 20, 2017.

Released: October 26, 2017.

Docket: 150871762Q1

Registry: Edmonton

[2017] A.J. No. 1119 | 2017 ABQB 643 | 395 C.R.R. (2d) 216

Between Her Majesty the Queen, Crown, and Tyson Richard Clark, Accused

(145 paras.)

Case Summary

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Protection against arbitrary detention or imprisonment — Protection against unreasonable search and seizure — Remedies for denial of rights — Specific remedies — Exclusion of evidence — Where administration of justice brought into disrepute — Determination of whether to exclude evidence of handgun — Evidence inadmissible — Police officer stopped vehicle owned by Clark's mother and in which he was passenger, after learning that it had been moving "in tandem" with one matching description of one connected with home invasion — Officer searched vehicle and found loaded handgun — There were violations of ss. 9 and 8 of Charter — Admission of evidence would bring administration of justice into disrepute — Canadian Charter of Rights and Freedoms, ss. 8, 9, 24(2).

Determination of whether to exclude evidence of a handgun. A police officer stopped a vehicle owned by Clark's mother and in which he was a passenger, after learning that it had been moving "in tandem" with one matching the description of one connected with a home invasion. The officer searched the vehicle and found a loaded handgun beneath his seat. He was not advised of the reasons for his detention until after the handgun was found and not able to contact a lawyer until more than two hours after the stop. Clark claimed violations of his rights under the Charter.

HELD: Evidence inadmissible.

There were violations of ss. 9, 8, 10(a) and 10(b) of the Charter. The officer did not have the legal authority to stop the vehicle under the investigative detention doctrine. The connection between the vehicle and the one that it had travelled with might have been suspicious, but that was all. Clark had a reasonable expectation of privacy in the vehicle. Admission of the evidence would bring the administration of justice into disrepute. The adverse impact of the Charter violations on Clark's liberty and privacy interest was significant. The multiple Charter violations aggravated the seriousness of the police conduct.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 8, s. 9, s. 10, s. 10(a), s. 10(b), s. 24, s. 24(2)

Traffic Safety Act, s. 166, s. 166(1), s. 167

Counsel

Richard Tchir, for the Crown.

Steve Smith, for the Accused.

Table of Contents

(b) Impact of the breach on the *Charter*-protected rights of the accused

(c) Seriousness of the *Charter*-infringing conduct

(d) On balance, does s. 24(2) require the exclusion of the Handgun evidence?

Reasons for Judgment on a *Voir Dire*

W.N. RENKE J.

1 Mr. Clark was charged with a set of firearm possession-related offences alleged to have occurred on July 21, 2015.

2 Mr. Clark was the passenger in a vehicle driven by Chantee Grant. The vehicle was stopped and searched by Sgt. Jason Forbes of the Edmonton Police Service. Sgt. Forbes located a loaded handgun (the Handgun) beneath the seat that had been occupied by Mr. Clark. The Handgun was a Ruger handgun with a 10-round capacity magazine. It was loaded with 3 live 40 calibre rounds.

3 A *voir dire* was held. The issues were whether Mr. Clark's *Charter* rights were violated in the course of the vehicle stop, the vehicle search, and after the search, and whether, if his rights were violated, evidence of the Handgun and its seizure from the vehicle should be excluded from trial under s. 24(2) of the *Charter*.

I. Background

4 The EPS were investigating a home invasion and shooting. The perpetrators were linked to a black Escalade SUV. The perpetrators were considered armed and dangerous. They were connected to a street gang. This investigation was discussed in the parade at the start of shift at the NE Division Police Station on July 21, 2015. All of the officers involved in this case worked from this station.

5 Mr. Clark was neither a suspect nor a person of interest in the investigation.

6 On July 21, 2015 at about 8:15 pm, Sgt. Forbes was on patrol in NE Edmonton without a partner. He was in uniform in a marked police vehicle, a Ford Explorer SUV. He spotted a black Escalade SUV matching the description of the vehicle connected with the home invasion (the Escalade). Two black men were in the Escalade. Two black men were suspects in the home invasion and shooting investigation. The Escalade was at an Automotive Shop that was itself a location of concern to the police as it was believed to be a site for criminal activities. The only vehicle Sgt. Forbes noted was the Escalade.

7 Sgt. Forbes called in a surveillance team and left the area. In uniform and in a marked vehicle, he was conspicuous.

8 The surveillance team responded. At about 8:45 pm, about half an hour after Sgt. Forbes had called in his observation of the Escalade, the surveillance team reported over the radio that the Escalade had left the Automotive Shop along with another vehicle, a Chrysler 300 (the Chrysler). The team described its colour and gave its licence plate number. The Escalade and the Chrysler were described as moving "in tandem." The vehicles travelled east-bound down 118 Avenue.

9 The Escalade was eventually stopped by police.

10 The Chrysler then travelled westbound down 118 Avenue. The Chrysler drove past Sgt. Forbes.

11 Sgt. Forbes pursued the Chrysler and caused it to stop in a gas station and convenience store parking lot. The time was about 8:48 p.m.

12 Ms. Grant and Mr. Clark were the occupants of the Chrysler. Following interactions involving Ms. Grant and Mr. Clark, Sgt. Forbes discovered the Handgun.

13 No fingerprints were found on the Handgun or its ammunition. A CIPC query respecting the serial number of the Handgun disclosed that it had been stolen from a gunshop in Brandon, Manitoba (the information from CIPC, while hearsay, was admissible through ***Ares v Venner***, [1970] SCR 608 and the principled exception to the hearsay rule).

14 After stopping the Chrysler, Sgt. Forbes radioed for back-up. At about 8:50 p.m. Cst. Murk, who did not have a partner, arrived first. He was in uniform but in an unmarked car. Subsequently, then-Cst. (now acting Sgt.) Farhat and Cst. Penny arrived in a marked Crown Victoria. Cst. Farhat seized the Handgun. He and Cst. Penny transported Mr. Clark to NE Division. Cst. VanVelzen also attended and transported Ms. Grant to NE Division. He arrived and left at about the same time as Cst. Penny and Cst. Farhat.

15 Sgt. Forbes' testimony was the centrepiece of the *voir dire*. In addition, the following EPS members testified: Cst. Murk, Cst. Farhat, Cst. Penny, and Cst. VanVelzen; Cst. Burns who searched Ms. Grant at NE Division; and Cst. Bourgeois, then with the Forensic Unit, who received and processed the Handgun. Debbie Godfrey, Mr. Clark's mother and the registered owner of the Chrysler, also testified.

16 I will address five questions concerning the claimed *Charter* violations:

(A) Was Mr. Clark arbitrarily detained through the stop of the Chrysler?

(B) Were Mr. Clark's rights violated in his interactions with Sgt. Forbes after the Chrysler was stopped and before it was searched?

(C) Were Mr. Clark's rights to be secure against unreasonable search and seizure violated by Sgt. Forbes' search of the Chrysler and the seizure of the Handgun?

(D) Were Mr. Clark's rights to counsel violated after the search of the Chrysler?

and, if any of Mr. Clark's *Charter* rights were violated,

(E) Must the evidence of the Handgun and connected evidence be excluded under s. 24(2) of the *Charter*?

I have borne in mind throughout that the burden of establishing *Charter* violations and the exclusion of evidence (absent any shifting of the burden) lies on Mr. Clark.

17 Before dealing with these issues, though, I must address an issue bearing on the assessment of Sgt. Forbes' testimony. Sgt. Forbes' notes of the events of the evening were, in Defence counsel's description, sparse. The notes had little detail. At one point, Sgt. Forbes had left a page and a half of his notebook blank so that he could fill in particulars later. He did not make detailed ongoing notes. Sgt. Forbes was at pains to explain that he had other responsibilities than making notes. He was a supervisor and had duties to attend to on the evening in question.

18 The difficulty is this: The events occurred in 2015. I would imagine that police officers like Sgt. Forbes are involved in multiple vehicle stops and interactions with vehicle occupants in weeks, in months, in years. All of us who deal with repetitive fact-situations -- that includes judges - can have difficulty remembering details of particular cases. Contemporaneous notes are very useful to document what occurred and to refresh the memory of officers when testifying. Justice Moldaver wrote in ***Wood v Schaeffer***, 2013 SCC 71 at para 66 that

> [66] ... The importance of police notes to the criminal justice system is obvious. As [the Honourable G.A.] Martin observed of properly-made notes:

> The notes of an investigator are often the most immediate source of the evidence relevant to the commission of a crime. The notes may be closest to what the witness actually saw or experienced. As the earliest record created, they may be the most accurate ...

Justice Moldaver stated at para 67 "that police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. Drawing on the remarks of Mr. Martin, such a duty to prepare notes is, at a minimum, implicit in an officer's duty to assist in the laying of charges and in prosecutions ..." See also ***R v Mascoe***, 2017 ONSC 4208, Hill J at paras 112 - 115.

19 Memory itself is an unreliable record. The mixing of facts from different cases, the recasting of initial recollections into a recalled narrative, and the sheer passage of time reduce the reliability of memory alone. The reliability of Sgt. Forbes' testimony was diminished by the absence of reasonably detailed notes. While I accept that a supervisor has responsibilities that may preclude creating reasonably detailed contemporaneous notes, that is an argument for supervisors not to be directly involved in investigations.

20 I have kept in mind that I may accept all, some, or none of the evidence of any witness.

II. Analysis

A. Was Mr. Clark arbitrarily detained through the stop of the Chrysler?

21 Under s. 9 of the *Charter* everyone has the right not to be arbitrarily detained.

22 Sgt. Forbes stopped the Chrysler in the parking lot. The driver and passenger were in the vehicle. The driver, Ms. Grant, was certainly detained. She was questioned about her driver's licence and the vehicle by Sgt. Forbes. Mr. Clark was eventually arrested. But before his arrest, was Mr. Clark detained and, if so, was his detention arbitrary?

1. Was Mr. Clark detained before he was arrested?

23 In my opinion, Mr. Clark was detained before he was arrested. A person is detained when a police officer significantly restrains the person thereby suspending the person's liberty interest: ***R v Grant***, 2009 SCC 32 at para 44(1). The restraint must not be merely fleeting, trivial, or slight. A person who is merely delayed or kept waiting is not detained: ***R v Mann***, 2004 SCC 52 at para 19, ***R v Suberu***, 2009 SCC 33 at para 3. Restraint may be physical or psychological. Psychological detention occurs if the person either has a legal obligation to comply with the restraint imposed by request or demand, or if a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. Detention is determined objectively based on all the circumstances: ***Grant*** at para 31, ***Suberu*** at para 22. As detention is determined objectively, it follows that that an accused need not testify in the *voir dire*: ***Grant*** at para 50. Factors relevant to the determination of whether a person was detained include (***Grant*** at para 44(2))

* the nature of the police initiation of contact with the person
    * whether the police were making general, preliminary, exploratory, or orienting inquiries respecting an occurrence, such as with a "bystander" or in an effort to "sort out" the situation;
    * whether the police, in contrast, had singled out the person for a "focused investigation" or had "zeroed in on the individual as someone whose movements must be controlled" (***Suberu*** at para 31);
    * keeping in mind that "focused investigation" or focused suspicion by itself is not a determinative factor (***Grant*** at para 41); but also that detention is determined objectively and not by the particular motivational state of the detaining officer;

* the nature of the police interaction with the person, including language used, physical contact, impeding of movement, location of interaction, presence of others, and duration; and
* the particular characteristics of the accused, including age, stature, minority status, or level of sophistication.

24 Mr. Clark's detention moved through four phases.

25 First, Mr. Clark was in the Chrysler when it was stopped. He remained in the vehicle while Ms. Grant was questioned. The Chrysler had stopped because Sgt. Forbes drove up behind it and Sgt. Forbes activated his vehicle's flashers. Sgt. Forbes' marked police vehicle, with flashers on, was parked behind the Chrysler. At the very least, its positioning blocked the movement of the Chrysler and its flashing lights signified the official nature of the restriction of movement. See ***R v Reid***, 2012 ABPC 109, Fradsham PCJ at para 35. Cst. Murk's testimony was that the flashers were on when he arrived. I infer that the flashers were on during the entire period that Mr. Clark was detained in the parking lot. Despite Sgt. Forbes' suggestion that Mr. Clark could have simply walked away after the Chrysler stopped, in my opinion a reasonable person in the position of Mr. Clark would have believed that he did not have a choice to walk away. A reasonable person would have believed that he was obligated to remain in the vehicle unless and until otherwise directed by the police officer who was questioning the driver. A reasonable person would have believed that an attempt to walk away would have been met with physical restraint by the investigating police officer. It is well-known that traffic stops are dangerous for police officers and for a passenger to engage in unusual conduct like getting out of a car and trying to walk away would likely attract a physical response from the officer conducting the stop. Mr. Clark was detained when the Chrysler was stopped.

26 This conclusion is in line with Justice Le Dain's observation in ***R v Therens***, [1985] 1 SCR 613 that

> Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for willful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. 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: at 644.

Passengers were found to be detained when the vehicles in which they were travelling were stopped by police in (e.g.) ***R v Harris***, 2007 ONCA 574 at paras 18 and 19; ***R v Taylor***, 2013 ONCJ 814; ***R v Pinto***, 2003 CanLII 11404 (ON SC), Hill J at para 45; and ***R v Forsyth***, 2015 BCSC 2663 at para 18.

27 Second, bearing in mind the vehicular detention context, Sgt. Forbes "asked" Mr. Clark to come out of the Chrysler and he did. Indeed, Sgt. Forbes testified that it was his practice to "remove" occupants of a vehicle, to talk to them one at a time, "to see if their stories match." Sgt. Forbes took control of Mr. Clark by verbal directions. He caused Mr. Clark to stand at the rear of the Chrysler. That was where Mr. Clark stood when Cst. Murk pulled up.

28 Third, as suggested by Sgt. Forbes' practice, Sgt. Forbes questioned Mr. Clark. He asked Mr. Clark to identify himself. Sgt. Forbes asked Mr. Clark if he had any previous involvement with the police. Mr. Clark handed a copy of a recognizance that bound him -- referred to in Sgt. Forbes' testimony as a probation order - to Sgt. Forbes. By the questioning of Mr. Clark, in the context of a vehicular stop, after Sgt. Forbes had caused Mr. Clark to get out of the Chrysler, Mr. Clark's detention was reinforced. Mr. Clark had become the subject of focused attention and suspicion. The questioning, it should be noted, had nothing to do with the Chrysler.

29 Fourth, Cst. Murk responded to the scene in answer to Sgt. Forbes' radioed request for back-up. Cst. Murk drove up in an unmarked car but he was in uniform. His car was parked by Sgt. Forbes' vehicle behind the Chrysler. His vehicle, then, reinforced the physical containment of the Chrysler and its occupants. When Cst. Murk arrived, both Ms. Grant and Mr. Clark were out of the Chrysler. Mr. Clark was at the rear of the Chrysler. Cst. Murk stood near Mr. Clark at the rear of the Chrysler. To Cst. Murk's recollection, Mr. Clark was standing calmly, "placidly;" he was not nervous and nothing stood out about his behaviour. On two occasions, Mr. Clark became agitated and

started to move toward the front of the vehicle and Sgt. Forbes. Cst. Murk verbally directed him to return to the rear of the Chrysler. Mr. Clark did so, without argument. Cst. Murk, through his physical presence and verbal control of Mr. Clark's movements reinforced Mr. Clark's detention. Although Cst. Murk did not behave aggressively toward Mr. Clark, Cst. Murk was in a tactical adversarial position, as reflected in his comment that he had Sgt. Forbes' back. Cst. Murk, in my view quite rightly, testified that if Mr. Clark had sought to leave the scene, Cst. Murk could and would have arrested him, for "obstruction" (even though at this point Cst. Murk was not sure of the nature of Sgt. Forbes' investigation respecting the Chrysler and its occupants).

30 There was a suggestion in Defence counsel's submissions that a factor to be taken into account in determining whether Mr. Clark's acquiescence to Sgt. Forbes' demands amounted to a detention was that Mr. Clark was black. Mr. Clark did not testify so I cannot know whether that was in fact a consideration for him. Further, I was not prepared to take judicial notice that in Edmonton in 2015 a black man, in contrast to any other person stopped and questioned by the police, was at particular or exceptional risk should he not have complied with police directions. See ***R v Spence***, 2005 SCC 71 at paras 61, 65, and 67 and ***R v Find***, 2001 SCC 32; contrast ***R v Parks*** (1993), 84 CCC (3d) 353 (Ont CA) and ***R v Williams***, [1998] 1 SCR 1128.

2. Was Mr. Clark arbitrarily detained?

31 Since Mr. Clark has demonstrated that he was detained, it must be determined whether his detention was arbitrary. I will assume, there being no argument on the point, that the burden remains on Mr. Clark (see ***R v Hardy (SR)***, 2015 MBCA 51 at paras 34 - 43). Three questions must be addressed: Did Sgt. Forbes have authority to stop the Chrysler as an investigative detention? Was Sgt. Forbes' stopping of the Chrysler justified by s. 166 of the *Traffic Safety Act* or the common law of vehicle stops? Was Sgt. Forbes' interaction with Mr. Clark prior to the search legally justified?

(a) Did Sgt. Forbes have authority to stop the Chrysler as an investigative detention?

32 Investigative detention must be founded on grounds (objectively verifiable indications) that support an officer's reasonable suspicion that the individual to be detained is linked to or implicated in a recent or on-going specific criminal offence: ***Mann*** at para 34, ***R v Navales*** 2011 ABQB 404, Hughes J at para 12. The offence may have been reported to police or may be suspected by the detaining officer without it having been reported. The suspicion, though, must be particularized. The police "may not conduct an investigative detention to determine whether an individual is, in some broad way, 'up to no good':" ***R v Yeh*** (2009), SKCA, [2009] S.J. No. 582, at para 75. Further, detention must be objectively necessary in the circumstances.

33 From the time that Sgt. Forbes first heard about the Chrysler's association with the Escalade until just before the recovery of the Handgun, Sgt. Forbes had no foundation for a reasonable suspicion that Mr. Clark or Ms. Grant were involved in any criminal activity, whether past, present, or future. Indeed, when reflecting on the time when the Chrysler drove westward past him and when he stopped the Chrysler, Sgt. Forbes confirmed that he did not (subjectively) believe that he had grounds to stop the Chrysler. At that point he did not have "reasonable suspicion." He was right in that belief. What had been communicated was that the two vehicles had left the Automotive Shop together and had travelled together for a period. The connection between the Chrysler and the Escalade may indeed have been suspicious. But that is all. Sgt. Forbes had no legal authority to stop the Chrysler under the investigative detention doctrine set out in ***Mann*** and ***Grant***.

34 Furthermore, Sgt. Forbes' recollection of the passage of the Chrysler was either faulty or based on mistakes. Sgt. Forbes' testimony in chief had suggested that the Chrysler had been travelling east-bound with the Escalade until the Escalade was stopped. The Chrysler then turned around and headed back west on 118 Avenue. This matter was not referred to in Sgt. Forbes' notes or report. If the Chrysler did this manouevre, this could have contributed to a conclusion that the Chrysler was evading contact with the police. This could have been construed as "suspicious" behaviour. However, the recordings of the radio communications indicated that the Escalade and Chrysler had broken off contact before the Escalade was stopped. After the Escalade was stopped the Chrysler had in fact continued east-bound for a time. It then returned west-bound, passing Sgt. Forbes. Sgt. Forbes did not recall

that the Escalade had stopped at a car wash, but the Chrysler did not. Sgt. Forbes may have misheard or misunderstood the radio information. The effect of Sgt. Forbes' erroneous narrative concerning the Chrysler was to heighten his expressed concern about the vehicle. That heightening of concern did not support a reasonable belief in the commission of any offence, however. The errors are relevant to the assessment of the reliability of Sgt. Forbes' account of what happened next.

(b) Did s. 166 of the *Traffic Safety Act* or the common law justify stopping the Chrysler?

35 Section 166 of the *Traffic Safety Act* permits a police officer to stop a vehicle and to request information from the driver about the driver and the vehicle. Under s. 167, the driver must produce, on the officer's request, documentation concerning his or her operator's licence, vehicle registration, and vehicle insurance. The police also have a common law authority to stop a vehicle to determine whether the operator is impaired: ***R v Orbanski***, 2005 SCC 37, Charron J at para 41.

36 Justice Cory confirmed in ***R v Ladouceur***, [1990] 1 SCR 1257 that traffic safety legislation extends to police the authority to make random stops of vehicles as part of an organized inspection program or not as part of an organized inspection program. The police have authority to stop vehicles based on "articulable cause" or without articulable cause: at 1283 - 1284; see ***R v Fleury***, 2014 ABQB 199, Nation J at para 13; ***R v Ali***, 2016 ABCA 261 at para 7. The scope of police authority is perhaps shockingly broad, as noted by Justice Sopinka in his minority opinion in ***Ladouceur*** at 1267. See also the dissenting opinion of Justice La Forest in ***R v Belnavis***, [1997] 3 SCR 341 at para 54. The constitutionality of the legislation is not at issue, though.

37 Further, the absence of ***Mann*** grounds for a stop does not preclude reliance on random stop authority. And dual purpose stops are also permitted -- an officer may make a random stop of a vehicle for (e.g.) traffic safety purposes while at the same time harbouring another investigative purpose. That other purpose may relate to the investigation of a criminal offence. See ***Fleury*** at paras 18 - 21 and ***Ali*** at para 7. Certainly a random stop for traffic safety purposes may disclose evidence that supports further investigation of a criminal offence: ***R v Nolet***, 2010 SCC 24; ***Fleury*** at para 22.

38 However, s. 166(1) predicates detention authority on purpose: "For the purposes of administering and enforcing this Act or a bylaw, a peace officer may ..."

39 Sgt. Forbes did invoke the traffic safety (licence, registration, insurance, mechanical fitness) and sobriety grounds for stopping the Chrysler in his testimony. Nonetheless, a testimonial declaration of purpose does not dictate a factual finding of purpose. I find, in the circumstances, that Sgt. Forbes did *not* stop the Chrysler for traffic safety or sobriety-check purposes but because he wished to obtain information about the occupants of the Chrysler. He was engaged in intelligence gathering about the occupants of the Chrysler because of their connection to the Escalade and its occupants.

40 That evening the NE Division police were on the heels of armed and dangerous suspects linked to home invasion and homicide. That would have been top-of-mind for all officers involved and would have engaged them emotionally. The Chrysler drove into these police concerns.

41 Sgt. Forbes' recollection of the suspicious activities of the Chrysler before it passed him going west-bound was improperly enhanced. Sgt. Forbes either misheard the radio or misremembered the progress of the Chrysler as it moved westward. Sgt. Forbes' notes could not assist on this point.

42 Neither the Chrysler itself nor its mode of operation supported any traffic safety concerns. While "articulable cause" is not required for a random stop, the appearance of vehicular defects or a suspicious driving pattern or speeding would have been circumstantial evidence supporting the formation of a traffic safety purpose.

43 The Chrysler passed Sgt. Forbes. He had no concerns with its speed. He made some remarkable observations. The time was near 8:45 p.m. and there was no evidence that the lighting was not good or that environmental

conditions impaired his observations (Cst. Murk did say that it was overcast and rain came later). But there was no evidence that the Chrysler was not travelling at around the speed limit. If the Chrysler was travelling at about 50 km per hour it would have passed Sgt. Forbes moving at nearly 14 metres per second. Whatever the exact speed, Sgt. Forbes would have had only moments to observe the Chrysler and its occupants. He could have had only a fleeting glance. See, e.g., ***R v Roasting***, 2016 ABCA 138 and the observations of Justice Verville in ***R v Hoffman***, 2016 ABQB 51 at para 28.

44 Sgt. Forbes testified that the driver of the Chrysler looked "startled" to see him, a uniformed officer in a marked police vehicle. That look was "unusual" and was a "clue." I grant that people do regularly discern startle responses, and that we can do so through brief observations and we can do so despite difficulties in interpreting others' demeanour. Regardless, the issue would not be whether the driver *was* startled but *appeared* to Sgt. Forbes to be startled. Sgt. Forbes then testified that the driver had a "deer in the headlights" look. Granting some allowance for inexact uses of language, that is not a description equivalent to "startled." The "deer in the headlights" description refers to the third element of the fight, flight, or freeze triad. It connotes immobility in the face of a startling event. But Sgt. Forbes did not have a significantly long period of time to observe the driver and her alleged "freezing." A further difficulty is that Sgt. Forbes used a pre-packaged phrase. The phrase, in context, is not an expression of memory but a substitute for memory. Finally, Sgt. Forbes described the driver as "mulatto" (his term), as half black and half white. Sgt. Forbes' term is no longer in current usage, whether or not it is regarded as offensive. More to the point, the judgment made could not be based on a fraction of a second's observation (if any length of time could support it). Sgt. Forbes' descriptions of what he saw, considered in the context of the unreliability of his other observation evidence, demonstrate that he was recalling a constructed narrative not his actual observations.

45 If any of my concerns were considered in isolation, none might support the conclusion that Sgt. Forbes' recollection was likely inaccurate. Taken all together though, and again in light of the weaknesses of his testimony, I find that Sgt. Forbes' recollection was likely not accurate. What he recalled and what occurred were different sets of events.

46 Sgt. Forbes checked the registration of the Chrysler as he was following it, learning that the registered owner was Debbie Godfrey, so that aspect of his inquiries was dealt with before the vehicle was stopped. This evidence could support an inference that Sgt. Forbes was pursuing vehicle "validity" concerns but in context the evidence supports the inference that Sgt. Forbes' true purpose was intelligence gathering about the Chrysler and its occupants.

47 When Sgt. Forbes stopped the Chrysler, he did ask Ms. Grant to produce her driver's licence. She did not have one. She produced her passport. Sgt. Forbes did not write up the violation ticket. Cst. Farhat did later. Ms. Grant was not the registered owner. Sgt. Forbes testified that Ms. Grant said that she and Mr. Clark came from a restaurant and were going to a friend's house. She said the Chrysler belonged "to a family member." As for the restaurant comment, the Chrysler was seen by the police at the Automotive Shop. Where it had been earlier was not in evidence.

48 Sgt. Forbes did not pursue the ticketing of Ms. Grant because he was the supervisor and needed to focus on broader issues. That would suggest that he had a role-based reason not to concern himself with a s. 166 stop.

49 Sgt. Forbes testified that he did inquire into Ms. Grant's sobriety when he talked to her. His notes did not reflect this. I do not find as a fact that he pursued the issue of Ms. Grant's sobriety with her.

50 There was no evidence that anyone followed up respecting the registered owner before Mr. Clark was arrested and transported to NE Division. Ms. Godfrey, according to her testimony, heard about the arrest first from Mr. Clark's brother, and wasn't advised by the police that her car was impounded until about 2:30 a.m. the next morning. If Sgt. Forbes had been concerned, say, about whether the Chrysler was stolen, he might have been expected to follow up with some investigation respecting Ms. Godfrey. Instead, he shortly turned to questioning Mr. Clark.

51 The link between Sgt. Forbes' questioning of Mr. Clark and the s. 166 inquiries was not elaborated in testimony, besides Sgt. Forbes' reference to his practice of talking to passengers to see if stories are consistent. But Sgt. Forbes did not test Ms. Grant's story through his questioning of Mr. Clark. Sgt. Forbes inquired into Mr. Clark's contact with the police. Sgt. Forbes did not explain how his conversation with Mr. Clark related to any information he gained from Ms. Grant relating to the Chrysler.

52 In all the circumstances, I find that Sgt. Forbes did not intend to stop the Chrysler for the purposes of s. 166 or to check sobriety. Rather, his purpose was to gather information about the occupants of the Chrysler. There was no dual purpose here, only the purpose of acquiring information about the occupants of the Chrysler.

53 Hence, in the absence of ***Mann*** grounds or a traffic safety or sobriety-check purpose, stopping the Chrysler, detaining Ms. Grant, and detaining Mr. Clark was arbitrary. Put another way, the stop was not random but targeted, targeted for the purposes of acquiring information about the occupants of the Chrysler. See ***Fleury*** at paras 27 and 29; ***R v Adair***, 2015 ABQB 76 at paras 27 - 31; ***Reid*** at para 56; ***R v JMC***, 2005 ABPC 369, Tousignant PCJ at paras 31-33.

54 Hence, Mr. Clark's s. 9 right not to be arbitrarily detained was violated.

(c) Was Sgt. Forbes' interaction with Mr. Clark prior to the search legally justified?

55 If Mr. Clark's detention had rested on legal authority, Sgt. Forbes would have been entitled to ask some questions of Mr. Clark. But even then, Sgt. Forbes' authority to question Mr. Clark would have been limited. Aside from s. 10 issues, the scope of questioning is bounded by the purposes of the stop. In ***Ladouceur***, Justice Cory wrote that "[o]fficers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences:" at 1287. Consistently, Justice Cory wrote in ***R v Mellenthin***, [1992] 3 SCR 615 that "[r]andom stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search:" at 624. Justice Blok provided practical guidance in ***Forsyth***, [2015] B.C.J. No. 3110 at para 23:

> [23] I find that the request made of the passengers to produce identification was for the sole purpose of assisting the drug investigation. To paraphrase ***R. v. Pinto*** ... at para. 55, Mr. Forsyth was entitled to sit in the passenger seat of the truck and be left alone while the driver was processed in some fashion. As Mr. Justice Hill said in ***Pinto*** at para. 55:
>
> > [55] ... In a lawful traffic stop, as a general rule, a vehicle passenger cannot be subjected to non-consensual dragnet or general investigative questioning or identification production.

56 Sgt. Forbes' questioning of Mr. Clark's contact with the police went beyond the scope of any legitimate traffic stop questions. Regardless, as I have found that there were no legal grounds for Mr. Clark's detention, his questioning of Mr. Clark was not justified.

57 Given the absence of any immunizing legal authority supporting Sgt. Forbes' questioning of Mr. Clark, I turn to the next set of issues: did Sgt. Forbes' questioning violate any further *Charter* rights of Mr. Clark?

B. Were Mr. Clark's rights violated in his interactions with Sgt. Forbes after the Chrysler was stopped and before it was searched?

58 Two lines of inquiry emerge at this point: Did Sgt. Forbes respect Mr. Clark's rights under s. 10(a) and 10(b) of the *Charter*? and did Sgt. Forbes' questions amount to a warrantless and unjustified informational search of Mr. Clark?

1. Were Mr. Clark's rights under s. 10(a) and 10(b) of the *Charter* violated?

59 Under s. 10 of the *Charter*, "[e]veryone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right ..."

I found that Mr. Clark was detained upon the stop of the Chrysler, when questioned by Sgt. Forbes, when directed to stand at the rear of the Chrysler by Sgt. Forbes, and when placed under the supervision of Cst. Murk.

60 Sgt. Forbes did not advise Mr. Clark of the reasons for his detention. Neither did Cst. Murk, until after the Handgun was found. Cst. Murk initially did not know what the investigation concerned so he could not (and did not) immediately comply with ss. 10(a) or (b). Mr. Clark's right to informed of the reasons for his detention, protected by s. 10(a) of the *Charter*, were violated. Justice Iacobucci wrote in ***Mann*** at para 21 that "[a]t a minimum, individuals who are detained for investigative purposes must ... be advised, in clear and simple language, of the reasons for the detention."

61 Mr. Clark was not advised of his right to counsel until Cst. Murk did so, again after the Handgun was found. Even then, there was a short delay. Following Sgt. Forbes' search of the Chrysler, Sgt. Forbes instructed Cst. Murk to arrest Ms. Grant and Mr. Clark. Sgt. Forbes "did not say what for." Cst. Murk cuffed them both. He put Mr. Clark in his vehicle. He *Chartered* Mr. Clark at 9:23 p.m., about half an hour after the Chrysler was stopped. Cst. Murk read the standard language verbatim. Mr. Clark's right to be informed of his right to retain and instruct counsel and his implementation right to retain and instruct counsel, protected under s. 10(b) of the *Charter*, were violated. In ***Suberu***, Chief Justice McLachlin and Justice Charron wrote at para 2 that "from the moment an individual is detained, s. 10(b) is engaged and ... the police have the obligation to inform the detainee of his or her right to counsel 'without delay'." "Without delay" means immediately: ***Suberu*** at paras 41 and 42.

62 The evidence did not legitimate a suspension of Mr. Clark's s. 10(b) rights because of safety or security of evidence concerns: see ***R v Logan***, 2005 ABQB 321, Macklin J at para 53. The presence of a firearm might have supported safety concerns but Sgt. Forbes did not know that a firearm was present until he found it in his search of the Chrysler. That discovery did not legitimate a suspension of s. 10(b) rights retroactively.

63 When Cst. Penny and Cst. Farhat arrived soon after at about 9:26 p.m. Cst. Murk delivered Mr. Clark into Cst. Penny and Cst. Farhat's custody. Cst. Farhat provided a "secondary caution" to Mr. Clark at 9:50 p.m. Cst. Penny and Cst. Farhat left the scene with Mr. Clark at about 10:38 p.m., arriving at NE Division at about 10:46 p.m. Mr. Clark had advised Cst. Farhat that he wanted to call his lawyer. His lawyer's number was on a cellphone that had been seized in connection with the search of the Chrysler and his arrest.

64 None of Cst. Murk, Cst. Penny, or Cst. Farhat questioned Mr. Clark about any offence. They did "hold off" questioning him.

65 Sgt. Forbes had asked Mr. Clark some questions leading to Mr. Clark identifying himself and to Mr. Clark's disclosure that he was under court-imposed conditions. To that extent, the questioning compounded the violations of Mr. Clark's ss. 10(a) and 10(b) rights.

66 A further issue is whether this questioning resulted in a violation of Mr. Clark's s. 8 rights.

2. Did Sgt. Forbes' questioning of Mr. Clark

amount to a warrantless informational search?

67 Sgt. Forbes did not have any specific legal entitlement to obtain personal information from Mr. Clark. That information included Mr. Clark's name. There is authority to the effect that obtaining the name of a detained

individual, when the police have no legal entitlement to extract that information, amounts to a warrantless search for and seizure of personal information: ***Harris*** at paras 33 and 36-37. On the one hand, this was a small thing, just Mr. Clark's name. On the other hand, with his name, Sgt. Forbes was in a position to access a "wealth of personal information" about Mr. Clark using police computer resources. The warrantless acquisition of personal information about Mr. Clark was not justified by the Crown.

68 Sgt. Forbes also acquired information about the documentation imposing conditions on Mr. Clark. That information, which related to firearms, heightened Sgt. Forbes' concerns. Sgt. Forbes, though, did not conduct himself as if he inferred from this information that Mr. Clark had a firearm in the Chrysler, even in the context of events of the evening.

69 If the acquisition of the information about the conditions document -- a recognizance rather than a probation order -- should also be classified as a warrantless acquisition of personal information about Mr. Clark, Mr. Clark's expectation of privacy respecting this document was reduced. Mr. Clark was obliged by para 15 of his recognizance to "carry with you at all times a copy of this order" (which he did this evening) and "to show a copy of this order to any peace officer or person responsible for the enforcement or supervision of this order upon request of that person." Mr. Clark showed the recognizance to Sgt. Forbes. It may be that he was not required to since the evidence did not disclose that Sgt. Forbes knew about the recognizance or requested it, but the "request" language may not relate to a peace officer but to a "person responsible for the enforcement or supervision of this order." Regardless, the recognizance was produced and Mr. Clark's name was on it. That muted the effects of any disclosure of his name in response to questioning. See ***R v Coady***, 2012 ABPC 194, A.J. Brown PCJ at para 22. That being said, the disclosure condition would not bar a s. 8 claim by Mr. Clark respecting the recognizance since Sgt. Forbes had no legal authorization for making the inquiries that led to the disclosure.

70 Of course, in relation both to the s. 10(a) and (b) and the questioning *Charter* violations, violations are one thing and their implications for the exclusion of the Handgun and connected evidence are another.

C. Were Mr. Clark's rights to be secure against unreasonable search and seizure violated by Sgt. Forbes' search of the Chrysler and the seizure of the Handgun?

71 Sgt. Forbes searched the Chrysler and found the Handgun beneath Mr. Clark's seat. Sgt. Forbes (wearing gloves) removed the magazine and cleared the gun. He left it where he found it. Cst. Farhat effected the formal seizure. Sgt. Forbes did not seize the Handgun himself because of his supervisory duties.

72 The search was preceded by some observations by Sgt. Forbes of Mr. Clark and by an exchange between Sgt. Forbes and Ms. Grant. Two questions emerge immediately. First, did Sgt. Forbes have grounds to conduct a search of the Chrysler aside from any purported consent by Ms. Grant? Second, did Ms. Grant provide a consent to search to Sgt. Forbes that authorized him to search for and seize the Handgun?

1. Did Sgt. Forbes have grounds to conduct the search of the Chrysler?

73 Sgt. Forbes testified that when he was behind the Chrysler after it had stopped, he saw Mr. Clark hunch down in the seat, as if his hands were towards the floor, as if he were dealing with something beneath his seat. Sgt. Forbes believed that Mr. Clark was manipulating something under his seat. Sgt. Forbes claimed that he also saw Mr. Clark looking up towards Ms. Grant.

74 The lighting in the parking lot was not elaborated in evidence. The observations were made a few minutes after 8:45 p.m. It was a cloudy night, with rain on the way. The rear window of the Chrysler was tinted. I could not infer from the evidence that it would have been impossible to see through the rear window of the Chrysler. If Sgt. Forbes were standing or seated in his vehicle behind the Chrysler, he could have seen Mr. Clark's head dip down. The passenger seat would have prevented him from making further observations about Mr. Clark's hands or the upward tilt of his head. I find that these latter are imagined narrative and not observed elements of Sgt. Forbes' memory. Nonetheless, from the dipping of his head, Mr. Clark's dealing with something beneath his seat could be inferred,

even if the inference is not overwhelming. It was contended in argument by Defence counsel that Sgt. Forbes could not have seen what he claimed to have seen because of his angle of view based on his location and because the rear window of the Chrysler was tinted. This, however, was speculation. Further evidence, perhaps demonstrative in-court evidence, would have been necessary to provide a foundation for the urged inference of impossibility.

75 Sgt. Forbes' evidence, while perhaps raising a suspicion, did not provide reasonable grounds to believe that Mr. Clark was manipulating contraband beneath his seat, either by itself, or in connection with the other evidence about the occupants of the Chrysler that Sgt. Forbes had acquired that evening. Further, what was beneath the seat was not in plain view. Further, a search was not justified by safety reasons. The evidence does not support the conclusion that, at this point, Sgt. Forbes had any safety concerns. He engaged Ms. Grant in conversation and did not initially focus his attention on Mr. Clark or on a search of the area of Mr. Clark's seat. And further, Sgt. Forbes would not have been in a position to have made any observations without having arbitrarily detained Mr. Clark.

76 The legal authority with which Sgt. Forbes was clothed, even with the addition of the observations of Mr. Clark and his knowledge of the journey of the Chrysler, did not provide a foundation for Sgt. Forbes to engage in a warrantless search of the Chrysler: ***Ladouceur*** at 1287. In ***Mellenthin***, Justice Cory wrote that "[a] check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over. Unless there are reasonable and probable grounds for conducting the search, or drugs, alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted:" at 642; ***R v Dreyer***, 2008 BCCA 89 at para 21. I bear in mind that this detention did not (even) rise to the level of being justified as a "check stop."

77 While police estimates of their legal authority are not determinative, it was doubtless because Sgt. Forbes did not in fact believe that he had independent reasonable grounds to search the Chrysler that he sought Ms. Grant's consent to a search.

2. Did Ms. Grant provide a valid consent to search to Sgt. Forbes?

78 Following his questioning of Ms. Grant and then of Mr. Clark, Sgt. Forbes asked Ms. Grant if he could look in the vehicle. She asked why. He told her it was to make sure she was safe and that the public was safe. She asked why she was pulled over. Sgt. Forbes said it was to check the validity of her driver's licence, insurance, and registration. He told her she did not have to consent, but asked her why she wouldn't consent if she had nothing to hide.

79 Ms. Grant said OK (meaning he could search the Chrysler), got out of the vehicle, and asked if she have a smoke. She went to the curb and smoked a cigarette. The search ensued.

80 Sgt. Forbes had in his possession an EPS notebook. It contained a guideline for obtaining consent to a search. Sgt. Forbes did not read or read from this guideline in his conversation with Ms. Grant. Sgt. Forbes testified that the guideline "sounds robotic." It was, in his view, a template. Reading it word for word would not help the person to whom it was read to understand. Sgt. Forbes testified that he did use the guideline "to organize my dialogue."

81 Sgt. Forbes actually began with the final question in the guideline ("Do you consent to this search?"). He did not advise Ms. Grant, as the consent guideline laid out, that "[i]f you consent to this search, you maintain your ability to withdraw that consent at any and all times." The consent guideline did not contain phrases aimed at eliciting consent, persuading to provide consent, or arguing in favour of consent, such as "if you have nothing to hide, why wouldn't you consent?".

82 Ms. Grant had not been advised of her right to counsel before providing her apparent consent.

83 Mr. Clark did not provide any consent to the search of the Chrysler. Sgt. Forbes testified that when he was asking Ms. Grant for her consent but before she said OK, Mr. Clark had become agitated, had moved toward Sgt. Forbes, and said "No, no, no." Sgt. Forbes said that he told Mr. Clark that "it is not your consent to give." Sgt.

Forbes said that Cst. Murk was present at this time and that Mr. Clark was then "engaged by Cst. Murk." Cst. Murk did testify that Mr. Clark twice became agitated and began walking toward the front of the car, but he returned in compliance with commands from Cst. Murk. Cst. Murk did not testify to the "No, no, no" utterance by Mr. Clark.

84 Did Ms. Grant validly consent to Sgt. Forbes searching the Chrysler?

85 A valid consent to a search must be voluntary and fully informed: see ***Mascoe*** at paras 135 - 137; ***R v Wills*** (1992), 7 OR (3d) 337 (CA), Doherty JA; ***R v Borden***, [1994] 3 SCR 145, Iacobucci J at 162. To be fully informed, a person giving consent must know that he or she has a right to refuse to provide consent and must be advised that anything seized may be used in a prosecution of that person; to a degree of specificity, the person must be made aware of the jeopardy faced or the uses to which the evidence will be put. Further, and this is a feature of consent in multiple contexts - whether to participate as a research subject, to undergo ongoing medical treatment, or to permit physical contact - the person must be able to withdraw consent, and in circumstances of State-sought consent, must be made aware of this right.

86 In my opinion, Ms. Grant did not provide a valid consent to search to Sgt. Forbes.

87 Sgt. Forbes did not read the standard language provided in his notebook to obtain consent to a search. That, by itself, was not fatal. No formula must be recited to obtain consent. I take Sgt. Forbes' point that the standard language could sound stilted or robotic. I take his point that the person spoken to may not understand the standard language. However, the standard language has two virtues. First, it will have been composed by persons who had an eye to legal requirements. Standard language may turn out not to be perfect, but it is more likely to meet legal requirements than extemporizations in pressing circumstances. Second, from an evidential perspective, invariable recitation of the standard language is evidence that the standard language was in fact deployed in particular circumstances. Standard recitation of the standard language protects an officer from reliance on his or her mere memory of what was said. As for the standard language meeting with incomprehension on the part of the listener, it would be the officer's duty to elaborate so that informed and voluntary consent may be obtained. That duty attaches whether or not standard language were used.

88 In this case, Sgt. Forbes' verbal interventions did not secure informed and voluntary consent. His approach was skewed to eliciting consent. There were four problems with his approach.

89 First, he began by requesting consent. This is the last step in the standard guidelines approach. Second, he did not advise Ms. Grant that she could withdraw consent at any time. Third, he undermined the voluntariness of her consent by asking (as the guidelines do not) why she would not consent if she had nothing to hide. Fourth, he did not provide information to Ms. Grant about the purposes of the search or use of evidence found, particularly that evidence found could be used against her.

90 Furthermore, Ms. Grant was not advised of her right to counsel before her consent was sought. Ms. Grant, as much as Mr. Clark, was detained at this time. The stop was no more a legitimate traffic stop as regards Ms. Grant than as regards Mr. Clark.

91 The failure of Sgt. Forbes to obtain a valid consent to search from Ms. Grant and the violation of Ms. Grant's privacy interests in the Chrysler do not provide *Charter* violations on which Mr. Clark may rely. He may rely only on violations of his own rights to support a remedy under s. 24(2). The significance of the failure of Sgt. Forbes to obtain valid consent to search from Ms. Grant is that the Crown cannot rely on any purported consent from Ms. Grant to support the constitutionality of the warrantless search of the Chrysler as regards Mr. Clark. If Ms. Grant had provided a valid consent, Mr. Clark would have faced the difficulty of establishing a s. 8 violation when the police had an authorization to search the Chrysler. The invalidity of her consent eliminated that route to State authorization.

92 The invalidity of her consent also eliminated the need to resolve another issue, which would have concerned the legal effects on Mr. Clark's interests of a valid consent by Ms. Grant. Ms. Grant, presumably, would not have been

entitled to waive Mr. Clark's rights: ***R v Reeves***, 2017 ONCA 365 at para 42. But in the circumstances, Mr. Clark's expectation of privacy may well have been limited or diminished by Ms. Grant's authority to allow others to access the Chrysler. Mr. Clark could have been in the position of having to accept that his privacy interests would not be violated by Ms. Grant letting some third party, which could include Sgt. Forbes, into the car. See ***Reeves*** at paras 48 and 49.

93 The invalidity of the consent, however, does not eliminate the need to resolve another issue. Mr. Clark's rights were not violated just because Ms. Grant did not provide a valid consent to the search. Mr. Clark could have a constitutional complaint about Sgt. Forbes' warrantless and consent-less search of the Chrysler only if he himself had a reasonable expectation of privacy in the Chrysler. Did Mr. Clark have a reasonable expectation of privacy in the Chrysler? This is a linchpin issue for Mr. Clark under s. 8. If he had a reasonable expectation of privacy, given the absence of a warrant, the absence of grounds authorizing a warrantless search, and the absence of valid consent to search, the search of the Chrysler would violate his rights.

3. Did Mr. Clark have a reasonable expectation of privacy in the Chrysler?

94 To determine whether an individual had a reasonable expectation of privacy, the ***Edwards*** factors remain canonical (***R v Edwards***, [1996] 1 SCR 128). In this case, territorial or spatial privacy is at issue. See ***R v Dyment***, [1988] 2 SCR 417 at para 19; ***Schreiber v Canada (Attorney General)***, [1998] 1 SCR 841 at para 51. The ***Edwards*** factors are set out by Justice Cory as follows at para 45:

1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed ...
2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places ...
3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated ...
4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably ...
5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances ...
6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
   (i) presence at the time of the search;
   (ii) possession or control of the property or place searched;
   (iii) ownership of the property or place;
   (iv) historical use of the property or item;
   (v) the ability to regulate access, including the right to admit or exclude others from the place;
   (vi) the existence of a subjective expectation of privacy; and
   (vii) the objective reasonableness of the expectation.

See also ***Belnavis*** at paras 19, 20, 22.

95 While Mr. Clark did not testify in the *voir dire*, Debbie Godfrey did. She is Mr. Clark's mother and was the registered owner of the Chrysler. Ms. Godfrey testified that Mr. Clark helped her find the Chrysler, a previously owned vehicle. She bought the car in late June or early July 2015. Ms. Godfrey was disabled. When she purchased the car, Mr. Clark and Ms. Grant asked if they could use it. At the time, Ms. Grant was either Mr. Clark's fiancé or

his girlfriend. Mr. Clark did not have a drivers licence. Ms. Godfrey was fine with Mr. Clark and Ms. Grant using the car, so long as Mr. Clark did not drive. (Ms. Godfrey had another reason for not keeping the car near to her. She was going through a divorce and did not want her soon-to-be ex-husband to know about the car.) There were two sets of keys for the Chrysler. Both were left with Mr. Clark and Ms. Grant. Other family members including Mr. Clark's brother Omar had Ms. Godfrey's permission to use the car. Ms. Godfrey testified that if Ms. Grant and Mr. Clark split up, she would have taken the keys. The car would not have stayed with Ms. Grant. Ms. Godfrey paid the insurance premiums for the Chrysler.

96 The recognizance states on its face that Debbie Godfrey is the assignee. She was the registered owner of the Chrysler. It does not appear that this connection was noted at the time the events took place.

97 As for the ***Edwards*** factors: Mr. Clark was present at the time of the search. According to Sgt. Forbes, he even raised objections ("No, no, no") before Sgt. Forbes obtained the putative consent from Ms. Grant. The Chrysler was owned by Ms. Godfrey. Mr. Clark had a possessory interest in the Chrysler. While personal property classifications are not necessarily determinative for criminal law purposes and while s. 8 protects persons not places, I would characterize Mr. Clark and Ms. Grant as holding (whether or not jointly) a bailment interest in the Chrysler. A property or possessory interest is not a necessary condition for constitutional protection and it may not always be a sufficient condition for constitutional protection but it is at least a factor counting in favour of constitutional protection. Mr. Clark (with Ms. Grant as his driver) had historical use of the Chrysler. This permission to use the Chrysler was granted to him by his mother, the owner of the vehicle. Mr. Grant and Ms. Clark had the ability to regulate access to the Chrysler. They had controlling possessory interests in the Chrysler and would have been entitled to determine whether others could have access to the vehicle. In the absence of evidence from Mr. Clark, an inference of his subjective expectation of privacy might be regarded as speculation, but Ms. Godfrey's testimony provided a foundation for an inference that Mr. Clark did have a subjective expectation of privacy relating to the Chrysler. Ms. Godfrey, Mr. Clark's mother, had permitted him to use it. His subjective appreciation of his possessory interest in the vehicle may be inferred. His expectation of privacy was objectively reasonable. Mr. Clark was objectively entitled to be of the view that his enjoyment of the use of the Chrysler would be exclusive, save for driving by Ms. Grant and by use by his brother Omar. His mother, after all, had granted the possessory interest to him. See ***Dreyer*** at para 13. I note that in ***Belnavis***, Justice Cory quoted with approval the following from Justice Doherty at para 23: "There may be other circumstances, such as the relationship between the owner and the passenger, or the terms on which the passenger came to be a passenger, that will support the contention that a passenger had a reasonable expectation of privacy in relation to the vehicle ..."

98 The Crown sought to argue that Mr. Clark did not have an expectation of privacy because that was not evident to Sgt. Forbes. It is true that -- except for the "No, no, no" -- Mr. Clark said nothing about his interest or connection to the vehicle. According to the Crown, Mr. Clark left Ms. Grant hanging. He did not step up and take any responsibility for the Chrysler. It is true that from Ms. Godfrey's name as registered owner, it would not have been intuitively obvious that Mr. Clark had an interest in the vehicle. It is true that even if Sgt. Forbes had noticed Ms. Godfrey's name as assignee on the recognizance that he would not likely have worked out that Mr. Clark somehow had a possessory interest in the vehicle. It is true that Ms. Grant's reference to the vehicle belonging to a "family member" would not have obviously indicated that the family member was Mr. Clark's mother who had loaned the car to Ms. Grant and Mr. Clark.

99 The ***Edwards*** factors, however, do not list information provided to the police as a factor in determining whether an individual has a reasonable expectation of privacy. A reasonable expectation of privacy is not an expectation that appears to be reasonable to investigating officers. Privacy rights are based on the facts not on the information the police have gathered at the point of interfering with privacy. The point is that the police should do their investigations, do their due diligence, before interfering with privacy rights.

100 Furthermore, reliance on a reasonable expectation of privacy does not depend on sacrificing the right to remain silent. Mr. Clark was under no obligation to talk to Sgt. Forbes. It was his constitutional right to choose not to talk to Sgt. Forbes. A reasonable expectation of privacy cannot be denied just because an accused did not pipe up.

101 The fact that Sgt. Forbes did not know and could not work out that Mr. Clark had a privacy interest in the Chrysler did not entail that Mr. Clark did not have a privacy interest in the Chrysler. What Sgt. Forbes did or did not know was beside the point.

102 Hence, Mr. Clark, through the application of the ***Edwards*** factors, had a reasonable expectation of privacy in the Chrysler.

103 I acknowledge that Mr. Clark's reasonable expectation of privacy was reduced or attenuated because the Chrysler was a vehicle. Manifold types of surveillance and information-gathering about vehicles by the State is legally authorized. Vehicle owners cannot expect the same degree of privacy about their vehicles and their vehicles' operations as they can about their homes: ***R v Wise***, [1992] 1 SCR 527, Cory J at 534; ***R v Arabi***, 2007 ABQB 303, Moreau J (as she then was) at para 45. But while vehicle owners' expectations of privacy are limited, that does not make those expectations of privacy nonexistent. Furthermore, the intrusions on privacy borne by vehicle owners relate to the vehicles, the legal status of vehicles and their operators, and the operations of vehicles. The reduction of expectations of privacy for vehicle owners does not expose those owners to informational or physical search and seizure intrusions for any and all State purposes.

104 Sgt. Forbes searched the Chrysler without a warrant and without grounds to conduct a warrantless search thereby violating Mr. Clark's privacy interests. Sgt. Forbes did not have valid consent to search the Chrysler from Ms. Grant. Sgt. Forbes violated Mr. Clark's s. 8 rights by searching the Chrysler.

D. Were Mr. Clark's rights to counsel violated after the search of the Chrysler?

105 Under s. 10(b), Mr. Clark had the right to retain and instruct counsel without delay. According to Justice Abella in ***R v Taylor***, 2014 SCC 50, the police have a duty to provide phone access by an accused to counsel as soon as is practicable. The duty is to provide telephone access at the *first* reasonable opportunity: para 28.

106 Cst. Farhat and Cst. Penny took Mr. Clark from the parking lot to NE Division. They left the scene at 10:38 p.m. and arrived at NE Division at 10:46 p.m. Mr. Clark was put in a holding cell. The phone room was occupied when he arrived, so he had to wait to call a lawyer. It was not clear from the evidence when Mr. Clark had an opportunity to call a lawyer, although it was not until some time after 10:46 p.m.

107 Mr. Clark was, Cst. Farhat reported, interviewed by Detectives from 3:18 - 3:50 a.m. the next morning and he "would have been" re-*Chartered* then.

108 Over two hours elapsed from the time the Chrysler was pulled over until Mr. Clark was able to contact counsel. It cannot be said that Mr. Clark was able to exercise his right to retain and instruct counsel without delay. Mr. Clark's right to contact counsel without delay was violated.

109 However, no statements from Mr. Clark were introduced in evidence. I note that Mr. Clark, unlike Ms. Grant, provided no consent to any search.

110 Thus, by way of summary, in the course of his interactions with Sgt. Forbes and the EPS, Mr. Grant's s. 9, s. 10(a) and (b), and s. 8 *Charter* rights were violated. The question then is whether the evidence obtained through any or all of those *Charter* violations must be excluded under s. 24(2) of the *Charter*.

E. Must the evidence of the Handgun and connected evidence be excluded under s. 24(2) of the *Charter*?

111 Section 24 of the *Charter* provides as follows:

> 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.

An accused bears the burden of establishing exclusion of evidence under s. 24(2). The s. 24(2) argument has three elements. The accused must establish the infringement or denial of a *Charter* right; the evidence in question must have been "obtained in a manner that infringed or denied" rights or freedoms guaranteed by the *Charter*; and the admission of the evidence in the proceedings would bring the administration of justice into disrepute.

112 The violations of Mr. Clark's *Charter* rights have been established. The two remaining issues are whether (1) the evidence relating to the Handgun was "obtained in a manner that infringed or denied any rights or freedoms guaranteed" by the *Charter* and (2) whether the admission in the trial of the evidence relating to the Handgun would "bring the administration of justice into disrepute." I will refer to the Handgun and evidence about locating the Handgun in the Chrysler as the "Handgun evidence."

> **1. Was the evidence of the Handgun obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter*?**

113 In ***R v Strachan***, [1988] 2 SCR 980, Chief Justice Dickson wrote as follows at 1005 - 1006:

> ... [T]he first inquiry under s. 24(2) would be to determine whether a *Charter* violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the *Charter* and the discovery of the evidence figures prominently in this assessment, particularly where the *Charter* violation and the discovery of the evidence occur in the course of a single transaction.

In this case, the seizure of the Handgun occurred after and depended upon Mr. Clark's arbitrary detention. The seizure of the Handgun occurred in the course of a warrantless and unjustified search that violated Mr. Clark's privacy interests relating to the Chrysler. In my opinion, the Handgun evidence was "obtained in a manner that infringed or denied" Mr. Clark's s. 9 and s. 8 rights.

114 What of the s. 10(a) and 10(b) violations? And with respect to s. 10(b), not only the failure to advise of rights, but the delay before Mr. Clark was able to contact counsel?

115 Mr. Clark did engage in conversation with Sgt. Forbes when detained in the parking lot. He did not provide information to Sgt. Forbes beyond his name and the recognizance. Mr. Clark did not provide additional information that linked to the seizure of evidence. The evidence did not disclose that any of the officers questioned Mr. Clark about the Handgun or questioned him after the Handgun was found.

116 Could it be said that the Handgun evidence was obtained in a manner that violated Mr. Clark's s. 10(a) and (b) rights? The s. 10(a) and 10(b) violations that occurred by the Chrysler in the parking lot before the Handgun was seized formed part of the "single transaction" that led to the seizure of the Handgun. But did the subsequent post-seizure delay in permitting Mr. Clark to contact counsel also form part of that transaction?

117 In my opinion, while the Handgun evidence was obtained in a manner that infringed Mr. Clark's s. 9 and 8 rights and his s. 10(a) and (b) rights in the circumstances prior to and existing at the time of the search, it cannot be said the subsequent delay in permitting Mr. Clark to contact counsel formed part of the circumstances that generated the Handgun evidence. That is, any post-seizure *Charter* violations are not relevant at this stage of analysis.

118 I realize that the Ontario Court of Appeal has taken a broad approach to the threshold "obtained in a manner" issue in ***R v Pino***, 2016 ONCA 389. According to Justice Laskin at para 48, "I think the Supreme Court's generous and increasingly broad approach to the 'obtained in a manner' requirement allows the court, in an appropriate case, to exclude the evidence because of a *Charter* breach occurring after the evidence was discovered." Justice Laskin set out the factors to be considered in determining whether evidence was obtained in a manner infringed or denied *Charter* rights at para 72:

> [72] Based on the case law, the following considerations should guide a court's approach to the "obtained in a manner" requirement in s. 24(2):
>
> * The approach should be generous, consistent with the purpose of s. 24(2)
> * The court should consider the entire "chain of events" between the accused and the police
> * The requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of conduct
> * The connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections.
> * But the connection cannot be either too tenuous or too remote.

A "temporal connection" is one that is close in time and that might straddle an accused's detention or arrest. A "contextual connection" pertains to "the surroundings or situation in which something happens:" para 74.

119 In my opinion, any post-seizure violations of the implementation element of Mr. Clark's s. 10(b) rights did not form part of the "same transaction or course of conduct" or "context" that involved the seizure of the Handgun and the observations relating to the Handgun. The Handgun was long since seized, new officers were involved who had not been present for the key police interactions with Mr. Clark, Mr. Clark was *Chartered* afresh when taken into the custody of Cst. Farhat and Cst. Penny, Mr. Clark was transported from the scene by these officers, and the delay occurring after their involvement was caused by the lack of availability of a phone room at NE Division not by detention at the scene. With the introduction of Cst. Farhat and Cst. Penny, a new later context was established. The connection between the post-transportation to NE Division violation and obtaining the Handgun is too tenuous or remote to be considered on the threshold "obtained in a manner" issue.

120 However, in my opinion, post-seizure violations not forming part of the circumstances in which evidence was obtained may be considered in the "seriousness of State conduct" avenue of inquiry into admission "bringing the administration of justice into disrepute". Continued neglect of an accused's rights or the occurrence of an evidence-gathering violation in a series of violations magnifies the seriousness of improper State conduct.

2. Would the admission of the evidence bring the administration of justice into disrepute?

121 The critical element of the s. 24(2) assessment, as in many cases, is the third element. In ***Grant***, Chief Justice McLachlin and Justice Charron identified three overarching purposes of s. 24(2). Decisions to exclude or not to exclude evidence under s. 24(2) should promote the integrity of the justice system and public confidence in the justice system. Decisions should have a "prospective" focus, preserving the repute of the justice system from further injury. Decisions should address societal or systemic concerns, the impact of admitting the evidence on the long-term repute of the justice system. In addressing these matters, there should not be a "focus on immediate reaction to the individual case." Rather, a long-term perspective must be adopted. The perspective should be that of the reasonable person informed of all relevant circumstances and the values underlying the *Charter*: ***Grant*** at paras 68 - 70.

122 In ***Grant***, the Supreme Court identified three avenues of inquiry to guide courts in determining whether the admission of evidence would bring the administration of justice into disrepute:

* the seriousness of the *Charter* infringing state conduct;
* the impact of the breach on the *Charter* protected interests of the accused; and
* society's interest in the adjudication of the case on its merits.

A judge deciding a s. 24(2) application must balance factors considered under these headings. According to Chief Justice McLachlin in ***R v Harrison***, 2009 SCC 34 at para 36, the balancing is qualitative and case-specific and does not involve simply stacking factors on the side of exclusion or admission: "In all cases, it is the long-term repute of the administration of justice that must be assessed."

123 I will go through the avenues of inquiry in reverse order. The avenues of inquiry are not sequential; one is not a threshold test for the others. This approach should assist in highlighting the issues at stake in this case.

(a) Society's interest in the adjudication of the case on its merits

124 According to ***Grant*** at para 79, this line of inquiry concerns "whether the truth-seeking function of the criminal trial process would be better served by the admission of the evidence or its exclusion." Factors relevant to this avenue of inquiry are the reliability of the evidence and its importance to the Crown's case: ***Grant*** at para 139; ***Harrison*** at paras 33 and 34.

125 In this case, the Handgun itself is a physical object. It is reliable evidence. Its physical nature was unaffected by any *Charter* breaches or indeed by any police conduct: ***Grant*** at para 115. The evidence of the location of the Handgun, observational evidence from Sgt. Forbes and Cst. Farhat is similarly reliable. There was no suggestion that their observations bore risks of inaccuracy, either because of any *Charter* breaches or for any other reason.

126 The evidence of the Handgun and connected evidence is essential to the Crown's case. Its exclusion would "gut" the Crown's case. The exclusion of highly reliable evidence and essential evidence may negatively affect the repute of the administration of justice.

(b) Impact of the breach on the *Charter*-protected rights of the accused

127 This avenue of inquiry calls for an evaluation of the extent to which the *Charter* violation or violations actually undermined the interests protected by the right or rights infringed. The inquiry looks to the effect of the *Charter* violations on the person whose rights were violated -- the *Charter* violations are assessed from the perspective of the impact on the accused rather than from the perspective of the conduct of the police. The impact of a *Charter* violation on an accused may range from fleeting and technical to profoundly intrusive: ***Grant*** at para 76.

128 In this case, it is true that as a passenger in a vehicle and as a person with privacy interests in a vehicle, Mr. Clark's reasonable expectations of privacy would be reduced by the relatively intrusive legal regulation of vehicle use. The search did not occur in Mr. Clark's home or a home shared with Ms. Grant. The search was not of Mr. Clark's person and did not involve an intimate personal search or a seizure of information-bearing bodily substances. The search was not of a paper or digital record-based archive of personal information. He gave up only his name and his recognizance. Mr. Clark was not "conscripted" to assist in locating the evidence, although he did disclose some personal information to Sgt. Forbes in response to Sgt. Forbes' questions, and that information was connected to the initiation of the search. The search was not conducted in a manner that was demeaning to Mr. Clark.

129 On the other hand, I have found that Mr. Clark's liberty interests were wrongly limited by an arbitrary detention. He still had privacy interests in the car and those interests were injured by an illegal search. I took into account the observations of Chief Justice McLachlin in ***Harrison*** at para 31:

> [31] This said, being stopped and subjected to a search by the police without justification impacts on the motorist's rightful expectation of liberty and privacy in a way that is much more than trivial. As Iacobucci J.

> observed in ***Mann***, the relatively non-intrusive nature of the detention and search "must be weighed against the absence of any reasonable basis for justification" (para. 56 (emphasis in original)). A person in the appellant's position has every expectation of being left alone -- subject, as already noted, to valid highway traffic stops.

Mr. Clark was detained and the police failed to perform their duties under s. 10(a) and 10(b) of the Charter. The detention in the parking lot was not brief. About an hour elapsed from the time the Chrysler was stopped until Mr. Clark was transported from the scene. See ***Fleury*** at para 49.

130 The adverse impact of the *Charter* violations on Mr. Clark's liberty and privacy interests was significant.

131 The Crown contended that the Handgun evidence was "discoverable" -- that is, it would have been recovered regardless of any *Charter* violations. That is, the *Charter* violations amounted to harmless error. If the Handgun would inevitably have been discovered through lawful investigation, the adverse impact of the wrongful search of the Chrysler on Mr. Clark's privacy interests would be reduced: see ***Grant*** at para 122.

132 In this case, "it cannot be determined with any confidence" whether the Handgun evidence would have been discovered in the absence of *Charter* violations: ***Grant*** at para 122. The mere fact that the Handgun is a physical object does not entail that it was "discoverable." There was no argument that grounds for a search warrant existed. The Handgun would not have been found through a safety search as it was not on Mr. Clark's person and he had complied with directions to get out of the Chrysler. Just how the Handgun would have been legally discovered was not made clear. On the evidence, the adverse impact of the *Charter* violations was not attenuated because the Handgun was discoverable.

(c) Seriousness of the *Charter*-infringing conduct

133 This line of inquiry considers the *Charter* violation or violations by looking to the conduct of the State actors. The minimum necessary wrongful conduct must have occurred to warrant a finding of *Charter* violation. The actual wrongful conduct may have been only that minimum or may have involved more serious or significant improper activity. The more serious the *Charter*-violating conduct of the State actors, the stronger the case for exclusion of evidence. This is because admitting the evidence despite the wrong-doing would amount, in effect, to the court condoning or ignoring the wrong-doing. It would amount, in effect, to the court disregarding the rule of law, the requirement that the State abide by the rule of law. See ***Grant*** at paras 72 and 74. (The seriousness inquiry, then, involves judicial self-reflection on the constitutional tolerability of the *Charter* violations.)

134 Yet s. 24(2) does not establish an automatic exclusion rule so that any *Charter* violation requires the exclusion of evidence. Rather, s. 24(2) recognizes that the administration of the law is a human activity, subject to error and imperfection. Not every bare *Charter* violation will result in the exclusion of evidence. In addition to considering the other avenues of inquiry, the present avenue of inquiry requires consideration of the nature of the State actors' *Charter*-violating conduct, whether it was inadvertent or in good faith, based for example on legal advice or legal understanding that turned out to be wrong, whether it involved the intentional or reckless violation or disregard of rights, whether it was part of a pattern of wrongful conduct, or whether the conduct resulted from improper or arbitrary motivations: ***Harrison*** at para 25. Another relevant consideration might be whether the purpose of the conduct was to preserve a third party from imminent harm or to reduce the risks that others would be exposed to imminent harm. The State actors' conduct must be assessed in the totality of the circumstances: ***Belnavis*** at para 41.

135 In this case, I have found that stopping the Chrysler was improper. It was not stopped for *Traffic Safety Act* or sobriety-checking purposes. There was no suggestion that Sgt. Forbes' manner was anything but professional and polite, but the detention was not brief. Moreover, there was an ongoing disregard not only of Mr. Clark's s. 9 then s. 8 rights but of his rights under s. 10(a) and 10(b). The disregard of his s. 10(a) and 10(b) rights continued from the parking lot to NE Division. Mr. Clark was not permitted to contact counsel promptly. The phone room may have

been busy when he arrived, but that cannot be a rare event. Some alternatives permitting quick contact with counsel should have been available.

136 Further, invalid consent was obtained from Ms. Grant. Sgt. Forbes did not use the template for obtaining consent in his notebook.

137 None of these defects was justified by extenuating circumstances.

138 The multiple *Charter* violations aggravate the seriousness of the police conduct: ***Harris*** at para 54, ***R v Tieu***, 2016 ABQB 344, Tilleman J at paras 115, 117.

139 Moreover, either there was a legal basis for applying for a search warrant to search the Chrysler or, as I have found, there was no foundation for a legal search of the Chrysler. Regardless, the solution was not to have searched the car without a warrant and without proper consent. The solution was not to have searched the car. Justice Sopinka wrote as follows in ***R v Kokesch***, [1990] 3 SCR 3: "Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally:" at 29. Proceeding to search when search was not lawful magnified the seriousness of the police conduct.

140 In my opinion, what occurred in this case is what occurred in ***Harrison***, as described by Chief Justice McLachlin at para 24:

> The officer's determination to turn up incriminating evidence blinded him to constitutional requirements of reasonable grounds. While the violations may not have been "deliberate", in the sense of setting out to breach the *Charter*, they were reckless and showed an insufficient regard for *Charter* rights. Exacerbating the situation, the departure from *Charter* standards was major in degree, since reasonable grounds for the initial stop were entirely non-existent.

141 I did consider the Crown's claim that Mr. Clark is charged with serious offences. I wholly accept that illegal possession of a handgun is (or may be) very serious criminal conduct. ***R v Felawka***, [1993] 4 SCR 199; see ***Grant*** at para 139. However, the seriousness of charges, by itself, does not mitigate the seriousness of *Charter*-violating conduct. It is not that there is one set of *Charter* rules for "serious" offences and another for "less serious" offences: ***R v Williamson***, 2016 SCC 28 at para 34. The seriousness of the offence, which would generally entail exposure to more severe penalties and greater stigma, might be argued to require greater constitutional scrupulousness rather than less. In any event, as Justice Cronk has wisely observed, what must avoided is "ends justify the means" reasoning. This approach

> would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law 'the ends justify the means'" (para. 150). *Charter* protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences: ***Harrison*** at para 40.

142 Moreover, even the category of serious offences has gradations. Now Chief Justice Moreau wrote as follows in ***Arabi*** at para 57:

> [57] ... The presence of a fully loaded handgun in an open vehicle and within reach of its occupants is a dangerous situation. However, this is not a situation, as in *R v Calder*, 2006 ABCA 307, where a loaded handgun was found in a backpack of a person walking through a public square during a summer festival involving hundreds of people. In this case, the gun was located within a vehicle. While not attempting to undermine the dangerousness of the situation, this factor must be weighed with the factors relating to the seriousness of the breach in determining whether the repute of the administration of justice is furthered by the inclusion or exclusion of the evidence.

143 In the seriousness of State conduct avenue of inquiry, "misleading testimony" by a State actor is also a relevant consideration: ***Harrison*** at para 26. I did not accept Sgt. Forbes' testimony on all points, particularly concerning the purpose behind stopping the Chrysler. I did not find that Sgt. Forbes was not sincere or that he was not accurately trying to recount what he recalled. I found that his memory was not reliable. This was a consequence, in no small part, of inadequate notes. Again, keeping adequate notes is a police officer's duty. To the extent that police officer evidence about their conduct does not display indicia of reliability or to the extent that objective means are not provided for testing the reliability of their testimony, to that extent the seriousness of their *Charter*-violating conduct is aggravated.

(d) On balance, does s. 24(2) require the exclusion of the Handgun evidence?

144 I have taken into account the impact of the admission or exclusion of the Handgun evidence on the long-term repute of the administration of justice, from the perspective of a reasonable person informed of all the circumstances and informed of *Charter* values. I have taken into account the truth-seeking objectives of trial and society's interests in adjudicating this case on its merits. Specifically, I have taken into account that the Handgun is physical evidence, unaffected by any *Charter* violations and the surrounding evidence is also free from taint by any *Charter* violations. I appreciate that excluding the evidence would "gut" the Crown's case. I have taken into account the impact of the violations on Mr. Clark's *Charter*-protected rights to liberty and privacy, his right to be left alone by the State and not to be subject to search without legal grounds, the length of his pre-arrest detention, and that Mr. Clark's right to be advised of the nature of the offence and of his right to counsel were ignored until after the search was concluded. I have not ignored the reduction of Mr. Clark's reasonable expectations of liberty and privacy as an occupant of a vehicle. I have taken into account the seriousness of the State conduct, particularly the arbitrary stop and unjustified warrantless search, the stop motivated by the desire to obtain information about the occupants, the search motivated by the desire to find out what was beneath Mr. Clark's seat when there was no foundation for a legal search. The seriousness of the charges faced by Mr. Clark does not attenuate the seriousness of the police violations of his rights. The lack of fulsome contemporaneous notes by the key officer involved (with the consequent deleterious effects on the reliability of his testimony) exacerbated the seriousness of the police conduct.

145 Taking into account the totality of the circumstances, in my opinion, the long-term repute of the administration of justice demands that the Handgun evidence, the evidence of the Handgun itself and the evidence surrounding its seizure, be excluded from the trial. Mr. Clark has established that the admission of the Handgun evidence in the trial would bring the administration of justice into disrepute. The Handgun evidence, being the Handgun itself and the evidence concerning its seizure, is therefore excluded from trial under s. 24(2) of the *Charter*.

Dated at the City of Edmonton, Alberta this 20th day of October, 2017.

W.N. RENKE J.

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R. v. Demers, [2004] 2 S.C.R. 489

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

Heard: January 21, 2004;

Judgment: June 30, 2004.

File No.: 29234.

[2004] 2 S.C.R. 489 | [2004] 2 R.C.S. 489 | [2004] S.C.J. No. 43 | [2004] A.C.S. no 43 | 2004 SCC 46

Réjean Demers, appellant; v. Her Majesty The Queen, respondent, and Attorney General of Canada and Attorney General of Ontario, interveners, and Tribunal administratif du Québec, section des affaires sociales, and Centre hospitalier Robert-Giffard, mis en cause.

(108 paras.)

Appeal From:

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC

Case Summary

Catchwords:

Constitutional law — Division of powers — Criminal law — Permanently unfit accused who do not pose a significant threat to public safety — Accused unfit to stand trial on account of permanent mental disability — Whether ss. 672.33, 672.54 and 672.81(1) of Criminal Code ultra vires Parliament — Constitution Act, 1867, s. 91(27) — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.33, 672.54, 672.81(1).

Catchwords:

Constitutional law — Charter of Rights — Liberty — Fundamental justice — Presumption of innocence — Overbroad legislation — Accused unfit to stand trial on account of permanent mental disability — Absolute discharge not available to permanently unfit accused who do not pose a significant threat to public safety — Courts and Review Boards having no power to order psychiatric assessment of unfit accused after initial evaluation in order to adapt disposition to his current circumstances — Whether ss. 672.33, 672.54 and 672.81(1) of Criminal [page490] Code 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. 672.33, 672.54, 672.81(1).

Summary:

The accused, who is moderately intellectually handicapped, was declared unfit to stand trial on charges of sexual assault. He remained in hospital until he was discharged, subject to conditions, three months later by a Review Board acting under ss. 672.47 and 672.54 of the *Criminal Code*. The result of the combined operation of ss. 672.33, 672.54 and 672.81(1) is that an accused found unfit to stand trial remains in the "system" established under Part XX.1 of the *Code* until either he becomes fit to stand trial or the Crown fails to establish a *prima facie* case against him. An absolute discharge is not available. People like the accused who are permanently unfit and

could never stand trial are subject to indefinite appearances before the Review Board and to the exercise of its powers. The Quebec Superior Court refused to grant the accused a stay of proceedings and upheld the constitutionality of s. 672.54. In this Court, the accused challenged the constitutional validity of ss. 672.33, 672.54 and 672.81(1) of the *Code* under the *Constitution Act, 1867*'s division of powers and the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be allowed. The impugned provisions are unconstitutional.

Per McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, Deschamps and Fish JJ.: The impugned provisions are *intra vires* Parliament. The pith and substance of Part XX.1 of the *Criminal Code* is revealed by its twin goals of protecting the public and treating the mentally ill accused fairly and appropriately. While the exercise of criminal power over accused found "not criminally responsible on account of mental disorder" can only be justified under the protective branch of criminal law, the situation is different in respect of accused found unfit to stand trial. Unless he is found to be dangerous, the criminal law's jurisdiction over the unfit accused does not stem from that branch of the criminal law. Rather, the criminal justice system maintains jurisdictional control over the accused found unfit to stand trial because that person is subject to a criminal accusation and pending proceedings. As long as this accusation is maintained, it is not necessary to consider the dangerousness of the accused or the protection of the public because other [page491] considerations justify Parliament's jurisdiction in regard to accused found unfit to stand trial, namely its jurisdiction over criminal procedure. The pith and substance of the impugned provisions thus falls within both the preventive and criminal procedure branches of the criminal law. It should also be noted that laws dealing with the unfit accused have long been accepted as valid criminal law. Lastly, where, as here, one level of government supports the constitutionality of another level's legislation, a court should be cautious before finding the impugned provision *ultra vires*.

With respect to s. 7 of the *Charter*, the deprivation of the unfit accused's liberty accords with the presumption of innocence as a principle of fundamental justice. The Review Board proceedings under ss. 672.54 and 672.81(1) do not involve a determination of guilt or innocence. Nor do they presume that the unfit accused is dangerous. They simply require the Review Board to perform an assessment of the accused and impose the least onerous condition on his liberty. The unavailability of an absolute discharge relates to the fact that the accused has not been tried, rather than the presumption that the accused is guilty or dangerous. Section 672.33 does not presume guilt, but rather aims at preventing abuses of the regime under Part XX.1 by providing that the accused is acquitted when the evidence presented to the court is insufficient to put him on trial.

However, it is a well-established principle of fundamental justice that criminal legislation must not be overbroad. The least onerous disposition under s. 672.54(*a*), absolute discharge, is not available to the accused found unfit to stand trial. This is justified in the case of an unfit accused who does not suffer from a permanent mental disorder, because the means chosen by Parliament significantly advance the goals of assessment and treatment, which can result in rendering the accused fit for trial, and the goal of protecting the public. In the case of a permanently unfit accused, a trial is not a possibility and the objective of rendering the accused fit for trial does not apply. Consequently, the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered and there is no evidence of a significant threat to public safety, makes the law overbroad because the means chosen are not the least restrictive of the unfit person's liberty and are not necessary to achieve the state's objective. The impugned legislation thus infringes the s. 7 liberty of permanently [page492] unfit accused who do not pose a significant threat to society.

The overbroad legislation cannot be upheld under s. 1 of the *Charter*, because its overbreadth causes it to fail the minimal impairment branch of the s. 1 analysis. Part XX.1 deals unfairly with the permanently unfit accused who are not a significant threat to public safety. The regime does not provide for an end to the prosecution. Permanently unfit accused are subject to indefinite conditions on their liberty, of varying degrees of restrictiveness, resulting from the disposition orders of the Review Board or the court. Psychiatric evaluations are necessary to assess the mental condition of the permanently unfit accused in order to impose the least restrictive conditions, if any, on his liberty. The inability of courts and Review Boards to order such an assessment after the initial evaluation of the accused makes it impossible to ensure that the disposition under s. 672.54 or any review pursuant to s. 672.81(1) is tailored to the unfit accused's current circumstances.

The appropriate remedy in this case is a declaration of invalidity of the impugned provisions, suspended for a 12-

month period to give Parliament time to amend the legislation. Such amendments should allow courts, under s. 672.54, to absolutely discharge a permanently unfit accused, and should also allow courts or Review Boards to order psychiatric evaluations if no current evaluations are available to them. Although the rule in *Schachter* precludes courts from granting an individual remedy under s. 24(1) of the *Charter* during the period of suspended invalidity, it does not stop them from awarding prospective remedies under s. 24(1) in conjunction with remedies under s. 52 of the *Constitution Act, 1982*. Therefore, if Parliament does not amend the invalid legislation within one year, those permanently unfit accused who do not pose a significant threat to the safety of the public can ask for a stay of proceedings.

Per LeBel J.: The impugned provisions are *ultra vires* Parliament. The criminal procedure power under s. 91(27) of the *Constitution Act, 1867* does not grant Parliament the authority to supervise and detain accused [page493] who are permanently unfit to stand trial. The division of powers should be read in light of the principles that animate the whole of our Constitution, including the principle of respect for human rights and freedoms. The human rights and freedoms expressed in the *Charter*, while they do not formally modify the scope of the powers in ss. 91 and 92 of the *Constitution Act, 1867*, provide a new lens through which those powers should be viewed. In choosing one among several possible interpretations of powers that implicate human rights, the interpretation that best accords with the imperatives of the *Charter* should be adopted. In this case, the pith and substance of Part XX.1 in relation to accused found unfit to stand trial is the treatment and supervision of these accused as well as the protection of the public while they remain unfit and subject to an outstanding criminal charge. Insofar as the aim of Part XX.1 is concerned with the treatment and supervision of a temporarily unfit accused and the protection of the public during the accused's limited period of unfitness, its ultimate aim is to try the accused once he becomes fit. This falls squarely within the ambit of the criminal procedure power. However, where the accused is permanently unfit to stand trial, the overriding goal of Part XX.1 is absent and Parliament loses jurisdiction. A person cannot be subject to state control and have limits imposed on his liberty based on the criminal procedure power absent progress towards the adjudication of his legal culpability. This is a fundamental human right affirmed in ss. 7 and 11(*b*) of the *Charter*. The continued supervision, detention or conditional liberty of a permanently unfit accused can relate only to the mental health of the individual, and this is considered to be within the provincial jurisdiction under ss. 92(7), 92(13) and 92(16) of the *Constitution Act, 1867*. Further, this approach has the salutary effect of respecting and enhancing the permanently unfit accused's human dignity.

There is agreement with the majority's conclusion regarding the violation of s. 7 of the *Charter.*

An application for a stay resulting from a violation of an accused's right under s. 11(*b*) to a trial within a reasonable time would be available to both dangerous and non-dangerous permanently unfit accused, as our jurisprudence has made no distinction between an accused's character or alleged propensity for violence in determining whether s. 11(*b*) has been violated and whether a stay should issue under s. 24(1) of the *Charter*.

[page494]

With respect to a remedy, ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* should be declared invalid pursuant to s. 52 of the *Constitution Act, 1982* and the declaration should be suspended for 12 months. Further, the accused and all permanently unfit accused who do not pose a significant threat to public safety should be granted a stay of proceedings within 30 days under s. 24(1) of the *Charter* for the breach of their s. 7 rights. This is an appropriate case to combine remedies under ss. 24(1) and 52, because slavish adherence to the rule in *Schachter* would result in an injustice. This is not a situation in which a s. 24 remedy would only duplicate the relief flowing from the s. 52 remedy. From the perspective of the public role of the *Charter*, a suspended declaration of invalidity under s. 52 ensures future compliance with the *Constitution Act, 1867* by Parliament and also protects the public from the immediate release of potentially dangerous persons, while giving time to both Parliament and the provincial legislatures to amend their respective legislation. From the perspective of the accused, however, a suspended declaration of invalidity gives him no immediate redress and the violation of his liberty interest under s. 7 continues. In light of the seriousness of the violation and the Review Board's recent finding that the accused was not dangerous enough to warrant hospitalization, a stay to be granted within 30 days would effectively redress the wrong he has suffered. The 30-day period is sufficient to allow the provincial health authorities to seek a protective order under their mental health regime, if necessary. There is no question in this case that the Court can effectively implement the suspended declaration of invalidity or the stay.

Cases Cited

By Iacobucci and Bastarache JJ.

Applied: Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625; R. v. Heywood, [1994] 3 S.C.R 761; Schachter v. Canada, [1992] 2 S.C.R. 679; discussed: R. v. Swain, [1991] 1 S.C.R. 933; referred to: R. v. Malmo-Levine, [2003] 3 S.C.R. 571, 2003 SCC 74; Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1; Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31; RJR-MacDonald Inc. v. Canada (Attorney [page495] General), [1995] 3 S.C.R. 199; Ward v. Canada (Attorney General), [2002] 1 S.C.R. 569, 2002 SCC 17; R. v. Morgentaler, [1993] 3 S.C.R. 463; Attorney General of Quebec v. Lechasseur, [1981] 2 S.C.R. 253; R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12; MacDonald v. Vapor Canada Ltd., [1977] 2 S.C.R. 134; OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; Siemens v. Manitoba (Attorney General), [2003] 1 S.C.R. 6, 2003 SCC 3; Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), [2002] 2 S.C.R. 146, 2002 SCC 31; R. v. Pearson, [1992] 3 S.C.R. 665; R. v. Charemski, [1998] 1 S.C.R. 679; United States of America v. Shephard, [1977] 2 S.C.R. 1067; Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, 2004 SCC 4; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; Cunningham v. Canada, [1993] 2 S.C.R. 143; R. v. Power, [1994] 1 S.C.R. 601; Krieger v. Law Society of Alberta, [2002] 3 S.C.R. 372, 2002 SCC 65; Vriend v. Alberta, [1998] 1 S.C.R. 493; M. v. H., [1999] 2 S.C.R. 3; Guimond v. Quebec (Attorney General), [1996] 3 S.C.R. 347; Winnipeg Child and Family Services v. K.L.W., [2000] 2 S.C.R. 519, 2000 SCC 48; Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, 2002 SCC 13; Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391; R. v. Conway, [1989] 1 S.C.R. 1659.

By LeBel J.

Not followed: Schachter v. Canada, [1992] 2 S.C.R. 679; distinguished: R. v. Swain, [1991] 1 S.C.R. 933; Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625; referred to: Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1, aff'd [1951] A.C. 179 (sub nom. Canadian Federation of Agriculture v. Attorney-General for Quebec); Morgentaler v. The Queen, [1976] 1 S.C.R. 616; R. v. Morgentaler, [1993] 3 S.C.R. 463; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; R. v. Hydro-Québec, [1997] 3 S.C.R. 213; Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31; Di Iorio v. Warden of the Common Jail of the City of Montreal, [1978] 1 S.C.R. 152; Ritcey v. The Queen, [1980] 1 S.C.R. 1077; Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen, [1956] S.C.R. 303; R. v. Lyons, [1987] 2 S.C.R. 309; United States of America v. Shephard, [1977] 2 S.C.R. 1067; R. v. Monteleone, [1987] 2 S.C.R. 154; Edwards v. Attorney-General for Canada, [1930] A.C. 124; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Adler v. Ontario, [1996] 3 S.C.R. 609; [page496] Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3; Reference re Secession of Quebec, [1998] 2 S.C.R. 217; Reference re Alberta Statutes, [1938] S.C.R. 100; Switzman v. Elbling, [1957] S.C.R. 285; OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; Reference re Resolution to amend the Constitution, [1981] 1 S.C.R. 753; Schneider v. The Queen, [1982] 2 S.C.R. 112; R. v. Askov, [1990] 2 S.C.R. 1199; R. v. Morin, [1992] 1 S.C.R. 771; Guimond v. Quebec (Attorney General), [1996] 3 S.C.R. 347; Winnipeg Child and Family Services v. K.L.W., [2000] 2 S.C.R. 519, 2000 SCC 48; Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, 2002 SCC 13; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1998] 1 S.C.R. 3; R. v. Brydges, [1990] 1 S.C.R. 190; R. v. Bain, [1992] 1 S.C.R. 91.

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History and Disposition:

APPEAL from a judgment of the Quebec Superior Court, [2002] Q.J. No. 590 (QL), J.E. 2002-976, dismissing the accused's motion for a stay of proceedings and for a declaration that s. 672.54 of the Criminal Code is unconstitutional. Appeal allowed.

Counsel

Suzanne Gagné and Stéphane Lepage, for the appellant.

Joanne Marceau, for the respondent.

Michel F. Denis and Yvan Poulin, for the intervener the Attorney General of Canada.

Lucy Cecchetto and Shaun Nakatsuru, for the intervener the Attorney General of Ontario.

The judgment of McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, Deschamps and Fish JJ. was delivered by

IACOBUCCI and BASTARACHE JJ.

I. Introduction

1 This appeal raises the issue of the constitutional validity of ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("Cr. C."), [page498] with respect to accused persons who are unfit to stand trial. More specifically, the questions raised are whether the regime set out by Parliament in Part XX.1 Cr. C. is unconstitutional under the division of powers analysis or under ss. 7, 11(*b*), 11(*d*) or 15(1) of the *Canadian Charter of Rights and Freedoms* when applied to persons who have been found permanently unfit to stand trial.

2 We have found that the application of the impugned provisions to persons found unfit to stand trial, on account of permanent or temporary mental disorder, falls within the legislative jurisdiction of the Parliament of Canada. However, we have also found that persons who are permanently unfit to stand trial and do not pose a significant threat to public safety suffer a breach of their liberty interest under s. 7 of the *Charter* because they are subject to indefinite appearances before the Review Board and to the exercise of its powers over them. The limitation of their liberty interest does not accord with the principles of fundamental justice and cannot be saved under s. 1 of the *Charter*. Accordingly, we would allow the appeal.

II. Background

3 The appellant suffers from Trisomy 21, more commonly known as Down Syndrome, which causes him to be moderately intellectually handicapped. On January 23, 1997, he appeared before the Court of Quebec in relation to charges of sexual assault under s. 271(1)(*a*) Cr. C. On that date, the judge before whom the appellant appeared

ordered an inquiry to determine whether he was fit to stand trial. On February 28, 1997, the appellant was declared unfit to stand trial, following which he remained in hospital until he was discharged three months later, on May 5, 1997, by a Review Board acting under ss. 672.47 and 672.54 Cr. C. His discharge was subject to the condition that he live with his family, keep the peace and establish a consensual treatment regime together with his parents and medical professionals.

4 The appellant presented a motion to obtain a stay of proceedings under s. 24(1) of the *Charter*, [page499] or alternatively, to have s. 672.54 Cr. C. declared of no force and effect under s. 52(1) of the *Constitution Act, 1982*, on the basis that it violated his rights under ss. 7, 11(*b*) and 15(1). The Quebec Superior Court refused to grant a stay and upheld the impugned provision: [2002] Q.J. No. 590 (QL). Since the matters at issue are not appealable to the Quebec Court of Appeal, leave to appeal was sought. Leave to appeal was granted by this Court on December 12, 2002.

III. Constitutional and Statutory Provisions

5 The following provisions of the *Constitution Act, 1867* and the *Criminal Code* are at issue:

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 herein-after enumerated; that is to say, --
>
> ...
>
> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Criminal Code, R.S.C. 1985, c. C-46

> **672.33** (1) The court that has jurisdiction in respect of the offence charged against an accused who is found unfit to stand trial shall hold an inquiry, not later than two years after the verdict is rendered and every two years thereafter until the accused is acquitted pursuant to subsection (6) or tried, to decide whether sufficient evidence can be adduced at that time to put the accused on trial.

[page500]

> **672.54** Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
>
> (*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
>
> (*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
>
> (*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

> **672.81** (1) A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(*a*).

6 The appellant submits that ss. 672.33, 672.54 and 672.81(1) Cr. C. infringe his right to liberty and security of the person guaranteed by s. 7, his right to be tried within a reasonable time guaranteed by s. 11(*b*), the presumption of innocence guaranteed by s. 11(*d*), and his equality rights guaranteed by s. 15(1) of the *Charter*. The relevant provisions of the *Charter* are as follows:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **11.** Any person charged with an offence has the right
>
> ...
>
> (*b*) to be tried within a reasonable time;
>
> ...

[page501]

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

IV. Issues

7 The following constitutional questions were stated by the Chief Justice on February 13, 2003:

1. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that they deprive persons who have been found unfit to stand trial of their right to liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice?
2. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
3. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* infringe the rights and freedoms guaranteed by s. 11(*d*) of the *Charter* on the ground that they deprive persons who have been found unfit to stand trial of the right to be presumed innocent?
4. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
5. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* infringe the rights and freedoms guaranteed by s. 15(1) of the *Charter* on the ground that they create discrimination against persons with a mental disability who have been found unfit to stand trial?
6. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

[page502]

An additional question was stated on November 4, 2003:

> 7. Does the application of ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to persons found unfit to stand trial on account of permanent mental disorder overstep the legislative jurisdiction of the Parliament of Canada under the *Constitution Act, 1867*?

V. Discussion

A. *The Impugned Scheme*

8 In the wake of this Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, Parliament introduced Part XX.1 Cr. C. The provisions in Part XX.1 establish a regime for dealing with accused persons who suffer from mental disorders. The first group covered by the regime is made up of accused that are found "not criminally responsible on account of mental disorder" ("NCR") under s. 672.34 Cr. C. The second group constitutes individuals declared unfit to stand trial. In *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, a majority of this Court held that Part XX.1 was constitutional insofar as it applied to NCR offenders. The constitutionality of Part XX.1 in its application to accused who are unfit to stand trial was not addressed in *Winko* and is the focus of this appeal.

9 Under s. 672.23(1) Cr. C., where a court has reasonable grounds to believe that the accused is unfit to stand trial, it may direct, on its own motion or on the application of one of the parties, that the issue of fitness of the accused be tried. The court has the power under s. 672.11 to order an assessment of the accused, which constitutes an examination by a medical practitioner on the mental condition of the accused, and any incidental observation or examination of the accused. During a trial on the fitness of the accused, an unrepresented accused is provided with legal representation under s. 672.24(1). He or she is presumed fit to stand trial (s. 672.22). The party requesting that the issue of fitness be tried bears the burden of proving on a balance of probabilities that the accused is unfit to stand trial (ss. 672.22 and 672.23(2)). Although expert [page503] evidence is relied on heavily, the ultimate issue of fitness is decided by the trier of fact (s. 672.26).

10 If the accused is found unfit to stand trial, the court may order the forcible treatment of the accused for up to 60 days if (i) the Crown requests forcible treatment and (ii) according to a medical practitioner, specific treatment should be administered for the purpose of making the accused fit to stand trial (ss. 672.58 and 672.59). Immediately following such treatment or a finding that the accused is unfit to stand trial (in the event that no treatment of the accused is ordered), a disposition hearing is held, either by the court (s. 672.45) or alternatively by a Review Board (s. 672.47) to determine whether, and subject to what conditions, if any, the accused should be released or detained. The body conducting the disposition hearing must take into consideration the factors set out in s. 672.54: the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused. It must be pointed out that under s. 672.54, the Review Board is not authorized to grant an absolute or unconditional discharge to persons who are unfit to stand trial (although it does allow for the absolute discharge of individuals declared NCR).

11 Following its initial disposition in respect of an accused, the Review Board must conduct a hearing every year to determine whether the circumstances warrant a modification of its disposition (s. 672.81(1)). If the accused is fit to stand trial, he is sent to trial under s. 672.48, and the jurisdiction of the Review Board ceases to operate. Otherwise, and subject to what will be said immediately below, another review hearing is held the following year.

12 In addition to the proceedings conducted by the Review Board, under s. 672.33, every two years, the Crown must appear before a court to show that there still exists a *prima facie* case against the accused. This is the only way the Crown can justify maintaining the outstanding criminal charge against the [page504] accused. In the event that the Crown cannot make out a *prima facie* case against the accused, the court is required to acquit the accused.

13 The result of the combined operation of ss. 672.33, 672.54 and 672.81(1) is that an accused found unfit to

stand trial remains in the "system" established under Part XX.1 until either (a) he or she becomes fit to stand trial or (b) the Crown fails to establish a *prima facie* case against him or her.

B. *Division of Powers*

14 We will first examine the issue as to whether the impugned provisions fall within Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867*, or whether, as the appellant contends, it is *ultra vires*.

15 Whenever an issue of division of powers arises, the first step in the analysis is to characterize the "pith and substance" of the impugned legislation. In order to determine the pith and substance of any particular legislative provision, it is necessary to examine that provision in its overall legislative context: *Swain, supra*, at p. 998.

(1) The Criminal Law Power

16 Parliament's jurisdiction over criminal law was recently examined by this Court in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at paras. 73-74:

> The federal criminal law power is "plenary in nature" and has been broadly construed:
>
> > A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
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> [page505]
>
> (*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the "*Margarine Reference*"), at p. 49)
>
> ...
>
> For a law to be classified as a criminal law, it must possess three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty (*Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 27). The criminal power extends to those laws that are designed to promote public peace, safety, order, health or other legitimate public purpose. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, it was held that some legitimate public purpose must underlie the prohibition. In *Labatt Breweries* [*of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914], in holding that a health hazard may ground a criminal prohibition, Estey J. stated the potential purposes of the criminal law rather broadly as including "public peace, order, security, health and morality" (p. 933). Of course Parliament cannot use its authority improperly, e.g. colourably, to invade areas of provincial competence: *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 237.

17 In determining whether the purpose of a law constitutes a valid criminal law purpose, courts also look at whether laws of this type have traditionally been held to be criminal law: *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, 2002 SCC 17, at para. 51; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 32; *RJR-MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 204; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 491.

18 The pith and substance of Part XX.1 Cr. C. is revealed by its twin goals of protecting the public and treating the mentally ill accused fairly and appropriately: *Winko, supra*, at para. 20.

(2) Pith and Substance of the Impugned Provisions and Their Classification as Criminal Law Under Section 91(27)

19 The appellant contends that once it has been established that a person will not be tried because of permanent unfitness to stand trial, the circumstances [page506] no longer constitute a matter within Parliament's criminal law power. Instead, he claims that persons who represent a danger to themselves or others fall under the exclusive provincial jurisdiction of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*. The appellant also argues that the impugned provisions are not within Parliament's criminal law powers because their pith and substance is the protection of society from persons with dangerous mental states, not persons who have engaged in conduct proscribed by the *Criminal Code*. He relies on passages from this Court's decisions in *Swain* and *Winko* to suggest that once an unfit accused ceases to pose a significant threat to public safety, the criminal justice system has no further application.

20 Such a statement is true of the NCR accused. This Court has stated that the only constitutional basis for the criminal law restricting the liberty of an NCR accused is the protection of the public from significant threats to its safety. For example, in *Winko*, at para. 33, McLachlin J. (as she then was) held:

> The preventative or protective jurisdiction exercised by the criminal law over NCR offenders extends only to those who present a significant threat to society... . Once an NCR accused is no longer a significant threat to public safety, the criminal justice system has no further application.

21 However, to say that the same considerations apply to the accused person found unfit to stand trial is to ignore fundamental differences between persons who are found to be NCR and persons who are found unfit to stand trial. The difference in legal status between the NCR and the unfit accused has been discussed by R. D. Schneider in "Mental Disorder in the Courts: Absolute Discharge for Unfits?" (2000), 21 *For the Defence* 36, at p. 38:

> The NCR accused has not been convicted of a crime, but the criminal proceedings have been fully concluded [page507] and a final verdict obtained. Therefore, society's residual hold on the accused can only be justified if the accused is shown to be a significant threat to the safety of the public. On the other hand, the unfit accused has yet to be tried. So long as the information or indictment is outstanding the court and/or the Review Board maintain jurisdiction over the accused. Jurisdiction over the unfit has nothing to do with dangerousness. The fitness rules were established to ensure that a prosecution not proceed where an accused is not able to adequately respond to the state. The rules are in place to protect the accused. While it is true that an accused may be "permanently unfit", surely that status accompanied by the presumption of innocence [*Charter*, s. 11(*d*)] is preferable to either proceeding against the unfit accused or terminating the outstanding charges. [Emphasis added.]

22 Thus, when a verdict of NCR has been rendered, the criminal process has ended and the exercise of criminal state power over NCR offenders can only be justified under the protective branch of the criminal law, when it is proven that the NCR offender presents a significant threat to the public. However, the situation is different with respect to accused found unfit to stand trial: the criminal law's jurisdiction over the unfit accused does not stem from the protective branch of the criminal law, unless he or she is found to be dangerous. Rather, the criminal justice system maintains jurisdictional control over the accused found unfit to stand trial because that person is subject to a criminal accusation and pending proceedings. As long as this accusation is maintained, it is not necessary to consider the dangerousness of the accused or the protection of the public because other considerations justify Parliament's jurisdiction in regards to accused found unfit to stand trial, namely its jurisdiction over criminal procedure.

23 Parliament's power in matters of criminal law, under s. 91(27) of the *Constitution Act, 1867*, expressly includes "the [p]rocedure in [c]riminal [m]atters". Its jurisdiction over criminal procedure was discussed by this Court in *Attorney General of Quebec v. Lechasseur*, [1981] 2 S.C.R. 253, at p. 262:

[page508]

That the present s. 455, no less than its forerunners, is within federal competence as an exercise of power in

relation to the criminal law, including procedure in a criminal matter, appears to me to be incontestable. The section makes it possible for a charge of an indictable offence to be brought before a justice of the peace or a magistrate to consider the issue of a summons or a warrant in respect of the charge. The criminal process is thus initiated and this initiation is integral to the process. [Emphasis added.]

From the time a person is accused of a crime under the *Criminal Code*, the criminal process is validly engaged and its hold on the accused found unfit to stand trial is established. Therefore, the authority to establish a scheme to administer the rights of the accused found unfit to stand trial flows from Parliament's jurisdiction on criminal law, including criminal procedure.

24 The system of Crown pre-charge screening in Quebec was described by this Court in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at para. 76 (citing the Attorney General of Quebec's factum):

> [TRANSLATION] The prosecutor's decision to authorize the laying of criminal charges presupposes that the conduct complained of constitutes an offence in law, that there are reasonable grounds to believe that the person under investigation is the perpetrator, that it is legally possible to prove it, and that it is appropriate to prosecute. In exercising prosecutorial discretion, the prosecutor must take into account various policy and social considerations.

Consequently, when the Crown has reasonable grounds to believe that the person under investigation is the perpetrator, that it is legally possible to prove it and that it is appropriate to prosecute, it will lay criminal charges and the person falls within Parliament's criminal law jurisdiction. Such a finding reinforces the government's fundamental interest in bringing to trial an individual accused of a serious crime.

25 As mentioned above, Part XX.1 Cr. C. was enacted as a balanced response to this Court's decision in *Swain*. This new scheme reflects both the public's needs (protection from dangerous [page509] individuals and bringing to trial an individual accused of a serious crime) and the needs of the accused (right to a fair trial, assessment and treatment of persons with mental disorders). The pith and substance of the impugned provisions falls within both the preventive and criminal procedure branches of the criminal law, all within well-accepted criminal law purposes (*Margarine Reference, supra*).

26 In *Swain, supra*, this Court found that the predecessor legislation to Part XX.1 was a valid exercise of Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867*. After citing *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, at p. 146, as an authority for the proposition that "legislation under the preventative branch of the criminal law power must relate in some way to criminal proceedings" but does not require an actual conviction, Lamer C.J. explained, at p. 1001:

> Since the insanity provisions only relate to persons whose actions are proscribed by the *Criminal Code*, the required connection with criminal law is present. The system of Lieutenant Governor warrants, through the supervision of persons acquitted by reason of insanity, serves to prevent further dangerous conduct proscribed by the *Criminal Code* and thereby protects society. The protection of society is clearly one of the aims of the criminal law.
>
> While I am aware of the potential danger of eroding provincial power if "protection of society" is characterized too broadly, I would emphasize that in this case Parliament is protecting society from individuals whose behaviour is proscribed by the *Criminal Code*. The provisions do not relate to all insane persons, but only those who, through their actions, have brought themselves within the criminal law sphere.

27 It is also important to note that laws dealing with the unfit accused have long been accepted as valid criminal law. Until 1990, where an accused was "acquitted on the basis of mental illness, he or she was not released, but was automatically detained at the pleasure of the Lieutenant Governor in Council: [page510] *Criminal Code*, s. 614(2) (formerly s. 542(2)) (repealed S.C. 1991, c. 43, s. 3)": *Winko, supra*, at para. 18.

28 Finally, as stated by Dickson C.J. in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 19-20, where one level of government supports the constitutionality of another level's legislation, the Court should be cautious before finding the impugned provision *ultra vires*:

> I think it is important to note, and attach some significance to, not only the similar federal legislation but also the fact that the federal government intervened in this appeal to support the Ontario law. The distribution of powers provisions contained in the *Constitution Act, 1867* do not have as their exclusive addressees the federal and provincial governments. They set boundaries that are of interest to, and can be relied upon by, all Canadians. Accordingly, the fact of federal-provincial agreement on a particular boundary between their jurisdictions is not conclusive of the demarcation of that boundary. Nevertheless, in my opinion the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity or, as in this case, actually intervenes to support it and has enacted legislation based on the same constitutional approach adopted by Ontario. [Emphasis added.]

See also *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, 2003 SCC 3, at para. 34, and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 31. In the case at bar, the Attorney General of Canada, as well as the Attorney General of Ontario, have intervened to support the constitutionality of the impugned provisions of the *Criminal Code*.

29 Thus, for all the aforementioned reasons, we are of the view that the application of ss. 672.33, 672.54 and 672.81(1) Cr. C. to persons found unfit to stand trial, on account of permanent or temporary mental disorder, falls within the legislative [page511] jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*.

C. *Do Sections 672.33, 672.54 and 672.81(1) of the Criminal Code Infringe Section 7 of the Charter?*

(1) The Liberty Interest

30 As stated in *Winko, supra*, at para. 64, the provisions of Part XX.1 Cr. C. permit the state, through a court or Review Board, to deprive the NCR accused of his or her liberty. It is conceded by the respondent in the case at bar that an unfit accused is also deprived of his or her right to liberty under Part XX.1, because he or she is subject to a disposition order by the Review Board that imposes certain conditions on his or her liberty. It is therefore necessary to move to the next stage of the s. 7 analysis to determine whether the deprivation of liberty accords with the principles of fundamental justice.

(2) Principles of Fundamental Justice

31 The appellant argues that two principles of fundamental justice have been breached: (1) the presumption of innocence and (2) the principle that criminal legislation must not be overbroad.

(a) *Presumption of Innocence*

32 The appellant contends that Part XX.1 requires the state to treat unfit accused as offenders who have a mental illness, without taking into account that it has not been proved beyond a reasonable doubt that they have committed a criminal offence. The appellant also argues that the presumption of innocence is infringed when permanently unfit accused are subjected to the criminal justice system during an indeterminable period for the sole reason that a *prima facie* case against them exists, one that they will never be able to contest because they are permanently unfit. In sum, the appellant argues that the state cannot subject a permanently unfit accused to the criminal charges for an indeterminate period with only the goal of ensuring public safety, based solely on a *prima [page512] facie* case that he or she committed the offence charged.

33 In our view, the deprivation of the unfit accused's liberty accords with the presumption of innocence as a principle of fundamental justice.

34 As discussed by this Court in *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 685, the presumption of innocence as a principle of fundamental justice under s. 7 of the *Charter* "does not necessarily require anything in the nature of proof beyond reasonable doubt, because the particular step in the process does not involve a determination of guilt". The Review Board proceedings under ss. 672.54 and 672.81(1) do not involve a determination of guilt or innocence. Nor do they presume that the unfit accused is dangerous. They simply require the Review Board to perform an assessment of the accused and impose the least onerous condition on his or her liberty. The unavailability of an absolute discharge relates to the fact that the accused has not been tried, rather than the presumption that the accused is guilty or dangerous.

35 Section 672.33 requires the court only to examine whether or not the Crown is able to put forward sufficient evidence to put the accused on trial. In other words, the Crown must adduce some "evidence upon which a reasonable jury properly instructed could return a verdict of guilty": *R. v. Charemski*, [1998] 1 S.C.R. 679, at para. 2; *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080. Section 672.33 does not presume guilt, but rather aims at preventing abuses of the regime under Part XX.1 Cr. C. by providing that the accused is acquitted when the evidence presented to the court is insufficient to put him or her on trial.

36 Even though the disposition orders do restrict the unfit person's liberty, they do not aim to punish the [page513] accused. Nor are they based on a presumption of guilt or innocence. The *prima facie* case against the unfit accused is sufficient to keep him or her under Part XX.1 Cr. C. and is consistent with *Pearson, supra*.

(b) *Overbreadth*

37 It is a well-established principle of fundamental justice that criminal legislation must not be overbroad: *R. v. Heywood*, [1994] 3 S.C.R. 761; *Winko, supra*; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

38 The appellant argues that Part XX.1 Cr. C. assumes that persons who are found unfit to stand trial will become fit. He submits that in the event that this Court concludes that the state can restrain the liberty of accused persons unfit to stand trial on account of permanent mental disorders, with the sole goal of protecting the public, these provisions are overbroad. He also argues that the provisions are overbroad because they require the court or the Review Board to restrain the liberty of an unfit accused even in the absence of a conclusion that he or she represents a significant threat to the safety of the public.

39 Overbreadth in criminal legislation was examined by our Court in *Heywood, supra*, at pp. 792-93:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

40 In *Winko, supra*, at para. 71, this Court stated that the scheme under s. 672.54 is not overbroad in regards to NCR accused because Parliament has stipulated that unless it is established that the NCR [page514] accused is a significant threat to public safety, he must be discharged absolutely. In cases where a significant threat is established, Parliament has further stipulated that the least onerous and least restrictive disposition of the accused

must be selected. This ensures that the NCR accused's liberty is impaired no more than is necessary to protect public safety.

41 The least onerous disposition under s. 672.54(*a*), absolute discharge, is not available to the accused found unfit to stand trial. This is justified in the case of an unfit accused who does not suffer from a permanent mental disorder, and does not overshoot the goals of Part XX.1, particularly the goal of providing individual assessment and opportunities for appropriate treatment: *Winko, supra*, at para. 43. The purpose of Part XX.1, as a unique scheme that exists within the criminal process, is to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial while preserving his or her maximum liberty and dignity. Part XX.1 is not overbroad in the case of temporarily unfit accused, because the means chosen by Parliament significantly advance the goals of assessment and treatment, which can result in rendering the accused fit for trial and the goal of protecting the public.

42 However, in the case of a permanently unfit accused, a trial is not a possibility; therefore, the objective of rendering the accused fit for trial does not apply. The criminal process will never come to an end because the accused will not become fit for trial. In enacting Part XX.1, Parliament has set up an assessment and treatment system so that the accused can become fit, thus creating a presumption of possibility of recovered capacity to stand trial.

43 Consequently, the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered and there is no evidence of a significant threat [page515] to public safety, makes the law overbroad because the means chosen are not the least restrictive of the unfit person's liberty and are not necessary to achieve the state's objective. Accordingly, these sections of the law restrict the liberty of permanently unfit accused "for no reason", to use Cory J.'s words in *Heywood, supra*, at p. 793.

(3) The Proper Approach to Section 7

44 The respondent argues that the impugned provisions do not violate the principles of fundamental justice because they strike an appropriate balance between the interests of society and the accused. It relies on *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at p. 152, where McLachlin J. wrote that "[f]undamental justice requires that a fair balance be struck between these interests, both substantively and procedurally."

45 In making this argument, the respondent misconceives the role played by "balancing" in the structure of s. 7 of the *Charter*. It effectively argues that it is a principle of fundamental justice that the correct balance be struck between individual and societal interests. However, as a majority of this Court made clear in the case of *Malmo-Levine, supra*, at para. 97, the "balancing of interests" referred to by McLachlin J. in *Cunningham* is to be taken into consideration by courts only when they are deriving or construing the content and scope of the principles of fundamental justice themselves. It is not in and of itself a freestanding principle of fundamental justice which must be respected if a deprivation of life, liberty and security of the person is to be upheld. This was explained by Gonthier and Binnie JJ. in *Malmo-Levine*, at paras. 96 and 98:

> We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure "strikes the right balance" between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual [page516] and societal interests, *independent of any identified principle of fundamental justice*, would entirely collapse the s. 1 inquiry into s. 7.
>
> ...
>
> The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in *Rodriguez*, ... "in arriving at these principles (of fundamental justice), a balancing of the interest of the state and the individual is required" (pp. 592-93 ...). [Italics and underlining in original.]

46 With respect to a justification analysis under s. 1 of the *Charter*, it was mentioned in *Heywood, supra*, at pp. 802-3 that "[o]verbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis." To the extent that the impugned provisions at issue are overbroad, it impairs individuals' interests unnecessarily, and therefore has not employed the least restrictive means of achieving Parliament's objective under the circumstances.

D. *Analysis of the Process and its Shortcomings*

47 Although the court and Review Board have a wide latitude in determining the appropriate conditions to be imposed under s. 672.54 Cr. C., the scope of their authority does not encompass the power to make an order for psychiatric or other treatment of the accused or an order requiring the accused to submit to such treatment, unless the accused consents to the condition and the Review Board or court considers it reasonable and necessary in the interests of the accused: s. 672.55 Cr. C. However, a determination of the least restrictive and onerous disposition compatible with the unfit accused's current situation under s. 672.54 Cr. C. requires an evaluation of the individual's dangerousness, among other factors. It is therefore necessary to examine the powers of the court and Review Board under Part XX.1, particularly their ability to order psychiatric evaluations, [page517] to ensure that the scheme provides for the ongoing assessment of the unfit accused.

(1) Powers and Role of the Review Board

48 The regime under Part XX.1 is inquisitorial rather than adversarial: *Winko, supra*, at para. 54. The court or Review Board gathers and reviews all available evidence pertaining to the four factors set out in s. 672.54: public protection, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused (*Winko, supra*, at para. 55).

49 While a court, under Part XX.1 Cr. C., orders a first psychiatric evaluation and makes an initial determination, the Review Board is in charge of evaluating all the relevant factors on an ongoing basis and making, as best as it can, an assessment of whether the unfit accused poses a significant threat to the safety of the public. However, the Review Board itself lacks the power to order psychiatric evaluations. Such a power, which is necessary to make an accurate assessment of the accused, is especially important as time passes (after the initial evaluation) and the accused is neither undergoing treatment nor detained in a hospital. For the Review Board to properly assess the individual, and to make or recommend an appropriate disposition to fit the given situation of an accused, it must have the authority to order a psychiatric evaluation. As discussed below, its inability to order such evaluations fails to provide for the proper assessment of the permanently unfit accused, which, in our view, results in unfair treatment under Part XX.1.

(2) Powers and Role of the Courts

50 Unlike the Review Board, the court has the power, under s. 672.11 Cr. C., to order psychiatric evaluations:

> **672.11** A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable [page518] grounds to believe that such evidence is necessary to determine
>
> (*a*) whether the accused is unfit to stand trial;
>
> ...
>
> (*d*) the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused.

51 Under Part XX.1, courts are afforded a certain discretion to order an assessment of the accused's mental

condition where they have jurisdiction over the accused. However, this discretion seems limited (1) to making a first disposition under s. 672.54 after a verdict of unfit to stand trial has initially been rendered, and (2) to ordering a proceeding under s. 672.33 Cr. C., according to which no individual declared unfit to stand trial may continue to be subjected to criminal proceedings where the Crown is unable to establish a *prima facie* case against him or her. Section 672.11 does not explicitly grant the court the power to order a psychiatric evaluation for the mandatory review of a disposition under s. 672.81(1). The process under Part XX.1 therefore makes the court's power to order psychiatric evaluations unproductive after the first disposition, because the court does not deal at the same time with sufficiency of evidence and dangerousness.

(3) Application of the Process to Permanently Unfit Accused Who Do Not Present a Significant Threat to Public Safety

52 The entire criminal process in relation to permanently unfit accused rests on psychiatric evaluations, namely assessments of fitness to stand trial and assessments of dangerousness. Psychiatric evaluations are necessary to assess the mental condition of the permanently unfit accused in order to impose the least restrictive conditions, if any, on his or her liberty. The inability of courts and Review Boards to order an assessment of the accused after the initial evaluation makes it impossible to ensure that the disposition under s. 672.54 or any review pursuant [page519] to s. 672.81(1) is tailored to the unfit accused's current circumstances.

53 A permanently unfit accused will never become fit, nor will he or she ever be tried. Such individuals will be subject to anxiety, concern and stigma because of the criminal proceedings that hang over them indefinitely.

54 The respondent submits that there is a way of putting a stop to the proceedings, namely its discretion to withdraw the charges against the accused notwithstanding the existence of a *prima facie* case, a power within the prerogative of the Crown. Although this Court has recognized the importance of prosecutorial discretion (see *R. v. Power*, [1994] 1 S.C.R. 601; *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65), the constitutional validity of the impugned scheme in this case cannot depend on such discretion.

55 In our view, Part XX.1 Cr. C. fails to deal fairly with the permanently unfit accused who are not a significant threat to public safety. Society's interest in bringing accused persons to trial cannot be accomplished, nor can society's interest in treating the accused fairly. The regime fails to provide for an end to the prosecution. Permanently unfit accused are subject to indefinite conditions on their liberty, of varying degrees of restrictiveness, resulting from the disposition orders of the Review Board or the court, who do not even have the power to order a psychiatric assessment in order to adapt a disposition to meet the permanently unfit accused's current circumstances. Thus, the failure of the regime to provide for the permanently unfit accused, combined with the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered, renders the entire scheme under Part XX.1 overbroad as it relates to permanently unfit accused who do not pose a significant threat to the safety of the public.

[page520]

E. *Remedy*

56 Because the impugned provisions are unconstitutional as a violation of s. 7 of the *Charter*, a remedy under s. 52(1) of the *Constitution Act, 1982* is in order, particularly because the main problem here is the overbreadth of the legislation. As outlined in *Schachter v. Canada*, [1992] 2 S.C.R. 679, there is a range of possible remedies available. The remedy of choice under the circumstances is a declaration of invalidity that is to be suspended for a period of twelve months.

57 It is inappropriate to simply strike down the legislation in this case since doing so would create a lacuna in the regime before Parliament would have a chance to act. In accordance with *Schachter, supra*, a suspended declaration of invalidity is warranted in situations like this one, where striking down the legislation could create a

danger to public safety. For similar reasons, Lamer C.J. in *Swain, supra*, at p. 1021, avoided declaring the legislation at issue of no force or effect and suspended the declaration of invalidity:

> If, based on the reasons given above, s. 542(2) is simply declared to be of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*, it will mean that as of the date this judgment is released, judges will be compelled to release into the community all insanity acquittees, including those who may well be a danger to the public. Because of the serious consequences of finding s. 542(2) to be of no force and effect, there will be a period of temporary validity which will extend for a period of six months.

58 In addition, the "reading in" remedy of *Vriend v. Alberta*, [1998] 1 S.C.R. 493, is also not appropriate here because doing so would necessarily include reading in detailed and complicated consequential amendments to the existing legislation, which, as the Court decided in *M. v. H.*, [1999] 2 S.C.R. 3, is better left to Parliament or the legislatures. Nor is the "reading down" remedy appropriate for similar reasons.

59 Under the circumstances, and recognizing the federal government's acknowledgement of the [page521] need to address the situation of permanently unfit accused and its intent to propose amendments to the legislation (see *Response to the 14th Report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the Criminal Code* (November 2002), at p. 11), we order a declaration of invalidity of the impugned provisions of Part XX.1 Cr. C. as a result of their overbreadth in regard to permanently unfit accused who do not pose a significant threat.

60 This declaration is suspended for a period of 12 months to allow for Parliament to amend the legislation. Such amendments, as already proposed by Government in November 2002, would allow courts, under s. 672.54 Cr. C. to absolutely discharge a permanently unfit accused either on its own motion or following the recommendation of a Review Board. They would also allow for courts or Review Boards to order psychiatric evaluations if no current evaluations are available to them.

61 In case, however, Parliament does not amend the legislation within a year, there is a need to consider the issue of whether an individual remedy under s. 24(1) is available in conjunction with the suspended declaration of invalidity pursuant to s. 52. In *Schachter, supra*, at p. 720, Lamer C.J. limited the situations in which courts could grant individual remedies under s. 24(1) in conjunction with s. 52 remedies:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief [page522] flowing from the action that court has already taken. [Emphasis added.]

62 This rule precludes courts from granting a s. 24(1) individual remedy during the period of suspended invalidity. Although this rule has mostly been applied in cases dealing with pecuniary liability (see *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at para. 18; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, at para. 43), the policy rationale for this rule is not in our view based solely on financial liability. This was discussed by our Court in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 79:

> Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long

> as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded.

In our view, there is no reason to revisit the wisdom of the *Schachter* rule in the present case. There is no evidence that government acted in bad faith or abused its powers.

63 Although the rule in *Schachter, supra*, precludes courts from combining retroactive remedies under s. 24(1) with s. 52 remedies, it does not stop courts from awarding prospective remedies under s. 24(1) in conjunction with s. 52 remedies. Therefore, if Parliament does not amend the invalid legislation within one year, those accused who do not pose a significant threat to the safety of the public can ask for a stay of proceedings as an individual remedy under s. 24(1) of the *Charter*. This will quash the criminal charge and liberate them from what will [page523] remain of the impugned regime. As recently stated by LeBel J. in *Regan, supra*, at para. 54, citing *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 75, a stay of proceedings is a "drastic" remedy, and is therefore reserved for the cases where a very high threshold is met:

> ... a stay of proceedings will only be appropriate when two criteria are met:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

64 Thus, a stay should be granted to permanently unfit accused who do not pose a significant threat to the safety of the public, in order to prevent their indefinite subjection to criminal proceedings. In deciding whether or not to grant a stay, courts will have to consider such factors as the nature of the accusation, the time since the offence, later conduct, initial and current medical evaluations, whether the accused is taking medication required to eliminate the risk, as well as all other relevant information and circumstances of the accused. Also, as mentioned by this Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 92, it will also be appropriate at this stage "to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits". This balancing recognizes that the administration of justice is best served by staying the proceedings where the affront to fairness and decency is disproportionate to the societal interest in the subjection of the accused to criminal proceedings: *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667.

[page524]

F. *Application to Demers*

65 Aside from requesting to have s. 672.54 Cr. C. declared of no force or effect under s. 52, the appellant also requests an immediate remedy under s. 24(1) of the *Charter*. As noted above, the *Schachter* rule does not preclude our Court from awarding a stay of proceedings under s. 24(1) after the one-year suspension. In order to qualify for the stay of proceedings, Mr. Demers must be found not to present a significant threat to the safety of the public after undergoing a psychiatric evaluation. It must be noted here that the appellant has never been found to pose no threat to public safety on the basis of a psychiatric evaluation; he has not been reevaluated in that respect since the original determination of dangerousness because he has not been institutionalized, nor has he been receiving treatment, two situations which would have provided for new medical evidence of dangerousness that could be considered by the Review Board. Although Mr. Demers has undergone annual hearings pursuant to s. 672.81(1) Cr. C., these proceedings do not provide for psychiatric evaluations of dangerousness.

VI. Disposition

66 For the above reasons, we would allow the appeal, set aside the judgment of the Superior Court, and declare that ss. 672.33, 672.54 and 672.81(1) Cr. C. are overbroad, thus violating the s. 7 rights of permanently unfit accused who do not pose a significant threat to society. Because we find the impugned provisions unconstitutional

as violating s. 7 of the *Charter*, it is unnecessary for us to consider the other *Charter* questions posed. The most appropriate remedy in this case is a suspended declaration of invalidity for a period of twelve months. If after twelve months Parliament does not cure the unconstitutionality of the regime, accused who qualify can ask for a stay of proceedings.

[page525]

67 We would therefore answer the constitutional questions as follows:

1. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that they deprive persons who have been found unfit to stand trial of their right to liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice?

Yes.

2. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

No. The legislation's overbreadth causes it to fail the minimal impairment branch of the s. 1 analysis.

3. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* infringe the rights and freedoms guaranteed by s. 11(*d*) of the *Charter* on the ground that they deprive persons who have been found unfit to stand trial of the right to be presumed innocent?

It is unnecessary to answer this question.

4. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

It is unnecessary to answer this question.

5. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* infringe the rights and freedoms guaranteed by s. 15(1) of the *Charter* on the ground that they create discrimination against persons with a mental disability who have been found unfit to stand trial?

It is unnecessary to answer this question.

6. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

It is unnecessary to answer this question.

[page526]

7. Does the application of ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to persons found unfit to stand trial on account of permanent mental disorder overstep the legislative jurisdiction of the Parliament of Canada under the *Constitution Act, 1867*?

No.

The following are the reasons delivered by

LeBEL J.

I. Introduction

68 This appeal raises some important questions regarding our basic constitutional arrangements, including the relationship between the *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms*. I agree with my colleagues' conclusion regarding the breach of s. 7 of the *Charter*, but I disagree with respect to the division of powers issue and wish to leave open the possibility that an individual stay might be available for a violation of s. 11(*b*) of the *Charter*.

69 In my view, the criminal procedure power under s. 91(27) of the *Constitution Act, 1867* does not grant Parliament the authority to supervise and detain accused who are permanently unfit to stand trial. Although Parliament is competent to legislate procedures for unfit accused at the outset of proceedings, once a court has determined that the accused is in fact permanently unfit to stand trial, the jurisdiction shifts to the provincial governments under their health power.

70 With respect to the appropriate remedy, I agree that the declaration of invalidity of ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, should be suspended for 12 months in order to give Parliament and the provinces time to amend their respective mental health legislation. However, I would also order a stay of the proceedings against Mr. Demers within 30 days under s. 24(1) of the *Charter* for the breach of his s. 7 rights. Similarly, I would stay proceedings against all permanently unfit accused who do not pose a significant [page527] threat to public safety within 30 days. This period of time should permit the provincial authorities to seek protective orders under their respective mental health regimes, if necessary. I think it is appropriate that we should revisit our position about the combination of remedies: see, e.g., *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720.

II. Division of Powers

71 Justices Iacobucci and Bastarache conclude that, with respect to permanently unfit accused, ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* are a valid exercise of Parliament's criminal procedure power under s. 91(27) of the *Constitution Act, 1867*. I disagree. The supervision and treatment of permanently unfit accused and the protection of the public from potentially violent permanently unfit accused are matters exclusively within the health jurisdiction of the provinces under ss. 92(7), 92(13), and 92(16).

A. *Historical Scope of the Criminal Law Power*

72 This appeal raises fundamental questions regarding our constitutional structure, including the proper relationship between the *Constitution Act, 1867* and the *Charter*. Historically, the federal criminal law power and the contingent criminal procedure power have been construed broadly. The classic definition of the scope of the criminal law was provided by Rand J. in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at pp. 49-50, aff'd [1951] A.C. 179 (P.C.) (*sub nom. Canadian Federation of Agriculture v. Attorney-General for Quebec*), as a public purpose that can support the prohibition and penalty as being in relation to criminal law:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious [page528] or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> ...
>
> Is the prohibition ... enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law ... .

This wide scope has been consistently affirmed by the Court, as Laskin C.J. remarked in *Morgentaler v. The*

Queen, [1976] 1 S.C.R. 616, at p. 625:

> The wide scope of the exclusive federal criminal law power has been consistently asserted in the relevant case law in both the Privy Council, when it was Canada's ultimate appellate court, and in this Court.

This expansive interpretation has continued more recently in cases such as *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; see also Professor A. W. MacKay, "The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?" (2001), 80 *Can. Bar Rev.* 241, at pp. 266-79.

73 Similarly, as a corollary of this plenary criminal law power, Parliament's jurisdiction over criminal procedure under s. 91(27) has also been construed broadly. A precise definition of "procedure in criminal matters", however, has been difficult to formulate:

> It is not necessary and perhaps impossible, to find a satisfactory definition of "criminal procedure." Although I would reject the view which would confine criminal procedure to that which takes place within the courtroom on a prosecution, I am equally of the opinion that "criminal procedure" is not co-extensive with "criminal justice" or that the phrase "criminal procedure" as used in the *B.N.A. Act* can drain from the words "administration of [page529] justice" in s. 92(14) that which gives those words much of their substance -- the element of "criminal justice."
>
> (*Di Iorio v. Warden of the Common Jail of the City of Montreal*, [1978] 1 S.C.R. 152, at pp. 209-10, quoted with approval by Ritchie J. in *Ritcey v. The Queen*, [1980] 1 S.C.R. 1077, at p. 1085)

Based on the apparent elasticity of the concept, the Court held that the preventative branch of criminal procedure under s. 91(27) gave Parliament jurisdiction over the detention of accused who have been found not criminally responsible ("NCR"): *Swain, supra*.

74 In *Swain, supra*, Lamer C.J., for all seven judges on this issue, held that the then insanity provisions of the *Criminal Code* were *intra vires* Parliament. In *Swain*, Lamer C.J. considered s. 542(2) and the surrounding legislative scheme, including ss. 545 and 547. These provisions dealt with persons who had been acquitted by reason of a mental disorder. Lamer C.J. held that the pith and substance of the legislative scheme was not to treat and cure the mentally ill, but the protection of society from dangerous people who have engaged in conduct proscribed by the *Criminal Code* (p. 998). In *Swain*, the Court did not consider the question from the perspective of those who were found unfit to stand trial because of mental disorder. Lamer C.J. held that the provisions dealing with the detention of persons who had been acquitted by reason of mental disorder were founded on the "preventative" branch of the criminal procedure power.

75 In reviewing the existence of the preventative branch of criminal procedure power, Lamer C.J. considered *Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen*, [1956] S.C.R. 303, and *R. v. Lyons*, [1987] 2 S.C.R. 309. Both cases dealt with the preventative branch in the context of sentencing. While Lamer C.J. held, at p. 1000, that "a conviction is not necessary before Parliament can legislate pursuant to this particular aspect of [page530] s. 91(27)", he qualified the scope of the preventative aspect such that it must relate in some way to criminal proceedings (p. 1001). Lamer C.J. concluded that the provisions only apply to those insane individuals who have committed acts (i.e. the *actus reus*) proscribed by the *Criminal Code* (at p. 1001):

> Since the insanity provisions only relate to persons whose actions are proscribed by the *Criminal Code*, the required connection with criminal law is present. The system of Lieutenant Governor warrants, through the supervision of persons acquitted by reason of insanity, serves to prevent further dangerous conduct proscribed by the *Criminal Code* and thereby protects society.

> ... I would emphasize that in this case Parliament is protecting society from individuals whose behaviour is proscribed by the *Criminal Code*. The provisions do not relate to all insane persons, but only those who, through their actions, have brought themselves within the criminal law sphere. [Emphasis added.]

Similarly, McLachlin J. (as she then was) for the majority in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, only considered the criminal procedure power in relation to those who were found not criminally responsible on account of mental disorder, the same group considered in *Swain, supra*. She held, at para. 32, that the provisions relating to the ongoing supervision and control of NCR accused were *intra vires* the preventative branch of the federal criminal procedure power:

> Nor is the verdict that a person is NCR a verdict of acquittal. Although people may be relieved of criminal responsibility when they commit offences while suffering from mental disorders, it does not follow that they are entitled to be released absolutely. Parliament may properly use its criminal law power to prevent further criminal conduct and protect society: *Swain*, at p. 1001. By committing acts proscribed by the *Criminal Code*, NCR accused bring themselves within the criminal justice system, raising the question of what, if anything, is required to protect society from recurrences. [Emphasis added.]

[page531]

76 The conclusions reached regarding the scope of the criminal procedure power in *Swain* and *Winko* do not apply to accused who are unfit by reason of a mental disorder; they only apply to NCR accused. Unlike NCR accused, the Crown has not proved beyond a reasonable doubt that an accused found unfit to stand trial has committed an offence. Rather, an accused found unfit to stand trial only stands charged with a criminal offence; in order to maintain its hold over the accused under Part XX.1, the Crown need only demonstrate a *prima facie* case. The standard is not an onerous one: the test is whether there is admissible evidence upon which a properly instructed jury, acting reasonably, could convict (in other contexts see *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080; *R. v. Monteleone*, [1987] 2 S.C.R. 154, at p. 161).

77 Because the conclusions in *Swain* and *Winko* only apply to NCR accused, we must consider the reach of s. 91(27) in respect of temporarily and permanently unfit accused with fresh eyes. In my view, the criminal procedure power applies to temporarily but not permanently unfit accused. I will discuss the reasons for my conclusion below.

B. *Certain Fundamental Limits on the Criminal Procedure Power*

78 When interpreting the scope of the federal criminal procedure power, arid legal formalism should be rejected in favour of an interpretative stance under which the scope of the power is considered in light of the principles underlying the whole of our constitutional structure. This approach is more harmonious with our understanding of the Constitution as a living tree "capable of growth and expansion within its natural limits" (*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, *per* Lord Sankey). This metaphor, which originated in [page532] the context of interpreting the *Constitution Act, 1867*, was later applied to the *Charter*. Dickson J. (as he then was) explained, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155, the need for a Constitution that was capable of growth in order to meet the changing needs of society:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter* of *Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".

In light of this need for development, I find that the catalogue or "shopping list" approach to the division of powers under ss. 91 and 92 is a singularly impoverished notion. The view of some is that the *Constitution Act, 1867* and the *Constitution Act, 1982* -- particularly the *Charter* -- are separate silos, the first logically prior to and distinct from the second. This approach must be rejected. The *Charter* did not repeal or alter the division of powers between Parliament and the provincial legislatures: *Adler v. Ontario*, [1996] 3 S.C.R. 609, at para. 38. On the other hand, the advent of the *Charter* may have impacted on how some of the powers should be interpreted, defined or examined in order to ensure consistency with its values.

79 It is proper to view the relationship between the elements of our Constitution as organic in nature. [page533] In particular, the division of powers should be read in light of the principles that animate the whole of our Constitution. These principles have been discussed in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Court Judges Reference*"), and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Quebec Secession Reference*") . To those principles which have been previously expounded, I would add that a further principle underlying our constitutional arrangement is respect for human rights and freedoms. As I will explain below, the promulgation of the *Charter* signalled an evolution in our constitutional and political culture.

(1) The Implied Bill of Rights

80 Looking to the basic constitutional structure in interpreting the Constitution is not new. It was applied by some judges of this Court to find an implied "bill of rights" in the *Constitution Act, 1867*: see, e.g., *Reference re Alberta Statutes*, [1938] S.C.R. 100, *per* Duff C.J.; *Switzman v. Elbling*, [1957] S.C.R. 285, *per* Abbott J.; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, *per* Beetz J. and Dickson C.J. In *OPSEU*, at p. 57, Beetz J. for the majority held that "quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them". Professor Bora Laskin (as he then was) was critical of the implied bill of rights notion. He rejected the idea that there were any civil rights limitations on the provincial or federal legislative power; he viewed the idea of an implied bill of rights to be "at variance with the legal doctrine of parliamentary supremacy" ("An Inquiry into the Diefenbaker Bill of Rights" (1959), 37 *Can. Bar Rev.* 77, at p. 102).

81 This view was shared by Professor P. C. Weiler, who also rejected that there were any inherent limits on the exercise of legislative power. He wrote, in [page534] "The Supreme Court and the Law of Canadian Federalism" (1973), 23 U.T.L.J. 307, that any inferences drawn from the structure of the *British North America Act* (now the *Constitution Act, 1867*) lead to the opposite conclusion based on the principle of parliamentary sovereignty inherited from the United Kingdom (at p. 344):

> Those judges and commentators who have tried to spell out constitutional limitations from the preamble, spirit, institutions (ie, parliament), or structure of the BNA Act, face difficulties which seem insuperable to me. These inferences logically lead to the conclusion that there is no power in either provinces or dominion to pass such restrictive legislation, in the face of the long-held assumption ... that the distribution of legislative authority is exhaustive... . Moreover, the evidence from which the inference is to be made -- the institution of parliament as mentioned and defined in the act, and as understood at the time -- again, if anything, proves the contrary because of the basic principle of parliamentary sovereignty then and still extant in Britain.

82 Still, the view of Laskin and Weiler was not shared universally. I would rather agree with Professor F. R. Scott, who understood that in importing certain principles found in the United Kingdom, the *Constitution Act, 1867* incorporated principles of civil liberties and human rights embedded in English constitutional history. As he aptly observed, "[t]he theoretical sovereignty of the British Parliament has tended to blind us to the reality of the limitations upon that sovereignty residing in the theory of government these documents proclaim" (*Civil Liberties & Canadian Federalism* (1959), at pp. 14-15). The documents Scott was referring to were the Magna Carta, the Bill of Rights of 1689, the Balfour Declaration of 1926 and the Statute of Westminster of 1931. Of course, today we must

also interpret the Constitution in light of its patriation in 1982 and the promulgation of the *Charter*, and it is to this discussion that I now turn.

[page535]

(2) Beyond the Implied Bill of Rights

83 In construing the text of the Constitution it is necessary to refer to the principles underlying our constitutional structure. The Court has on more than one occasion explained that the Canadian Constitution comprises not only a written text but also unwritten elements that make up a "global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state" (*Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at p. 874; aff'd in *Quebec Secession Reference, supra*, at para. 32). This matrix of values infuses the totality of our constitutional documents. No one part of the Constitution can be read in isolation from another, nor does any one principle of our Constitution trump another: *Quebec Secession Reference, supra*, at para. 49. These unwritten elements are aids in the interpretation of the text of our constitutional documents and can fill gaps in the text: *Quebec Secession Reference*, at paras. 53-54. They may also, in certain circumstances, give rise to substantive legal obligations, which themselves are limitations on government and courts: *Quebec Secession Reference*, at para. 54. The Court has identified a number of foundational principles: federalism, democracy, constitutionalism and the rule of law, respect for minority rights (*Quebec Secession Reference*, at para. 49), and judicial independence (*Provincial Court Judges Reference, supra*, at para. 83). I would identify a further principle: respect for human rights and freedoms.

84 In *Quebec Secession Reference*, the Court held that "[b]ehind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles" (para. 49) . But to limit Canada's constitutional story to those elements inherited from Britain would fundamentally misconstrue the nature of our civil society. Our civil society was only in its infancy at Confederation. It has evolved [page536] considerably since then. The period between 1948 and 1982 -- including the enactment of the *Canadian Bill of Rights*, S.C. 1960, c. 44 -- was an interval during which respect for human rights matured. Even leading up the enactment of the *Canadian Bill of Rights*, eminent scholars recognized that upon those British constitutional foundations we built our own distinctive political and constitutional culture:

> The B.N.A. Act provided us with a written constitution of strict law, embedded in a context of constitutional convention and tradition. From that moment the growth of our ideas about civil liberties and human rights took place inside and under that constitution.
>
> (Scott, *supra*, at p. 25)

Professor Scott added that even within the strictures of the *Constitution Act, 1867*, there was considerable discretion to adopt interpretations that protected liberties and human rights. It was not only courts that valued human rights, but also Parliament, the legislatures, and most importantly, Canadian political society. This communal will towards recognizing and entrenching fundamental rights was a gradual evolution, and not a "rights revolution" as some would have it. In my opinion, the promulgation of the *Charter* was marked more by continuity than discontinuity in our political and constitutional culture. The *Charter* is the apotheosis of this evolution. As J. Raz observed, in *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd ed. 1980), at pp. 188-89, changes in legal systems reflect the interaction between the basic elements of a community:

> Legal systems are always legal systems of complex forms of social life, such as religions, states, regimes, tribes, etc... .
>
> The identity of legal systems depends on the identity of the social forms to which they belong. The criterion of identity of legal systems is therefore determined not only by jurisprudential or legal considerations but by other [page537] considerations as well considerations belonging to other social sciences.

In 1982 Canada affirmed its own, distinct political culture. That year was marked by the affirmation of independence

in its constitutional culture from the United Kingdom as well as an expression of the spirit of human rights in Canada.

85 Since the promulgation of the *Charter* in 1982, the provisions set out therein have resulted in fructifying contact with the other elements of our Constitution. Thus, the human rights and freedoms expressed in the *Charter*, while they do not formally modify the scope of the powers in ss. 91 and 92 of the *Constitution Act, 1867*, do provide a new lens through which those powers should be viewed. In choosing one among several possible interpretations of powers that implicate human rights, the interpretation that best accords with the imperatives of the *Charter* should be adopted.

86 This type of analysis, sometimes called structural analysis, is not new and is often implicit in our federalism jurisprudence: for a discussion of structural analysis see R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67; P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982), at pp. 74-92; and C. L. Black, Jr., *Structure and Relationship in Constitutional Law* (1983). In order to determine what result in a particular case is dictated by the Constitution, structural analysis looks to the relationships created by the Constitution among various levels and branches of government, and also between the state and the individual: Bobbitt, *supra*, at p. 74. Using structural analysis concurrently with other approaches to constitutional interpretation gives us a truer sense of the Constitution's meaning.

C. *Application to This Case*

87 Lamer C.J. in *Swain, supra*, held that the preventative aspect of the criminal procedure power [page538] must relate in some way to criminal proceedings. Following intervention by the police, an accused typically has his or her initial brush with criminal proceedings when he or she is charged with an offence, and is thereafter firmly within the grasp of the federal criminal procedure power. At any time once proceedings against an accused have been commenced, but prior to a verdict, the court may of its own motion, or on an application by the accused or the prosecution, direct that the fitness of the accused be tried (s. 672.23(1)). Where the verdict is that the accused is unfit to stand trial, proceedings are suspended pending the accused's return to fitness.

88 Like my colleagues, I conclude that the pith and substance of Part XX.1 in relation to accused found unfit to stand trial is the treatment and supervision of these accused as well as the protection of the public while they remain unfit and subject to an outstanding criminal charge . Part XX.1 is predicated on an accused found unfit to stand trial becoming fit for trial. Such accused is subject to the regime only so long as a *prima facie* case exists that he or she committed an offence. Further, the court or Review Board can order treatment of the accused, with the accused's consent (s. 672.55), or the court can order the treatment of the accused without the accused's consent if certain conditions are met (ss. 672.58 to 672.62). The accused found unfit to stand trial is also subject to ongoing supervision by the Review Board (s. 672.81(1)).

89 Insofar as the aim of Part XX.1 is concerned with the treatment and supervision of a temporarily unfit accused and the protection of the public during the accused's limited period of unfitness, its ultimate aim is to try the accused once he or she becomes fit. In my opinion, this falls squarely within the ambit of the criminal procedure power because it "relate[s] in some way to criminal proceedings" -- i.e., the trial: *Swain, supra*, at p. 1001. The continued subjection of an unfit accused to Part XX.1 is justified under the goal of trying him or her for the offence charged. However, where the accused is permanently unfit to stand trial, the overriding goal of [page539] Part XX.1 is absent and Parliament loses jurisdiction.

90 As I discussed above, the scope of the criminal procedure power under s. 91(27) needs to be re-evaluated in light of the evolution in our constitutional culture since the entrenchment of the *Charter*. In choosing one of several possible interpretations of the criminal procedure power that implicate human rights, the interpretation that best accords with the imperatives of human rights and freedoms should be adopted. Under the existing scheme, an accused who is permanently unfit will forever be within the grip of the state's machinery for criminal justice. He or she will always have the weight of a criminal accusation hanging overhead, but the day of judgment is permanently postponed. Meanwhile, without the final adjudication of his or her culpability, a permanently unfit accused is subject

to the ongoing control of the state through criminal proceedings set out in Part XX.1. His or her continued detention or conditional liberty cannot be justified by progress towards a trial.

91 In my opinion, a person cannot be subject to state control and have limits imposed on his or her liberty based on the criminal procedure power absent progress towards the adjudication of his or her legal culpability. This is a fundamental human right. The principle is affirmed in ss. 7 and 11(*b*) of the *Charter*. In construing the scope of the criminal procedure power, an interpretation at odds with this principle should be eschewed. The continued control over a permanently unfit accused and the resulting protection of the public based on a *prima facie* case do not "relate in some way to criminal proceedings". The continued supervision, detention or conditional liberty of a permanently unfit accused can only relate to the mental health of the individual, and this is considered to be within the provincial jurisdiction under ss. 92(7), 92(13) and 92(16) of the *Constitution [page540] Act, 1867*: see *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at pp. 135-36.

92 Further, this approach has the salutary effect of respecting and enhancing the permanently unfit accused's human dignity: rather than being stigmatized by criminal proceedings, his or her needs and those of society can be addressed through mental health legislation. Persons with a mental disorder are a historically disadvantaged group and have been, and continue to be, subjected to social prejudice. We should adopt an interpretation of s. 91(27) that does not perpetuate that disadvantage and prejudice. The potential danger a permanently unfit accused may present is more properly attributable to his or her mental illness and is a matter of health and not criminal procedure. The need to protect the community from permanently unfit accused who pose a significant threat to public safety can be answered through the exercise of the provincial health power.

93 Consequently, I find that Parliament is not competent under its criminal procedure jurisdiction to legislate for the supervision, treatment, detention or control of permanently unfit accused. Once a court has found that an accused is permanently unfit to stand trial, the criminal procedure jurisdiction is exhausted. Administrative supervision or control is then a matter falling within the jurisdiction of the provincial health power. The present scheme does not provide for a finding of permanent or temporary fitness; it will have to be amended accordingly. On the facts of this case, it is clear that Mr. Demers will never become fit for trial.

[page541]

III. Section 11(*b*) of the *Charter*

94 It was argued by counsel for Mr. Demers that the impugned provisions violate the defendant's right to trial within a reasonable time contrary to s. 11(*b*) of the *Charter*. In the case of an accused who is permanently unfit to stand trial by reason of a mental disorder, the accused will never be tried within a reasonable time under s. 11(*b*). The violation results from the intersection of the legislation with an immutable personal characteristic of the accused. Iacobucci and Bastarache JJ. choose not to address this argument. In my view, their reasons should not be understood as foreclosing an application, on an individual basis, by a permanently unfit accused who has been prejudiced by an unreasonable delay. This application would, I believe, be available to both dangerous and non-dangerous permanently unfit accused, as our jurisprudence has made no distinction between an accused's character or alleged propensity for violence in determining whether s. 11(*b*) has been violated and whether a stay should issue under s. 24(1): see *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771. The same principles should guide courts in the future.

IV. Remedy

95 Iacobucci and Bastarache JJ. order that ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* should be declared invalid, on the limited basis that they violate the s. 7 *Charter* rights of permanently unfit accused who do not pose a significant threat to public safety. Although I agree with my colleagues that the impugned sections should be declared invalid under s. 52 of the *Constitution Act, 1982*, I do so primarily on the basis that they are *ultra vires* the federal criminal procedure power insofar as they apply to accused who are permanently unfit to stand trial.

I would also order that the declaration be suspended for one year to give the provincial legislatures sufficient time to amend their mental health [page542] statutes accordingly. Such amendments, in my view, should reflect the principles articulated by the Court in *Winko, supra*, so that a permanently unfit accused's liberty is infringed no more than necessary to protect the public.

96 Further, I would grant Mr. Demers a stay of proceedings within 30 days of this judgment pursuant to s. 24(1) of the *Charter*. This time limit should give the provincial mental health authorities sufficient time to address, under existing mental health legislation, any concerns that Mr. Demers presents a danger to himself or others. I would also order that a stay be granted within 30 days for all permanently unfit accused who do not pose a significant threat to the public. In this respect, this is an appropriate case to combine remedies under ss. 24(1) and 52 . This invites us to revisit certain remarks made in *Schachter, supra*, at p. 720, that ss. 24 and 52 remedies should generally not be combined. In my view, slavish adherence to this rule would result in an injustice in this case.

A. *Combining Sections 52 and 24(1) Remedies*

97 The source of this rule is found in a brief passage written by Lamer C.J. in *Schachter, supra*, at p. 720:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or [page543] in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

In *Schachter*, the claimant sought retrospective payment of paternity benefits under s. 24(1) in addition to the declaration of invalidity. This passage in *Schachter* was then applied in subsequent cases: *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at para. 18; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, at para. 43; and *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at paras. 80-81. Interestingly, those cases all dealt with claims for monetary awards under s. 24(1) of the *Charter*. Despite the concession by Gonthier J. in *Guimond, supra*, at para. 19, and *Mackin, supra*, at para. 81, that damages may be obtained in an exceptional case under s. 24(1) in combination with a declaration of invalidity under s. 52, the merits of the general rule in *Schachter* against combining remedies have not been subjected to sustained or critical examination by the Court.

98 The policy rationales implicit in the rule articulated by Lamer C.J. in *Schachter* are examined by V. Shandal in "Combining Remedies Under Section 24 of the *Charter* and Section 52 of the *Constitution Act, 1982*: A Discretionary Approach" (2003), 61 *U.T. Fac. L. Rev*. 175 . He observes that they are essentially about limiting the government's pecuniary liability: "The first justification was the traditional immunity of Parliament and the provincial legislatures from liability for the consequences of legislation they enact. The second was a policy concern of avoiding the imposition of indeterminate liability upon the government" (p. 190). Although these rationales may have some merit where a claimant is bringing an action for damages under s. 24(1), they fail to justify a general prohibition against a retroactive remedy under s. 24(1) in conjunction with s. 52. I do not [page544] foreclose the possibility that damages might be appropriate in some cases; however, I direct the following analysis to the present situation in which the claimant is not seeking a monetary remedy.

99 Public law litigation is essentially different from private law. In private law actions, remedies are primarily geared towards compensating a plaintiff for the loss suffered at the hands of a defendant. By contrast, public law actions are about ensuring compliance with the Constitution, in this case, vindicating constitutional rights that have been violated by the state. In doing so, it is typically more than an individual claimant's rights that are being affirmed; the benefit of a successful claim enures to society at large. For when an individual or group successfully obtains a remedy for illegal state action, the constitutional rights and freedoms of all citizens are enhanced.

100 Private law litigation typically has the following characteristics: it is a dispute between two unitary interests; it concerns past events; the remedy is dependent on the right because it effectively seeks to compensate a plaintiff for the loss suffered at the hands of a defendant; the impact of a judgment is confined to the parties, though it may alter or affect the development of the law; and the litigation is initiated and controlled by them: A. Chayes, "The Role of the Judge in Public Law Litigation" (1976), 89 Harv. L. Rev. 1281, at pp. 1282-83. Public law litigation differs significantly. As Professor Chayes explains (at p. 1284):

> The characteristic features of the public law model are very different from those of the traditional model. The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding [page545] the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders -- masters, experts, and oversight personnel... .

And, most significantly, the effects of a judgment in a public law case reach far beyond the party bringing the claim against the state. The primary focus is often on achieving future compliance with the Constitution, rather than compensating past wrongs.

101 Nevertheless, public law actions share a necessary commonality with private litigation: an individual or group is seeking to redress a wrong done to them. The larger public dimensions of a constitutional challenge piggyback on the claimant's pursuit of his or her own interests, particularly in criminal law cases. Courts should not lose sight of this symbiosis; they should not forget to provide a remedy to the party who brought the challenge. This is not a reward so much as a vindication of the particularized claim brought by this person in assertion of his or her rights. Corrective justice suggests that the successful applicant has a right to a remedy. There will be occasions where the failure to grant the claimant immediate and concrete relief will result in an ongoing injustice. That is the case here.

102 Moreover, Lamer C.J.'s statement in *Schachter* is at odds with the general rule of this Court to provide a successful applicant with immediate relief despite a prospective remedy. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 20, Lamer C.J. held: "In the rare cases in which this Court makes a prospective ruling, it has always allowed the party bringing the case to take advantage of the finding of unconstitutionality: see, e.g., *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Feeney*, [1997] 2 S.C.R. 117." In *Brydges, supra*, the Court held that the police were required under s. 10(*b*) of the *Charter* to inform a detainee of the existence of legal aid and duty [page546] counsel. It suspended the operation of this rule for 30 days but upheld the trial judge's exclusion of the evidence, under s. 24(2), obtained from the accused in violation of s. 10(*b*), and restored the acquittal. I recognize that *Brydges, supra*, was not a case where legislation was declared invalid under s. 52, but it demonstrates that the Court will give *Charter* remedies retrospective effect for the applicant.

103 The applicant is typically exempted from the period of delay by having the ruling applied immediately to him or her, usually by ordering a new trial or entering an acquittal under the *Criminal Code*. For example, in *R. v. Bain*, [1992] 1 S.C.R. 91, the Court suspended a declaration that the then provisions providing the Crown with 48 standbys during jury empanelling were invalid, but ordered that Bain's acquittal be restored immediately. In the case at bar, the appeal comes by way of a final judgment on a *Charter* application from the Superior Court of Quebec; it is not an appeal from the verdict of unfit to stand trial by reason of a mental disorder. To give immediate effect to Mr. Demers' rights, it is necessary to consider combining remedies under ss. 52 and 24(1). Consequently, this is not a situation in which a s. 24 remedy would only duplicate the relief flowing from the s. 52 remedy.

104 The crafting of a remedy is highly contextual and is intimately linked to the nature of the violation and the facts of the particular case. In determining when to combine remedies under ss. 52 and 24(1), the following questions should be considered. First, from the perspective of the public role of the *Charter*, what remedy or remedies would most effectively foster compliance with the *Charter* and deter future infringements without unduly interfering with the effective operation of government and the implementation [page547] of legitimate public policy? Second, from the

perspective of the claimant, what remedy or remedies would most effectively redress the wrong he or she has suffered, putting him or her in the position he or she would have been in had his or her rights not been violated? This will often call for the consideration of the adequacy of a s. 52 remedy standing alone. At this stage, a court may also weigh the deleterious effects of delay to the claimant against the salutary effects of delay to the public. Third, can the courts effectively implement the proposed remedy or remedies? See M. L. Pilkington, "Monetary Redress for Charter Infringement", in R. J. Sharpe, ed., *Charter Litigation* (1987), 307, at pp. 308-9; and Shandal, *supra*, at pp. 196 ff.

B. *Application to the Case at Bar*

105 Turning to the constitutional violations before us, I will now apply the test for combining remedies. From the perspective of the public role of the *Charter*, a suspended declaration of invalidity under s. 52 would best serve to ensure future compliance with the *Constitution Act, 1867* by Parliament and also protect the public from the immediate release of potentially dangerous persons. A suspended declaration would permit both Parliament and the provincial legislatures to amend their respective legislation according to the imperatives of the constitutional division of powers.

106 From the perspective of Mr. Demers, however, a suspended declaration of invalidity would give him no immediate redress. The violation of his liberty interest under s. 7 would continue. In light of the seriousness of the violation, and the fact that the Review Board recently found that [TRANSLATION] "Nothing in the evidence in the record or adduced at the hearing leads to the conclusion that Mr. A. is so dangerous a patient that he must be detained in a hospital", I conclude that a stay should be granted within 30 days. The 30-day period is sufficient to allow the provincial health authorities to make an application under mental health legislation if circumstances have changed and Mr. Demers presents [page548] a danger to himself or others owing to his mental state. There is no question in this case that the Court can effectively implement the suspended declaration of invalidity or the stay.

107 Finally, all permanently unfit accused who do not pose a significant threat to public safety should benefit from a stay for the violation of their s. 7 rights within 30 days under s. 24(1) of the *Charter*. Iacobucci and Bastarache JJ. suspend the availability of a stay for one year on grounds of public safety. There is no sound policy reason, particularly on the basis of safety, to delay a stay for one year for those permanently unfit accused who do not pose a significant danger to society.

108 Consequently, I would allow the appeal, order that the impugned provisions be declared invalid under s. 52 of the *Constitution Act, 1982* insofar as they violate the division of powers and the *Charter*, and suspend the declaration for one year. I would also order that Mr. Demers be granted a stay within 30 days under s. 24(1) of the *Charter* for the violation of his s. 7 rights. All other permanently unfit accused who do not pose a significant threat to public safety should be given a stay within 30 days.

Solicitors

Solicitors for the appellant: Létourneau & Gagné, Québec.

Solicitor for the respondent: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Montréal.

[page549]

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

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R. v. ELLIOTT, [1984] A.J. No. 940

Alberta Judgments

Alberta Provincial Court

Porter, P.C.J.

July 24, 1984

[1984] A.J. No. 940 | 57 A.R. 49*

(11 pages) (15 paras.)

CASES NOTICED:

R. v. Tisdale, 13 C.R.N.S. 120, appld. [para. 10].

STATUTES NOTICED:

Criminal Code of Canada, R.S.C. 1970, c. C-34, s. 452(1) [para. 4].
Canadian Charter of Rights and Freedoms, 1982, ss. 7, 9 [para. 12]; 24 (1) [para. 13].

COUNSEL

J. Higgerty, for the Crown S. Hamilton, for the defence

These charges were heard at Jasper, Alberta, before Porter, P.C.J., of the Alberta Provincial Court, who delivered the following judgment orally on July 4, 1984.

Porter, J. [Orally]

1 This case is another shocking example of events that all too often flow from the somewhat vigilant, if not over-zealous, enforcement of the provisions of the Liquor Control Act relating to open liquor in a public place, by the police forces of this Province. The events that followed the initial police involvement, in what can only be described as the most trifling of offences, are out of all proportion to the original transgression, particularly when one considers the lost police and counsel time involved in this lengthy trial. Unfortunately it is the type of situation that this court has had to consider far too often over the past years and from all reports it is not uncommon in the sittings of the Provincial Court in many other parts of the Province both in cities and small towns. It really involves the angry reaction of a citizen to the technical enforcement of the Liquor Control Actby a police officer where no apparent harm or wrong is being done. It is a case of enforcement for the sake of enforcement, statistics maybe, where no particular purpose is being served. One has to wonder for how long in this Province, which after all is part of the free and democratic western world in 1984, where laws are surely created with the idea of preserving the peace, order and safety of the Province and it's citizens, those in charge of our law enforcement agencies, will allow or

indeed in some cases encourage their police officers in the field to continue to enforce the law in this manner. Until those in charge, if necessary prompted by the courts, build in some discretion so as to enforce the law with a degree of comon sense, recognizing as was once said by the famous Battle of Britain Fighter pilot Sir Douglas Bader that:

"rules and regulations are made for the guidance of wise men and the blind obedience of fools",

then we are unfortunately going to continue to see these types of incidents before the courts. The regrettable thing about it is that it serves no purpose. However, the harm that is occasioned each time and the damage that is done to the respect which the citizenry at large have for law enforcement and indeed the administration of Justice as a whole, are matters of great concern and in my judgment it is well past time for these concerns to be addressed. It has been going on for years in this Province and it involves rich and poor alike, well educated citizens and those with no education at all. One hears of proposals forthcoming by legislatures to frame guide lines for sentencing judges and one has to consider sometimes whether or not there would not be good value in framing such legislative guidelines for law enforcement agencies, so that they would charge and bring before the courts those who truly transgress the law, in the sense of clearly offending the purpose of the law rather than technically breaking it and doing no harm. Then perhaps would the citizenry develop a healthier respect for the law and for those charged with the responsibility of enforcing it. Then perhaps and only then will we see a marked decline in the courts of the type of incident in the case at bar where [*page52] an angry citizen over-reacts and finds himself involved in the horrendous situation which enbroiled the accused. The accused is charged as follows:

Count #1

"That he on or about the 29th day of February, A.D. 1984, at or near Jasper in the Province of Alberta, did assault Constable Stephen William VIGOR, a Peace Officer, engaged in the execution of his duty, contrary to the provisions of the Criminal Code

Count # 2

"On or about the 29th day of February, A.D. 1984, at or near Jasper in the Province of Alberta, did resist Constable Stephen William VIGOR, a peace officer, to wit: a member of the Royal Canadian Mounted Police engaged in the execution of his duty, the lawful arrest of Mark Alvin ELLIOTT, by fighting, contrary to the provisions of the Criminal Code and amendments thereto."

It is common ground between the parties that the resistance alleged was in the course of the detention of the accused and not the initial arrest and were it necessary I would amend the information accordingly to conform to the evidence. In light of the conclusion to which I have come it will not be necessary.

2 The facts are divided into three phases;

> "1) The events at the initial scene,
>
> 2) The events at the RCMP detachment that night and,
>
> 3) The events from 8:00 am on the next day until his release at 3:00 pm which are only relevant to the extent that the Charter of Rights has any bearing on the matter if there was an illegal and arbitrary detention of the accused."

The initial events, phase (1) were comparatively straight forward. Constable Vigor, a peace officer and member of the RCMP was on duty in Jasper, Alberta at 1:42 am in his patrol car when he saw the accused in company with another individual carrying what the constable believed at the time was an open glass of beer but which he was later led to believe during an internal investigation was an open can of beer. The accused was crossing a parking lot going towards a condominium building. In actual fact the accused was carrying an open can of beer and was going from the bar a few hundred yards away to the condominium in question. There was no suggestion of any

rowdiness, noise or any kind of disturbance but simply two individuals going to a condominium to visit a friend with a pack of beer and the accused had opened one as they walked harmlessly and innocuously to their friends residence, about 100 yards away. The officer pulled his vehicle across the centre line parked on the wrong side of the road and sought to accost the accused and his friend. He placed his hand on the friend who shrugged it off and then ran away. The accused poured out the contents of the container, which the constable still could not really see as it was relatively dark, and threw it away. The constable never retrieved the container. All of these facts are pretty well agreed. Almost everything else is in dispute. The officer says that as he approached them, at what must have at least been a fast walk he said "hold it guys, I'm a peace officer! May I please have your beer." The accused and his friend, Maclean say they never heard this but the first they heard was a sort of grunt and then a hand was put upon Maclean's shoulder. The officer says that as soon as the accused discarded his container he turned around and punched him, the officer, in the right shoulder moving him back half a step. The officer says he told him he was only going to charge him with open liquor whereupon the accused who was facing him by now punched him in the face in the right eye and cheek area. At this point the officer got hold of the accused by the shoulders, swung him around 180[DEGREES], told [*page53] him he was under arrest for assaulting a police officer and pushed him all the way back to the police car, into which he placed him and read him his rights to counsel in accordance with the Canadian Charter of Rights. They then departed for the Jasper detachment. He said that he did not believe that the accused was intoxicated. The accused resisted some of the way to the police car but did not strike out again. He was loud and abusive. The evidence of the accused in summary is that the officer simply grabbed him by the shoulders after Maclean had run off and said "you're coming with me", led him to the patrol car, placed him inside, told him he did not need I.D. where he was going and that he would be charged with littering, illegal possession and being drunk in a public place. The officer agrees he told him he would be charged with these and in addition with assaulting a peace officer.

3 The defence witnesses Maclean and the friend in the condominium saw nothing of the events so were unable to assist the court. I have no hesitation in accepting Constable Vigor's version of the events as being the correct one. However zealous he may have been to issue a ticket to the accused for such a minor infraction of the Liquor Control Act, I do not believe that he simply grabbed the accused in the manner suggested by the latter and hauled him off to the detachment for no reason whatsoever. Such an action would place his whole career in jeopardy and makes no sense, I simply do not believe the accused on this point. I do believe the officer and find that he was assaulted while acting in the execution of his duty.

4 We now turn to phase (2), Constable Vigor did not call any other RCMP members to assist him although there was one on duty on the highway, but chose instead to call Cst. Spencer of the CN Police, something the latter had never encountered before. He left the accused in the car until Cst. Spencer arrived at the police garage at which time the accused was let out and led into the detachment booking in area. The Constable proceeded to immediately go through the booking in procedure. This is really confirmed by Constable Spencer, who knew the accused as the latter worked for CNR, and who at the request of the accused phoned the CNR Dispatch office almost right away to say that the accused was being detained and would not be coming to work. Absolutely no consideration appears to have been given by either officer, at the time, to the provisions of s. 452(1) of the Criminal Code which reads as follows:

"452. (1) Where a peace officer arrests a person without warrant for ...

"(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, he shall, as soon as practicable ...

"(d) release the person from custody with the intention of compelling his appearance by way of summons, or

"(e) issue an appearance notice to the person and thereupon release him, unless

"(f) he has reasonable and probable grounds to believe that it is necessary in the public interest, having regard to all

the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

that the person be detained in custody or that the matter of his release from custody be dealt with under another provision of the Part, or [*page54]

"(g) he has reasonable and probable grounds to believe that, if the person is released by him from custody, the person will fail to attend in court in order to be dealt with according to law."

Clearly it was not necessary to detain the accused at this point for any of the reasons set out in (f) or (g) and on the substantive offence of assaulting the peace officer in the execution of his duty he should unquestionably have been released at that point. His identity was known, no evidence was to be secured, nor as he appeared to have calmed down was any repetition likely. He was a local resident, employed locally and known to the CNR officer. He could and should have been given an appearance notice unless there was some other reason to detain him. The officer had already formed the opinion that he was not intoxicated. He sought to justify the detention in rebuttal evidence by saying that he was "drunk in a public place" which was not the same as intoxicated in his opinion. He said he showed signs of being impaired namely his eyes were watery, he had a smell of alcohol on his breath, his clothes were messed and he had a slight imbalance which was not noticeably bad. All of this clearly falls far short of intoxication. To say that he was simply covering himself by giving evidence in rebuttal in the court would be an understatement. It is clear to me from the evidence and the manner in which he immediately went about trying to book in the accused with no explanation to the latter whatsoever, that he never for one moment applied his mind objectively to the question of releasing the accused or the reasons why he was going to detain him. Curiously enough he was the victim of the initial assault he had no NCO or Senior Constable to whom he could turn the matter over, an "officer in charge" so to speak. There is no policy he says of the RCMP to turn the matter over to another officer when one officer is a victim of an offence but rather the victim has to decide whether or not the accused, his assailant, should be locked up for the night. If this is so it is an appalling omission on the part of the RCMP authorities.

5 In any event the decision was made to detain the accused and the officer wanted to take his personal effects. The accused agreed but made it clear he was not taking off his pants with the CNR officer present. Cst. Vigor removed the belt of the accused. He says he was not going to remove his pants nor do a strip search. The accused clearly felt this was about to happen with some cause and I believe him on the point. He then set out to defend himself and the fracas started. The subsequent events were horrible. An awful fight ensued. It is impossible for me to unravel the evidence as to who did what in any particular order and I am sure a lot of reconstruction has gone on on both sides. However I do not consider it necessary for me to do so as I am of the view that the accused was being quite illegally detained and the officers had no legal justification whatsoever in their attempt to remove his personal possessions and items of clothing. His detention at this point was unlawful. The accused was acting reasonably at the detachment up to the point where he thought things were going too far and in my judgment he did no more than was reasonably necessary to protect himself from an unnecessary assault on his person. Of course he embarked upon a course of action that was doomed to failure. He was finally over-powered and lodged in the "drunk tank" a civilian guard was called and he was left to sleep. He fell asleep quickly. He certainly had an injury to his left eye which in the Photo, Exhibit # 4 taken the next morning reveals a puffed up swollen and bloodshot left eye in clear contrast to a normal looking right eye. Although his rights had been read to him at the police car at the time of the initial arrest it was quite apparent that no further consideration was given to that subject by the two officers at the detachment nor was the opportunity to contact counsel ever really provided to him, although it is true he did not request it. Apart from the lipservice paid to this at the police vehicle no further attention was [*page55] paid to it before he was locked up for the night! There does seem to me to be a difference between telling the accused at the time of arrest and giving him a fair opportunity to consult counsel if he is going to be thereafter

detained. Officer Vigor paid no further attention to the accused, apart from completing his file, and going off duty at 8:00 am, leaving the matter of the release of the prisoner to the day shift. This then leads us to phase (3).

6 Phase (3) covers the period of time at the RCMP detachment in Jasper from 8:00 am when the day shift came on duty to 2:50 pm when the accused was finally released. To deal with why he was detained for a further seven hours the Crown called in rebuttal a rather pitiful parade of policemen who had had dealings with the accused throughout the day. I use this terminology as I have never before seen such a procession of police officers trying to shift responsibility for the detention of a prisoner to someone else in an attempt to exculpate themselves when called to account. The officer in charge was Corporal Shuttleworth, in the absence on vacation of the Staff Sergeant. He said he was busy that day. He reviewed the prisoner sheet and delegated the responsibility for the release of the prisoner and the investigation of the matter to one Cst. Haring under the supervision of a Senior Constable one Cst. Douglas. The latter knew nothing about that delegation of responsibility. The Corporal was too busy to see if the prisoner had been released and just expected this to be done. He was the officer in charge and primarily responsible but no one seems to have understood the specific instructions he says he gave.

7 One Cst. McCaskell went into the cell at about 8:30 am. He was concerned about RCMP policy requiring the prisoner not to wear boots in the cell and other personal items and he removed these from the accused. He was not in the slightest interested in why the accused was not being released as it was not his file, although for some curious reason he admits that he read the file before going in to the cell. He says it was the duty of every officer to see that policy concerning prisoners was being followed but not to become involved with the release of a prisoner. The accused gave evidence that in the cell that morning he was told by Cst. McCaskell that if [he] had been there last night "you would be in the fucking hospital for a long time." McCaskell admitted on the stand that he said this without the expletive. I give him credit for his honesty but that apart one can only be appalled that an RCMP officer would behave in such a manner. He also said that in his view the accused was semi-intoxicated, although he noticed nothing unusual about him, he said the accused did not speak and gave no reasons for his opinion.

8 McCaskell's performance was followed by that of Constable Douglas who apparently has some expertise in the martial arts. He went to the cells. He wasn't concerned with the release as it was another officer's file but he had had some dealings with the accused's family previously and went to talk to him. Curiously the conversation quite quickly moved to the subject of the martial arts and karate. The accused understood it to mean an invitation to take him on. The constable sprightly says that no such veiled threat was intended but simply it was a matter of some mutual interest about which they could make light talk. He said the accused seemed heavily hung over but apart from a smell of alcohol about the accused gave no reasons for saying that he was in a generally intoxicated state. He made no enquiry of the obvious injury to the eye of the accused and obviously gave no credit to the fact that the man had been involved in a heavy fight the night before. He did inquire in the office before visiting the accused why he was in custody and was told Cst. Haring was investigating the file and later that morning the officers would get together and decide what charge to lay.

9 Cst. Haring, to whom the file was [*page56] assigned gave evidence that was even more amazing. He said Cst. Vigor not the Corporal gave him the file and after he had reviewed it he took it to the Corporal. They reviewed the file together and got out the Criminal Code. This all took quite awhile. At 9:50 am he decided to interview the accused. I interject here that the accused thought this happened at 2:00 pm but I am satisfied after reviewing the notes kept by the guard that it was 10:00 am. Cst. Haring took the accused from the cells to the interview room, gave him the appropriate warnings and the accused said he did not want to speak to a lawyer. He denied the evidence of the accused that he told him if he wanted to speak to a lawyer it would take quite awhile and he would have to wait in the cells. The accused was concerned about his eye. He had to read the warning twice. The accused gave an intelligible statement, answered all his questions, signed the statement and behaved generally normally. He gave him a glass of water. He had had no drink or food up to this time, because it was RCMP policy not to give it to someone who was intoxicated in the drunk tank. He was however sufficiently coherent to be invited to have lunch at 11:00 am but for some curious reason only back in the cells. The reason given was that he had a smell of alcohol about him and he seemed slightly disorientated. In Constable Haring's view an accused should not be released until he understood the release procedure. He did not try to go through the release procedure with the accused. He gave no thought to attributing any disorientation he noticed to any injury from which the accused might

be suffering. He put him back in the cells and ordered in lunch for him. This is totally inconsistent as either he was intoxicated and should not be eating or he was not and should have been released. At 2:00 pm when he was out of the office he decided that that was a good time to release the accused, called one Cst. Flood to do so and the latter released him fifty minutes later.

10 I have already decided that the original detention was illegal. I have no hesitation in accepting the evidence of the accused and his friend MacLean that they had had only a moderate amount to drink before these events set in motion. All the evidence of his condition is consistent with this. Cst. Thorpe gave evidence of an incident several years ago when the accused was very aggressive after consuming alcohol and he treated him respectfully and very carefully and no incident occurred. The accused obviously has an aggressive nature, or at least a quick temper. There is however nothing in the evidence I have heard from the officers present the next day which would back up the opinion of any one of them that the accused was intoxicated and required to be detained under the Liquor Control Act. Constable Haring particularly seemed to demonstrate a complete and utter lack of understanding of the law in this respect. The law is probably best laid out in the case of R. v. Tisdale, 13 C.R.N.S. 120, a decision of Mackenzie, P.M. (now Mr. Justice Mackenzie of the Court of Queen's Bench). I cite from page 123;

"I think, then, that before a police office can be said to have arrived at an opinion as contemplated by this section, it must be shown that he acted judicially. That is to say, the opinion should be one arrived at upon proven principles, based upon sufficient materials or observations. It must be an objective, careful and considered opinion, one which can be justified by appropriate reasons. It cannot be an opinion arbitrarily arrived at by a constable.

"One matter which should be demonstrated is that the constable understood the meaning of the word "intoxicated" as it is used in the section when arriving at his opinion. That is one of the proper principles upon which his opinion should be based."

and from page 124:

"If a combination of several tests and observations shows a marked departure from what is usually considered as the normal, it seems a [*page57] reasonable conclusion that the person is intoxicated with consequent impairment of control of faculties.

"I do not think that such a finding should be made on a slight variation from the normal."

"There are also the cases of McRae v. McLaughlin Motor Car Co. Ltd. et al., [1926] 1 W.W.R. 161; [1926] 1 D.L.R. 372; and McKnight v. General Casualty Insurance Co. of Paris, 44 B.C.R. 1; [1931] 2 W.W.R. 315; [1931] 3 D.L.R. 476, which acknowledge the fact that 'intoxication' exists in degrees and therefore, to determine the degree contemplated by the Legislature, one should look to the particular statute or section in which the word is found.

"It would seem that when a constable, in acting under s. 87a of the Liquor Control Act, 1958, forms his opinion as to the condition of a person, he is not justified in relieving that person of his liberty merely because he appears to be under the influence of liquor. He must have clear evidence that the person has been stupefied by liquor. The question remains as to what degree of stupefication the person must have reached before a constable is justified in acting. I think that question is answered by subs. (2)(a) of the section, which speaks of the person in custody recovering 'sufficient capacity that, if released, he is unlikely to cause injury to himself or be a danger, nuisance or disturbance to others'. The subsection clearly presupposes that before the person was taken into custody he had become so stupefied by alcohol that he had lost the capacity, as distinct possibly from the inclination, to prevent himself from causing 'injury to himself or be a danger, nuisance or disturbance to others.'

"Furthermore, clause (b) of the same subs. (2) provides for the release of a person in custody to a person capable of taking care of him. From that it can be concluded that the Legislature had in mind that people arrested under this section would be in such a state of intoxication that they would be unable to take care of themselves.

"It seems, then, that the degree of intoxication contemplated by the Legislature in enacting this section would be very considerable. A person must be very drunk before he can be said to be intoxicated under this section."

11 Some 14 years later I cannot better express what is required by the legislation before police officers act under this section. The Tisdale case would seem to be required reading for every police officer before he ever effects an arrest under this section. Clearly everything that happened fell short of these considerations. I am not prepared to hold that the Jasper R.C.M.P. collectively decided to hold the accused in custody with the idea of exacting their own vengeance as the defence suggests, as the evidence is inconclusive as to whether the detention occurred as a result of vindictiveness or neglect. In either case however, it was clearly arbitrary and clearly contrary to the Criminal Code, the Liquor Control Act, and amounted to a breach of the rights of the accused afforded to him under the Canadian Charter of Rights not to be detained arbitrarily.

12 In summary therefore I reach this point. The actions of the officer in the first place although somewhat zealous were legal and he was acting in the course of his duty. The actions of the accused, however unreasonable he may have felt the officer was being were in themselves unreasonable and illegal. He had no justification whatsoever in striking the officer. Had the matter ended there and he had been released properly on an appearance notice, he would undoubtedly have been sentenced to a gaol term. It did not end there however. He was illegally detained and endured a degrading period of 13 hours in a police cell in a somewhat injured state without food or drink for most of the time. The original [*page58] detention was aggravated by the length of time involved. The Canadian Charter of Rights, Section 9 reads:

"Everyone has the right not to be arbitrarily detained or imprisoned"

And Section 7 reads:

"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."

It seems fundamentally unjust to me that a police officer who has been assaulted should decide whether or not to detain an accused. At the very least an "officer in charge" should be brought in and if he does not release the accused, arrangements should be made with a Justice of the Peace to review the situation expeditiously. Anything else smacks of vindictiveness as the defence suggest. The old adage that not only must justice be done but it must manifestly be seen to be done is relevant here. In addition the N.C.O. in charge the next day when confronted with the situation should clearly have taken on the responsibility of releasing the man or taking him directly before a J.P. forthwith and unquestionably he was derelict in his duty in this respect. It is simply not good enough to delegate responsibility and forget about it.

13 The defence argues before me that these breaches of the constitutional rights of the accused enable me to dismiss the charge under s. 24(1) of the Charter. They cite no authority for this. I do not think that it is appropriate in the circumstances although it may be "just" as the assault on the officer took place well before the police transgression of the law and these transgressions did not in any manner cause the assault to take place. I am of the view that it is appropriate that I find the accused guilty of the assault in count 1, and I do so find. Clearly he is not guilty of the resisting in Count 2 and I find him not guilty of that charge. The matter does not end there however as I do consider that there is a just and appropriate remedy under s. 24(1) of the Charter. Whilst the subsequent behaviour of the officer in question and the members of the Jasper Detachment of the Royal Canadian Mounted Police did nothing to alter the original illegal action of the accused, they do taint the proceedings to the extent that in my view it is not appropriate to convict the accused of the offence. The public interest is not well served by police officers dealing with such situations in this manner. There is a Justice system in place and many of the laws dealing with the liberty of the subject and the manner of compelling attendance at court are just as, if not more, important than the laws which police officers have occasion to enforce daily. They cannot be seen to bring before the courts an accused charged with an offence against the law, when they have themselves acted contrary to different

provisions of the same law. They must always remember that the end does not justify the means, but rather the means themselves must be just and lawful or else the courts should not entertain them lest the whole administration of justice be seen in the same light. However strong their personal feelings may be they must follow the law too, lest they forget that they are the servants of the public and not the rulers. Perhaps it is the responsibility of the courts to remind them of this from time to time. Tough as their job may sometimes be they cannot place themselves beyond the law and then expect the courts to convict and sentence an accused person.

14 To reflect the general disapproval by the court of what transpired in this case I am of the view that a "just and appropriate" remedy is to find and I do find that it would not be contrary to the public interest and it is certainly in the best interests of the accused that he not be convicted of the offence but granted an absolute discharge.

15 I have dealt with these issues at length because they are fundamental issues. I see them, as I know many other judges do, arising all too often and unless they are dealt with at length in [*page59] a judgment such as this they will remain buried and continue to fester. The purpose of the judgment is not to criticize unduly the police officers in question, regrettable as their conduct may have been, but to raise the issues in the hope that they will be addressed generally across the Province by those responsible so that similar situations will be avoided in the future. Mr. Elliott I grant you an absolute discharge.

Accused found guilty; granted absolute discharge.

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R. v. Flintoff, [1998] O.J. No. 2337

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

Finlayson, Carthy JJ.A. and MacPherson J. (ad hoc)

Heard: May 15, 1998.

Judgment: June 10, 1998.

Docket No. C28301

[1998] O.J. No. 2337 | 111 O.A.C. 305 | 126 C.C.C. (3d) 321 | 16 C.R. (5th) 248 | 36 M.V.R. (3d) 1 | 39 W.C.B. (2d) 6 | 1998 CarswellOnt 2373 | 1998 CanLII 632

Between Her Majesty the Queen, respondent, and Paul Flintoff, appellant

(26 pp.)

Case Summary

Civil rights — Security of person — Lawful or reasonable search — Strip searches — Unlawful search — Canadian Charter of Rights and Freedoms — Denial of rights — Remedies, exclusion of evidence.

Appeal by Flintoff from an order reversing his acquittal and ordering a new trial on charges of driving with an excessive blood alcohol level. Flintoff was arrested for impaired driving and was taken to the police station for a breathalyzer test where he was strip-searched. It was a station policy to strip search all persons in custody brought into the station. Nothing was found in the search. The trial judge excluded the breathalyzer evidence and dismissed the charge of driving with a blood alcohol level over .08. The impaired driving offence was adjourned pending the Crown's appeal to the Summary Conviction Appeal Court. The Crown's appeal was allowed and a new trial was ordered for the over .08 charge.

HELD: Appeal allowed.

There were sufficient grounds to justify the arrest for impaired driving. However, the strip search was a flagrant violation of the Charter, an abuse of police power and would shock the public. The search was not incidental to the arrest. There was a temporal connection between the search and the breathalyzer test. The breathalyzer test was tainted by the unconstitutional and unnecessary strip search which formed an integral part of a single investigation. The Charter violation was so serious that the admission of the breathalyzer evidence would have brought the administration of justice into disrepute. Since the evidence was not admissible, the charge of driving with an excessive blood-alcohol level was unsupportable. The charge of impaired driving was severable and was not stayed.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 8, 9, 24(2).

Criminal Code, ss. 253(a), 253(b), 254(3).

Counsel

Alan J. Risen, for the appellant. Roger A. Pinnock, for the respondent.

The judgment of the Court was delivered by

FINLAYSON J.A.

1 This case involves a constitutional challenge to the conduct of the police in subjecting the appellant to a strip search prior to permitting him to respond to a demand for a breath sample pursuant to s. 254(3) of the Criminal Code.

2 The appellant was arrested for impaired driving and taken to the police station for a breathalyzer test. At the station the investigating officer strip-searched him but found nothing. The appellant failed the breathalyzer test and was arrested for having a blood alcohol level over 80 milligrams per 100 millilitres of blood. The trial judge, Provincial Judge D.B. Dodds, in considering a Canadian Charter of Rights and Freedoms application at the beginning of the trial, found that the strip search violated the appellant's right under s. 8 of the Charter to be secure against unreasonable search. The trial judge, in written reasons released October 31, 1996, excluded the evidence of the breathalyzer and dismissed the over 80 milligram charge. The trial of the impaired driving offence was adjourned until the Crown's appeal to the Summary Conviction Appeal Court could be considered. The Honourable Mr. Justice D.S. Ferguson, of the Ontario Court (General Division) sitting as the Summary Conviction Appeal Court, allowed the Crown's appeal, set aside the verdict of not guilty on the over 80 milligram charge and ordered a new trial. He also asked the court hearing the new trial to consider a reduced sentence in light of the breach of the appellant's Charter rights. The appellant applies for leave to appeal from this decision, and if leave is granted, that an appropriate remedy be ordered.

Facts

3 On the way home from a local establishment in the Oshawa area, in the early hours of March 22, 1996, the appellant was in a motor vehicle accident. The appellant got out of his vehicle, checked on the well-being of the other driver, satisfied himself that the other driver was being cared for, and returned to his vehicle to await the arrival of the police.

4 When an officer from the Durham Regional Police Services arrived on the scene, the appellant readily identified himself to the investigating officer as the operator of the motor vehicle involved in the accident. He produced his drivers licence, ownership, and insurance. Throughout, the appellant was polite and cooperative, and was indeed described by the investigating officer as a "model accused".

5 The investigating officer was informed from another party at the scene that the appellant had been driving at an excessive speed and ran two red lights just prior to the accident. The officer observed that the appellant appeared to be slightly unsteady on his feet, his speech was slightly slurred, and there was a strong odour of alcohol on the appellant's breath. The appellant admitted consuming four or five beers earlier in the evening. Based on his own observations and this information, the officer formed the opinion that the appellant's ability to operate a motor vehicle was impaired by alcohol and arrested the appellant for impaired driving. There is no issue that all procedural requirements were met in making the arrest. The officer then read the appellant the breathalyzer demand and advised him of his right to counsel. The appellant indicated he wished to have counsel.

6 After a brief pat-down search at the roadside, the appellant was placed in the back of the police cruiser and transported to the police station for the purpose of securing breath samples.

7 At the station, the appellant was taken to the booking area. This area consists of a counter-type desk where the booking or cell officer is stationed. A few feet in front of this counter and to the left is the door into the cell area through which all police officers and prisoners pass when entering or exiting the cells. A few feet to the front of this door and directly in front of the booking officer's desk is a small room approximately six by eight feet that contains a shower stall.

8 The appellant was escorted into the room with the shower stall and a form of strip search of the appellant was performed. There was a conflict in the evidence adduced at trial (which was not resolved by the trial judge) as to the exact nature of the search of the appellant at the police station. The investigating and now arresting officer testified that he required the appellant to remove all of his clothing and then turn in a circle so that he might be completely observed by the officer. In contrast, the appellant testified that he was only required to remove his socks and drop his pants to his ankles, standing in his underwear in front of the officer. He stated that he did not remove his shirt and that he did not turn around. Both parties agreed that there was no physical contact between the officer and the appellant during the course of this search.

9 The appellant testified that while this strip search took place the door to the room was left wide open. He stated that before entering the shower room he observed three police officers in the outer office, at least one of whom was female. The appellant testified he was not told the reason for this strip search. He further indicated he felt embarrassed and degraded by this proceeding. The arresting officer conceded that persons entering or exiting the cell area would have to walk past the door of the room where the strip search took place and that there may have been female officers in the outer office at the time of the search.

10 After the strip search, the appellant was allowed to get dressed and was taken to an adjoining room where he was allowed to make a telephone call to duty counsel for legal advice. The arresting officer testified that he did not observe the appellant during this call because he did not have any security worries about the appellant.

11 After the call to duty counsel, the appellant was taken to the breathalyzer room where the breath tests were conducted. At the conclusion of the breathalyzer tests the appellant was served with the appropriate documentation and released on a Promise to Appear. The Certificate of Analysis indicates that the appellant registered 120 milligrams on each of the two tests. The appellant was then allowed to leave the police station on his own.

12 The appellant never entered the cell area and the arresting officer said he never intended to put him in the cells.

13 The arresting officer testified that he observed nothing about the appellant throughout the investigation that aroused any suspicion that the appellant had weapons concealed on his person.

14 The arresting officer further testified that the strip search was conducted on the basis of general policy and not founded on any circumstances related to this particular investigation or appellant. The officer stated that a strip search is conducted in every instance of a person being brought to the police station in the custody of a police officer regardless of whether there is a reason to believe that the individual possesses any weapons or contraband. This search is performed for the purpose of maintaining the safety of the accused, the police, and other persons at the station. The officer stated that not only was it his personal policy to strip search everyone brought into the police station, but it was also the policy of the Durham Regional Police Services as set out in Durham Regional Police Services' policy routine order No. 96-101-0045 (the "Order"). The Order, which was signed by the Chief of Police, states in part:

DURHAM REGIONAL POLICE SERVICE

POLICY AND ROUTINE ORDERS

ORDER NUMBER: 96-101-0045

SUBJECT: PRISONER SEARCHES

17 DIVISION CELL BLOCK PROCEDURES

There have been several incidents recently where prisoners have been brought into the 17 Division Cell Block still in possession of weapons and other items capable of inflicting injury upon themselves or officers. Effective immediately, the following prisoner search and lodging procedure will be followed.

PRISONER SEARCHES

When an officer takes a person into custody as a result of an arrest or receives a prisoner who is already in custody, it is the officer's responsibility to search that person immediately and thoroughly. Evidence and any items capable of inflicting injury, affecting or assisting to affect escape shall be removed from the person and secured. Only after a thorough search has been conducted will an officer escort or transport a prisoner.

If an officer of the same sex as the prisoner is not available to conduct the search, a combination of physical search and visual observation should be utilized. Outer clothing should be removed and searched, the prisoner handcuffed behind the back and the area where the hands have access after handcuffing thoroughly searched. A careful visual check of the rest of the prisoner can be done and the back of the hand can be used to conduct a "pat down". A second officer should be requested to assist with transporting the prisoner.

As a general rule, all prisoners must be handcuffed. Officers can use discretion under extenuating circumstances.

LODGING PRISONERS IN 17 DIVISION CELL BLOCK

Prisoners brought into the cell block must be handcuffed and kept under control at all times until the prisoner is secured in a cell. The Cell Officer is not to be left alone with a prisoner in the booking area. Metal rings have been installed in the 17 Division booking area to assist in the securing of unco-operative prisoners.

All prisoners will be escorted by the arresting/escort officer to a designated area and subjected to a thorough search by an officer of the same sex before being lodged. All articles of clothing will be removed from the prisoner and the clothing taken outside the designated search area. The arrest/escort officer will search all articles of clothing including cuffs, seams, collars, rolled up sleeves, shoes, underwear or anything else that might conceal contraband. All pockets will be emptied and anything removed from pockets will be stored in the prisoners property bag. Prisoners may have the following clothing returned: socks, underwear, pants and shirt.

Any other articles accompanying the prisoner (e.g. gym bags) will be thoroughly searched for evidence or weapons.

Bodies of prisoners will be searched including soles of feet, between toes and fingers as well as hair and beards.

Prisoners will not be allowed to possess jewellery, chains, watches, glasses, belts, shoelaces, draw strings or anything that could be used to hurt themselves or others.

15 Staff Sergeant Cameron of the Durham Regional Police Services, who participated in the formulation of the Order, testified in response to the Charter application, and stated that the Order requires every police officer to strip search every person who is brought into the station in custody, regardless of the circumstances of the case or the individual. He stated that the Order's purpose was to improve the safety of all persons at the police station and to remove the discretion to strip search or not from police officers. Any police officer who did not strip search an individual brought into the police station for a breathalyzer test would be subject to internal discipline regardless of the circumstances of the case or individual.

16 The trial judge, in considering a Charter application at the beginning of the trial, concluded that the investigating officer had reasonable and probable grounds to arrest the appellant for impaired driving. He further found that the officer was empowered by law to search the appellant incidental to arrest. The trial judge, however, found that in this case the mandatory strip search was not a search incidental to arrest and was only incidental to police policy. The trial judge found that the strip search was arbitrary and quite oppressive. Furthermore, the search was unsupported by any objective grounds and was patently unreasonable. The trial judge concluded that the appellant's rights under s. 8 of the Charter had been "violated in a fashion calculated to diminish the confidence of the public in the administration of justice and perhaps more particularly in the Police Department itself". He further found that that an informed public would be entirely startled by the Order and that the appropriate remedy was the exclusion of the evidence obtained following the Charter breach. Accordingly, the trial judge dismissed the over 80 milligram charge.

17 The trial of the impaired driving offence was adjourned until the Crown's appeal to the Summary Conviction Appeal Court could be considered. The Summary Conviction Appeal Court judge found that the strip search of the appellant was "patently unreasonable and constituted a breach of his Charter rights". The Summary Conviction Appeal Court judge found that there was no causal connection between the search and the breathalyzer tests and the temporal link was fortuitous. He concluded that the breathalyzer results could not be excluded. He further concluded that it would not be appropriate to enter a stay of proceedings because the Charter breach had no effect on the appellant's right to make a full answer and defence and had no causal connection to the trial. The Summary Conviction Appeal Court judge further held that the integrity of the justice system would not be affected if the trial in this case proceeded and further concluded that the prejudice the appellant suffered could be compensated by other remedies. The Summary Conviction Appeal Court judge suggested in his reasons that if the appellant was convicted in the new trial, which he ordered in allowing the Crown's appeal, the trial judge consider a remedy in the form of a reduced sentence. He noted as well that regardless of the outcome of the new trial, the appellant could seek the remedy of damages against the police, but that this would have to be done in a separate civil proceeding. The Summary Conviction Appeal Court judge also requested that a copy of his reasons be passed along to the testifying officers and their Chief.

18 In his s. 24(2) of the Charter inquiry, the Summary Conviction Appeal Court judge stated:

> The court must decide this issue by performing the analysis set out in R. v. Goldhart (1996), 107 C.C.C. (3d) 481 (S.C.C.). When I consider the entire relationship between the search and the obtaining of the breathalyzer tests it is clear that the temporal link is fortuitous. The strip-search was part of the routine followed with every person brought under arrest to the police station regardless of the offence charged. There was no evidence that the search had any effect on the willingness of the Respondent to take the breathalyzer tests. The breach of s. 8 occurred quite separately from the taking of the breath samples. There is no causal connection between the search and the obtaining of the test results. Considering all the circumstances I conclude that it would be unreasonable to find that the breathalyzer test results were obtained in a manner that breached s. 8 and therefore s. 24(2) does not apply. Consequently, the test results should not have been excluded.

Issues

19 The appellant raises the issue of whether in the circumstances the appellant should have been arrested for impaired driving or whether the appellant should have been charged and released from the scene on a notice to appear. The appellant also asserts that the Order contravenes s. 8 of the Charter. He raises the issue of what the appropriate remedy for the Charter breach should be in the circumstances and argues the Summary Conviction Appeal Court judge erred in not granting any remedy for the breach. Particularly, the appellant asserts that the Summary Conviction Appeal Court judge erred in not excluding the results of the breathalyzer test because he could not find a causal relationship between the strip search and the breathalyzer test and the temporal link was fortuitous. In addition the appellant asserts that the Summary Conviction Appeal Court judge erred in not granting a stay of proceedings relating to the failed breathalyzer test and the charge of driving while impaired.

20 I see no merit in the arguments relating to wrongful arrest at the scene of the accident. The appellant's argument amounts to no more than the assertion that an arrest was unnecessary. The appellant could simply have been charged and handed a Notice to Appear. The burden was on the appellant to show a violation of s. 9 of the Charter. Driving while impaired is an arrestable offence under s. 253(a) of the Code and there were sufficient grounds to justify the arrest: see R. v. Cayer (1988), 66 C.R. (3d) 30 (Ont. C.A.).

21 The breathalyzer was at the police station and the police officer was entitled under s. 254(3) of the Code to require the appellant to accompany him to the police station for the purpose of enabling a breath sample to be taken. Accordingly, whether the appellant was detained under s. 254(3) of the Code or was arrested for the offence under s. 253(a) of the Code, was in the circumstances of this case academic.

22 The Crown does not now contest the fact that the strip search violated the appellant's s. 8 Charter rights. As I will examine more closely below, the strip search conducted in the circumstances of this case is a flagrant violation of the Charter and an abuse of police power. After considering the submissions of the parties, I have concluded that the only issue to be addressed is what the appropriate remedy for the Charter breach is in the circumstances.

Analysis

23 The public places a great deal of power into the hands of its police forces to meet the heavy responsibility police forces take upon themselves everyday in protecting our safety and security. The public also places a corresponding amount of trust in its police forces to wield this power in accordance with common sense and in compliance with our laws. The strip search conducted in this case is not justified in law. It was not incidental to arrest. The strip search was an unreasonable search and accordingly was a violation of the appellant's s. 8 Charter right "to be secure against unreasonable search or seizure". The strip search was also a violation of the public's trust in its police forces and at odds with common decency. I agree with the Summary Conviction Appeal judge when he concluded that the breach of the appellant's Charter rights in this case was "outrageous". I would add that the breach was flagrant since, in the words of Mitchell J.A. in R. v. MacDonald (1989), 44 C.C.C. (3d) 134 (P.E.I. C.A.), "the actions of the police were quite deliberate, unjustified and in no way could one characterize the violations as trivial, inadvertent, merely technical or made in good faith". Furthermore, I find that the Charter violation in this case would shock the public.

24 I also agree with the Summary Conviction Appeal judge's comments on the law governing strip searches as incidental to arrest. Strip-searching is one of the most intrusive manners of searching and also one of the most extreme exercises of police power. Though the common law allows the police to search a person as an incident to arrest, the degree of intrusion must be reasonable and in pursuit of a valid objective such as safety: R. v. Caslake (1998), 121 C.C.C. (3d) 97 at 108.

25 It is not the court's role to pass upon the validity or otherwise of the Order in the abstract. The police reliance on a general policy with respect to placing prisoners in the cell block in the circumstances of this case is misconceived. At no time, on this record, was there any suggestion that the appellant was to be held in custody regardless of the outcome of the demand for a breathalyzer sample. It is clear that the policy in the Order was directed to problems inherent in introducing an accused person into the prison population. Such a process raises special problems which it is unnecessary to address in this case.

26 Having agreed that the unreasonable and offensive strip search of the appellant violated the appellant's s. 8 Charter rights, the question remaining is what remedy, if any, should be granted in the circumstances.

27 The beginning point of an inquiry into the appropriate remedy for the Charter breach is s. 24 of the Charter. Section 24 states:

> 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.

28 The usual remedy for an unreasonable search in violation of s. 8 of the Charter is to exclude under s. 24(2) the evidence that is the product of the unconstitutional search. Furthermore, usually it is self-evident that the "evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter". The contentious issue under a s. 24(2) inquiry usually is whether "having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". In this case, however, it is less than clear that the breathalyzer results were a product of the unconstitutional strip search. To see if the exclusion of the breathalyzer test results is the appropriate remedy in this case, I must address the first stage of the s. 24(2) test.

29 The nature of the first stage of a s. 24(2) inquiry was described by Sopinka J. for the majority of the Supreme Court of Canada in R. v. Goldhart (1996), 107 C.C.C. (3d) 481 at 492-495:

> When can evidence be said to have been "obtained in a manner" that breached the Charter? The proper method of determining whether s. 24(2) of the Charter is engaged was developed by this court in R. v. Therens (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, [1985] 1 S.C.R. 613, and [R. v. Strachan (1988), 46 C.C.C. (3d) 479 (S.C.C.)]. In both cases, the court rejected the strict application of the form of "causal analysis" relied on by the courts below in the instant case.
>
> In Therens, a majority of this court made it clear that the "causal connection approach" is often unhelpful in determining whether a piece of evidence can attract the application of s. 24(2) of the Charter. LeDain J., speaking for the majority, stated, at pp. 509-10:
>
> > It is not necessary to establish that the evidence would not have been obtained but for the violation of the Charter. Such a view gives adequate recognition to the intrinsic harm that is caused by a violation of a Charter right or freedom, apart from its bearing on the obtaining of evidence. I recognize, however, that in the case of derivative evidence which is not what is in issue here, some consideration may have to be given in particular cases to the question of relative remoteness.
>
> The question of "relative remoteness" or proximity, which is central to the issues in this case, was addressed by the court in Strachan. In that case, Dickson C.J.C., speaking for the court, warned against the "pitfalls of causation", and instead embarked upon a form of "proximity analysis" that measures the entire relationship between a breach of the Charter and subsequently discovered evidence. Dickson C.J.C. stated, at pp. 498-9:
>
> > In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained. Accordingly, the first inquiry under s. 24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment, particularly where the Charter violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, though obtained following the breach of a Charter right, will be too remote from the violation to be "obtained in a manner" that infringed the Charter. In my view, these situations should be dealt with on a case-by-case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote.
>
> In these judgments of our court, causation was rejected as the sole touchstone of the application of s. 24(2) of the Charter by reason of the pitfalls that are inherent in the concept. Its use in other areas of the law has

> been characterized by attempts to place limits on its reach. The happening of an event can be traced to a whole range of causes along a spectrum of diminishing connections to the event. The common law of torts has grappled with the problem of causation. In order to inject some degree of restraint on the potential reach of causation, the concepts of proximate cause and remoteness were developed. These concepts place limits on the extent of liability in order to implement the sound policy of the law that there exist a substantial connection between the tortious conduct and the injury for which compensation is claimed. On the other hand, causation need not be proved with scientific precision: see Snell v. Farrell (1990), 72 D.L.R. (4th) 289, [1990] 2 S.C.R. 311, 4 C.C.L.T. (2d) 229.
>
> . . . .
>
> Although Therens and Strachan warned against over-reliance on causation and advocated an examination of the entire relationship between the Charter breach and the impugned evidence, causation was not entirely discarded. Accordingly, while a temporal link will often suffice, it is not always determinative. It will not be determinative if the connection between the securing of the evidence and the breach is remote. I take remote to mean that the connection is tenuous. The concept of remoteness relates not only to the temporal connection but to the causal connection as well. It follows that the mere presence of a temporal link is not necessarily sufficient. In obedience to the instruction that the whole of the relationship between the breach and the evidence be examined, it is appropriate for the court to consider the strength of the causal relationship. If both the temporal connection and the causal connection are tenuous, the court may very well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the Charter. <u>On the other hand, the temporal connection may be so strong that the Charter breach is an integral part of a single transaction.</u> In that case, a causal connection that is weak or even absent will be of no importance. Once the principles of law are defined, the strength of the connection between the evidence obtained and the Charter breach is a question of fact. Accordingly, the applicability of s. 24(2) will be decided on a case-by-case basis as suggested by Dickson C.J.C. in Strachan. [Emphasis added.]

30 It is my opinion that this case is of the nature of one that Sopinka J. contemplated in Goldhart, supra, where the temporal connection is so strong that the Charter breach should be seen as "an integral part of a single transaction". Even with the absence of a causal connection, a court faced with a flagrant and intrusive violation of s. 8 of the Charter must give, as LeDain J. stated in Therens, supra, "adequate recognition to the intrinsic harm that is caused by a violation of a Charter right or freedom, apart from its bearing on the obtaining of evidence." It is important to note that immediately prior to making this point, LeDain J. in Therens, supra, considered the wording of the French version of s. 24(2) that does not speak of "in a manner" but instead states "obtenues dans des conditions qui portent atteinte aux droits et libertés garantis part la présente charte". As well, if an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained is adopted, then the temporal connection takes on greater importance. The breathalyzer test was tainted by the humiliating and unconstitutional strip search, which formed an integral part of a single investigatory transaction. It was also totally unnecessary. The investigating officer had already performed a search incident to arrest when he "patted the appellant down" on the highway. The temporal connection is sufficiently strong to permit me to conclude that it is not realistic to view the strip search as severable from the total investigatory process. The strip search was one link in the continuous chain of events involved in the investigation of the over 80 milligram offence.

31 The Summary Conviction Appeal judge concluded that "[w]hen I consider the entire relationship between the search and the obtaining of the breathalyzer tests it is clear that the temporal link is fortuitous. The strip-search was part of the routine followed with every person brought under arrest to the police station regardless of the offence charged. There was no evidence that the search had any effect on the willingness of the [appellant] to take the breathalyzer tests." With respect to the Summary Conviction Appeal judge, I cannot agree. The Summary Conviction Appeal judge's own reasoning shows that his conclusion is incorrect. The temporal connection between the strip search and the obtaining of the breathalyzer test results was not by chance, and even if it was, I am unsure of the relevance of such a conclusion. Every person brought into the cells or for a breathalyzer test was to be strip searched pursuant to the Order. The investigatory process dictated by the police force for an over 80 milligram charge included a breathalyzer test and therefore because of the Order (or rather the police interpretation of it)

required a strip search. We have no idea what effect the strip search had on the appellant and for that matter on his willingness to take the breathalyzer test except for the fact that he felt embarrassed and degraded.

32 The causal connection inquiry cannot exhaust the first stage of a s. 24(2) inquiry no matter how appealing it is to those who wish to limit the scope of the Charter or to eliminate judicial discretion in its application. In this case, the police introduced as a matter of policy a degrading and unnecessary pre-condition to permitting any accused to comply with a breathalyzer demand; a compliance which in many instances could establish his or her innocence. It is important to me that we are dealing here with a policy that results in a Charter violation. The court cannot sit idly by as the police, for their own reasons, import an unconstitutional procedural requirement into the Code.

33 The Charter was enacted as the supreme law of Canada to set out the rights, freedoms and responsibilities of Canadians. We cannot appear to condone a flagrant violation of the Charter occurring minutes before evidence was obtained by refusing to engage in the s. 24(2) inquiry because the evidence would have been obtained regardless of the violation. Subsection 24(2) does not only allow for the remedy of situations where through unconstitutional means the police obtain evidence they would not otherwise have been able to obtain. Subsection 24(2) allows for the exclusion of evidence that is obtained in a manner that infringes the Charter. A court cannot look at the results of the breathalyzer and not consider the immediately preceding strip search. Dickson C.J.C. rejected such a narrow and technical approach because it would encourage a restrictive approach to the rights and freedoms guaranteed by the Charter: Strachan, supra, at p. 497. The Charter reflects the principle underlying criminal justice in Canada: when it comes to criminal proceedings and the imposition of the state's coercive powers, it is obligatory that the police follow procedures mandated by law and not impose rules of their own making that are directed to concerns that are irrelevant to the case at hand.

34 Upon the above reasoning, I conclude that the Summary Conviction Appeal judge erred in law in not finding the breathalyzer results were "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter." The Summary Conviction Appeal judge's ruling to not exclude the evidence was a question of law not involving an assessment of credibility and I am within my jurisdiction to review his finding: see R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.) at 12. It is true that if the principles of law are correctly defined by a lower court, then the strength of the connection between the evidence obtained and the Charter breach as found by a lower court must be assessed as a finding of fact, but in this case the principles of law were not defined correctly: see Goldhart, supra at p. 495.

35 Having established that the breathalyzer test results were "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter", I turn to the second stage of a s. 24(2) inquiry for the exclusion of evidence: "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". The Crown submits that, in the circumstances of this case, a reasonable person, dispassionate and fully apprised of all the circumstances, would not be convinced, on the balance of probabilities, that the admission of the appellant's breathalyzer readings into evidence would bring the administration of justice into disrepute. The Crown further submits that the exclusion of the evidence would bring disrepute to the administration of justice. The Crown supports these submissions with the argument that the breathalyzer results would have been inevitably discovered and they were essential to the Crown's case on charges that involve allegations of a type of criminal conduct that is prevalent in society and involves a great risk to innocent members of the public.

36 In determining if it has been established that, having regard to all the circumstances, the admission of the impugned evidence in the proceedings would bring the administration of justice into disrepute, there are three categories of factors to be considered: the fairness of the trial, the seriousness of the Charter violation, and the possibility that excluding the evidence would bring the administration of justice into greater disrepute than admitting it: see Collins, supra, at pp. 19-21.

37 In this case, the first factor is inconclusive, since, though the evidence at issue emanated from the appellant and the use of such evidence after a Charter breach tends to render the trial unfair, there is a weak causal connection between obtaining the evidence and the breach in light of the fact that the evidence would have been obtained in

any event without the violation; and therefore, there is less of a chance that the trial would be unfair if the evidence was admitted.

38 The second factor, the seriousness of the breach, is conclusive. The evidence at issue could have been obtained without the violation of the Charter. The police failed to proceed properly, but instead flagrantly violated the Charter and strip searched the appellant. As I have stated, I find that the flagrant violation of the appellant's Charter rights would shock the public especially if this court was seen to condone the introduction into the investigative process available to police in the taking of breathalyzer samples, requirements that are contrary to the Code, the common law and the Charter. It was unreasonable to strip search the appellant and there was no tenable justification for the intrusive violation of the appellant's Charter rights. The protection against unreasonable search of one's person is a very important Charter right. The seriousness of the Charter violation is so great that the admission of the evidence would bring the administration of justice into disrepute.

39 In considering the third factor, it is true that the exclusion of the breathalyzer test results may also bring the administration of justice into disrepute. Drinking and driving is a serious criminal offence and a dangerous practice that puts the public at risk. The focus of inquiry, however, should not be restricted only to this specific prosecution, but should include the long-term consequences of the regular admission of this type of evidence under these circumstances: see R. v. Greffe, (1990), 55 C.C.C. (3d) 161 (S.C.C.) at 193. Despite the seriousness of the offence, I agree with the conclusion of the trial judge that a reasonable person, dispassionate and fully apprised of the circumstances of the case, would conclude that the seriousness of the Charter violation in this case overshadows the impact of the exclusion of the evidence on the administration of justice. As stated in Greffe, supra, at p. 194, with "great hesitation given the manifest culpability of the appellant, of a crime I consider heinous, I conclude that the integrity of our criminal justice system and the respect owed our Charter are more important than the conviction of this offender". I conclude, therefore, that it has been established that, having regard to all the circumstances, the admission of the breathalyzer results in the proceedings would bring the administration of justice into disrepute, and therefore that evidence should be excluded under s. 24(2).

40 Since it is conceded that the breathalyzer test results are the only evidence to support the charge under s. 253(b) of the Code, that charge cannot be sustained. However, I would not stay the charge of driving while impaired under s. 253(a) of the Code. The conduct of the investigating officer at the scene of the accident cannot be criticized. The evidence to support that charge is entirely severable from what took place at the police station. The Crown cannot, of course, rely upon the breathalyzer reading in support of this charge.

41 L'Heureux-Dubé J. for the majority of the Supreme Court of Canada in R. v. O'Connor (1995), 103 C.C.C. (3d) 1, in reference to R. v. Young (1984), 13 C.C.C. (3d) 1, a decision of this court, stated that:

> [i]t must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make a full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

42 I do not think this is the clearest of cases, particularly when a proper result can be obtained by a more surgical use of s. 24(2) of the Charter. The two charges arise out of a motor vehicle accident, the seriousness of which is not apparent on this record. There is no reason why the offence for which there can be no due process complaint should not proceed on other evidence available to the Crown.

43 I do not want to leave these reasons without stressing two things. First of all, my emphasis is on the impact of the policy of instituting illegal strip searches of all persons who are detained and required to accompany the investigating police officer to the Durham Regional police station to permit the person detained to provide a breath sample. This is not an isolated case where it could be said that an individual police officer was over zealous or inexperienced. Police policy respecting treatment of persons who are arrested must conform with Charter guarantees respecting search and seizure. The Supreme Court of Canada in a number of cases, including Cloutier v. Langlois (1990), 53 C.C.C. (3d) 257 and Caslake, supra, has articulated the limits of search incident to arrest and

those limits must be respected. The Crown's concession, properly made in this case, that the search in this case was unreasonable, demonstrates that the Durham Regional Police Services policy must be reconsidered as it applies to persons required to comply with a breathalyzer demand. Secondly, I want it to be clear that these reasons are restricted to the facts of this case as they apply to the taking of breathalyzer samples. They are not intended to be instructive of police procedures on arrest generally and in particular with regard to any person who is to be detained in a police cell.

Disposition

44 For the reasons given, I would grant leave to appeal, set aside the judgment of the Summary Conviction Appeals Court, and restore the order of the trial judge.

FINLAYSON J.A.
CARTHY J.A. -- I agree.
MacPHERSON J. (ad hoc) -- I agree.

End of Document

R. v. Herter, [2006] A.J. No. 1058

Alberta Judgments

Alberta Provincial Court

Medicine Hat, Alberta

LeGrandeur Prov. Ct. J.

Heard: February 10, 2006.

Judgment: August 15, 2006.

Docket No.: 050450022P101001-002

[2006] A.J. No. 1058 | 2006 ABPC 221 | 407 A.R. 171 | 40 C.R. (6th) 349 | 40 M.V.R. (5th) 312 | 72 W.C.B. (2d) 176 | 2006 CarswellAlta 1096

Between Her Majesty the Queen, and Shane Edwin Herter

(47 paras.)

Case Summary

Criminal law — Offences — Offences against person and reputation — Motor vehicle offences — Impaired driving or driving over the legal limit — Breathalyzer or blood sample demand — Reasonable suspicion or reasonable and probable grounds — Refusal — Charges of impaired driving and refusal to comply with breath demand were dismissed where officer ordered accused to exit his vehicle without telling him why — Officer knew vehicle contained intoxicated passenger, and had no evidentiary foundation to suspect accused had alcohol in his body prior to accused's removal from vehicle — All evidence gathered thereafter was in breach of s. 10(a) of Charter — Officer's decision to confine accused to custody as a means of punishing him for perceived failure to be co-operative constituted arbitrary detention and would have merited stay of proceedings if charges were not dismissed.

Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Procedural rights — Right to be informed of the specific offence — Protection against arbitrary detention or imprisonment — Remedies for denial of rights — Specific remedies — Dismissal of charge — Stay of proceedings — Charges of impaired driving and refusal to comply with breath demand were dismissed where officer ordered accused to exit his vehicle without telling him why — Officer knew vehicle contained intoxicated passenger, and had no evidentiary foundation to suspect accused had alcohol in his body prior to accused's removal from vehicle — All evidence gathered thereafter was in breach of s. 10(a) of Charter — Officer's decision to confine accused to custody as a means of punishing him for perceived failure to be co-operative constituted arbitrary detention and would have merited stay of proceedings if charges were not dismissed.

Application by accused for dismissal of charges or for stay of proceedings on the ground of breach of his Charter rights -- Accused was charged with failing to comply with breath demand and impaired driving -- Following a tip by a taxi driver, police officer followed accused's vehicle for 10 to 15 seconds before pulling it over -- No improper driving was observed -- Upon accused rolling down his window, officer noticed strong smell of alcohol -- Officer noted passenger in vehicle who was clearly intoxicated -- Without advising accused of his s. 10(a) or (b) Charter rights, officer ordered accused to get out of vehicle so he could determine if smell of alcohol was emanating from accused -- After accused became non-responsive to officer's questions, he was brought to

"drunk tank" and kept in custody for several hours -- Officer acknowledged that all his observations that led him to conclude he was going to arrest accused were made after accused's removal from vehicle -- Accused argued that his s. 10(a) Charter right to be informed promptly of the reason for his detention was breached -- He also argued that he was arbitrarily detained, contrary to s. 9 -- HELD: Application allowed, and charges dismissed -- When officer asked accused to get out of vehicle there was a detention within meaning of s. 10(a) -- Accused was entitled to be advised of reason for detention -- At point when officer ordered accused out of vehicle, he did not have adequate evidentiary foundation to reasonably suspect accused had alcohol in his body, particularly knowing there was an intoxicated passenger in vehicle -- Although s. 10(b) right to counsel could be overridden for short time, that was not the case with respect to s. 10(a) right -- Giving effect to s. 10(a) right was not incompatible with roadside check as to sobriety of drivers -- Accused's s. 9 Charter right was breached because he was placed in custody simply as a means of punishment for his failure to be more co-operative in answering officer's questions -- Police officer's frustration with accused was not valid reason to keep him in custody -- All evidence gathered after breach of accused's s. 10(a) right was to be excluded because such evidence would not have existed but for breach of right -- Evidence was conscriptive, and therefore likely to render trial process unfair -- Breach was not technical or minor -- Section 9 breach would have resulted in stay of proceedings had charges not already been dismissed, given police officer's flagrant and arbitrary conduct in punishing accused for his perceived lack of co-operation.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 9, s. 10(a), s. 10(b), s. 24(2)

Criminal Code of Canada, s. 253(a), s. 254(3)(a)

Counsel

B.R. Graff for the Crown

C.G. Yarshenko for the Accused

JUDGMENT

LeGRANDEUR PROV. CT. J.

Nature of Proceedings

1 In this case the accused is charged that on or about the 13th day of March, 2005, at or near the City of Medicine Hat, in the Province of Alberta, he did contravene s. 254(3)(a) of the Criminal Code of Canada by unlawfully failing or refusing to comply with a demand made to him by a peace officer to provide samples of his breath and that he did operate a motor vehicle while his ability to operate the motor vehicle was impaired by alcohol or drug contrary to s. 253(a) of the Criminal Code of Canada.

2 Although a formal Charter notice was not filed and served in this case, the Crown took no issue with that fact, given the explanation of counsel for the accused and certainly no prejudice has arisen therefrom, the Charter issue having been fully dealt with in the evidence and argued thoroughly.

3 The trial in this matter has not concluded, in that the accused has not been called upon as to whether he wishes to present any evidence in defence of the charge before the Court. Defence counsel on the basis of the evidence presented by the Crown in the trial proper alleges that the evidence demonstrates a breach of ss. 10(a) and 9 of the Charter of Rights. Counsel also argued that the evidence does not disclose a refusal on the part of the accused and that the Crown has not therefore proven the same beyond a reasonable doubt. The accused has not elected to call or not call evidence at this point, so I will not deal with this latter issue at this time.

4 This judgment is restricted to whether the alleged Charter breaches are made out and what remedy, if any, is to be granted.

Facts

5 In the early morning hours of March 13th, 2005 in the City of Medicine Hat, in the Province of Alberta, a taxi cab driver and his two passengers observed a motor vehicle being operated in circumstances such that they were concerned that the operator of the motor vehicle might be impaired. As a consequence of their 10 to 15 second observation and within a few minutes thereof, they spoke to a member of the Medicine Hat Police Service at Tim Horton's coffee shop located on Southview Drive S.E., in Medicine Hat. They advised him of what they had seen, gave him the description of the vehicle and three letters from the license plate number. He then passed on this information to other patrols.

6 Shortly thereafter, he was advised that Constable Jantz had located the vehicle matching the description given, at Thompson Crescent off of Southview Drive S.E. Constable Jantz, an officer with six years experience testified that he was notified of a possible impaired driver at approximately 3:30 a.m. and that he was given three letters of a license plate number and a description of the subject vehicle.

7 Minutes after receiving that description while stopped at a red light at Dunn and Southview Drive, he observed a vehicle that appeared to match the description he had received. He followed the vehicle down Southview Drive and stopped the same in Thompson Crescent. This occurred at approximately 3:32 a.m.

8 Constable Jantz had followed the subject vehicle for about 10 seconds and 1/2 a kilometer during which time he didn't notice any sign of impaired driving. The vehicle was proceeding normally in terms of speed and other driving actions.

9 Officer Jantz approached the driver's side door of the vehicle and knocked on the window. The driver rolled down the window about half way and Officer Jantz testified that he was immediately hit with a strong odour of alcohol emanating from the cab of the vehicle. He noted there was a passenger in the vehicle who he described as "well into his cups", so much so that later in his testimony he stated he did not think the passenger even knew he was present. He had observed the passenger earlier that morning in an inebriated condition in the parking lot of Ralph's Steak House.

10 Officer Jantz did not know at that point if the smell of alcohol was coming from the driver or not.

11 The accused did provide the police officer, when requested, with his driver's license, registration and insurance and in his examination-in-chief, the police officer made no comment as to whether this process was remarkable in any way. Later in cross-examination, Constable Jantz stated that the accused's participation in the process of providing his documentation was slower than normal.

12 Constable Jantz directed the accused to get out of his vehicle and to go to the rear of his truck. He did this

because he wanted to determine whether the smell of alcohol was coming from the accused. Constable Jantz testified that when the accused got out of the vehicle, he stumbled and in walking to the rear of the vehicle, walked with a little bit of a stutter. He asked him if he had been drinking and was advised "two beers". He testified that he could smell a strong odour of beverage alcohol on the accused's breath and at that point formed the view that he had reasonable and probable grounds to conclude that the accused's ability to operate a motor vehicle was impaired by alcohol. He did not ask for an ASD breath test, nor did he have an approved screening device with him.

13 Constable Jantz at no time advised the accused as to the reason he wanted him to get out of his vehicle. He acknowledged he directed the accused to get out of the vehicle and walk to the rear of his truck. At the time the accused was directed to get out of the vehicle, the only observation made by the investigating officer was a strong odour of alcohol coming from the vehicle. All the other observations he made concerning the accused's condition, occurred after he had been ordered out of his vehicle and directed to walk to the rear of his truck. These things all occurred without the accused being told of his s. 10(a) or (b) Charter rights.

14 Constable Jantz acknowledged in cross-examination that all of the observations that led him to conclude that he was going to arrest the accused for impaired driving were made after his removal from the truck and before he was given any reason to submit and before he was given any Charter rights. The police officer also acknowledged that if had he not observed any physical symptoms of impairment through this process, he would have had to request another vehicle to attend with a roadside screening device.

15 Upon his arrest at approximately 3:34 a.m. the accused was placed in the back of Constable Jantz's police vehicle and he was chartered and cautioned and a breath demand made upon him. It would appear upon the evidence of Constable Jantz that after he was arrested, the officer proceeded to demand a breath sample from him at 3:35 a.m. This demand came before any Charter rights had been given. He testified that the accused was given his Charter rights and Caution for the first time at 3:39 a.m., at which time the accused, when asked if he understood, said "No, I don't understand".

16 At 3:41 he read the Charter and Caution again and at that point the accused became, for the most part, non-responsive to the officer's questions as to whether he understood, whether he wanted a lawyer and whether he was going to blow. From that point on, the officer attempted to confirm on a number of occasions that the accused understood his rights and tried to ascertain whether the accused was going to provide a breath sample. For the most part, the accused was unresponsive to all the police officer's attempts in this regard. This was frustrating for the police officer, so much so that even before they left the scene to travel to the police station, he advised the accused that he was going to the drunk tank. In cross-examination, he acknowledge that the accused ended up in the drunk tank, "due to his lack of co-operation". Constable Jantz acknowledged that nothing in the accused's demeanour suggested that he was a threat to himself or anyone else and he offered no form of physical resistence to the police officer's actions. Constable Jantz made no effort to determine if the accused could be released to any third person. The last contact he had with the accused was at 4:11 a.m. when he asked him once again; "Do you want to call a lawyer, do you want to provide a breath sample?" He explained about the refusal again and received a single word from the accused, "No".

17 The accused was left in cells from that point and not released until 11:37 a.m. later that day.

Issues

18 The issues for determination at this point are as follows:

1. Was the accused's Charter right under s. 10(a) to be informed promptly of the reason for his detention breached in this circumstance?
2. Was the accused arbitrarily detained contrary to s. 9 of the Charter of Rights and Freedoms?
3. What remedy is appropriate, if any, for either or both breaches if demonstrated?

Section 10(a)

19 Section 10(a) of the Charter of Rights provides:

> s. 10 Everyone has the right on arrest or detention
>
> a. to be informed promptly of the reasons therefore;

20 The accused's vehicle was stopped in response to a complaint as to a possible impaired driver. The initial stopping of the vehicle operated by the accused was to investigate that complaint. It is certainly arguable that the effecting of that stop was a detention for investigative purposes and triggered the provisions of s. 10(a). There can be no doubt that when the peace officer directed the accused to get out of the vehicle and to walk to the rear of his vehicle so as to allow him to garner evidence as to the condition of the accused, a detention within the meaning of s. 10(a) had occurred. (***R.v.Orbanski***, (2005) 29 C.R. (6th) 205, S.C.C., at para. 31)

21 Section 10(a) is engaged when an investigative intention is effected. The detainee is entitled, at a minimum to be advised in clear and simple language of the reason for the detention, (***R.v.Mann*** (2004) 21 C.R. (6th) 1 S.C.C. at para. 21).

22 Indeed in ***Orbanski***, supra, Charron, J. commented in paragraph 31 of the judgment as follows:

> ... It may be more readily apparent how being stopped and pulled over by the police amounts to a detention for s. 10 purposes when s. 10(a) of the Charter is considered. I expect every motorist would fully expect "to be informed promptly of the reasons why he or she is being stopped".

23 In ***R. v. Evans*** (1991) 4 C.R. (4th) 144 S.C.C., the Supreme Court discussed the s. 10(a) right with the majority holding that "the question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to make a reasonable decision to decline to submit to arrest, or alternatively to undermine his right to counsel under s. 10(b)."

24 In this case, the accused was not informed of the reason for being stopped, nor advised as to why he was ordered out of his vehicle and directed to walk to the rear of his vehicle. He was not told that the police officer was investigating an impaired driving complaint, nor that he wanted him to exit the vehicle so that he could in effect, conduct roadside screening measures. To require a driver to exit a vehicle in order to speak to him so as to determine whether a smell of alcohol is emanating from his breath, and to order him to walk, even though he is not requested to do specific sobriety tests, is nonetheless conducting a roadside sobriety screening.

25 In this case, when the police officer directed him to get out of the vehicle so he could observe and gather evidence, he did not have anything except an odour of alcohol emanating from the vehicle in circumstances when he recognized the passenger in the vehicle to be highly intoxicated. At that point in time when he ordered the accused out of the vehicle, he did not even have an adequate evidentiary foundation to reasonably suspect based upon objective criteria that the accused had alcohol in his body. He did not have grounds for an approved screening device demand.

26 Although an accused's s. 10(b) right to counsel in such circumstances is overridden, at least for a short time (see ***Orbanski***); that is not the case in my view with respect to the individual's s. 10(a) right. Giving effect to the s. 10(a) right is not incompatible with a roadside check as to the sobriety of drivers. Telling an individual the reason for

the detention does not in any way limit or interfere with the fulfilment of the police duty to check the sobriety of drivers, as that duty is discussed and outlined in ***Orbanski***.

27 Section 10(a) serves to alert the accused to his or her jeopardy, which of course is necessary if a right to counsel is to be meaningful. However, its fundamental purpose requires that the individual be informed in clear and simple language the reason for the detention or arrest so he or she can determine whether they will submit to the same or not. A detained or arrested person may choose not to submit to the detention or arrest, given the circumstances present if they reach a conclusion that the arrest or detention is not justified.

28 This accused did not have the opportunity to make that decision. He was not told that he was being ordered from his vehicle so the police officer could screen his sobriety. Given that an accused has no legal duty to comply with directions that are in effect screening techniques or to answer questions with respect to consumption (***Orbanski***), it is imperative that any accused be advised of the s. 10(a) right so that they may, in a meaningful way, determine whether they will submit to the directions of the peace officer or answer questions.

29 It is my view that in every circumstance where the intention of the police officer is to remove the driver from the vehicle for purposes of observing his physical condition relative to the issue of sobriety, that even if he has reasonable grounds to justify that direction, the police officer must let the accused know directly or indirectly of his purpose. If he demands from the accused a roadside alert, the accused understands the reason for his detention without being directly told so. If he instructs him that he wishes him to get out of the vehicle to undertake some physical sobriety tests, the accused understands the reason for his detention through that direction. If however the police officer demands that the driver exit his vehicle with the intention of observing the driver's condition by directing him to do certain things, but without telling him why, then the police officer, in my view, has not given indication to the accused of the reason for his detention, nor is it reasonable to infer that the accused understands the reason for his detention. There is no reason not to provide, at the outset, in simple and clear language, the reason for the detention or arrest.

30 In the absence of evidence showing that the accused was specifically told of the reason for detention or arrest, or in the absence of evidence upon which it can be inferred on balance that the accused understood in a meaningful way the reasons for his or her detention, even though no formal words were used; a s. 10(a) breach must be found.

31 In this case, no specific words were used and I find no evidential basis upon which to infer that the accused understood the reason for the initial stop or the direction to leave the vehicle and walk to the rear thereof.

32 The evidence overall, in my view, clearly demonstrates a breach of the accused's s. 10(a) Charter right.

Section 9

33 After the accused's alleged refusal to provide breath samples, he was detained in the "drunk tank" from 4:11 a.m. until 11:37 a.m. that same morning. He was not detained in custody because he represented a risk to himself or others, or because he was likely to commit another offence, or because he was aggressive or physical with the police officers, or because he was highly intoxicated, but rather because had not "co-operated" with the arresting police officer insofar as responding to his demands for a breath sample or advising if he wanted to speak to a lawyer. The police officer candidly admitted he was frustrated, and in fact he advised the accused he was going to the "drunk tank" before they even left the scene to go to the police station. It is clear that he chose to keep the accused in custody because he had the power to do so and he was in effect punishing him for his perceived lack of co-operation. The actions of the police officer were arbitrary and capricious, undertaken with intent to punish the accused for failing to co-operate with the police officer to the degree he thought appropriate. The accused may refuse to provide breath samples, refuse to answer questions, or refuse counsel if he so chooses. These are all rights that he is entitled to exercise and the fact that the police officer personally was frustrated by that is not a lawful foundation upon which to keep him in custody.

34 Accordingly, I conclude that the accused was arbitrarily detained by the actions of the police officer, contrary to s. 9 of the Charter of rights.

Remedies

s. 10(a)

35 Counsel for the Defendant seeks the exclusion of all evidence obtained against the accused from the point when the accused is ordered out of his vehicle and directed to walk to the rear of his vehicle. It is on that evidence that the peace officer concluded that he had reasonable and probable grounds to arrest the accused for operation of a motor vehicle while his ability to do so was impaired by alcohol or drugs. At that point in time, when he was detained and directed out of the vehicle, the police officer had only the smell of alcohol emanating from the vehicle in circumstances when he could not tell whether the smell of alcohol was emanating from the accused or from the passenger in the vehicle. The police officer had no evidence of bad driving, indeed he had evidence of normal driving and accordingly at that point in time, he did not even have sufficient grounds to demand a roadside sample, because there was no objective criteria to support any reasonable suspicion that the accused had alcohol in his body.

36 The evidence obtained against the accused and used as a basis to charge him, was all obtained after the breach of his s. 10(a) right. It is not evidence that would likely have been obtained had the accused chosen not to submit to the police officer's demands. In ***R.v.Phillips***, (1986) 69 A.R. 54, Prowse J.A. for the Court at paragraphs 19-23 stated:

> Here not only is evidence of a material fact supplied by the accused following the infringement of his rights; it did not come into existence until after that event and might not have come into existence at all had there been no infringement of his rights.
>
> In those circumstances, where the accused has not committed the offence until after his rights have been infringed, and the effect of consulting a lawyer may well have resulted in this particular offence not occurring, I am of the opinion that the admission of such evidence would bring the admission of justice into disrepute in the eyes of reasonably minded persons.

37 Although Prowse J.A. was there dealing with a breach of s. 10(b), the principle is the same in this case. Had the s. 10(a) right been given to the accused, the accused may never have gotten out of the vehicle and complied with the directions of the police officer which led to the evidence upon which the Crown basis the two charges before the Court. This Court need not speculate upon whether he would have submitted had his s. 10(a) right been offered to him. (***R. v. Cobham*** [1994] 3 S.C.R. 360 per Lamer C.J. at 373)

38 The purported evidence of impairment and the evidence of refusal is conscriptive evidence and therefore likely to render the trial process unfair. Exclusion on this basis alone is not necessarily automatic. (See ***R. v. Buhay***, [2003] 1 S.C.R. 631, [2003] S.C.J. No. 30; ***R. v. Orobanski*** (2005) 29 C.R. (6th) 205 per LeBel J.). In this case, the connection between the breach and the nature of the evidence obtained which may very well not have existed if the accused had been apprised of his s. 10(a) right,- favours exclusion.

39 Further, the breach in this case is not a technical or minor breach. Even at common law, an accused upon arrest is entitled to be notified as to the reason for his arrest. There was no reason advanced in this case as to why the accused was not promptly advised of the reason for his detention. It would have been a simple thing to do in the circumstances of this case and would not have disrupted the investigative process. Given that the accused does not have to be advised, at least for a short period of time, of his s. 10(b) right to counsel, and given the fact that the accused as well is not obligated to answer questions or provide evidence against himself by way of participation in sobriety screening tests, it is that much more important that the accused be given his s. 10(a) right in that circumstance. To not advise of the s. 10(a) right when the intention of the peace officer is to obtain evidence against the accused, makes the breach serious.

40 Section 10(a) as I have said, is easy to fulfill. There was no reason for not giving the accused his s. 10(a) right. The failure to accord the accused his s. 10(a) right and the subsequent arbitrary detention reflects a failure on the part of the police to adequately recognize and give effect to Charter values. Further, two Charter breaches occurred in this particular circumstance and that may be seen as an aggravating factor in the context of the seriousness of the overall treatment of the accused by the police. (***R. v. Greffe*** (1990) 55 C.C.C. (3d) 161 (S.C.C.))

41 Considering the entirety of the circumstances, including the nature of the breach, the simplicity with which the Charter right may be fulfilled, the fact that the evidence obtained is conscriptive evidence, the fact that there were two Charter breaches occurring with respect to this incident and this accused and involving the same police officer and in that context the failure of the police officer to give proper consideration to Charter values, lead me to the conclusion that the administration of justice would be brought into further disrepute by the admission of the evidence obtained against the accused after the s. 10(a) breach. To allow the same would likely deprive the accused of a fair hearing and condone the indifference to the accused's s. 10(a) right.

42 Accordingly the evidence upon which the police officer based his conclusion that the accused was impaired is excluded and the evidence upon which the Crown relies to prove refusal on the part of the accused is excluded pursuant to s. 24(2) of the Charter.

Section 9

43 With respect to the determination of a remedy for the arbitrary detention of the accused contrary to s. 9 of the Charter of Rights; although this case is disposed of by virtue of my ruling with respect to the exclusion of evidence, it is appropriate I believe to determine what remedy would be available, if any, with respect to the s. 9 Charter breach which I have also found in the circumstances of this case.

44 Counsel for the accused seeks exclusion of evidence on the basis of the subject breach, or alternatively, a stay of proceedings. I choose in this case to deal with the s. 9 breach on the basis of the stay application. In ***R. v. Weaver*** (2005) 27 C.R. (6th) 397, the Alberta Court of Appeal reiterated that a stay of proceedings, which is tantamount to a dismissal of the charge, should only be granted in the "clearest of cases". In effect, a stay of proceedings should be granted as a last resort to be taken when other acceptable avenues protecting accused's rights to full answer and defence have been exhausted or irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were to continue, or if the circumstances of a prosecution were such as to connote unfairness or vexatious to such a degree that it would contravene fundamental notions of justice held by the community and thus undermine the integrity of the judicial process.

45 In the case at hand, the conduct of the police officer with respect to the detention of the accused was flagrant, capricious and arbitrary. He was kept in custody because he would not fulfill what the police officer thought was the requisite degree of co-operation the police officer felt he was entitled to receive. He was kept in custody for a significant period of time as punishment for failure to co-operate and for no other valid reason. In my view, this was a flagrant and intentional act upon the part of the police officer which reflects his lack of understanding of an accused person's right upon arrest not to be held in custody, except in appropriate circumstances and also reflects his lack of understanding of Charter values that are the under pinning of the system of law that is the foundation of this country. In this case, the officer assumed the role of a judge meting out a sentence of punishment and it is my view that a stay of proceedings is the only appropriate remedy to address the serious nature of this breach. The integrity of the judicial system would be irreparably prejudiced if I allowed the prosecution to continue in light of the circumstances of the accused's arbitrary detention.

46 I accordingly would grant a stay of the entire proceedings against the accused, based on the s. 9 breach as described aforesaid.

Ruling

47 The Crown's case cannot stand without the excluded evidence of impairment and refusal and therefore the charge is dismissed. If that were not the case, I would stay the charges for the reasons described aforesaid.

LeGRANDEUR PROV. CT. J.

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R. v. Heywood

Supreme Court Reports

Supreme Court of Canada

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

1994: April 27; 1994: November 24.

File No.: 23384.

[1994] 3 S.C.R. 761 | [1994] 3 R.C.S. 761 | [1994] S.C.J. No. 101 | [1994] A.C.S. no 101

Her Majesty The Queen, appellant; v. Robert Lorne Heywood, respondent, and The Attorney General of Canada, intervener.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Constitutional law — Charter of Rights — Criminal Code prohibiting convicted sexual offenders from loitering in school yards, playgrounds and public parks — Convicted sexual offender convicted of loitering by play area in public park — Definition of "loitering" — Whether infringement of s. 7 (the right to life, liberty and security of the person), s. 11(d) (the right to be presumed innocent), s. 12 (the right not to be subjected to cruel and unusual treatment or punishment), s. 9 (the right not to be arbitrarily detained or imprisoned) and s. 11(h) (the right not to be tried and punished for the same offence if already found guilty and punished for that offence) — If so, whether justified under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 7, 9, 11(d), (h), 12 — Criminal Code, R.S.C., 1985, c. C-46, s. 179(1)(b).

Criminal law — Sexual conviction — Loitering — Definition of "loitering" — Criminal Code prohibiting convicted sexual offenders from loitering in school yards, playgrounds and public parks — Convicted sexual offender convicted of loitering by play area in public park — Whether infringement of s. 7 (the right to life, liberty and security of the person), s. 11(d) (the right to be presumed innocent), s. 12 (the right not to be subjected to cruel and unusual treatment or punishment), s. 9 (the right not to be arbitrarily detained or imprisoned) and s. 11(h) (the right not to be tried and punished for the same offence if already found guilty and punished for that offence) — If so, whether justified under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 7, 9, 11(d), (h), 12 — Criminal Code, R.S.C., 1985, c. C-46, s. 179(1)(b).

Respondent's earlier convictions of sexual assault involving children made him subject to the prohibition in s. 179(1)(b) of the Criminal Code that he not commit vagrancy by loitering near playgrounds, school yards or public parks. On two occasions, respondent, who was carrying a camera with a telephoto lens in a public park near to where children were playing, was stopped by police and questioned as to whether he had a criminal record. On the first occasion, he was warned that a convicted sex offender was not permitted to loiter near a public park, school yard or playground. On the second, he was arrested and charged under s. 179(1)(b) of the Code with two counts of vagrancy -- "at or near a playground" and "in or near a public park" -- and the camera and film with frames focusing on the crotch areas of young girls playing in the park with their clothing in disarray were seized.

The respondent was convicted of the first count. The trial judge found that, even though s. 179(1)(b) infringed ss. 7 and 11(d) of the Charter, these infringements were a justifiable limitation under s. 1. The second count was conditionally stayed under the Kienapple principle. An appeal to the British Columbia Supreme Court was dismissed. The Court of Appeal, however, allowed respondent's appeal and quashed the conviction because the breaches of ss. 7 and 11(d) were not justified. The constitutional questions before this Court queried if s. 179(1)(b)

infringed several sections of the Charter, and if so, whether those infringements were justifiable under s. 1. The Charter provisions allegedly infringed were: s. 7 (the right to life, liberty and security of the person), s. 11(d) (the right to be presumed innocent), s. 12 (the right not to be subjected to cruel and unusual treatment or punishment), s. 9 (the right not to be arbitrarily detained or imprisoned) and s. 11(h) (the right not to be tried and punished for the same offence if already found guilty and punished for that offence).

Held (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting): The appeal should be dismissed. Section 179(1)(b) violated s. 7 of the Charter and was not justified under s. 1.

Per Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: The word "loiter" in s. 179(1)(b) should be given its ordinary meaning -- to stand idly around, hang around, linger, tarry, saunter, delay, dawdle -- and should not be interpreted as requiring a malevolent intent. None of the dictionary definitions requires a malevolent intent or makes any reference to such a requirement and the jurisprudence considering its meaning in other sections of the Code supports the use of the ordinary meaning in s. 179(1)(b). The ordinary definition is also consistent with section's purpose of protecting children from becoming victims of sexual offences by prohibiting any prolonged attendance in areas often frequented by children.

The concept of malevolent intent (as opposed to a narrower formula such as unlawful intent) raises problems of definition which make it unworkable. It is a concept of very broad scope that is extremely difficult to define. Malevolent intent could mean almost anything, and its definition would be dependent upon the subjective views of the particular judge trying the case.

The legislative debates both on the provision's enactment and later on its reconsideration cannot be used to support the notion of some sort of malevolent intent. These debates, assuming admissibility, were inconclusive for the purpose of determining legislative intent. Indeed, legislative history generally is not admissible as proof of legislative intent in the construction of statutes because it is not reliable evidence. Rather, it may be admissible for the more general purpose of showing the mischief Parliament was attempting to remedy with the legislation.

Section 179(1)(b) restricts the liberty of those to whom it applies. Although a prohibition for the purpose of protecting the public does not per se infringe the principles of fundamental justice, the prohibition in s. 179(1)(b) does so because it restricts liberty far more than is necessary to accomplish its goal. It applies, without prior notice to the accused, to too many places, to too many people, for an indefinite period with no possibility of review.

Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. They are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth, the means are too sweeping in relation to the objective.

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. A court must consider whether those means are necessary to achieve the state objective. If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

Reviewing legislation for overbreadth as a principle of fundamental justice is simply a matter of balancing the state interest against that of the individual. Where an independent principle of fundamental justice is violated, however, any balancing of the public interest must take place under s. 1 of the Charter. In analysing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective.

Section 7 of the Charter has a wide scope. An enactment, before it can be found to be so broad that it infringes s. 7 of the Charter, must clearly infringe life, liberty or security of the person in a manner that is unnecessarily broad,

going beyond what is needed to accomplish the governmental objective. In determining whether a provision is overly broad and not in accordance with the principles of fundamental justice, it must be determined whether the means chosen to accomplish the provision's objectives are reasonably tailored to effect its purpose. Where legislation limits the liberty of an individual in order to protect the public, that limitation should not go beyond what is necessary to accomplish that goal.

Section 179(1)(b) suffers from overbreadth and thus the deprivation of liberty it entails is not in accordance with the principles of fundamental justice. The section is overly broad in its geographical ambit. The limitation should be more narrowly defined, to apply only to those parks and bathing areas where children can reasonably be expected to be present. It is also overly broad in that it applies for life, with no possibility of review. Without a review a person who has ceased to be a danger to children (or who indeed never was a danger to children) continues to be subject to the prohibition in s. 179(1)(b). A pardon under the Criminal Records Act or the royal prerogative of mercy, while removing only any disqualification flowing from conviction, does not meet the need for review because of inadequate and insufficient availability. Finally, s. 179(1)(b) applies to all persons convicted of the listed offences, without regard to whether they constitute a danger to children and accordingly is also overly broad in respect to the people to whom it applies.

The absence of notice, too, offends the principles of fundamental justice. Great care is taken to give notice in connection with other provisions of the Code.

It is significant that the new s. 161, enacted after the Court of Appeal's decision, applies only to persons who have committed the listed offences in respect of persons under age fourteen. In addition, the order made pursuant to it is discretionary so that only those offenders constituting a danger to children will be subject to a prohibition. Unlike s. 179(1)(b), the new s. 161 provides for both notice and review of the prohibition and accordingly reduces the significance of the overbreadth factor.

Doubts exist as to whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies. Overbroad legislation infringing s. 7 of the Charter is even more difficult to justify and would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.

The objective of s. 179(1)(b) of protecting children from sexual offences is pressing and substantial. The protection of children from sexual offenses is obviously very important to society. Furthermore, the means employed in s. 179(1)(b), at least in some of their applications, are rationally connected to the objective. However, for the same reasons that s. 179(1)(b) is overly broad, it fails the minimal impairment branch of the s. 1 analysis and so cannot be justified under s. 1 of the Charter.

The remedies of reading in or reading down are not appropriate here. The changes which would be required to make s. 179(1)(b) constitutional would not constitute reading down or reading in but rather would amount to judicial rewriting of the legislation and the creation of an entirely new scheme with a completely different approach to the problem.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. (dissenting): Section 179(1)(b) should be interpreted as prohibiting the persons affected from being in one of the enumerated places for a malevolent or ulterior purpose related to the predicate offences. The purpose and legislative history of s. 179(1)(b), precedent and statutory context support this interpretation.

The legislative history of s. 179(1)(b) indicated that Parliament considered the word "loiter" to have a different meaning from the word "wander" which was removed from earlier versions of the provision. "Wander" connotes movement without specific intent; "loiter", notwithstanding the common element of idleness, is defined more narrowly and has a variable connotation according to the context.

The Crown's expert psychiatric and psychological evidence was of assistance in understanding the purpose and

scope of s. 179(1)(b). The evidence on cross-offending and the difficulty of predicting who will cross-offend or repeat offend justifies some form of restriction on the liberty of persons convicted of sexual offences.

The section has at its foundation a concern for public safety and a desire to aid in the treatment and rehabilitation of offenders. It applies broadly to all persons convicted of the enumerated offences and therefore provides protection not only to children but also to others who could be victims of sexual assault in the listed areas. The areas where the prohibition applies are places where people will generally lower their guard.

A caveat to the general rule that words be given their ordinary meaning arises because the sense of the term "loiter" varies according to its context. The absence of purpose element in the ordinary meaning of loiter can have no application in the context of s. 179(1)(b). Parliament clearly intended to include conduct of convicted sex offenders whose purpose was related to re-offending.

The prohibition contained in s. 179(1)(b) should be narrowed to render the prohibition less intrusive and to tailor it more carefully to the objectives being pursued. Not all loitering should be caught by its prohibition contained in s. 179(1)(b). Rather, the intrusion into the activities of individuals should be tied to some reason of public order. The concern to exclude presence in the enumerated areas for legitimate purposes from criminal prohibition is well-founded. The restriction created by s. 179(1)(b) will not be the same in each of the listed areas.

Analysis of the interaction of other provisions of the Code dealing with a similar subject-matter supports the interpretation that loitering as used in s. 179(1)(b) requires a malevolent purpose. Sections 179(1)(b) and 810.1 read together, however, produce a similar result to that achieved by s. 161 in relation to those convicted prior to the enactment of s. 161. (Section 161 allows a court at the time of sentencing to make an order prohibiting a sexual offender from attending day care centres, school grounds, playgrounds, community centres, or any public park or swimming area where persons under the age of 14 years are present or can reasonably be expected to be present. The s. 161 prohibition is available only in relation to persons who have committed offences against children under age 14.) Section 810.1 allows an application to be made to the provincial court, where there are reasonable grounds to fear that someone will commit certain sexual offences, for an order prohibiting that person from attending areas where children under age 14 are likely to be present. Section 179(1)(b) allows the police to take immediate preventative steps before a previous offender re-offends.

The two primary Charter concerns raised in relation to s. 179(1)(b) pertain to vagueness and overbreadth. Defining loitering in that section as being in an enumerated place for a malevolent or ulterior purpose related to the predicated offences avoids both these problems. A lifetime prohibition of activities with a malevolent or ulterior purpose related to re-offending is not objectionable or over-broad. Such a prohibition would impose a restriction on the liberty of the affected individuals to which ordinary citizens are not subject, but that restriction is directly related to preventing re-offending. The affected persons' history of offending, the uncertainties prevalent in treating offenders and a desire to disrupt the cycle of re-offending justify this minor intrusion which does not breach the principles of fundamental justice.

Section 7 of the Charter was not violated by the absence of any notice of the prohibition contained in s. 179(1)(b). Even though formal notice of the content of s. 179(1)(b) might be preferable, Parliament's decision to provide notice in respect of certain Criminal Code prohibitions cannot be transformed into a principle of fundamental justice.

The allegation that s. 179(1)(b) violates ss. 9, 11(d), (h) and 12 of the Charter are without foundation. The absence of notice, for reasons similar to those relating to overbreadth, did not violate the s. 9 Charter guarantee against being arbitrarily detained or imprisoned. The s. 11(d) Charter right to be presumed innocent until proven guilty was not infringed either for s. 179(1)(b) does not assume recidivism but rather provides the means to prevent it. Anyone charged under s. 179(1)(b) will be presumed innocent and the burden remains on the Crown to prove beyond a reasonable doubt that the accused committed the offence as interpreted. The s. 11(h) right against double jeopardy was not violated. Section 179(1)(b) applies to persons identified by the fact of having been convicted of one of the enumerated offences. Any conviction under that section, however, will be based on violating its terms and not of having been convicted of one of the enumerated offences. Finally, the respondent was not the subject of cruel and

unusual treatment or punishment contrary to s. 12 of the Charter. Such punishment or treatment must be "so excessive as to outrage the standards of decency" or have an effect "grossly disproportionate to what would have been appropriate". The lifetime prohibition of activities with a malevolent or ulterior purpose related to re-offending, however, is both a minor and justifiable restraint of the affected persons' liberty.

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By Cory J.

Referred to: Kienapple v. The Queen, [1975] 1 S.C.R. 729; R. v. Munroe (1983), 5 C.C.C. (3d) 217; Ledwith v. Roberts, [1937] 1 K.B. 232; R. v. Hasselwander, [1993] 2 S.C.R. 398; R. v. Gauvin (1984), 11 C.C.C. (3d) 229; R. v. Andsten and Petrie (1960), 33 C.R. 213; R. v. Lozowchuk (1984), 32 Sask. R. 51; R. v. Cloutier (M.) (1991), 51 Q.A.C. 143, 66 C.C.C. (3d) 149; R. v. Willis (1987), 37 C.C.C. (3d) 184; Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Gosselin v. The King (1903), 33 S.C.R. 255; Attorney General of Canada v. The Reader's Digest Association (Canada) Ltd., [1961] S.C.R. 775; R. v. Popovic and Askov, [1976] 2 S.C.R. 308; Highway Victims Indemnity Fund v. Gagné, [1977] 1 S.C.R. 785; Toronto Railway Co. v. The Queen (1894), 4 Ex. C.R. 262; Lyons v. The Queen, [1984] 2 S.C.R. 633; Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373; Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714; Schneider v. The Queen, [1982] 2 S.C.R. 112; Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297; Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; PSAC v. Canada, [1987] 1 S.C.R. 424; R. v. Whyte, [1988] 2 S.C.R. 3; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; R. v. Vasil, [1981] 1 S.C.R. 469; Paul v. The Queen, [1982] 1 S.C.R. 621; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; R. v. Zundel (1987), 58 O.R. (2d) 129; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519; R. v. Jones, [1986] 2 S.C.R. 284; R. v. Beare, [1988] 2 S.C.R. 387; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; Cunningham v. Canada, [1993] 2 S.C.R. 143; R. v. Swain, [1991] 1 S.C.R. 933; R. v. Graf (1988), 42 C.R.R. 146; R. v. Smith, [1987] 1 S.C.R. 1045; R. v. Goltz, [1991] 3 S.C.R. 485; Schachter v. Canada, [1992] 2 S.C.R. 679.

By Gonthier J. (dissenting)

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; R. v. Munroe (1983), 5 C.C.C. (3d) 217; R. v. Gauvin (1984), 11 C.C.C. (3d) 229; R. v. Cloutier (M.) (1991), 51 Q.A.C. 143, 66 C.C.C. (3d) 149; R. v. Lozowchuk (1984), 32 Sask. R. 51; R. v. Andsten and Petrie (1960), 33 C.R. 213; Attorney General for Ontario v. Regional Municipality of Peel, [1979] 2 S.C.R. 1134; Attorney-General of Hong Kong v. Sham Chuen, [1986] 1 A.C. 887; Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; R. v. Smith, [1987] 1 S.C.R. 1045; R. v. Goltz, [1991] 3 S.C.R. 485.

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APPEAL from a judgment of the British Columbia Court of Appeal (1992), 77 C.C.C. (3d) 502, 18 C.R. (4th) 63, 20 B.C.A.C. 166, 35 W.A.C. 166, 12 C.R.R. (2d) 238, allowing an appeal from a judgment of Melvin J. (1991), 65 C.C.C. (3d) 46, dismissing an appeal from conviction by Filmer Prov. Ct. J. Appeal dismissed, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting.

Robert A. Mulligan, for the appellant. B. Rory B. Morahan, for the respondent. Bernard Laprade, for the intervener.

Solicitor for the appellant: The Attorney General of British Columbia, Victoria. Solicitors for the respondent: Morahan & Aujla, Victoria. Solicitor for the intervener: John C. Tait, Ottawa.

The judgment of Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ. was delivered by

CORY J.

1 Section 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, as amended, makes it a crime for persons convicted of specified offences to be "found loitering in or near a school ground, playground, public park or bathing area". It must be determined whether the section infringes ss. 7 or 11(d) of the Canadian Charter of Rights and Freedoms.

Facts

2 The respondent was charged with two counts of vagrancy under s. 179(1)(b) alleging that on or about July 5, 1989, he did commit vagrancy by loitering at Beacon Hill Park in Victoria. The first count was framed as loitering "at or near a playground". The second count, which referred to the same events, was framed as loitering "in or near a public park".

3 In 1987 the respondent was convicted of two counts of sexual assault contrary to the former s. 246.1(1) (now s. 271(1)) of the Criminal Code, R.S.C. 1970, c. C-34. These convictions made him subject to the prohibition set out in s. 179(1)(b).

4 On June 16, 1989, for about two minutes, Police Constable Ronald German observed the respondent standing in Beacon Hill Park in Victoria, British Columbia at the edge of a playground area. Around his neck the respondent was carrying a camera with a telephoto lens. The constable did not see the respondent take any pictures or

approach or speak to any children. The respondent then went to another area of the park. Constable German followed the respondent and called to him. The respondent stopped, and German identified himself and produced his badge. He asked the respondent what he was doing in the park. The respondent replied that he was walking through the park just as he did every day.

5 After some further discussion, the officer asked the respondent for his address, date of birth, and if he had a criminal record. The respondent replied that he had a criminal record for sexual assault. Constable German then told the respondent that his hanging around the park was contrary to the vagrancy section of the Code, and that a convicted sex offender was not permitted to loiter near a public park, school yard or playground. The respondent asked the officer what he meant by "loitering", to which Constable German very astutely replied: "loitering meant standing around, apparently doing nothing, standing stationary in a location, or moving slowly in a certain area, stopping at regular intervals and standing around, or else loitering also could mean stopping in a location where it would obstruct persons who use that area too [sic] frequent". The officer did not charge the respondent, but warned him not to loiter near the playground at the park again.

6 On the afternoon of July 5, 1989, Constable Wayne Coleman observed the respondent walking on a pathway leading from the children's playground area in the Beacon Hill Park towards the petting zoo. After stopping there for a few minutes, the respondent went to his car. The respondent was once again carrying a camera with a large lens. Constable Coleman, who was in plain-clothes, followed the respondent in an unmarked police car. After driving around for approximately half an hour, the respondent returned to the park. There, the officer saw the respondent seated at a table approximately 50 yards from the playground area. He then moved to a bench approximately 20 yards from the playground and appeared to be using his camera. Some five minutes later, the respondent left the park and returned to his car. Constable Coleman followed the respondent to his residence, where he arrested Heywood and charged him with vagrancy. The police seized his camera and film. A search warrant was subsequently executed at his residence. A picture on the film found in the camera, and a number of pictures found in the respondent's residence and at the drugstore where he had his photographs developed, showed young girls playing in the park, their clothing disarranged from play so that the area of their crotch, although covered by underclothes, was visible.

7 At his trial, the respondent pleaded not guilty and challenged the constitutionality of s. 179(1)(b) on the grounds that it infringed ss. 7, 11(d), (h), 12 and 15 of the Charter. The trial judge found that s. 179(1)(b) violated ss. 7 and 11(d) of the Charter, but that it was a justifiable limit under s. 1. The respondent was convicted of the first count of vagrancy under s. 179(1)(b). The second count was conditionally stayed pursuant to the principle expressed in Kienapple v. The Queen, [1975] 1 S.C.R. 729. The respondent was sentenced to three months incarceration to be followed by three years probation. The respondent appealed to the Supreme Court of British Columbia, which dismissed his appeal. The Supreme Court judge accepted the trial judge's finding that s. 179(1)(b) violated ss. 7 and 11(d) of the Charter, but like the trial judge found that they were justified under s. 1.

8 The respondent appealed to the British Columbia Court of Appeal. The Court of Appeal allowed the respondent's appeal, and quashed the conviction. Hutcheon J.A. (Rowles J.A. concurring) accepted the breaches of ss. 7 and 11(d) as found by the lower courts. Southin J.A. only found a breach of s. 7. All three judges of the Court of Appeal found that s. 179(1)(b) was not justified under s. 1 of the Charter. The Crown appellant was granted leave to appeal to this Court.

Relevant Legislation

9 Section 179(1)(b) provides that:

> 179.(1) Every one commits vagrancy who
>
> . . .

(b) having at any time been convicted of an offence under section 151, 152 or 153, subsection 160(3) or 173(2) or section 271, 272 or 273, or of an offence under a provision referred to in paragraph (b) of the definition "serious personal injury offence" in section 687 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read before January 4, 1983, is found loitering in or near a school ground, playground, public park or bathing area.

10 The definition of "serious personal injury offence" in s. 687 of the Criminal Code, as it read before January 4, 1983, was as follows:

687. . . .

(b) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency).

Judgments

Provincial Court (Filmer Prov. Ct. J.)

11 The trial judge found that s. 179(1)(b) of the Code violated s. 7 of the Charter because it was "an impediment on the freedom and liberty of persons who have been previously convicted of the enumerated sections of the Criminal Code". He also found that s. 179(1)(b) violated s. 11(d) of the Charter. However, he concluded that s. 179(1)(b) could be saved under s. 1 of the Charter.

12 The trial judge found that the word "loiter" in s. 179(1)(b) did not connote innocent behaviour; rather, there must be an untoward or improper motive. In his opinion that motive did not need to be illegal. It was sufficient if it was "malevolent", or something a reasonable person would not consider innocent. In light of this interpretation of the word "loiter", the trial judge found that s. 179(1)(b) was justified under s. 1 of the Charter. He held that the objective of the section, namely protecting children and vulnerable persons from those within the community who might be sexually predatory, was pressing and substantial and that the means chosen were rationally connected to this objective.

13 Based on the evidence of the photographs taken by the respondent, the trial judge found that the respondent did not have an innocent purpose for being in the park. He stated:

> It is my view that the conduct of [the respondent] transcended the bounds of what is harmless and innocent. His conduct pandered to a purely prurient interest; that is, it arose from indulgence in lewd ideas. Lewd in this context means that it involved obscenity, indecency, or lasciviousness of thought. Such conduct is so reprehensible in my view no reasonable person could characterize it as innocent or lawful. As I said when reviewing the constitutionality of this section, the section is not intended to limit innocent attendances or attendances where a lawful purpose is involved. I cannot find such a purpose exists here.

14 He further noted that the provisions of the Criminal Records Act, R.S.C., 1985, c. C-47, applied to permit a person who was subject to s. 179(1)(b) to obtain a pardon so that they would no longer be subject to the prohibition. He found that this provision acted as a safeguard against the unfair application of s. 179(1)(b).

Supreme Court (1991), 65 C.C.C. (3d) 46 (Melvin J.)

15 Melvin J. held at p. 56 that the meaning of the word "loiter" should be determined "by reference to the general use of the word in everyday language as found in dictionaries, other sections in the same statutory enactment, and in the context of the offence section itself". He found, at pp. 57-58, that:

> I am satisfied that the word "loiter" in s. 179(1)(b) requires the existence of some unlawful, or evil, or malevolent intention or purpose on the part of the accused to complete the offence. Such an interpretation of the section demonstrates that a guilty mind is an essential component of the offence which must be established beyond a reasonable doubt. It is not sufficient to convict an individual under this section, in my view, of loitering on the basis that he attended at a park and sat watching flowers grow or ducks swim. There must be more to his conduct which will demonstrate an untoward or improper purpose.

He then concluded that the respondent's purpose was not innocent and it was that purpose or state of mind which brought him within the definition of "loitering" in s. 179(1)(b).

16 The appeal before Melvin J. was argued on the basis that the trial judge was correct to find violations of ss. 7 and 11(d) of the Charter. On this basis, he accepted that s. 179(1)(b) violated ss. 7 and 11(d) of the Charter. However, after reviewing the expert evidence he was satisfied that s. 179(1)(b) was justified under s. 1 of the Charter. He stated, at p. 63, that:

> The objective, namely, the controlling of the impulses of potential reoffenders and the protection of the public, is of great importance and clearly justifies overriding a constitutionally protected right or freedom, such as found in s. 7 or s. 11(d) of the Charter. When one considers the means chosen under those circumstances, if the section contains an evil or malevolent intent as a component to be demonstrated by the evidence led on behalf of the [appellant], then the proportionality test in R. v. Oakes is satisfied as the measures are designed to achieve their objective and are rationally connected with that objective and have little impairment of the rights or freedom in question.

17 As a result of his conclusions he dismissed the respondent's appeal.

Court of Appeal (1992), 77 C.C.C. (3d) 502

> Hutcheon J.A., Rowles J.A. concurring

18 In the Court of Appeal the Crown accepted the trial judge's finding that the provisions of s. 179(1)(b) violated ss. 7 and 11(d) of the Charter. Hutcheon J.A. proceeded on this basis and as a result dealt only with the question as to whether the section was saved by s. 1 of the Charter. He concluded that it was not.

19 Hutcheon J.A. carefully reviewed the jurisprudence pertaining to the word "loiter" and determined that there was no support for the position that the word implies an evil or malevolent intent. He wrote at p. 509:

> I cannot find any support in those authorities for the proposition that the word "loiter" implies an evil or malevolent intent or purpose or an untoward or improper motive. Moreover, I question whether the taking of the photographs would qualify as an evil or malevolent intent. To be a criminal offence under the Criminal Code, the intent must be directed toward the corruption of others, not oneself.

20 He observed that the objectives of s. 179(1)(b) were to control the impulses of potential re-offenders and to protect the public. However, he found at p. 511 that the lack of a provision for notice in s. 179(1)(b) caused the means chosen to achieve the objectives of s. 179(1)(b) "to be unfair and not carefully designed to achieve the two objectives". Thus, they were not justified under s. 1. Hutcheon J.A. stated that the Crown could not invoke s. 19 of the Code since s. 179(1)(b) was not a provision applicable to everyone. He concluded, at p. 511, that:

> Our system of criminal justice could not operate if accused persons could raise the defence that they did not know it was contrary to the law to steal or to assault someone or to defraud. But if the fundamental liberty of movement of a particular group, convicted sexual offenders, is to be controlled, proper notice of the prohibition to the members of that group is an essential element of the control. Because of lack of a provision for notice I have concluded that s. 179(1)(b) is inconsistent with the Constitution, in the words of s. 52, and is of no force and effect. Section 179(1)(b) is not the law of which one could be ignorant.

In other words, s. 19 has no application if no offence has been committed and that is the result in this case of declaring s. 179(1)(b) to be of no force or effect. Nothing of s. 179(1)(b) is left to be saved by s. 19.

Southin J.A. (concurring)

21 Southin J.A. agreed with Hutcheon and Rowles JJ.A. that the word "loiter" did not imply any evil or malevolent intent. She then considered whether s. 179(1)(b) violated either ss. 7 or 11(d) of the Charter. She found that the section did not violate s. 11(d) because the Crown had to prove the prior conviction and that the accused was "loitering" at one of the prohibited places.

22 Southin J.A. was of the view at p. 523 that Parliament, in the exercise of the authority conferred by s. 91(27) of the Constitution Act, 1867, could "attach new disabilities to persons convicted of a crime". Southin J.A. stated that, although s. 179(1)(b) did not expressly say that a person convicted of a sexual crime could not go to certain places, she was proceeding on the basis that it was a form of prohibition. She found that a measure imposing a disability has aspects of both punishment and prevention. She noted that the purpose of s. 179(1)(b) was to protect young persons from sexual attacks.

23 Southin J. approached the question of whether s. 7 was violated by making commendable use of analogy to case law under s. 12 with respect to minimum sentences. She considered whether s. 179(1)(b) was grossly disproportionate to its purpose, and whether it was necessary to achieve a valid criminal law purpose. In her opinion although the purpose of the section was valid, the means were not proportional. She found that the deprivation of liberty in s. 179(1)(b) was not in accordance with the principles of fundamental justice because it is for life, and there is no avenue of review to relieve those covered by the section in whole or in part from the disability. She was not satisfied that the s. 7 breach due to the lack of a review process could be justified under s. 1.

Constitutional Questions

24 On October 18, 1993 the Chief Justice stated the following constitutional questions:

1. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent to life, liberty and security of the person as guaranteed by s. 7 of the Charter?
2. If the answer to question 1 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the Charter?
3. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent to be presumed innocent until proven guilty according to law as guaranteed by s. 11(d) of the Charter?
4. If the answer to question 3 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the Charter?
5. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent not to be subjected to any cruel and unusual treatment or punishment as guaranteed by s. 12 of the Charter?
6. If the answer to question 5 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the Charter?
7. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent not to be arbitrarily detained or imprisoned as guaranteed by s. 9 of the Charter?
8. If the answer to question 7 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the Charter?

9. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent, if finally found guilty and punished for the offence, not to be tried or punished for it again, as guaranteed by s. 11(h) of the Charter?

10. If the answer to question 9 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the Charter?

Analysis

I. Legislative History of Section 179(1)(b)

25 A review of the history of the vagrancy sections can be found in the decision of the Ontario Court of Appeal in R. v. Munroe (1983), 5 C.C.C. (3d) 217. The offence of vagrancy was codified in ss. 207 and 208 of the 1892 Criminal Code, although its history dates back to the Middle Ages in England: See Ledwith v. Roberts, [1937] 1 K.B. 232 (C.A.), at p. 271. Section 207 of the Criminal Code, S.C. 1892, c. 29, provided:

> 207. Every one is a loose, idle or disorderly person or vagrant who --
>
> (a.) not having any visible means of maintaining himself lives without employment;
>
> (b.) being able to work and thereby or by other means to maintain himself and family wilfully refuses or neglects to do so;
>
> (c.) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition;
>
> (d.) without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two justices of the peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage or public place to beg or receive alms;
>
> (e.) loiters on any street, road, highway or public place, and obstructs passengers by standing across the footpath, or by using insulting language, or in any other way;
>
> (f.) causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers;
>
> (g.) by discharging firearms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway;
>
> (h.) tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;
>
> (i.) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself;
>
> (j.) is a keeper or inmate of a disorderly house, bawdy-house or house of ill-fame, or house for the resort of prostitutes;
>
> (k.) is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself; or
>
> (l.) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution.

Section 208 provided:

> 208. Every loose, idle or disorderly person or vagrant is liable, on summary conviction before two justices of the peace, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both.

26 Historically, the essence of the offence of vagrancy was that of being a loose, idle or disorderly person or vagrant, rather than the doing of any of the specific acts referred to in the vagrancy provisions. The vagrancy provisions remained virtually unchanged until the 1950s. The predecessor to s. 179(1)(b) was added to the vagrancy offences in S.C. 1951, c. 47, s. 13. This section provided that everyone is a loose, idle or disorderly person or vagrant who:

> 238. . . .
>
> (k) having at any time been convicted of an offence under paragraph (a) of section two hundred and ninety-two, section two hundred and ninety-three, subsection one or two of section three hundred and one, or section three hundred and two, is found loitering or wandering in or near a school ground or playground or public park or public bathing area.

27 In the 1953-54 Criminal Code (S.C. 1953-54, c. 51) the vagrancy provisions were restructured so that the focus shifted from being a vagrant to doing the acts prohibited by the section. However, it is significant that the acts prohibited were still primarily related to the status of the accused rather than the nature of the acts themselves. Section 164(1) of the 1953-54 Code provided:

> 164. (1) Every one commits vagrancy who
>
> (a) not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found;
>
> (b) begs from door to door or in a public place;
>
> (c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;
>
> (d) supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or
>
> (e) having at any time been convicted of an offence under a provision mentioned in paragraph (a) or (b) of subsection (1) of section 661, is found loitering or wandering in or near a school ground, playground, public park or bathing area.

Section 164(1)(e), which eventually became the present s. 179(1)(b), has been amended since that time to conform to changes in the numbering of the predicate offences in the Code, and in the definitions of sexual offences in the Code. However, it has not changed in substance.

II. How Should the Word "Loiter" be Defined in Section 179(1)(b)?

28 The appellant submits that the word "loiter" in s. 179(1)(b) should be interpreted as requiring a malevolent intent while the respondent takes the position that "loiter" should be given its ordinary meaning.

29 When a statutory provision is to be interpreted the word or words in question should be considered in the context in which they are used, and read in a manner which is consistent with the purpose of the provision and the intention of the legislature: Elmer A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87; R. v. Hasselwander, [1993] 2 S.C.R. 398. If the ordinary meaning of the words is consistent with the context in which the words are used and with the object of the act, then that is the interpretation which should govern.

30 What then is the ordinary meaning of the word "loiter"? The Oxford English Dictionary (2nd ed. 1989), defines "loiter" in this manner:

> loiter . . .

> 1. . . . a. In early use: To idle, waste one's time in idleness. Now only with more specific meaning: To linger indolently on the way when sent on an errand or when making a journey; to linger idly about a place; to waste time when engaged in some particular task, to dawdle. Freq. in legal phr. to loiter with intent (to commit a felony).

Similarly, Black's Law Dictionary (5th ed. 1979), defines "loiter" as follows:

> To be dilatory; to be slow in movement; to stand around or move slowly about; to stand idly around; to spend time idly; to saunter; to delay; to idle; to linger; to lag behind.

31 It is significant that these definitions are essentially the same as those Constable German provided to the respondent on June 16, 1989. None of these definitions requires a malevolent intent or makes any reference to such a requirement.

32 Cases which have considered the meaning of "loiter" in other sections of the Code support the use of the ordinary meaning of "loiter" in s. 179(1)(b). In R. v. Munroe, supra, the Ontario Court of Appeal considered the meaning of "loiter" in what was then s. 171(1)(c) of the Criminal Code (now s. 175(1)(c)). That section makes it an offence to loiter in a public place and in any way obstruct persons who are in that place. The Ontario Court of Appeal gave "loiter" its ordinary dictionary meaning of "hanging idly about a place". It further held that if a person has some purpose for "hanging idly about" such as waiting for a spouse, then he or she cannot be said to be idling. The decision in Munroe was followed by the Ontario Court of Appeal in R. v. Gauvin (1984), 11 C.C.C. (3d) 229, at p. 232.

33 The same definition of "loiter" has been applied to s. 177 of the Code. That section like its predecessor makes it an offence to loiter or prowl by night near a dwelling house on the property of another person without a lawful excuse. In R. v. Andsten and Petrie (1960), 33 C.R. 213 (B.C.C.A.), Davey J.A., writing for the court, held at p. 215 that "'hanging around' well expresses what is meant by 'loiters' as used in s. 162 [now s. 177]".

34 In R. v. Lozowchuk (1984), 32 Sask. R. 51 (Q.B.), Geatros J., after considering Munroe, supra, and Andsten, supra, concluded at p. 54: "I find nothing in Code s. 173 to suggest that 'loiter' is to be construed other than in its ordinary and natural meaning". A similar definition was endorsed by the Quebec Court of Appeal in R. v. Cloutier (M.) (1991), 51 Q.A.C. 143, 66 C.C.C. (3d) 149. Chevalier J.A. writing for the court held at p. 147 Q.A.C. and at pp. 154-55 C.C.C.:

> [TRANSLATION] I will also not undertake to repeat here the definitions supported by dictionaries, given in several judgments that I previously quoted, of the English terms "loitering" and "prowling". Their French equivalents "flâner" and "rôder" reflect the same notions in respect of the attitudes or acts involved. Other than mere dictionary definitions, and as confirmation of their correctness, the average person who hears these two words immediately knows the difference. And, for him, it is of great importance.
>
> In the loiterer, he sees an individual who is wandering about, apparently without precise destination, who does not have, in his manner of moving, a purpose or reason to do so other than to pass the time, who is not looking for anything identifiable and who often is merely motivated by the whim of the moment. The dictionnaire des synonymes Bordas (1988), p. 424 gives the following as synonyms for the verb "to wander, stroll, to go for a jaunt, saunter, bum about, dawdle, dillydally, hang about, and so on". In short, it is conduct which essentially has nothing reprehensible about it if, as required by s. 173, it does not take place on private property where, in principle, a loiterer has no business.

See also R. v. Willis (1987), 37 C.C.C. (3d) 184 (B.C. Co. Ct.).

35 Thus, where it is used in other sections of the Code, the word "loiter" has been given its ordinary dictionary definition.

36 The United States Supreme Court has also interpreted vagrancy statutes as not requiring proof of any special intent or malevolence in order to convict. In Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), the court held that a municipal vagrancy law was void for vagueness. In discussing the application of the vagrancy law, Douglas J., writing for the court, held that the law did not require a specific intent to commit an unlawful act. He wrote at p. 163: "The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent".

37 The ordinary definition of "loiter" is also consistent with the purpose of s. 179(1)(b). The section is aimed at protecting children from becoming victims of sexual offences. This is apparent from the places to which the prohibition of loitering applies. School grounds, playgrounds, public parks and public bathing areas are typically places where children are likely to congregate. The purpose of the prohibition on loitering is to keep people who are likely to pose a risk to children away from places where they are likely to be found. Prohibiting any prolonged attendance in these areas, which is what the ordinary definition of "loiter" does, achieves this goal.

38 Furthermore, the concept of malevolent intent favoured by the appellant (as opposed to a narrower formula such as unlawful intent, which the appellant does not endorse) raises problems of definition which make it unworkable. The Oxford English Dictionary defines "malevolent" as a person ". . . Desirous of evil to others; entertaining, actuated by, or indicative of ill-will; disposed or addicted to ill-will". These definitions make it apparent that it is a concept of very broad scope that is extremely difficult to define. Malevolent intent could mean almost anything, and its definition would be dependent upon the subjective views of the particular judge trying the case.

39 The appellant and the Attorney General of Canada argue that the legislative debates surrounding the passage of the section in 1951, and again when it was reconsidered in 1986-87 provide support for the proposition that "loiter" in s. 179(1)(b) includes the notion of some sort of malevolent intent. In my opinion this argument is not well founded. The admissibility of legislative debates to determine legislative intent in statutory construction is doubtful: Drieger, supra, at pp. 156-58; Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1992), at pp. 353-67. This Court has repeatedly held that legislative history is not admissible as proof of legislative intent in the construction of statutes: Gosselin v. The King (1903), 33 S.C.R. 255, at pp. 264-68, per Taschereau C.J.; Attorney General of Canada v. The Reader's Digest Association (Canada) Ltd., [1961] S.C.R. 775; R. v. Popovic and Askov, [1976] 2 S.C.R. 308, at p. 318; Highway Victims Indemnity Fund v. Gagné, [1977] 1 S.C.R. 785, at p. 792.

40 It is apparent that legislative history may be admissible for the more general purpose of showing the mischief Parliament was attempting to remedy with the legislation: Toronto Railway Co. v. The Queen (1894), 4 Ex. C.R. 262, at pp. 270-71; Lyons v. The Queen, [1984] 2 S.C.R. 633, at pp. 683-84. Additionally, more flexible rules apply in the admission of legislative history in constitutional cases. In those cases the legislative history will not be used to interpret the enactments themselves, but to appreciate their constitutional validity: Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373; Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714; Schneider v. The Queen, [1982] 2 S.C.R. 112; Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297; Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; PSAC v. Canada, [1987] 1 S.C.R. 424; and R. v. Whyte, [1988] 2 S.C.R. 3. Legislative history is also admissible in Charter cases to help interpret its provisions: Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at pp. 506-9.

41 Nonetheless there are persuasive reasons advanced which support the position that legislative history or debates are inadmissible as proof of legislative intent in statutory construction. Many of these same reasons are also put forward to demonstrate that such materials should be given little weight even in those cases where they are admitted. The main problem with the use of legislative history is its reliability. First, the intent of particular members of Parliament is not the same as the intent of the Parliament as a whole. Thus, it may be said that the corporate will of the legislature is only found in the text of provisions which are passed into law. Second, the political nature of Parliamentary debates brings into question the reliability of the statements made. Different members of the legislature may have different purposes in putting forward their positions. That is to say the statements of a member made in the heat of debate or in committee hearings may not reflect even that member's position at the time of the final vote on the legislation.

42 Despite the apparent merits of the rule that legislative history is inadmissible to determine legislative intent in statutory construction, this Court has on occasion made use of such materials for this very purpose: see R. v. Vasil, [1981] 1 S.C.R. 469, at p. 487, and Paul v. The Queen, [1982] 1 S.C.R. 621.

43 However, it is not necessary in this case to determine the admissibility of the debates for the purpose of determining legislative intent. The debates concerning s. 179(1)(b) are inconclusive with regard to the meaning of loitering. In both the 1951 debates (Hansard, June 25, 1951 at pp. 4664-66) and the 1986-87 debates (Legislative Committee Minutes, November 27, 1986 at p. 1:46; December 11, 1986 at pp. 3:24-3:25; December 18, 1986 at pp. 6:18-6:19; February 5, 1987 at pp. 8:29-8:30; February 17, 1987 at pp. 9:70-9:75; March 17, 1987 at pp. 10:27-10:31) different members of Parliament applied different meanings to the word "loiter". Some used it to mean simply "hanging around", while others attached to it the connotation of lurking or the concept of not being able to give a good account of oneself. Thus, even if the debates were held to be admissible, they are of no assistance in determining the meaning that Parliament intended to be given to the word "loiter" in s. 179(1)(b).

44 Thus, the word "loiter" in s. 179(1)(b) should be given its ordinary meaning, namely to stand idly around, hang around, linger, tarry, saunter, delay, dawdle, etc. This is consistent with the meaning given to the word as used elsewhere in the Code, and with the context and purpose of s. 179(1)(b).

III. Section 7 of the Charter

45 There can be no question that s. 179(1)(b) restricts the liberty of those to whom it applies. Indeed, the appellant made no argument to the contrary. The section prohibits convicted sex offenders from attending (except perhaps to quickly walk through on their way to another location) at school grounds, playgrounds, public parks or bathing areas -- places where the rest of the public is free to roam. The breach of this prohibition is punishable on summary conviction and, as this case demonstrates, imprisonment is the consequence.

46 The question this Court must decide is whether this restriction on liberty is in accordance with the principles of fundamental justice. The respondent conceded in oral argument that a prohibition for the purpose of protecting the public does not per se infringe the principles of fundamental justice. R. v. Lyons, [1987] 2 S.C.R. 309, at pp. 327-34, held that the indeterminate detention of a dangerous offender, the purpose of which was the protection of the public, did not per se violate s. 7. In light of that decision this concession was appropriate. If indeterminate detention in order to protect the public does not per se violate s. 7, then it follows the imposition of a lesser limit on liberty for the same purpose will not in itself constitute a violation of s. 7. The question, then, is whether some other aspect of the prohibition contained in s. 179(1)(b) violates the principles of fundamental justice. In my opinion it does. It applies without prior notice to the accused, to too many places, to too many people, for an indefinite period with no possibility of review. It restricts liberty far more than is necessary to accomplish its goal.

A. Overbreadth

47 This Court considered the issue of overbreadth as a principle of fundamental justice in R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606. Writing for the Court, Gonthier J. discussed the relationship between overbreadth and vagueness at pp. 627-31. After looking at the notion of overbreadth in American constitutional law, he wrote at pp. 629-31:

> This Court has repeatedly emphasized the numerous differences which exist between the Charter and the American Constitution. In particular, in the interpretation of s. 2 of the Charter, this Court has taken a route completely different from that of U.S. courts. In cases starting with Irwin Toy up to Butler, including the Prostitution Reference and Keegstra, this Court has given a wide ambit to the freedoms guaranteed by s. 2 of the Charter, on the basis that balancing between the objectives of the State and the violation of a right or freedom should occur at the s. 1 stage. Other sections of the Charter, such as ss. 7 and 8, do however

incorporate some element of balancing, as a limitation within the definition of the protected right, with respect to other notions such as principles of fundamental justice or reasonableness.

A notion tied to balancing such as overbreadth finds its proper place in sections of the Charter which involve a balancing process. Consequently, I cannot but agree with the opinion expressed by L'Heureux-Dubé J. in Committee for the Commonwealth of Canada that overbreadth is subsumed under the "minimal impairment branch" of the Oakes test, under s. 1 of the Charter. This is also in accordance with the trend evidenced in Osborne and Butler. Furthermore, in determining whether s. 12 of the Charter has been infringed, for instance, a court if it finds the punishment not grossly disproportionate for the accused, will typically examine reasonable hypotheses and assess whether the punishment is grossly disproportionate in these situations (R. v. Smith, [1987] 1 S.C.R. 1045, and R. v. Goltz, [1991] 3 S.C.R. 485). This inquiry also resembles the sort of balancing process associated with the notion of overbreadth.

In all these cases, however, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the Charter. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the Charter. As will be seen below, overbreadth is not at the heart of this case, although it has been invoked in argument.

The relationship between vagueness and "overbreadth" was well expounded by the Ontario Court of Appeal in this oft-quoted passage from R. v. Zundel (1987), 58 O.R. (2d) 129, at pp. 157-58:

> Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.

I agree. A vague law may also constitute an excessive impairment of Charter rights under the Oakes test. This Court recognized this, when it mentioned the two aspects of vagueness under s. 1 of the Charter, in Osborne and Butler.

For the sake of clarity, I would prefer to reserve the term "vagueness" for the most serious degree of vagueness, where a law is so vague as not to constitute a "limit prescribed by law" under s. 1 in limine. The other aspect of vagueness, being an instance of overbreadth, should be considered as such.

48 Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. As the Ontario Court of Appeal observed in R. v. Zundel (1987), 58 O.R. (2d) 129, at pp. 157-58, cited with approval by Gonthier J. in R. v. Nova Scotia Pharmaceutical Society, supra, the meaning of a law may be unambiguous and thus the law will not be vague; however, it may still be overly broad. Where a law is vague, it may also be overly broad, to the extent that the ambit of its application is difficult to define. Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.

49 Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

50 Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual. This type of balancing has been approved by this Court: see Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, per Sopinka J., at pp. 592-95; R. v. Jones,

[1986] 2 S.C.R. 284, per La Forest J., at p. 298; R. v. Lyons, supra, per La Forest J., at pp. 327-29; R. v. Beare, [1988] 2 S.C.R. 387, at pp. 402-3; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at pp. 538-39; and Cunningham v. Canada, [1993] 2 S.C.R. 143, at pp. 151-53. However, where an independent principle of fundamental justice is violated, such as the requirement of mens rea for penal liability, or of the right to natural justice, any balancing of the public interest must take place under s. 1 of the Charter: Re B.C. Motor Vehicle Act, supra, at p. 517; R. v. Swain, [1991] 1 S.C.R. 933, at p. 977.

51 In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the Charter, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator. It is true that s. 7 of the Charter has a wide scope. This was stressed by Lamer J. (as he then was) in Re B.C. Motor Vehicles Act, supra, at p. 502. There he observed:

> Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice.

52 However, before it can be found that an enactment is so broad that it infringes s. 7 of the Charter, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

53 The purpose of s. 179(1)(b) is to protect children from becoming victims of sexual offences. This is apparent from the prohibition which applies to places where children are very likely to be found. In determining whether s. 179(1)(b) is overly broad and not in accordance with the principles of fundamental justice, it must be determined whether the means chosen to accomplish this objective are reasonably tailored to effect this purpose. In those situations where legislation limits the liberty of an individual in order to protect the public, that limitation should not go beyond what is necessary to accomplish that goal. In Cunningham v. Canada, supra, at p. 153, McLachlin J. held that changes to the Parole Act which adversely affected the liberty of prisoners were in accordance with the principles of fundamental justice because "the prisoner's liberty interest is limited only to the extent that this is shown to be necessary for the protection of the public".

54 In my opinion, s. 179(1)(b) suffers from overbreadth and thus the deprivation of liberty it entails is not in accordance with the principles of fundamental justice.

i. Overbreadth in Geographical Ambit

55 The section is overly broad in its geographical ambit. It applies not only to school grounds and playgrounds, but also to all public parks and bathing areas. Its application to schools and playgrounds is appropriate, as these are the very places children are likely to congregate. But its application to all public parks and bathing areas is overly broad because not all such places are places where children are likely to be found. Public parks include the vast and remote wilderness parks. Bathing areas would include all the lakes in Canada with public beaches. Prohibiting individuals from loitering in all places in all parks is a significant limit on freedom of movement. Parks are places which are specifically designed to foster relaxation, indolent contemplation and strolling; in fact it may be assumed that "hanging around" and "idling" is encouraged in parks. The overly broad scope of this section was remarked upon by Maughan B.C. Prov. Ct. J. in R. v. Graf (1988), 42 C.R.R. 146, in which she found that what was at the time s. 175 (now s. 179(1)(b)) of the Criminal Code violated the Charter. She wrote at p. 150:

> The wording of s. 175 makes a person such as Mr. Graf, the accused, a person in a permanent state of exile within his community who is, because of his status, absolutely prohibited from standing idly in vast areas of this country. Mr. Graf, because of his status, does not have the liberty of movement and locomotion to go where other citizens are entitled to go and in the same manner as they are entitled to do.

> He is, for example, banned for life from standing idly about Stanley Park, including the aquarium and the zoo area, Lost Lagoon, the playing fields, the beaches and the entertainment area. Similarly are included Queen Elizabeth Park, English Bay, the Planetarium, Vanier Park, the endowment lands at the University of British Columbia, the Courthouse gardens, Jericho Beach, Spanish Banks, Kitsilano Park, the Sky Train greenbelt, the multitude of small city parks, Manning Park, the marine parks in the province, waterfront parks, Cleveland Dam, Capilano Hatchery, Mount Seymour ski area, Lynn Valley Park, Lynn Canyon Park and all beaches, lake and rivers in Canada capable of being used by people for bathing.

56 If the particular park or part of the park or bathing area is not a place frequented by children, the object of protecting children is not enhanced by limiting the individual's freedom. In my opinion, such a limit should be more narrowly defined, to apply only to those parks and bathing areas where children can reasonably be expected to be present.

ii. Overbreadth by the Life-Time Prohibition Without a Review Process

57 Section 179(1)(b) is also overly broad in another aspect. It applies for life, with no possibility of review. The absence of review means that a person who has ceased to be a danger to children (or who indeed never was a danger to children), is subject to the prohibition in s. 179(1)(b). In R. v. Lyons, supra, La Forest J., writing for the Court on this issue, held that the fact that a review process existed was essential to the finding that indeterminate sentences under the dangerous offender provisions did not violate s. 12. La Forest J. wrote at p. 341:

> In my opinion, if the sentence imposed under Part XXI was indeterminate, simpliciter, it would be certain, at least occasionally, to result in sentences grossly disproportionate to what individual offenders deserved. However, I believe that the parole process saves the legislation from being successfully challenged under s. 12, for it ensures that incarceration is imposed for only as long as the circumstances of the individual case require.

58 Thus the imposition of an indeterminate sentence upon dangerous offenders in the absence of a review procedure would constitute a cruel and unusual punishment and violate the principles of fundamental justice. It follows that there must be some review available for the prohibition in s. 179(1)(b) if it is to accord with the principles of fundamental justice. Admittedly, the prohibition in s. 179(1)(b) is a lesser infringement of liberty than the indeterminate detention of a dangerous offender. Yet, it is still a very significant limit on an individual's freedom of movement. Attendance at the places listed in s. 179(1)(b) has not as a rule been regulated in Canada, and still is not regulated for the general public who have not committed sex offences. In passing I would observe that a different conclusion regarding the need for a review might have been reached if the prohibition was in respect of a regulated activity such as driving or the possession of firearms.

59 The appellant and the Attorney General of Canada argued that the availability of a pardon under the Criminal Records Act, as amended, or the royal prerogative of mercy, meet any concerns about the need for review. In my opinion they do not. It is true that a pardon or the exercise of the royal prerogative of mercy would (subject to any conditions) vacate the conviction and remove the disqualification that resulted from the conviction: s. 5(b) of the Criminal Records Act; s. 749(3) of the Code; Clayton C. Ruby, Sentencing (3rd ed. 1987), at pp. 108-9. However, there are limits to the availability of pardons which make it inadequate and insufficient as a substitute for the review of the prohibition in s. 179(1)(b). For example, the conditions for granting pardons are not necessarily related to the dangerousness of the individual. A person who is not a danger to children may be denied a pardon. Under the Criminal Records Act, an individual may not apply for a pardon until five years after the completion of sentence in the case of an indictable offence, and three years after the completion of sentence in the case of a summary conviction offence: see s. 4 of the Criminal Records Act. As the prohibition applies to all persons convicted of the listed offences, there are individuals who will not be dangerous yet will, during the time they cannot apply for a pardon, still be subject to s. 179(1)(b).

60 A more serious problem is presented by the conditions which must be met in order to obtain a pardon. A person

convicted of an indictable offence may only obtain a pardon if he has been "of good behaviour", and has not been convicted of an offence under federal legislation: s. 4.1(1) of the Criminal Records Act. A sex offender who has not committed any further sexual offences, and is not considered a danger to re-offend, would not be eligible for a pardon if he was considered not to have been of good behaviour in a manner completely unrelated to sexual offences. Even if the conditions are met, in the case of indictable offences a pardon is still discretionary. In the case of a person convicted of a summary conviction offence, a pardon is mandatory if the person has not been convicted of any offence under federal legislation: s. 4.1(2) of the Criminal Records Act. However, a person who was no longer a danger, but who had committed an unrelated driving offence would not be eligible for a pardon. With respect to the royal prerogative of mercy, its use is exceptional: National Parole Board, Pardon Decision Policies, Annex: The Royal Prerogative of Mercy (June 1993). Neither the availability of a pardon nor the royal prerogative of mercy can constitute an acceptable review process.

iii. Overbreadth as to the People to Whom Section 179(1)(b) Applies

61 Section 179(1)(b) is overly broad in respect to the people to whom it applies. It applies to all persons convicted of the listed offences, without regard to whether they constitute a danger to children. This approach is contrary to the position taken by this Court in earlier decisions. In R. v. Swain, supra, the detention of all persons found not guilty by reason of insanity was found to be arbitrary because it was based on the overly inclusive assumption that all such persons were still dangerous at the time of sentencing: see pp. 1009, 1011-13. Similarly, in R. v. Lyons, supra, the necessity of showing that an individual was likely to be a danger in the future was one of the features which saved the legislation from violating s. 12 of the Charter (at p. 338). It is difficult to accept that a person who had sexually assaulted an adult fifteen years earlier with no subsequent offences should be assumed to still be a threat to children.

62 This Court has approved the use of reasonable hypotheses in determining whether legislation violates s. 12 of the Charter: R. v. Smith, [1987] 1 S.C.R. 1045; R. v. Goltz, [1991] 3 S.C.R. 485. I think the same process may properly be undertaken in determining the constitutionality of s. 179(1)(b). The effect of the section is that it could be applied to a man convicted at age 18 of sexual assault of an adult woman who was known to him in a situation aggravated by his consumption of alcohol. Even if that man never committed another offence, and was not considered to be a danger to children, at the age of 65 he would still be banned from attending, for all but the shortest length of time, a public park anywhere in Canada. The limitation on liberty in s. 179(1)(b) is simply much broader than is necessary to accomplish its laudable objective of protecting children from becoming victims of sexual offences.

63 A new s. 161 was passed following the decision of the British Columbia Court of Appeal in this case and is set out later in these reasons. It is significant and telling that the new section only applies to persons who have committed the listed offences in respect of a person who is under the age of 14 years. In addition, under the new section, the order is discretionary, so that only those offenders who constitute a danger to children will be subject to a prohibition. I would add that in certain circumstances, legislative provisions for notice and for review of the prohibition may reduce the significance of the factor of overbreadth in the application of one impugned provision. It is noteworthy that the new s. 161 provides for both notice and review of the prohibition. These provisions are absent in s. 179(1)(b).

iv. Absence of Notice

64 There is another aspect in which the section offends the principles of fundamental justice. As Hutcheon J.A. observed, there is no provision for notice to be given to a person convicted of a predicate offence of his potential liability for breaching s. 179(1)(b). As he points out, great care is taken to give notice in connection with other provisions of the Code. For example, the prohibition against ownership, custody or control of a firearm under s. 100 must be made part of the sentencing proceeding following a conviction for the indictable offence involving violence. Notice must also be given of the prohibition of operating a motor vehicle, vessel or aircraft pursuant to s. 260.

Similarly notice must be given of the terms of a probation order. The lack of a notice requirement for s. 179(1)(b) is unfair and unnecessarily so. It demonstrates that the section by the absence of a requirement of notice violates s. 7.

65 In summary, s. 179(1)(b) is overly broad to an extent that it violates the right to liberty proclaimed by s. 7 of the Charter for a number of reasons. First, it is overly broad in its geographical scope embracing as it does all public parks and beaches no matter how remote and devoid of children they may be. Secondly, it is overly broad in its temporal aspect with the prohibition applying for life without any process for review. Thirdly, it is too broad in the number of persons it encompasses. Fourth, the prohibitions are put in place and may be enforced without any notice to the accused.

66 I am strengthened in this conclusion by a consideration of the new s. 161 of the Criminal Code, S.C. 1993, c. 45, s. 1, which was enacted shortly after the decision of the British Columbia Court of Appeal in this case. The section provides:

> 161. (1) Where an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 736, of an offence under section 151, 152, 155 or 159, subsection 160(2) or (3) or section 170, 171, 271, 272 or 273, in respect of a person who is under the age of fourteen 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 fourteen years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre; or
>
> (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 fourteen years.
>
> (2) The prohibition may be for life or for any shorter duration that the court considers desirable and, in the case of a prohibition that is not for life, the prohibition begins on the later of
>
> (a) the date on which the order is made; and
>
> (b) where the offender is sentenced to a term of imprisonment, the date on which the offender is released from imprisonment for the offence, including release on parole, mandatory supervision or statutory release.
>
> (3) A court that makes an order of prohibition or, where the court is for any reason unable to act, another court of equivalent jurisdiction in the same province, may, on application of the offender or the prosecutor, require the offender to appear before it at any time and, after hearing the parties, that court may vary the conditions prescribed in the order if, in the opinion of the court, the variation is desirable because of changed circumstances after the conditions were prescribed.
>
> (4) Every person who is bound by an order of prohibition and who does not comply with the order is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.

67 It can be seen that this section is limited to clearly defined geographical areas where children are or can reasonably be expected to be present. Further, the prohibition may be for life or a shorter period and a system of review is provided. Additionally, the order of prohibition is made part of the sentencing procedure so that the accused is aware of and notified of the prohibitions. It is thus apparent that overly broad provisions are not essential or necessary in order to achieve the aim of s. 179(1)(b).

68 The violation of s. 7 of the Charter is thus established. It is now necessary to consider whether the section may

be saved by the provisions of s. 1 of the Charter.

IV. Section 1 of the Charter

69 This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies: Re B.C. Motor Vehicle Act, supra, at p. 518. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes s. 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.

70 The objective of s. 179(1)(b) is certainly pressing and substantial. The protection of children from sexual offences is obviously very important to society. Furthermore, at least in some of their applications, the means employed in s. 179(1)(b) are rationally connected to the objective. However, for the same reasons that s. 179(1)(b) is overly broad, it fails the minimal impairment branch of the s. 1 analysis. The new s. 161 is a good example of legislation which is much more carefully and narrowly fashioned to achieve the same objective as s. 179(1)(b). Section 179(1)(b) cannot be justified under s. 1 of the Charter.

V. Remedy

71 Counsel for the appellant argued that even if s. 179(1)(b) of the Criminal Code is so overbroad as to result in a violation of s. 7 which cannot be saved by s. 1, rather than striking the section down in its entirety, the section should be read down so as to come within constitutional limits. In my opinion reading down is not appropriate in this case. The changes which would be required to make s. 179(1)(b) constitutional would not constitute reading down or reading in; rather, they would amount to judicial rewriting of the legislation.

72 This Court considered the application of flexible remedial alternatives under s. 52 of the Constitution Act, 1982 such as reading in and reading down in Schachter v. Canada, [1992] 2 S.C.R. 679. Lamer C.J., writing for himself and four other members of the Court, held that reading in or reading down will only be warranted where: (i) the legislative objective is obvious, and reading in or reading down would constitute a lesser intrusion on that objective than striking down the legislation; (ii) the choice of means used by the legislature is not so unequivocal that reading in or reading down would unacceptably intrude into the legislative sphere; and (iii) reading in or reading down would not impact on budgetary decisions to such an extent that it would change the nature of the legislation at issue.

73 Reading in or reading down in this case would create an entirely new scheme. Parliament chose unequivocal means in s. 179(1)(b), namely, a prohibition on loitering for all persons convicted of the listed offences in all school grounds, playgrounds, public parks and bathing areas, for life, with no possibility of review. The changes required to make the section comply with s. 7 of the Charter would constitute a completely different approach to the problem, and would amount to an unwarranted intrusion into the legislative domain. Any changes required to be made over and above the provisions of the new s. 161 should be made by Parliament.

Disposition

74 The constitutional questions are, therefore, answered as follows:

1. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent to life, liberty and security of the person as guaranteed by s. 7 of the Charter?

A. Yes.

2. If the answer to question 1 is yes, is the limitation one which is reasonable, prescribed by law and demonstrably justified pursuant to s. 1 of the Charter?

A. No.

In view of the answers to the first two constitutional questions, it is unnecessary to answer the other constitutional questions. The appeal is dismissed.

The reasons of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. were delivered by

GONTHIER J.

75 I have read the opinion of Justice Cory and, with all due respect, find I am unable to agree. The central issue in this case concerns the interpretation of s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46. By giving the word "loiter" its ordinary meaning, Cory J. would interpret the provision as prohibiting lingering, tarrying, standing idly around, sauntering, delaying, dawdling, etc. in the enumerated areas. This interpretation leads him to conclude that the prohibition created by s. 179(1)(b) violates s. 7 of the Canadian Charter of Rights and Freedoms and is not saved by s. 1 because it is overbroad in terms of the persons, places and time period to which it applies and because notice to the accused is not required. In my view, however, s. 179(1)(b) should be interpreted as prohibiting the persons affected from being in one of the enumerated places for a malevolent or ulterior purpose related to the predicate offences. My reasons for favouring this interpretation are drawn from the purpose and legislative history of s. 179(1)(b) as well as precedent and statutory context. The first two parts of my reasons are devoted to these points. In the third part, I examine the constitutionality of this interpretation.

A. The legislative history and purpose of s. 179(1)(b) of the Criminal Code

76 Section 179(1)(b) makes it an offence for persons who have been convicted of certain enumerated offences to loiter "in or near a school ground, playground, public park or bathing area". The enumerated offences are:

- sexual interference, sexual touching or sexual exploitation of a person under 14 (ss. 151, 152 and 153 respectively);

- bestiality in the presence of a person under 14 (s. 160(3));

- sexual exposure to a person under 14 (s. 173(2));

- the sexual assault provisions (ss. 271, 272, 273); and

- the "serious personal injury offences" identified in s. 687 as it read before January 4, 1983 (rape, attempted rape, sexual intercourse with a female under fourteen or between fourteen and sixteen, indecent assault on a female or male and gross indecency).

Clearly a wide range of offenders are affected, in part because of the inclusion of the general sexual assault provisions and their antecedents. The central interpretive question relates to the scope of the prohibition. Guidance in answering this question can be taken from an examination of the legislative history of the section and an analysis of its purpose.

77 Though the prohibition of "vagrancy" in the common law world dates from at least the fourteenth century, s. 179(1)(b) of the Code was only added in 1951 (S.C. 1951, c. 47, s. 13). Excerpts from the parliamentary debates prior to the adoption of the offence aid in identifying the mischief which the offence was aimed at and its intended scope:

> Mr. Garson: ... The British Columbia section of the Canadian Bar Association made the suggestion. I think they were actuated in making it by several rather nasty cases that had arisen in which, as my hon. friend knows is often the case, children were the victims of these sex perverts. They thought that by keeping them away from the places indicated in this section the purpose they had in mind might be served.

...

> Mr. Fleming: ... If a man is listening to a band concert and behaves himself I do not think anyone will say he is loitering or wandering about. It seems to me a very sound idea that people with records like that who are found in these public areas loitering or wandering about should be liable to conviction on a charge of vagrancy. It is not any more serious than that, but I am sure it will give more effective opportunity to keep such people moving out of such places.
>
> (House of Commons Debates, June 25, 1951, at pp. 4664 and 4666.)

These two passages demonstrate an intention to keep sex offenders away from places frequented by children, but not to prohibit them totally from the enumerated areas. As with legislative debates generally, the above passages are not determinative. They are, however, properly part of the evidence which a court may consider to identify the purpose of a statutory provision (see R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at pp. 744-45, per Dickson C.J. for the majority).

78 Turning to the legislative history of s. 179(1)(b), it should be noted that the original provision enacted in 1951 prohibited persons convicted of the enumerated offences from loitering or wandering in the same areas now listed in s. 179(1)(b). In 1985, after the reports of the Badgley and Fraser Commissions, the provision was kept, but amended to remove the word "wander". This specific deletion would indicate that the word "loiter" was considered by Parliament to have a different meaning from "wander". Indeed, the word "wander" is somewhat broader than "loiter". "Wander" merely connotes movement without specific destination; "loiter" has a variable connotation according to the context, though these connotations share the common element of idleness. The Oxford English Dictionary (2nd ed. 1989), defines "wander" in the following general terms:

> wander ...
>
> 1.a. ... To move hither and thither without fixed course or certain aim; to be (in motion) without control or direction; to roam, ramble, go idly or restlessly about; to have no fixed abode or station.
>
> ...
>
> e. To go or take one's way casually or without predetermined route; to go to a place by a devious and leisurely course; to stroll, saunter.

The word "loiter", by contrast, is defined more narrowly:

> loiter ...
>
> 1. ... a. In early use: To idle, waste one's time in idleness. Now only with more specific meaning: To linger indolently on the way when sent on an errand or when making a journey; to linger idly about a place; to waste time when engaged in some particular task, to dawdle. Freq. in legal phr. to loiter with intent (to commit a felony).

79 Other evidence before the trial judge which is of assistance in understanding the purpose and scope of s. 179(1)(b) is the testimony of the psychiatric and psychological experts called on behalf of the Crown. Filmer Prov. Ct. J. summarized a crucial portion of this evidence in the following terms:

> ... the root cause of sexual offending is difficult to diagnose and treat. It involves a mechanism wherein sexual stimulation is found and relieved in various ways but usually in a fairly predictable cycle. The cycle involves an increasing need to be stimulated and is usually marked by an ever-increasing need to be near the object of arousal. To treat this drive, the subject must be disassociated from the objects, such as children, which may arouse. This separation is paramount in treatment. In many cases treatment is a lifelong endeavour.

A portion of the evidence of Dr. Semrau, a psychiatrist, more fully explains some of these points:

> ... one does not speak of curing sexual offenders and -- and particularly so of pedophiles. The -- one can hope to bring their offending tendency under some degree of control, but treatment has to involve a very long-term relapse prevention sort of component and so this kind of restriction is -- is a critical part of that because perhaps an analogy could be made with that of an alcoholic, [the example was of an alcoholic going into a bar thinking it would not kill him. Such a person, however, is at perpetual risk of slipping into alcoholism again] but the same sort of analogy can be made that once one has engaged in some such behaviour it -- it starts you on a slippery slope towards reoffending.
>
> So that sort of provision in the Criminal Code is entirely compatible with, and in keeping with, and supportive of, the basic principles of treatment of sexual offenders.

The psychiatrist stated that offenders will often believe that their conduct is perfectly lawful; however, in reality they will be "on a slippery slope towards reoffending". He stressed that it is an important part of treatment to help offenders to recognize that such conduct, though normally lawful for everyone else, is not benign in their case but rather is part of the cycle of re-offending.

80 In addition to the possibility that the risk of re-offending may be perpetual and that disassociation aids treatment, there was also considerable evidence before the trial judge on the issue of crossover. Crossover refers to the situation where a sexual offender commits a different type of offence when she/he re-offends. An example of such crossover would be where a person convicted of a sexual assault against an adult later molests a child. Both Dr. Semrau and Dr. Glackman made reference to the work of Dr. Abel. Dr. Abel was described as one of "half a dozen top experts in the world in the area of sexual offenders". Contrary to conventional wisdom, Dr. Abel discovered that there is extensive cross-offending so that a given offender is likely to be involved in a variety of different activities throughout a lifetime. Dr. Semrau summarized the implications of this research in the following terms: "So that there is -- there's, in fact, a large crossover from one category to another. A sexual offender convicted of a particular offence must be viewed also, in general, as having a substantial risk for all of the other kinds of sexual offences as well". The current state of knowledge therefore suggests that a person who demonstrates one form of sexually deviant behaviour may present a more general risk.

81 It is hard to deny that there will be individual cases where the risk of crossover or the risk of re-offending will not be present, but as both Dr. Semrau and Dr. Glackman stressed it is impossible, given the current state of knowledge, to identify such persons with any certainty. Dr. Semrau explained the problem in this way:

> Again, for some individuals it may not be important, but given our lack of ability to get people to be honest with us or, indeed, we have no -- we have some psychological and psychiatric testing and assessment methods which give us some clues to what an individual's tendencies are but it's very easy, given our current methods, for offenders to grossly mislead us with regard to what their tendencies are. Anyone who's worked in this area has had many painful experiences of finding that -- that, despite perhaps a lot of experience, that they are -- that they were woefully naive in believing people, and so we don't have the ability to separate out which, let's say adult female rapists, are going to be at risk for molesting children and which aren't. We know that a substantial proportion will, but we don't have any method of reliably identifying which of those individuals are at the highest risk for such behaviour, and so it certainly would be appropriate for all sexual offenders to -- to avoid those kinds of high risk situations.

Later he reiterated a similar sense of frustration:

> Again though, one can never be fully satisfied in any situation as to being able to relax the restrictions necessary. I've had more cases than I would like to think of in which an individual who seemed to be of the most benign sort and to be well treated and the problem seemed to be thoroughly dealt with, and -- and I

> really felt inclined to relax about the particular offender where, you know, some horrendous thing comes out of the blue.
>
> So, I mean, our -- our ability to -- to be certain that one can relax surveillance or restrictions on a particular individual is not very good at this point in history. Our methods of assessing sexual offenders are relatively crude and we -- the best therapists in this area frequently get nasty surprises in which they -- they realize that they have been naive. We don't have very good methods of being able to make accurate predictions about what will happen with an individual, so one can speak in relative terms of individuals who have lesser or greater risk and where restrictive conditions are more or less necessary or appropriate, but it -- one would never encounter a situation in which you could say that you could totally relax and completely omit any concern about a future problem.
>
> (See also the evidence of Dr. Glackman.)

The concerns with regard to crossover and the potentially perpetual nature of the risk of re-offending contributed to the conclusion of both Dr. Glackman and Dr. Semrau that a person who was convicted of a "date rape" type sexual assault offence or a random sexual assault offence involving physical contact would be a person who should be subject to the kind of prohibition contained in s. 179(1)(b). The evidence on cross-offending and the difficulty of predicting who will cross-offend or repeat offend would thus seem to justify some form of restriction on the liberty of persons convicted of sexual offences given our current state of knowledge.

82 Taking the above as a whole, the objectives embodied in the s. 179(1)(b) prohibition are relatively clear. The courts below have unanimously recognized that the section has at its foundation a concern for public safety and a desire to aid in the treatment and rehabilitation of offenders. I agree and would stress that the provision applies broadly to all persons convicted of the enumerated offences and therefore provides protection not only to children but also to others who could be victims of sexual assault in the listed areas. These areas, it should be remembered, are places where people will generally lower their guard.

83 The above, though, does not allow us to identify as easily the specific conduct prohibited. The identified objectives are clearly achieved, and perhaps most efficiently, by the broad interpretation of the prohibition adopted by Cory J. A less intrusive interpretation which prohibits the persons affected from being in one of the enumerated places for a malevolent or ulterior purpose related to the predicate offences, however, is also consistent with the objectives. The more narrow interpretation would go beyond a mere "attempts" offence. It would preserve the preventive aspect of the section by allowing the state to deal with activities that are part of the cycle of re-offending, such as taking photos, which can be proven to reflect a malevolent or ulterior purpose related to the predicate offences. At the same time, this interpretation would allow the affected persons to use the listed areas for the legitimate purposes for which they were intended.

84 The deletion of "wandering" and the use of the word "loitering" as opposed to simply "attending at" or some other formulation can be seen as reflecting a concern to limit the scope of the prohibition. Portions of the legislative debates which I have noted above can also be invoked in this regard. My conclusion to adopt the less intrusive interpretation, however, is supported by the case law interpreting offences defined in terms of loitering as well as the statutory context in which s. 179(1)(b) is situated.

B. Case Law Interpreting the Word "Loiter" and the Statutory Context of Section 179(1)(b)

85 As Cory J. has noted, at p. 789, the ordinary or usual dictionary meaning of loiter is "to stand idly around, hang around, linger, tarry, saunter, delay, dawdle, etc." There is no suggestion in this definition that the term includes an evil or malevolent purpose. The dictionary definition of the French term "flâner" is similar.

86 The Canadian case law interpreting the word "loiter" deals primarily with ss. 175(1)(c) and 177 of the Code:

> 175.(1) Every one who

...

(c) loiters in a public place and in any way obstructs persons who are in that place, ...

is guilty of an offence punishable on summary conviction.

177. Every one who, without lawful excuse, the proof of which lies on him, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

As will be seen, the interpretation given to "loiter" in relation to these sections, though generally involving some part of the ordinary meaning of the word, has not been exactly the same in all cases.

87 In R. v. Munroe (1983), 5 C.C.C. (3d) 217, per Cory J.A., as he then was, and in R. v. Gauvin (1984), 11 C.C.C. (3d) 229, the Ontario Court of Appeal gave loiter its ordinary meaning in the context of s. 175(1)(c): idly hanging about. Munroe dealt with a woman suspected of being a prostitute, while Gauvin concerned a man who insisted upon taking a seat reserved for others at a political meeting. In both cases the court refused to convict the accused persons on the basis that their activities were purposeful. Purposeful activity was held to be the antithesis of idleness.

88 In terms of prohibited physical activity, loiter has been given a similar meaning in the context of s. 177. In R. v. Cloutier (M.) (1991), 51 Q.A.C. 143, 66 C.C.C. (3d) 149, the Quebec Court of Appeal also gave loiter its ordinary dictionary meaning and noted the absence of purpose as a defining element. In distinguishing loiter from prowl ("flâner" from "rôder"), the court underlined the "innocent" nature of loiter as compared to prowl. The court wrote, at pp. 147-48 Q.A.C. and at pp. 154-55 C.C.C., respectively:

> [TRANSLATION] In the loiterer, he sees an individual who is wandering about, apparently without precise destination, who does not have, in his manner of moving, a purpose or reason to do so other than to pass the time, who is not looking for anything identifiable and who often is merely motivated by the whim of the moment.... In short, it is conduct which essentially has nothing reprehensible about it if, as required by s. [177], it does not take place on private property where, in principle, a loiterer has no business.
>
> Opposite to this, for the average person, "prowl" inspires a pejorative reaction. The verb includes a notion of evil; it depreciates in his eyes the person who is involved in the action that it represents.

Similarly, in R. v. Lozowchuk (1984), 32 Sask. R. 51 (Q.B.), Geatros J. held that the accused could not be convicted of loitering within the terms of s. 177 because, in going to his girlfriend's home late one evening, he had a definite purpose in mind.

89 The interpretation of s. 177, however, has not been entirely consistent. In at least one case, a Court of Appeal has departed from the interpretation that the offence is defined by the absence of purpose associated with idleness. In R. v. Andsten and Petrie (1960), 33 C.R. 213, the British Columbia Court of Appeal upheld the convictions of two private detectives who had been snooping around the complainant's house looking for evidence which would be relevant to divorce proceedings. The court concluded that "hanging around" expressed what was meant by loiter in s. 177. The existence or absence of a purpose was held to be irrelevant to the question of whether a person is loitering within the terms of s. 177 (ibid., at p. 214). Davey J.A., perhaps foreseeing the difficulties presented by the different uses of the word loiter in the Code, was careful to stress that the court's discussion of the meaning of loiter was restricted to issues involving invasion of private property.

90 In my view, the case law summarized above suggests that the term "loiter" will vary to some extent according to its context. Ascribing an absence of purpose may make sense in terms of s. 175; however, as at least Andsten and Petrie, supra, clearly demonstrated, it may not be applicable under s. 177. Similarly, the absence of purpose

element in the ordinary meaning of loiter can have no application in the context of s. 179(1)(b). Clearly Parliament intended to include conduct of convicted sex offenders whose purpose was related to re-offending.

91 My suggestion that the meaning of loiter will vary according to the specific statutory context is merely an illustration of a caveat to the general rule that words be given their ordinary meaning. Pierre-André Côté expressed this caveat in The Interpretation of Legislation in Canada (2nd ed. 1992), at p. 221 (as quoted below), citing Laskin C.J., in Attorney General for Ontario v. Regional Municipality of Peel, [1979] 2 S.C.R. 1134, at p. 1145:

> The need to determine the word's meaning within the context of the statute remains. Dictionaries provide meanings for a number of standard and recurring situations. Even the best of them will only tersely indicate the context in which a particular meaning is used. The range of meanings in a dictionary is necessarily limited. It cannot be sufficiently repeated "how much context and purpose relate to meaning".

An illustration of this basic principle in relation to the word loiter and of the nuances which arise from context is found in a recent decision of the Judicial Committee of the Privy Council, Attorney-General of Hong Kong v. Sham Chuen, [1986] 1 A.C. 887.

92 In Sham Chuen, the Privy Council considered s. 160(1) of the Hong Kong Crimes Ordinance. Section 160(1) made it an offence to loiter in a public place or in the common parts of any building unless the person was able to give a satisfactory account of her/his presence. The crucial portions of the Privy Council's reasoning as to the scope of the offence are contained in a single rather long paragraph. For ease of discussion, I have broken the paragraph (at pp. 895-96) into two parts.

> A considerable amount of argument before the Board was directed to the meaning of "loitering" in section 160(1). Given that the acceptable dictionary meaning of the word was simply "lingering", three possible constructions of the word in its present context were suggested. These were (i) any lingering; (ii) lingering with no apparent purpose at all; and (iii) lingering in circumstances which suggest an unlawful purpose.... Reference was made at some length to the legislative history of this particular enactment and of similar enactments in other Commonwealth jurisdictions, as well as to a number of reported decisions on the interpretation of such enactments. In their Lordships' opinion no helpful guidance is to be obtained from any of them. The word is to be construed in the light of the context in which it appears in this particular enactment.

My review of the Canadian case law summarized above supports the Privy Council's suggestion that the task of ascertaining the specific meaning of "loiter" and therefore of the offence of which loiter is an element in any given case will not always be eased by referring to the interpretation of other enactments. Rather, as I have suggested and as the Privy Council concluded, a contextual approach attuned to the particular enactment is more apposite. The Privy Council's contextual interpretation of s. 160(1), however, is of some assistance to the interpretive question now before this Court. The Privy Council wrote, at p. 896:

> Subsections (2) and (3) of section 160 are each concerned with loitering of a particular character, the first being loitering which causes an obstruction and the second being loitering which causes reasonable concern to a person for his safety or well-being. In their Lordships' opinion subsection (1) is also concerned with loitering of a particular character, namely loitering which calls for a satisfactory account of the loiterer and a satisfactory explanation for his presence. Obviously a person may loiter for a great variety of reasons, some entirely innocent and others not so. It would be unreasonable to construe the subsection to the effect that there might be subjected to questioning persons loitering for plainly inoffensive purposes, such as a tourist admiring the surrounding architecture. The subsection impliedly authorises the putting of questions to the loiterer, whether by a police officer or by any ordinary citizen. The putting of questions is intrusive, and the legislation cannot be taken to have contemplated that this would be done in the absence of some circumstances which make it appropriate in the interests of public order. So their Lordships conclude that the loitering aimed at by the subsection is loitering in circumstances which reasonably suggest that its purpose is other than innocent.

Despite the absence of any sort of charter of rights and freedoms in Hong Kong, the Privy Council concluded that the legislation should be given a circumscribed interpretation so that "innocent" loitering was not subject to criminal sanction. The Privy Council's decision demonstrates that the word "loiter" on its own may create an offence which is excessively intrusive. Generally, this has been the chief problem identified in regard to vagrancy or loitering provisions (see the discussion contained in the decision of the United States Supreme Court in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)). As the decision in Sham Chuen, supra, demonstrates, however, such excessive intrusiveness can and should be avoided where it would be consistent with the statutory context.

93 As stated at the outset, I am of the view that the prohibition contained in s. 179(1)(b) should be narrowed to render the prohibition less intrusive and to tailor it more carefully to the objectives being pursued. Just as in Sham Chuen, supra, not all loitering should be caught by the prohibition contained in s. 179(1)(b). Rather, the intrusion into the activities of individuals should be tied to some reason of public order. The three provisions in which loiter is used in our Code suggest a structure with some parallels to the situation in Hong Kong. In each case, it is loitering of a particular character which is being prohibited. Section 175(1)(c) deals with loitering which causes an obstruction. Section 177 pertains to loitering at night on the property of another without lawful excuse. In this context, s. 179(1)(b) prohibits loitering related to the enumerated sexual offences. The enumerated offences thus qualify the word "loiter" and limit the otherwise broad scope of the prohibition.

94 I draw additional support for narrowing the scope of the prohibition created by s. 179(1)(b) from the opinion of a distinguished commentator of the Code. In the 1962 edition of his treatise, Droit pénal canadien, Irénée Lagarde explained the antecedent version of s. 179(1)(b) as follows, at p. 224:

> [TRANSLATION] [Persons who have been convicted of one of the enumerated offences] may not "loiter" or "prowl" near (1) a school, (2) a playground, (3) a public park or (4) a public beach. Like anyone else such a person is entitled to sit on a bench in a public park, to bathe at a public beach and to be found near a school or playground. The legislature is prohibiting not his or her presence but "loitering" or "prowling". What are we to understand by these terms? It seems to me that they mean a presence which tends to indicate a probable guilty intent and which by its persistence might reasonably suggest that the accused has the intention of sexually attacking children or adults. In other words, the legislature prohibits him or her from hanging about near a schoolyard, public beach or playground without any specific purpose. In a public park, the accused may relax peacefully but without "watching", "being on the lookout for" or "abnormally observing" persons who might become his or her victims. The particular circumstances of the case will determine whether or not there was "loitering". [Emphasis in original.]

While I do not entirely agree with Lagarde's description of the offence, his concern to exclude from the criminal prohibition presence in the enumerated areas for legitimate purposes would appear to be well founded. I also support the suggestion that the restriction created by s. 179(1)(b) will not be the same in each of the listed areas. While it may be perfectly legitimate to rest in a public park with no other apparent purpose, the same cannot be said for hanging around a school yard. An application of the section which is not sensitive to these points will create a prohibition which is more intrusive than necessary.

95 Additional support for the interpretation I would give to s. 179(1)(b) is found when the section is analyzed in conjunction with ss. 161 and 810.1. Sections 161 and 810.1 were enacted by Parliament following the decision of the British Columbia Court of Appeal in this case. Section 161 allows a court at the time of sentencing to make an order prohibiting a sexual offender from attending at day care centres, school grounds, playgrounds, community centres, or any public park or swimming area where persons under the age of 14 years are present or can reasonably by expected to be present. The section relies on a similar list of offences to that contained in s. 179(1)(b), but the s. 161 prohibition is available only in relation to persons who have committed offences against children under the age of 14. The prohibition may be for life or any shorter duration and the court which makes the order can vary it at any time on application of the offender or the prosecutor. This provision is thus a powerful means of enhancing public safety and aiding offender treatment. Section 161 though does not apply to sex offenders convicted prior to its enactment.

96 Sections 179(1)(b) and 810.1 read together, however, produce a similar result to that achieved by s. 161 in relation to those convicted prior to the enactment of s. 161. Section 810.1 allows any person who has reasonable grounds to fear that another person will commit one of a number of sexual offences to appear before a provincial court judge and seek an order prohibiting the person in question from attending areas where children under 14 are likely to be present. This procedure, while eventually achieving the same result as s. 161, would obviously require the expenditure of significant time and energy before a prohibition could be ordered. The interpretation I would give to s. 179(1)(b) allows it to serve as a useful means for law enforcement officers to take immediate preventive steps when a person who has been convicted of one of the enumerated sexual offences is in one of the listed areas and demonstrates an ulterior or malevolent purpose related to the predicate offences. In short, the provision allows the police to intervene before a previous offender re-offends. In such cases, s. 810.1 would then be available to subject the offender to a prohibition similar to s. 161 if it can be shown that there are reasonable grounds to fear that the person will commit one of the predicate offences specified in s. 161. Satisfying the requirements of s. 179(1)(b) and demonstrating that the accused had a malevolent or ulterior purpose related to one of the predicate offences would no doubt help to satisfy the reasonable grounds requirement in s. 810.1. An excessively broad view of the prohibition contained in s. 179(1)(b) would destroy this symmetry.

97 My review of the legislative history, purpose and context of s. 179(1)(b) thus leads to the conclusion that the offence should be interpreted as lingering or hanging about the enumerated areas for a malevolent or ulterior purpose related to any of the predicate offences. This interpretation is suggested by the terms of the offence and general desire to limit the intrusiveness of the prohibition while still achieving the objectives of public safety and offender treatment. As will be seen in the next section, this interpretation is also consistent with the Charter.

C. Section 179(1)(b) and Its Conformity with the Charter

98 The two primary Charter concerns raised by s. 179(1)(b) pertain to vagueness and overbreadth. The interpretation of the provision adopted by Filmer Prov. Ct. J. and Melvin J., requiring proof of an "untoward or improper motive", is arguably unconstitutionally vague. Cory J.'s broader interpretation of s. 179(1)(b) eliminates any vagueness problem, but, in his view, leads to a prohibition which is unjustifiably overbroad. The interpretation I have adopted avoids both these problems.

99 As discussed in R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at p. 643, a provision which is unconstitutionally vague provides an intolerable level of prosecutorial discretion and fails to give those subject to the provision notice of its content. Put in its most simplistic form, what is prohibited will be what those charged with law enforcement decide at any given moment should be prohibited. Interpreting s. 179(1)(b) to prohibit lingering with an "untoward or improper motive" would arguably be an example of an unconstitutionally vague restriction on liberty. "Untoward or improper motive" gives little basis for legal debate within the terms of Nova Scotia Pharmaceutical Society. It is difficult to identify the factors to be considered or the determinative elements in ascertaining whether a motive is untoward or improper. The United States Supreme Court made a similar suggestion in Papachristou v. City of Jacksonville, supra, at p. 164. Qualifying malevolent or ulterior purposes by reference to the predicate offences, however, eliminates any concerns as to vagueness. The enumerated offences provide a clear basis for legal debate and narrow the scope of potential liability. The persons affected would thus have notice of what is prohibited and prosecutorial discretion would be sufficiently restricted.

100 Cory J., however, suggests that the prohibition created by s. 179(1)(b) is overbroad in terms of the persons, places and time period to which it applies. I express no opinion on the soundness of this analysis of liberty because it is not necessary in this case to decide the issue. The interpretation I advocate eliminates Cory J.'s concern that the prohibition is overbroad. A lifetime prohibition of activities with a malevolent or ulterior purpose related to re-offending is in no way objectionable or overbroad. Such a prohibition would impose a restriction on the liberty of the affected individuals to which ordinary citizens are not subject, but that restriction is directly related to preventing re-offending. The affected persons' history of offending, the uncertainties prevalent in treating offenders and a desire

to disrupt the cycle of re-offending justify what is in effect a minor intrusion which does not breach the principles of fundamental justice.

101 That restraint of the affected persons' liberty is minor and easily illustrated. As noted above, use of public parks for the legitimate purposes for which they are intended would not be caught. Furthermore, though trite, it must be remembered that the Crown will bear the burden of proving all elements of the offence beyond a reasonable doubt. This burden guarantees that only loitering which can be proven to be related to one of the predicate offences will be subject to the criminal prohibition. I recognize that this formulation of the offence will likely lead to certain evidentiary presumptions which, absent a satisfactory explanation, may cause a judge to draw an adverse inference. Take for example a person with a history of offences in relation to children who is observed hanging around a playground and offering children candy. Similarly, as discussed above, just lingering about a school yard with no apparent purpose, as distinct from a public park, would give rise to legitimate suspicions. Such presumptions, however, in no way reverse the burden of proof, nor do they violate the accused's right to silence.

102 One of the most obvious objections to the more narrow formulation is that it is potentially less efficient than the alternatives in terms of achieving the legislative objective. As I noted above, a broad prohibition preventing certain persons from even attending at areas where the risk of re-offending is high may be a superior way to achieve the objectives of public safety and offender treatment. As Cory J. convincingly demonstrates, however, for such a broad prohibition to be constitutional, it would probably have to be accompanied by the same kind of guarantees present in the new s. 161. It is well beyond the proper scope of the judicial role to contemplate such extensive additions in this case.

103 In addition to overbreadth, the absence of any notice of the prohibition contained in s. 179(1)(b) was relied upon by Cory J. in concluding that s. 7 of the Charter was violated. The basis for this conclusion was that notice is provided for in the case of certain other prohibitions contained in the Code and that the lack of notice in the case of s. 179(1)(b) "is unfair and unnecessarily so". In so concluding, Cory J. would make notice, albeit in limited circumstances, a principle of fundamental justice. With all due respect, I cannot agree. It is a basic tenet of our legal system that ignorance of the law is not an excuse for breaking the law. This fundamental principle has been given legislative expression in s. 19 of the Criminal Code: "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence." Though formal notice of the content of s. 179(1)(b) might be preferable, I can see no basis for transforming the legislator's decision to provide notice in respect of certain Code prohibitions into a principle of fundamental justice.

104 For his part and in addition to s. 7, the respondent alleges that s. 179(1)(b) violates ss. 9, 11(d), (h) and 12 of the Charter. These allegations are without foundation and can be dismissed summarily.

105 Section 9 of the Charter provides a guarantee against being arbitrarily detained or imprisoned. The respondent's argument that any detention or imprisonment pursuant to s. 179(1)(b) would be arbitrary related largely to his objection to the absence of notice. As I have stated, the absence of notice does not provide a basis for attacking the validity of s. 179(1)(b). The reasoning set out above applies with equal force to the respondent's arguments in respect of s. 9 of the Charter.

106 Section 11(d) of the Charter enshrines the right to be presumed innocent until proven guilty. The respondent argues that s. 179(1)(b) presumes that an offender will re-offend and therefore violates the presumption of innocence. In reality, the provision does not assume recidivism, but rather provides the means to prevent it when convicted sex offenders demonstrate, through their conduct, a malevolent intent related to re-offending. Furthermore as I stressed above, anyone charged under s. 179(1)(b) will be presumed innocent and the burden remains on the Crown to prove beyond a reasonable doubt that the accused committed the offence as interpreted.

107 Section 11(h) protects a person found guilty and punished for an offence from being tried or punished again for the same offence. The class of persons to whom s. 179(1)(b) applies is identified by the fact of having been convicted of one of the enumerated offences. Any conviction under that section, however, will be based on violating

its terms and not of having been convicted of one of the enumerated offences. Section 11(h) is therefore not violated.

108 Finally, the s. 12 guarantee against cruel and unusual treatment or punishment is also of no avail to the respondent. Even if the respondent could demonstrate that he is subject to a punishment or treatment within the meaning of s. 12, which I doubt, it is clear that any such punishment or treatment is not cruel and unusual. A punishment or treatment will only be cruel and unusual where it is "so excessive as to outrage standards of decency" or where its effect is "grossly disproportionate to what would have been appropriate" (see R. v. Smith, [1987] 1 S.C.R. 1045, at p. 1072; R. v. Goltz, [1991] 3 S.C.R. 485, at p. 499). As explained above in the context of my discussion of s. 7 of the Charter, the lifetime prohibition of activities with a malevolent or ulterior purpose related to re-offending is both a minor and justifiable restraint of the affected persons' liberty. In the circumstances, neither the prohibition created by s. 179(1)(b) nor any punishment which would result from its infringement can be said to be grossly disproportionate to what would be appropriate or so excessive as to outrage the standards of decency.

109 Prohibiting lingering or hanging about the enumerated areas for a malevolent or ulterior purpose related to one of the predicate offences thus survives Charter scrutiny. The predicate offences provide an ample basis for limiting prosecutorial discretion and giving guidance as to what is prohibited to those affected. Furthermore, prohibiting only conduct which can be demonstrated to be part of the cycle of re-offending carefully balances the objectives of public safety and offender treatment with a desire to limit the intrusiveness of the prohibition.

D. Disposition

110 For the foregoing reasons, s. 179(1)(b) of the Code should be interpreted as prohibiting lingering or hanging about the enumerated areas for a malevolent or ulterior purpose related to any of the predicate offences. Based on this interpretation the constitutional questions are, therefore, answered as follows:

1. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent to life, liberty and security of the person as guaranteed by s. 7 of the Charter?

A. No.

3. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent to be presumed innocent until proven guilty according to law as guaranteed by s. 11(d) of the Charter?

A. No.

5. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent not to be subjected to any cruel and unusual treatment or punishment as guaranteed by s. 12 of the Charter?

A. No.

7. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent not to be arbitrarily detained or imprisoned as guaranteed by s. 9 of the Charter?

A. No.

9. Does s. 179(1)(b) of the Criminal Code, R.S.C., 1985, c. C-46, limit the right of the respondent, if finally found guilty and punished for the offence, not to be tried or punished for it again, as guaranteed by s. 11(h) of the Charter?

A. No.

Given the negative answers to questions 1, 3, 5, 7 and 9, it is unnecessary to answer questions 2, 4, 6, 8 and 10.

111 In this case, the evidence demonstrated beyond any doubt that the accused had a malevolent purpose related

to the predicate offences. I would therefore allow the appeal and restore the accused's conviction.

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R. v. O'Connor

Supreme Court Reports

Supreme Court of Canada

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

1995: February 1 / 1995: December 14.

Errata : 2017: March 21.

File No.: 24114.

[1995] 4 S.C.R. 411 | [1995] 4 R.C.S. 411 | [1995] S.C.J. No. 98 | [1995] A.C.S. no 98 | 1995 CanLII 51

Hubert Patrick O'Connor, appellant; v. Her Majesty The Queen, respondent, and The Attorney General of Canada, the Attorney General for Ontario, the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, the DisAbled Women's Network of Canada, the Women's Legal Education and Action Fund, the Canadian Mental Health Association and the Canadian Foundation for Children, Youth and the Law, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Criminal law — Evidence — Disclosure — Accused charged with sexual offences — Defence counsel obtaining pre-trial order requiring Crown to disclose complainants' entire medical, counselling and school records — Trial judge ordering stay of proceedings owing to non-disclosure and late disclosure by Crown — Court of Appeal allowing Crown's appeal and ordering new trial — Whether stay of proceedings appropriate remedy for non-disclosure by Crown of information in its possession.

Criminal law — Evidence — Medical and counselling records — Procedure to be followed where accused seeks production of records in hands of third parties.

The accused was charged with a number of sexual offences. Defence counsel obtained a pre-trial order requiring that the Crown disclose the complainants' entire medical, counselling and school records and that the complainants authorize production of such records. The Crown applied to a different judge for directions regarding the disclosure order and for the early appointment of a trial judge. After a trial judge had been appointed, the Crown again sought directions regarding the disclosure order. By this time many of the impugned records had come into its possession. The trial judge made it clear that he was to be provided promptly with therapy records relating to all four complainants. The accused later applied for a judicial stay of proceedings based on non-disclosure of several items. Crown counsel submitted that the two Crown prosecutors were handling the case from different cities, and that there were difficulties concerning communication and organization. She asserted that the non-disclosure of some of the medical records was due to inadvertence on her part, and that she had "dreamt" the transcripts of certain interviews had been disclosed. She submitted that uninhibited disclosure of medical and therapeutic records would revictimize the victims, and suggested that the disclosure order exhibited gender bias. The trial judge dismissed the application for a stay, finding that the failure to disclose certain medical records had been an oversight. He noted, however, that the letters written by Crown counsel to the counsellors had unacceptably limited the scope of the disclosure to only those portions of the records which related directly to the incidents involving the accused. This resulted in the full therapy records not being disclosed to the defence until just before the trial. He concluded that while the conduct of the Crown was "disturbing", he did not believe that there was a "grand design" to conceal evidence, nor any "deliberate plan to subvert justice". In light of the difficulties encountered during discovery, Crown counsel then agreed to waive any privilege with respect to the contents of the Crown's file and to prepare a binder in relation to each of the complainants containing all information in the Crown's possession relating to each of them.

On the second day of the trial, counsel for the accused made another application for a judicial stay of proceedings based largely on the fact that the Crown was still unable to guarantee to the accused that full disclosure had been made. The trial judge stayed proceedings on all four counts. He noted the constant intervention required by the court to ensure full compliance with the disclosure order and found that the Crown's earlier conduct had created "an aura" that had pervaded and ultimately destroyed the case. The Court of Appeal allowed the Crown's appeal and directed a new trial. This appeal raises the issues of (1) when non-disclosure by the Crown justifies an order that the proceedings be stayed and (2) the appropriate procedure to be followed when an accused seeks production of documents such as medical or therapeutic records that are in the hands of third parties.

Held (Lamer C.J. and Sopinka and Major JJ. dissenting): The appeal should be dismissed.

(1) Stay of Proceedings

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: There is no need to maintain any type of distinction between the common law doctrine of abuse of process and Charter requirements regarding abusive conduct. Where an accused seeks to establish that non-disclosure by the Crown has violated s. 7, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. Such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned actions on the fairness of the trial. Once a violation is made out, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Where the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate. There may, however, be exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy the prejudice. In those "clearest of cases", a stay of proceedings will be appropriate. When choosing a remedy for a non-disclosure that has violated s. 7, the court should also consider whether the Crown's breach of its disclosure obligations has violated fundamental principles underlying the community's sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system. If so, it should be asked whether this prejudice is remediable, having regard to the seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence.

While the Crown's conduct in this case was shoddy and inappropriate, the non-disclosure cannot be said to have violated the accused's right to full answer and defence. The whole issue of disclosure in this case arose out of the order requiring that the Crown "disclose" records in the hands of third parties and that the complainants authorize production of such records. This order was issued without any form of inquiry into their relevance, let alone a balancing of the privacy rights of the complainants and the accused's right to a fair trial, and was thus wrong. The Crown was ultimately right in trying to protect the interests of justice, and the fact that it did so in such a clumsy way should not result in a stay of proceedings, particularly when no prejudice was demonstrated to the fairness of the accused's trial or to his ability to make full answer and defence. Even had a violation of s. 7 been found, this cannot be said to be one of the "clearest of cases" which would mandate a stay of proceedings.

Per Cory and Iacobucci JJ.: While the actions of Crown counsel originally responsible for the prosecution of this case were extremely high-handed and thoroughly reprehensible, the Crown's misdeeds were not such that, upon a consideration of all the circumstances, the drastic remedy of a stay was merited.

Per Lamer C.J. and Sopinka and Major JJ. (dissenting on this issue): A stay of proceedings was appropriate here. The Crown's conduct impaired the accused's ability to make full answer and defence. The impropriety of the disclosure order if any does not excuse the Crown's failure to comply with it until immediately before the trial. The Crown never took proper action regarding the objections it had. If it could not appeal the order it should have returned to the issuing judge to request variation or rescission. The letters from the Crown prosecutor to the therapists narrowed the scope of the order. As soon as the order was clarified for the therapists, complete records

were disclosed, suggesting that had the letters contained an accurate description of the order, compliance would have occurred at a much earlier time. The Crown also breached its general duty to disclose all relevant information. Each time disclosure was made in this case it was the result of the defence having to raise the matter in court. The conduct of the Crown was such that trust was lost, first by the defence, and finally by the trial judge. It is of little consequence that a considerable amount of the non-disclosed material was ultimately released piecemeal to the defence prior to the trial. The effect of continual discovery of more non-disclosed evidence, coupled with the Crown's admission that disclosure was possibly incomplete, created an atmosphere in which the defence's ability to prepare was impaired. The Crown's delay in making disclosure and its inability to assure the trial judge that full disclosure had been made even after commencement of the trial were fatal to the proceedings. The continual breaches by the Crown made a stay the appropriate remedy. Proceedings had become unworkable and unfair. Remedies under s. 24(1) of the Charter are properly in the discretion of the trial judge. This discretion should not be interfered with unless the decision was clearly unreasonable.

The same breaches of the disclosure order, the general duty of disclosure and the undertaking to disclose files to the defence which impaired the accused's right to make full answer and defence also violated fundamental principles of justice underlying the community's sense of fair play and decency. The trial judge showed admirable tolerance for the behaviour of the Crown but in the end had no choice but to order a stay. When a criminal trial gains notoriety because of the nature of the offence, the parties charged or any other reason, there is an added burden in the paramount interest of ensuring fairness in the process. In this case, the fact that the offences alleged were many years in the past and that the accused had a high profile in the community called for a careful prosecution to ensure fairness and the maintenance of integrity in the process. The conduct of the Crown during the time the trial judge was involved, as well as in the months before his appointment, was negligent, incompetent and unfair. The trial judge was in the best position to observe the conduct of the Crown and its effect on the proceedings. He found that the trial had become so tainted that it violated fundamental principles underlying the community's sense of fair play and decency and that the accused was impaired in his ability to make full answer and defence.

(2) Production of Records in the Possession of the Crown

Per Lamer C.J. and Sopinka J.: The Crown's disclosure obligations established in Stinchcombe are unaffected by the confidential nature of therapeutic records when the records are in the possession of the Crown. The complainant's privacy interests in therapeutic records need not be balanced against the right of the accused to make full answer and defence in the context of disclosure, since concerns relating to privacy or privilege disappear where the documents in question have fallen into the Crown's possession. The complainant's lack of a privacy interest in records that are possessed by the Crown counsels against a finding of privilege in such records. Fairness must require that if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his or her defence. Moreover, any form of privilege may be forced to yield where such a privilege would preclude the accused's right to make full answer and defence. Information in the possession of the Crown which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed to the accused, regardless of any potential claim of privilege that might arise. While the mere existence of therapeutic records is insufficient to establish the relevance of those records to the defence, their relevance must be presumed where the records are in the Crown's possession.

Per Cory and Iacobucci JJ.: The principles set out in the Stinchcombe decision, affirmed in Egger, pertaining to the Crown's duty to disclose must apply to therapeutic records in the Crown's possession, as found by Lamer C.J. and Sopinka J.

Per Major J.: The Crown's disclosure obligations established in Stinchcombe are unaffected by the confidential nature of therapeutic records in its possession, as found by Lamer C.J. and Sopinka J.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: This appeal does not concern the extent of the

Crown's obligation to disclose private records in its possession, or the question whether privacy and equality interests may militate against such disclosure by the Crown. These issues do not arise in this appeal and were not argued before the Court. Any comment on these questions would be strictly obiter.

(3) Production of Records in the Possession of Third Parties

Per Lamer C.J. and Sopinka J.: When the defence seeks information in the hands of a third party (as compared to the state), the onus should be on the accused to satisfy a judge that the information is likely to be relevant. In order to initiate the production procedure, the accused must bring a formal written application supported by an affidavit setting out the specific grounds for production. However, the court should be able, in the interests of justice, to waive the need for a formal application in some cases. In either event, notice must be given to third parties in possession of the documents as well as to those persons who have a privacy interest in the records. The accused must also ensure that the custodian and the records are subpoenaed to ensure their attendance in the court. The initial application for disclosure should be made to the judge seized of the trial, but may be brought before the trial judge prior to the empanelling of the jury, at the same time that other motions are heard. In the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be useful to the defence. In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. While "likely relevance" is the appropriate threshold for the first stage of the two-step procedure, it should not be interpreted as an onerous burden upon the accused. A relevance threshold, at this stage, is simply a requirement to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production.

Upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. In making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. In balancing the competing rights in question, the following factors should be considered: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or bias; and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record. The effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome, is more appropriately dealt with at the admissibility stage and not in deciding whether the information should be produced. As for society's interest in the reporting of sexual crimes, there are other avenues available to the judge to ensure that production does not frustrate the societal interests that may be implicated by the production of the records to the defence. In applying these factors, it is also appropriate to bear in mind that production of third party records is always available to the Crown provided it can obtain a search warrant.

Per Cory and Iacobucci JJ.: The procedure suggested by Lamer C.J. and Sopinka J. for determining whether records in the possession of third parties are likely to be relevant was agreed with, as were their reasons pertaining to the nature of the onus resting upon the accused and the nature of the balancing process which must be undertaken by the trial judge.

Per Major J.: The substantive law and the procedure recommended by Lamer C.J. and Sopinka J. in obtaining therapeutic records from third persons were agreed with.

Per La Forest, L'Heureux-Dubé and Gonthier JJ. (dissenting on this issue): Private records, or records in which a reasonable expectation of privacy lies, may include medical or therapeutic records, school records, private diaries and social worker activity logs. An order for production of private records held by third parties does not arise as a remedy under s. 24(1) of the Charter since, at the moment of the request for production, the accused's rights under the Charter have not been violated. Nonetheless, when deciding whether to order production of private records, the

court must exercise its discretion in a manner that is respectful of Charter values. The constitutional values involved here are the right to full answer and defence, the right to privacy, and the right to equality without discrimination.

Witnesses have a right to privacy in relation to private documents and records which are not part of the Crown's "case to meet" against the accused. They are entitled not to be deprived of their reasonable expectation of privacy except in accordance with the principles of fundamental justice. Since an applicant seeking production of private records from third parties is seeking to invoke the power of the State to violate the privacy rights of other individuals, the applicant must show that the use of the State power to compel production is justified in a free and democratic society. The use of State power to compel production of private records will be justified in a free and democratic society when the following criteria are met: (1) it is shown that the accused cannot obtain the information sought by any other reasonable means; (2) production that infringes privacy must be as limited as reasonably possible to fulfil the right to make full answer and defence; (3) the arguments urging production rest on permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes; and (4) there is proportionality between the salutary and deleterious effects of production. The measure of proportionality must reflect the extent to which a reasonable expectation of privacy vests in the particular records, on the one hand, and the importance of the issue to which the evidence relates, on the other. Moreover, courts must remain alive to the fact that, in certain cases, the deleterious effects of production may demonstrably include negative effects on the complainant's course of therapy, threatening psychological harm to the individual concerned and thereby resulting in a concomitant deprivation of the individual's security of the person.

The first step for an accused who seeks production of private records held by a third party is to obtain and serve on the third party a subpoena duces tecum. When the subpoena is served, the accused should notify the Crown, the subject of the records, and any other person with an interest in the confidentiality of the records that the accused will ask the trial judge for an order for their production. Then, at the trial, the accused must bring an application supported by appropriate affidavit evidence showing that the records are likely to be relevant either to an issue in the trial or to the competence to testify of the subject of the records. If the records are relevant, the court must balance the salutary and deleterious effects of ordering that the records be produced to determine whether, and to what extent, production should be ordered.

The records at issue here are not within the possession or control of the Crown, do not form part of the Crown's "case to meet", and were created by a third party for a purpose unrelated to the investigation or prosecution of the offence. It cannot be assumed that such records are likely to be relevant, and if the accused is unable to show that they are, then the application for production must be rejected as it amounts to nothing more than a fishing expedition. The burden on an accused to demonstrate likely relevance is a significant one. It would be insufficient for the accused to demand production simply on the basis of a bare, unsupported assertion that the records might impact on "recent complaint" or the "kind of person" the witness is. Similarly, the applicant cannot simply invoke credibility "at large", but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant's credibility on a particular, material issue at trial. Equally inadequate is a bare, unsupported assertion that a prior inconsistent statement might be revealed, or that the defence wishes to explore the records for "allegations of sexual abuse by other people". Similarly, the mere fact that a witness has a medical or psychiatric record cannot be taken as indicative of the potential unreliability of the evidence. Any suggestion that a particular treatment, therapy, illness, or disability implies unreliability must be informed by cogent evidence, rather than stereotype, myth or prejudice. Finally, it must not be presumed that the mere fact that a witness received treatment or counselling after a sexual assault indicates that the records will contain information that is relevant to the defence. The focus of therapy is vastly different from that of an investigation or other process undertaken for the purposes of the trial. While investigations and witness testimony are oriented toward ascertaining historical truth, therapy generally focuses on exploring the complainant's emotional and psychological responses to certain events, after the alleged assault has taken place.

If the trial judge decides that the records are likely to be relevant, then the analysis proceeds to the second stage, which has two parts. First, the trial judge must balance the salutary and deleterious effects of ordering the production of the records to the court for inspection, having regard to the accused's right to make full answer and defence, and the effect of such production on the privacy and equality rights of the subject of the records. If the

judge concludes that production to the court is warranted, he or she should so order. Next, upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. Production should only be ordered in respect of those records, or parts of records, that have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice or by the harm to the privacy rights of the witness or to the privileged relation. The following factors should be considered in this determination: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or bias; (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record; (6) the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and (7) the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome. Where a court concludes that production is warranted, it should only be made in the manner and to the extent necessary to achieve that objective.

A preliminary inquiry judge is without jurisdiction to order the production of private records held by third parties. The disclosure order in the present case did not emanate from a preliminary inquiry judge, but was issued in response to a pre-trial application by the defence. Even a superior court judge, however, should not, in advance of the trial, entertain an application for production of private third party records. Such applications should be heard by the judge seized of the trial, rather than a pre-trial judge. In addition, it is desirable for the judge hearing an application for production to have had the benefit of hearing, and pronouncing upon, the defence's earlier applications, so as to minimize the possibility of inconsistency in the treatment of two similar applications. More generally, applications for production of third party records should not be entertained before the commencement of the trial, even by the judge who is seized of the trial. First, the concept of pre-trial applications for production of documents held by third parties is alien to criminal proceedings. Second, if pre-trial applications for production from third parties were permitted, it would invite fishing expeditions, create unnecessary delays, and inconvenience witnesses by requiring them to attend court on multiple occasions. Moreover, a judge is not in a position, before the beginning of the trial, to determine whether the records in question are relevant, much less whether they are admissible, and will be unable to balance effectively the constitutional rights affected by a production order.

Since the right of the accused to a fair trial has not been balanced with the competing rights of the complainant to privacy and to equality without discrimination in this case, a new trial should be ordered.

Per McLachlin J. (dissenting on this issue): L'Heureux-Dubé J.'s reasons were concurred in entirely. The test proposed strikes the appropriate balance between the desire of the accused for complete disclosure from everyone of everything that could conceivably be helpful to his defence, on the one hand, and the constraints imposed by the trial process and privacy interests of third parties who find themselves caught up in the justice system, on the other, all without compromising the constitutional guarantee of a trial which is fundamentally fair. The Charter guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. What the law demands is not perfect justice, but fundamentally fair justice.

Cases Cited

By L'Heureux-Dubé J.

Referred to: R. v. O'Connor (1994), 90 C.C.C. (3d) 257; A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536; R. v. Stinchcombe, [1991] 3 S.C.R. 326; R. v. Jewitt, [1985] 2 S.C.R. 128; R. v. Keyowski, [1988] 1 S.C.R. 657, aff'g (1986), 28 C.C.C. (3d) 553; R. v. Mack, [1988] 2 S.C.R. 903; R. v. Conway, [1989] 1 S.C.R. 1659; R. v. Scott, [1990] 3 S.C.R. 979; R. v. Power, [1994] 1 S.C.R. 601; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; R. v. Beare, [1988] 2 S.C.R. 387; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Potvin, [1993] 2 S.C.R. 880; R. v. Collins,

yet where the circumstances nevertheless point to an abuse of the court's process. Because the question is not before us, however, I leave for another day any discussion of when such situations, if they indeed exist, may arise. As a general rule, however, there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant. More importantly, maintaining this somewhat artificial dichotomy may, over time, create considerably more confusion than it resolves.

71 The principles of fundamental justice both reflect and accommodate the nature of the common law doctrine of abuse of process. Although I am willing to concede that the focus of the common law doctrine of abuse of process has traditionally been more on the protection of the integrity of the judicial system whereas the focus of the Charter has traditionally been more on the protection of individual rights, I believe that the overlap between the two has now become so significant that there is no real utility in maintaining two distinct analytic regimes. We should not invite schizophrenia into the law.

72 I therefore propose to set down some guidelines for evaluating, first, whether there has been a violation of the Charter that invokes concerns analogous to those traditionally raised under the doctrine of abuse of process and, second, the circumstances under which the remedy of a judicial stay of proceedings will be "appropriate and just", as required by s. 24(1) of the Charter.

(ii) Section 7, Abuse of Process and Non-disclosure

73 As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the Charter. Depending on the circumstances, different Charter guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b) of the Charter, to which the jurisprudence of this Court has now established fairly clear guidelines (Morin, supra). Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in ss. 7 and 11(d) of the Charter. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

74 Non-disclosure by the Crown normally falls within the second category described above. Consequently, a challenge based on non-disclosure will generally require a showing of actual prejudice to the accused's ability to make full answer and defence. In this connection, I am in full agreement with the Court of Appeal that there is no autonomous "right" to disclosure in the Charter (at pp. 148-49 C.C.C.):

> ...the right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence. It is not itself a constitutionally protected right. What this means is that while the Crown has an obligation to disclose, and the accused has a right to all that which the Crown is obligated to disclose, a simple breach of the accused's right to such disclosure does not, in and of itself, constitute a violation of the Charter such as to entitle a remedy under s. 24(1). This flows from the fact that the non-disclosure of information which ought to have been disclosed because it was relevant, in the sense there was a reasonable possibility it could assist the accused in making full answer and defence, will not amount to a violation of the accused's s. 7 right not to be deprived of liberty except in accordance with the principles of fundamental justice unless the accused establishes that the non-disclosure has probably prejudiced or had an adverse effect on his or her ability to make full answer and defence.

> It is the distinction between the "reasonable possibility" of impairment of the right to make full answer and defence and the "probable" impairment of that right which marks the difference between a mere breach of the right to relevant disclosure on the one hand and a constitutionally material non-disclosure on the other. [Italics in original; underlining added.]

Where the accused seeks to establish that the non-disclosure by the Crown violates s. 7 of the Charter, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. It goes without saying that such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot possibly be a violation of the Charter in this respect. I would note, moreover, that inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned actions on the fairness of the accused's trial. Once a violation is made out, a just and appropriate remedy must be found.

(iii) The Appropriate Remedy to a s. 7 Violation for Non-disclosure

75 Where there has been a violation of a right under the Charter, s. 24(1) confers upon a court of competent jurisdiction the power to confer "such remedy as the court considers appropriate and just in the circumstances". Professor Paciocco, supra, at p. 341, has recommended that a stay of proceedings will only be appropriate when two criteria are fulfilled:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice.

I adopt these guidelines, and note that they apply equally with respect to prejudice to the accused or to the integrity of the judicial system.

76 As I have stated, non-disclosure will generally violate s. 7 only if it impairs the accused's right to full answer and defence. Although it is not a precondition to a disclosure order that there be a Charter violation, a disclosure order can be a remedy under s. 24(1) of the Charter. Thus, where the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate.

77 There may, however, be exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy through reasonable means the prejudice to the accused's right to make full answer and defence. In such cases, the drastic remedy of a stay of proceedings may be necessary. Although I will return to this matter in my discussion on the disclosure of records held by third parties, we must recall that, under certain circumstances, the defence will be unable to lay the foundation for disclosure of a certain item until the trial has actually begun and witnesses have already been called. In those instances, it may be necessary to take measures such as permitting the defence to recall certain witnesses for examination or cross-examination, adjournments to permit the defence to subpoena additional witnesses or even, in extreme circumstances, declaring a mistrial. A stay of proceedings is a last resort, to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted.

78 When choosing a remedy for a non-disclosure that has violated s. 7, the court should also consider whether the Crown's breach of its disclosure obligations has also violated fundamental principles underlying the community's sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system. If so, it should be asked whether this prejudice is remediable. Consideration must be given to the seriousness of the violation and to

the societal and individual interests in obtaining a determination of guilt or innocence. Although some of the most salient considerations are discussed immediately below, that discussion is by no means exhaustive.

79 Among the most relevant considerations are the conduct and intention of the Crown. For instance, non-disclosure due to a refusal to comply with a court order will be regarded more seriously than non-disclosure attributable to inefficiency or oversight. It must be noted, however, that while a finding of flagrant and intentional Crown misconduct may make it significantly more likely that a stay of proceedings will be warranted, it does not follow that a demonstration of mala fides on the part of the Crown is a necessary precondition to such a finding. As Wilson J. observed for the Court in Keyowski, supra, at p. 659:

> To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine.... Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's [conduct] amounts to an abuse of process.

80 Another pertinent consideration will be the number and nature of adjournments attributable to the Crown's conduct, including adjournments attributable to its failure to disclose in a timely manner. Every adjournment and/or additional hearing caused by the Crown's breach of its obligation to disclose may have physical, psychological and economic consequences upon the accused, particularly if the accused is incarcerated pending trial. In all fairness, however, the Crown may also seek to establish by evidence that the accused is in the majority group of persons who benefit from a delay in the proceedings because they do not want an early trial: Morin, supra, at pp. 802-3.

81 Finally, in determining whether the prejudice to the integrity of the judicial system is remediable, consideration must be given to the societal and individual interests in obtaining a determination of guilt or innocence. It goes without saying that these interests will increase commensurately to the seriousness of the charges against the accused. Consideration should be given to less drastic remedies than a stay of proceedings (see for example R. v. Burlingham, [1995] 2 S.C.R. 206, where, although I agreed with the majority that the Crown's conduct in disregarding the plea bargain made with the accused did not amount to one of the "clearest of cases" requiring a stay of proceedings, I would have nonetheless found a violation of the accused's rights under s. 7 and substituted a conviction for the lesser included offence which was the object of the plea bargain).

82 It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

(iv) Summary

83 Where life, liberty or security of the person is engaged in a judicial proceeding, and it is proved on a balance of probabilities that the Crown's failure to make proper disclosure to the defence has impaired the accused's ability to make full answer and defence, a violation of s. 7 will have been made out. In such circumstances, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Although the remedy for such a violation will typically be a disclosure order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those "clearest of cases", a stay of proceedings will be appropriate.

C. Application to the Facts

84 The motion which prompted Thackray J.'s pronouncement of a stay of proceedings was the fifth such motion since the trial judge was seized of the case. It was only the second, however, that related in any way to non-disclosure by the Crown. The first motion for a stay based upon non-disclosure, which Thackray J. rejected in reasons delivered on November 27, pertained to non-disclosures relating to the order of Campbell A.C.J., which in

turn governed the production of materials which were almost exclusively in the hands of third parties. Much of the delayed disclosure by the Crown of the complainants' medical and therapeutic records, even after the order of Campbell A.C.J., seems to have been genuinely motivated by a desire to protect the privacy interests of the complainants, and not to compromise the rights of the accused. Some of the non-disclosure was attributable to simple incompetence. Thackray J. concluded as much when he noted that there was no evidence to suggest any "grand design by the Crown to conceal evidence" (p. 105). Although, for reasons which appear below, I agree that the scope and nature of the disclosure order were unacceptably broad, I agree with the Court of Appeal that a more appropriate route for the Crown to have taken would have been to apply for a variation of the original disclosure order, in which the Crown would have sought greater accommodation for the privacy interests of the individual complainants involved.

85 Nonetheless, due in part to an undertaking by the Crown on November 28 to disclose to the defence its complete files on the case, there is no dispute that the order of Campbell A.C.J. had been fully complied with by the Crown at the time of the fifth application by the defence for a stay of proceedings. This fifth application was founded upon the non-disclosure of a full transcript of a witness interview which had previously only partly been disclosed to the defence, the non-disclosure of several diagrams produced by witnesses in the course of their preparations with the Crown, and the failure of Crown counsel to be able to assure the court on the third day of the trial that all relevant documents in Ms. Harvey's computer files had been fully disclosed to the defence. Defence counsel exhorted the trial judge to consider, as well, the previous disclosure difficulties encountered by the defence.

86 In granting the stay of proceedings on December 7, Thackray J. concluded that the Crown's previous uncooperativeness in response to Campbell A.C.J.'s disclosure order had created an "aura" which ultimately pervaded and destroyed the case. In the November 27 ruling refusing the fourth application for a stay, however, Thackray J. had ruled that although the Crown's excuses for non-disclosure were "limp" and indicative of incompetence, there was no evidence to suggest any "grand design by the Crown to conceal evidence" (p. 105). Given that the order of Campbell A.C.J. had been fully complied with by the time of the fifth application for a stay, it is unclear what changed the trial judge's mind about the Crown's conduct in relation to that non-disclosure. Rather, it would appear that Thackray J. attached greatest significance to the fact that, notwithstanding that the trial had now begun, Crown counsel could still not provide the court with an assurance that all relevant information had been disclosed. This may have been the straw that broke the proverbial camel's back.

87 The frustration of the trial judge, forced on several occasions to intervene in order to further the disclosure process, is certainly understandable. As I have already noted, the Crown's failure to comply fully with the disclosure order of Campbell A.C.J. must not be regarded lightly. At the same time, however, we must place the considerable disclosure difficulties within their proper context. The considerable disclosure difficulties related almost entirely to the following: (1) materials which were not in the Crown's possession at the time of the making of the original disclosure order and which consequently, for reasons that I shall discuss below, the Crown is not under any obligation to produce; and (2) work product which, provided that it contains no material inconsistencies or additional facts not already disclosed to the defence, the Crown would also not ordinarily be obliged to disclose, were it not for the undertaking which it gave to the defence the weekend before the beginning of the trial. This was not a case where the Crown failed, for whatever reason, to disclose the fruits of an investigation undertaken by agents of the state. Much confusion was attributable to the fact that the law regarding the disclosure of third parties' private records was highly uncertain, and nobody was quite sure what to do.

88 In agreeing on November 28 to hand over its complete files in the case, the Crown may unwittingly have promised more than it could realistically deliver in such a short time, given the lack of computer literacy of one of the Crown counsel, the complexities involved in the preparation of the case, and the fact that the prosecution was being run from two different cities. These are, as the trial judge noted, "limp" excuses. Nonetheless, although the Crown, as an officer of the court, must always strive to fulfil its undertakings, the fact that the imperfect compliance which ultimately triggered the granting of the stay was with respect to a voluntary undertaking by the Crown rather than with respect to an order of the trial judge or a clear legal obligation is a factor that should not be ignored.

89 Finally, although the non-disclosure of the diagrams prepared by the witnesses, as well as certain of Ms.

R. v. Pringle, [2003] A.J. No. 118

Alberta Judgments

Alberta Provincial Court

Edmonton, Alberta

Lefever Prov. Ct. J.

Judgment: February 7, 2003.

Docket No.: 16019531

[2003] A.J. No. 118 | 2003 ABPC 7 | [2003] 7 W.W.R. 496 | 15 Alta. L.R. (4th) 131 | 324 A.R. 352 | 10 C.R. (6th) 53 | 35 M.V.R. (4th) 282 | 56 W.C.B. (2d) 621 | 48 C.H.R.R. D/111 | 2003 CarswellAlta 112

Between Her Majesty the Queen, and Jeffrey Donald Pringle

(176 paras.)

Case Summary

Civil rights — Security of the person — Detention and imprisonment — Unlawful search — Strip searches — Canadian Charter of Rights and Freedoms — Denial of rights — Remedies, acquittal.

Trial of Pringle on charges of impaired driving, refusing to provide a breath sample, failing to stop, and assaulting a police officer. Pringle brought a Charter application for an acquittal based on arbitrary detention and unreasonable search and seizure. Pringle had been driving a car after having consumed alcoholic beverages. He evaded police, who sought to stop him because of his erratic driving. He willfully delayed providing a breath sample so that the two-hour window of opportunity expired. He was accused of punching a police officer while in the cells. However, there were discrepancies in the evidence surrounding that charge. After the alleged assault, the police decided that Pringle would be detained and subject to a strip search rather than being released as previously intended.

HELD: Pringle was acquitted of all the charges.

The Crown had proved that Pringle failed to provide a breath sample and failed to stop. However, it did not meet its burden on the charges of impaired driving and assaulting a police officer. Pringle established that his Charter rights were breached. The actions of the police in requiring his detention and strip search were high handed and unnecessary, and warranted an acquittal on all charges.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8, 9, 11(d).
Criminal Code, ss. 249.1(1), 253(a), 254(5), 270(1)(a).
Highway Traffic Act.

> the voir dire turned into; a judicial inquiry into the State's overall treatment of a subject who had been lawfully arrested. This is not what the Charter has necessitated. (my emphasis)
>
> The Crown has urged that, on the evidence, the respondent's detention was justified under the provisions of s. 452 of the Criminal Code. That may or may not be so. If it is disputed, it can be decided for or against the respondent in another, appropriate, forum, i.e., the Court of Queen's Bench of this province: Mills, supra, 26 C.C.C. (3d) 481. It does not have to be decided now. It should not be decided now.
>
> An adversarial criminal trial should retain its traditional function. Leaving aside clear and defined heads of exclusion such as involuntary confessions, unauthorized but intercepted private communication and the objects of s. 24(2) of the Charter, a criminal trial remains an inquiry, under all relevant evidence, to determine whether the accused, in truth, is guilty of a specified offence. That was the conclusion of the U.K. Criminal Law Revision Committee in 1972, a philosophy furthered in Canada by post-Charter cases such as: R. v. Collins, (1983), 5 C.C.C. (3d) 141, 148 D.L.R. (3d) 40, [1983] 5 W.W.R. 43; reversed 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265; R. v. Ericksen (1984), 13 C.C.C. (3d) 269, [1984] 5 W.W.R. 577, 56 B.C.L.R. 247; R. v. Dennis, Kubin and Frank (1984), 15 C.C.C. (3d) 527, 14 D.L.R. (4th) 205, 55 A.R. 366 (C.A.); and R. v. Phillips; R. v. Reid (1986), 26 C.C.C. (3d) 60, 27 D.L.R. (4th) 689, 44 Alta. L.R. (2d) 190 (C.A.).
>
> In this case the length, features or quality of his detention neither provided, altered nor destroyed evidence touching the solitary issue of Mr. Cutforth's driving capacity. It shed no light on the behaviour which brought about his arrest. Credibility was not affected. As the trial judge found, it could not trigger s. 24(2) of the Charter to suppress the evidence contained in the certificates of analysis. It provided no potential guidance to the court on what might be a fit sentence following a conviction. Detention, as an issue, stood alone and irrelevant. While the Canadian Charter of Rights and Freedoms has and will continue to affect much of Canadian societal and legal life, it did not recast the rules of relevancy. (my emphasis)
>
> If the occasion of a post-Charter criminal trial permits an open-ended review of all aspects of the arrest and detention of the accused as somehow probative of a substantive defence or answer to the indictment, the legacy is not attractive. ..."

91 McClung J.A. articulated the test for determining whether to address Charter infringements within a particular criminal trial in the following terms (Cutforth pp. 261-262):

> "The answer is to discourage the redress of Charter infringements within the trial at hand unless they are clearly relevant to the offences being tried. The test must be; does the breach alleged equate to a recognized defence in law or did the breach alleged create evidence which should be excluded under the application of s. 24(2) of the Charter of Rights and Freedoms.
>
> . . .
>
> To this I would respectfully add that the competent court should not be the trial court where the Charter infringement involved is foreign to the issues raised by the indictment (or information) or does not engage the trial court's exclusionary jurisdiction under s. 24(2)."

92 In my view, the conclusions reached by the Court of Appeal in Cutforth (at page 261-262) in respect of the required nexus between the alleged Charter breach and the issues raised in the criminal trial are in pari materia to the conclusions reached by the Newfoundland Court of Appeal in Simpson C.A. (at page 394). With respect, it is my view that the underlying assumption inherent in Cutforth has been over-ruled by the Supreme Court of Canada in Simpson. Further support for the conclusion that Cutforth has been over-ruled can be found in R. v. Golden, [2001] S.C.J. No. 81 ("Golden") discussed later in the context of the argument that the strip search of Pringle was violative of his s. 8 Charter rights.

93 Cutforth also held that where the Charter infringement was seen as foreign to the issues raised in the indictment or information, the trial court was not the "competent court" to address the Charter breach (Cutforth at page 262).

This conclusion differs from the conclusion reached in Simpson C.A. on the same point (Simpson C.A. at page 402).

94 With respect, in my view the jurisdictional view taken in Cutforth has been over-ruled in Simpson. The Provincial Court of Alberta is a court of competent jurisdiction to grant a judicial stay where a breach of s. 9 of the Charter or where a breach of other Charter rights has been established and the presiding judge determines that a judicial stay is the appropriate and just remedy under s. 24 (1) of the Charter.

95 In my opinion, the law now is clear that where a breach of an accused's Charter rights occurs within a criminal investigation, it is a matter of discretion for the trial judge to determine if, from the full panoply of Charter remedies, a judicial stay should be entered. Where the Charter breach arises outside of the offences being tried in the sense that the breach did not "equate to a recognized defence in law or . . . create evidence which should be excluded under the application of s. 24 (2)", or where the Charter breach may constitute a "civil tort and a constitutional tort", by application of s. 24 (1), a court of competent jurisdiction may issue a judicial stay (or other Charter remedies) in respect of the criminal proceedings.

96 The test to determine whether or not to issue a judicial stay under either s 24 (1) or s. 24 (2) of the Charter remains as set out in R. v. O'Connor, [1995] 4 S.C.R. 411, R. v. Carosella, [1997] 1 S.C.R. 80, and R. v. Tobiass, [1997] 3 S.C.R. 391 ("Tobiass").

97 In the per curiam judgment in Tobiass in respect of the first requirement, the Supreme Court stated (at para 91):

> "The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future. See O'Connor, at para. 82. For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category. See O'Connor, at para. 75. The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well - - society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare." (my emphasis)
>
> Strip search - s. 8 of the Charter

98 The issue of strip searches constituting a breach of s. 8 Charter rights and the related issue of remedies in that context has recently been considered by the Supreme Court of Canada in Golden, where, in considering the nature of strip searches, the Court held strip searches were (para. 90):

> ". . . inherently humiliating and degrading for detainees regardless of the manner in which they [were] carried out . . . and for this reason they [could] not be carried out simply as a matter of routine policy."

99 In R. v. Simmons, [1988] 2 S.C.R. 495 ("Simmons") and R. v. Monney, [1999] 1 S.C.R. 652 ("Monney"), the Supreme Court of Canada had concluded that people do not expect to be able to cross international borders free from scrutiny and that strip searches of travelers, carried out pursuant to s. 98 of the Customs Act, R.S.C. 1985, (2d Supp.), did not violate s. 8 of the Charter. In reaching this conclusion, the Court made it clear that this conclusion was based upon the unique factual circumstances presented by border crossing cases (Golden, paras. 73-74).

100 Prior to Golden, the Supreme Court of Canada had acknowledged the common law principle that searches of the person incident to arrest were an established exception to the general rule that warrantless searches are prima

facie illegal (see Golden at para. 73 and 74); (Simmons; Monney). However, before Golden the constitutionality of strip searches incident to arrest had not previously been addressed by the Court.

101 The key issues addressed in Golden were whether the search incident to arrest power was broad enough to encompass the authority to strip search an individual, and assuming that there was a common law power to strip search as incidental to arrest, whether such a power was reasonable.

102 Iacobucci and Arbour JJ. were explicit in stating that the only court in Canada that had addressed the issue of whether strip searches incident to arrest were constitutional was the Ontario Court of Appeal in R. v. Morrison (1987), 35 C.C.C. (3d) 437 ("Morrison"), where Dubin J.A. "concluded that a strip search of a female detainee arrested for theft and possession of stolen goods and cash did not violate s. 8 of the Charter and that the evidence discovered in the search, namely marijuana, was therefore admissible." Golden (para. 77).

103 Iacobucci and Arbour JJ. then note that in two subsequent decisions contrary to Morrison, R. v. Ferguson (1990), 1 C.R. (4th) 53; and R. v Flintoff (1998), 16 C.R. (5th) 248), the Ontario Court of Appeal had held that strip searches did violate s. 8 (Golden, paras. 79-80):

> "In R. v. Flintoff (1998), 16 C.R. (5th) 248, (Ont. C.A.), the accused was arrested for impaired driving and taken to the police station for a breathalyzer test. Prior to the breathalyzer test, the accused was strip searched as part of the routine policy of the police department and not on the basis of any circumstances related to the particular case. After the strip search, the appellant was taken to the breathalyzer room and failed the test. The Ontario Court of Appeal concluded that it was unreasonable to strip search the appellant and that the breach of s. 8 was serious. Accordingly, the court held that the breathalyzer evidence should be excluded and the decision of the trial judge dismissing the charge restored.
>
> At the trial level, there are numerous examples of cases involving strip searches performed as an incident to arrest. In some cases, the courts have concluded that the strip searches did not constitute a s. 8 violation, while in other cases similar searches have been held to violate s. 8. In R. v. Stott, [1997] O.J. No. 5449 (Prov. Div.) [summarized 37 W.C.B. (2d) 390], a strip search of an individual arrested for impaired driving carried out as a matter of routine police policy was held not to violate s. 8. Similarly, in R. v. K.D.S. (1990), 65 Man. R. (2d) 301 (Q.B.), the strip search of a young offender at the police station as part of normal police procedure following his arrest for possession of a stolen licence plate was held not to be a violation of s. 8. Strip searches accompanied by the threat of a subsequent body cavity search as an incident to arrest have also been found not to infringe s. 8: R. v. Miller, [1993] B.C.J. No. 1613 (S.C.) [summarized 20 W.C.B. (2d) 294]. On the other hand, a routine strip search of a female accused arrested for theft and possession of stolen property was held not to be authorized by the common law of search incident to arrest in R. v. King, [1999] O.J. No. 565 (Gen. Div.). Also, in R. v. Kalin, [1987] B.C.J. No. 2580 (Co. Ct.), a routine strip search conducted at the police station following an arrest for impaired driving was held to be unreasonable under s. 8 of the Charter. As these cases illustrate, there is inconsistency in the lower court decisions as to when strip searches are reasonable and when they are unreasonable under s. 8."

104 When considering the scope of the power to strip search in Golden, Iacobucci and Arbour JJ. distinguished strip searches from other types of searches, including "pat-down" or frisk searches, and the more intrusive, body cavity searches, accepting as the definition of strip search the following (Golden para. 47):

> "The appellant submits that the term 'strip search' is properly defined as follows: the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments."

105 The facts underlying the Golden decision led the Supreme Court to conclude the accused had been subjected to three strip searches in the context of a cocaine take-down. The first occurred when the police having strip-searched the appellant at the scene of the take-down. The accused was then searched in the "privacy" of a

Reference Re Public Service Employee Relations Act (Alberta)

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Beetz, McIntyre, Chouinard *, Wilson, Le Dain and La Forest JJ.

1985: June 27, 28 / 1987: April 9.

[page314]

File No: 19234.

[1987] 1 S.C.R. 313 | [1987] 1 R.C.S. 313 | [1987] S.C.J. No. 10 | [1987] A.C.S. no 10

IN THE MATTER OF A REFERENCE under section 27(1) of the Judicature Act, being chapter J-1 of the Revised Statutes of Alberta, 1980; AND IN THE MATTER OF the validity of compulsory arbitration provisions found in the Public Service Employee Relations Act, the Labour Relations Act, and the Police Officers Collective Bargaining Act, being chapters P-33, L-1.1 and P-12.05 of the Revised Statutes of Alberta, 1980 respectively; AND IN THE MATTER OF the exclusion of certain employees from units for collective bargaining Alberta Union of Provincial Employees, Canadian Union of Public Employees and Alberta International Fire Fighters Association, appellants; and Attorney General of Manitoba, intervener for the appellants; v. Attorney General for Alberta, respondent; and Attorney General of Canada, Attorney General for Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Prince Edward Island, Attorney General for Saskatchewan and Attorney General of Newfoundland, interveners for the respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

* Chouinard J. took no part in the judgment.

Case Summary

Constitutional law — Charter of Rights — Freedom of association — Scope of protection in labour relations context — Provincial legislation prohibiting strikes and lock-outs — Legislation providing for arbitration-- Whether provincial legislation violated s. 2(d) of the Charter — If infringed, whether such violation justifiable under s. 1 of the Charter — Public Service Employee Relations Act, R.S.A. 1980, c. P-33, ss. 48, 49, 50, 55, 93, 94 — Labour Relations Act, R.S.A. 1980 (Supp.), c. L-1.1, ss. 117.1, 117.2, 117.3, 117.8 — Police Officers Collective Bargaining Act S.A. 1983, c. P-12.05, ss. 2(2), 3, 9, 10, 15.

The Lieutenant-Governor in Council of Alberta, in accordance with s. 27(1) of the Judicature Act of that Province, referred to the Alberta Court of Appeal several constitutional questions which raised two main issues: (1) whether the provisions of the Public Service Employee Relations Act, the Labour Relations Act and the Police Officers Collective Bargaining Act of Alberta, which prohibit strikes and impose compulsory arbitration to resolve impasses in collective bargaining, were inconsistent with the Canadian Charter of Rights and Freedoms; and (2) whether the provisions of the Acts relating to the conduct of the arbitration and which limit the arbitrability of certain items and require the arbitration board to consider certain factors in making the arbitration award were inconsistent with the Charter. The first Act applied to public service employees, the second to firefighters and hospital employees and the third one to police officers. The majority of the Court of Appeal of Alberta answered the first issue in the negative and declined to answer the second issue. This appeal is to determine whether the Alberta legislation infringes the guarantee of freedom of association in s. 2(d) of the Charter and, if so, whether such violation can be justified under s. 1.

Held (Dickson C.J. and Wilson J. dissenting): The appeal should be dismissed.

Per Beetz, Le Dain and La Forest JJ.: The challenged provisions of the Public Service Employee Relations Act, the Labour Relations Act and the Police Officers Collective Bargaining Act were not inconsistent with the Charter. The constitutional guarantee of freedom of association in s. 2(d) of the Charter does not include, in [page315] the case of a trade union, a guarantee of the right to bargain collectively and the right to strike. In considering the meaning that must be given to freedom of association in s. 2(d) of the Charter, it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

In considering whether it is reasonable to ascribe such a sweeping intention to the Charter, the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one must be rejected. Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. That is indicated by its express recognition and protection in labour relations legislation. It is a freedom that has been suppressed in varying degrees from time to time by totalitarian regimes.

What is in issue here is not the importance of freedom of association in this sense but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection is sought -- the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer -- are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that, in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action, this Court should be considering the substitution of its judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature [page316] has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the Charter to a review of particular legislation in this field demonstrates the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted.

Per McIntyre J.: The freedom of association in s. 2(d) of the Charter did not give constitutional protection to the right of a trade union to strike as an incident to collective bargaining. Freedom of association under the Charter means the freedom to engage collectively in those activities which are constitutionally protected for each individual. It means also the freedom to associate for the purposes of activities which are lawful when performed alone. Freedom of association, however, does not vest independent rights in the group. People cannot, by merely combining together, create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. The group can exercise only the constitutional rights of its members on behalf of those members. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association. Therefore, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual. This definition fully realizes the purpose of freedom of association which is to ensure that various goals may be pursued in common as well as individually. When this definition of freedom of association is applied, it is clear that freedom of association does not guarantee the right to strike. Since the right to strike is not independently protected under the Charter, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual.

Further, read in the context of the whole Charter, s. 2(d) cannot support an interpretation of freedom of association which could include a right to strike. Although strikes are commonplace in Canada and have been for many years, the framers of the Constitution did not include a specific reference to the right to strike in the Charter. This omission,

taken with the fact that the overwhelming preoccupation of the Charter is with individual, political, and democratic rights with conspicuous inattention to economic and property rights, speaks strongly against any implication of a right to strike.

[page317]

Finally, it must be recognized that the right to strike accorded by legislation throughout Canada is of relatively recent vintage. It cannot be said that at this time it has achieved status as a fundamental right which should be implied in the absence of specific reference in the Charter.

Consequently, the provisions of the Public Service Employee Relations Act, the Labour Relations Act and the Police Officers Collective Bargaining Act which prohibited the use of strikes and lockouts were not inconsistent with the provisions of the Charter since the Charter does not guarantee a right to strike. The provisions of the Acts which related to the conduct of arbitration were also not inconsistent with the Charter, since the Charter does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

Per Dickson C.J. and Wilson J. (dissenting): The purpose of the constitutional guarantee of freedom of association in s. 2(d) of the Charter is to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. While s. 2(d), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status in order to give effective protection to the interests to which the constitutional guarantee is directed and must protect the pursuit of the activities for which the association was formed. What freedom of association seeks to protect, however, is not associational activities qua particular activities, but the freedom of individuals to interact with, support and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional licence for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

In the context of labour relations, the guarantee of freedom of association in s. 2(d) of the Charter includes not only the freedom to form and join associations but also the freedom to bargain collectively and to strike. [page318] The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers, and the capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. It remains vital to the capacity of individual employees to participate in ensuring equitable and humane working conditions. Under our existing system of industrial relations, the effective constitutional protection of the associational interests of employees in the collective bargaining process also requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the Charter. Indeed, the right of workers to strike is an essential element in the principle of collective bargaining. This is not to say that s. 2(d) of the Charter entrenches for all time the existing system of labour relations. The area of industrial relations is subject to significant legislative regulation. The point is that this regulation cannot define the scope of the underlying freedom.

In the present case, the three statutes prohibited strikes and defined a strike as a cessation of work or refusal to work by two or more persons acting in combination or in concert or in accordance with a common understanding. There is no doubt that the Alberta legislation was aimed at foreclosing a particular collective activity because of its associational nature. The very nature of a strike is to influence an employer by joint action which would be ineffective if it were carried out by an individual. Therefore, s. 93 of the Public Service Employee Relations Act, s. 117.1(2) of the Labour Relations Act and s. 3(1) of the Police Officers Collective Bargaining Act, which directly abridged the freedom of employees to strike, infringed the guarantee of freedom of association in s. 2(d) of the Charter.

The limits on freedom of association imposed by these provisions were not justifiable under s. 1 of the Charter. The protection of the government from the political pressure of strike action from their employees was not an objective of sufficient importance for the purpose of s. 1 for limiting freedom of association through legislative prohibition of freedom to strike. It has not been shown that all public service employees have a substantial bargaining advantage on account of their employer's governmental status. Nor has it been shown that any political pressure exerted on the government during [page319] strikes was of an unusual or peculiarly detrimental nature.

The protection of essential services is a government objective of sufficient importance for the purpose of s. 1, but the government did not demonstrate that this objective justified the limit on freedom of association imposed by the abrogation of the right to strike. The essential quality of police officers and firefighters was obvious and self-evident, and did not have to be proven by evidence. Thus, the Legislature's decision to prevent interruption in police protection and firefighting was rationally connected to the objective of protecting essential services. But the prohibition of the right to strike of all hospital workers and public service employees was too drastic a measure for achieving the object of protecting essential services. Indeed, without some evidentiary basis, it was neither obvious nor self-evident that all those employees performed services "whose interruption would endanger the life, personal safety or health of the whole or part of the population". Section 93 of the Public Service Employee Relations Act and s. 117.1(2) of the Labour Relations Act, in so far as it pertains to the hospital employees under s. 117.1(1)(b), were too wide to be justified by relating to essential services for the purpose of s. 1.

Further, to impair as little as possible the freedom of association of those affected by a legislative prohibition to strike, such prohibition must also be accompanied by a mechanism for dispute resolution by a third party which would adequately safeguard workers' interest. In the present reference, the arbitration system provided by the Acts was not an adequate replacement for the employees' freedom to strike. While the provisions which required the arbitrator to consider the fiscal policies of the government and the wages and benefits of private and public unionized and non-unionized employees did not compromise the adequacy of the arbitration procedure, the exclusion of certain subjects from the arbitration process in the Police Officers Collective Bargaining Act and the Public Service Employee Relations Act did compromise the effectiveness of the process as a means of ensuring equal bargaining power in the absence of freedom to strike. Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration. It may be necessary in some circumstances for a government employer [page320] to maintain absolute control over aspects of employment through exclusion of certain subjects from arbitration, but the presumption must be against such exclusion to ensure that the effectiveness of an arbitration scheme as a substitute for freedom to strike is not compromised. Here, the government has not satisfied the onus upon it to demonstrate such necessity.

Finally, none of the arbitration schemes in the Acts provided a right to refer a dispute to arbitration. Rather, a discretionary power is placed in a Minister or an administrative board to establish an arbitration board if it is deemed appropriate. Such a discretionary power was an unjustified interference with the effectiveness of the arbitration procedure in promoting equality of bargaining power between the parties.

In sum, the provisions relating to the arbitration schemes did not themselves limit freedom of association. These provisions, however, with the exception of those requiring the arbitrator to consider certain factors in making the arbitration award, contributed to the inadequacy of the arbitration scheme as a replacement for the freedom to strike, and therefore to the failure of s. 93 of the Public Service Employee Relations Act, s. 117.1(2) of the Labour Relations Act and s. 3(1) of the Police Officers Collective Bargaining Act to be justified under s. 1.

Cases Cited

By McIntyre J.

Referred to: Hunter v. Southam Inc. [1984] 2 S.C.R. 145; R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295; Collymore v. Attorney-General, [1970] A.C. 538; Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store

activities for its members, to the establishment of union pension plans, to the discussion of collective bargaining strategy, could be prohibited by the state without infringing s. 2(d).

81 The essentially formal nature of a constitutive approach to freedom of association is equally apparent when one considers other types of associational activity in our society. While the constitutive approach might find a possible violation of s. 2(d) in a legislative enactment which prohibited marriage for certain classes of people, it would hold inoffensive an enactment which precluded the same people from engaging in the activities integral to a marriage, such as cohabiting and raising children together. If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of [page363] the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.

82 In my view, while it is unquestionable that s. 2(d), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed. In this respect, it is important to consider the purposive approach to constitutional interpretation mandated by this Court in R. v. Big M Drug Mart Ltd., supra, at p. 344:

> This Court has already, in some measure set out the basic approach to be taken in interpreting the Charter. In Hunter v. Southam Inc., [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood in other words in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be as the judgment in Southam emphasizes a generous rather than a legalistic one aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis added.]

83 A second approach, the derivative approach, prevalent in the United States, embodies a somewhat more generous definition of freedom of association than the formal, constitutive approach. In [page364] the Canadian context, it is suggested by some that associational action which relates specifically to one of the other freedoms enumerated in s. 2 is constitutionally protected, but other associational activity is not.

84 I am unable, however, to accept that freedom of association should be interpreted so restrictively. Section 2(d) of the Charter provides an explicit and independent guarantee of freedom of association. In this respect it stands in marked contrast to the First Amendment to the American Constitution. The derivative approach would, in my view, largely make surplusage of s. 2(d). The associational or collective dimensions of s. 2(a) and (b) have already been recognized by this Court in R. v. Big M Drug Mart Ltd., supra, without resort to s. 2(d). The associational aspect of s. 2(c) clearly finds adequate protection in the very expression of a freedom of peaceful assembly. What is to be learnt from the United States jurisprudence is not that freedom of association must be restricted to associational activities involving independent constitutional rights, but rather, that the express conferral of a freedom of association is unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms.

85 I am also unimpressed with the argument that the inclusion of s. 2(d) with freedoms of a "political" nature requires a narrow or restrictive interpretation of freedom of association. I am unable to regard s. 2 as embodying

purely political freedoms. Paragraph (a), which protects freedom of conscience and religion is quite clearly not exclusively political in nature. It would, moreover, be unsatisfactory to overlook our Constitution's history of giving special recognition to collectivities or communities of interest other than the government and political parties. Sections 93 and 133 of the Constitution Act, 1867 and ss. 16 - 24, 25, 27 and 29 of the Charter, dealing variously with denominational schools, language rights, aboriginal rights, and our multicultural heritage implicitly embody an awareness of the importance of various collectivities in the pursuit of educational, linguistic, cultural and social as well as political ends. Just as the individual is incapable of resisting political domination [page365] without the support of persons with similar values, so too is he or she, in isolation, incapable of resisting domination, over the long term, in many other aspects of life.

86 Freedom of association is protected in s. 2(d) under the rubric of "fundamental" freedoms. In my view, the "fundamental" nature of freedom of association relates to the central importance to the individual of his or her interaction with fellow human beings. The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. In the famous words of Alexis de Tocqueville in Democracy in America, (1945), vol. 1, at p. 196:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears ... almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live. As John Stuart Mill stated, "if public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured". (Principles of Political Economy (1893), vol. 2, at p. 352.)

87 Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through [page366] which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. T.I. Emerson, "Freedom of Association and Freedom of Expression" (1964), 74 Yale L.J. 1 at p. 1, states that:

> More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.

88 What freedom of association seeks to protect is not associational activities qua particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional license for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation.

89 I believe that Bayda C.J.S. was right in holding that s. 2(d) normally embraces the liberty to do collectively that which one is permitted to do as an individual, a proposition which one American writer, Reena Raggi perceives to

be the cornerstone of freedom of association:

> The basic principle for which recognition will be sought in the formulation of an independent constitutional right of association is that whatever action a person can pursue as an individual, freedom of association must ensure he can pursue with others. Only such a principle assures man that, in his struggle to be independent of government control, he will not be crippled simply because on occasion he strives to achieve that independence with the help of others.
>
> ("An Independent Right to Freedom of Association" (1977), 12 Harv. C.R. - C.L.L. Rev. 1 at p. 15.)

[page367]

However, it is not in my view correct to regard this proposition as the exclusive touchstone for determining the presence or absence of a violation of s. 2(d). Certainly, if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a bona fide prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g. criminal conduct), and not merely because of the fact that the activity might sometimes be done in association. The proposition articulated by Bayda C.J.S. is therefore a useful test of legislative purpose in some circumstances. There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

90 I wish to refer to one further concern. It has been suggested that associational activity for the pursuit of economic ends should not be accorded constitutional protection. If by this it is meant that something as fundamental as a person's livelihood or dignity in the workplace is beyond the scope of constitutional protection, I cannot agree. If, on the other hand, it is meant that concerns of an exclusively pecuniary nature are excluded from such protection, such an argument would merit careful [page368] consideration. In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.

91 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. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect. In exploring the personal meaning of employment, Professor David M. Beatty, in his article "Labour is Not a Commodity" in Studies in Contract Law (1980), has described it as follows, at p. 324:

> As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.

92 The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political

and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions. As Professor Paul Weiler explains in Reconcilable Differences: New [page369] Directions in Canadian Labour Law (1980), at p. 31:

> An apt way of putting it is to say that good collective bargaining tries to subject the employment relationship and the work environment to the "rule of law". Many theorists of industrial relations believe that this function of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law.

93 Professor Weiler goes on to characterize collective bargaining as "intrinsically valuable as an experience in self-government" (p. 33), and writes at p. 32:

> ... collective bargaining is the most significant occasion upon which most of these workers ever participate in making social decisions about matters that are salient to their daily lives. That is the essence of collective bargaining.

A similar rationale for endorsing collective bargaining was advanced in the Woods Task Force Report on Canadian Industrial Relations (1968), at p. 96:

> 296. One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place.

94 Closely related to collective bargaining, at least in our existing industrial relations context, is the freedom to strike. A.W.R. Carrothers, E.E. Palmer and W.B. Rayner, Collective Bargaining Law in Canada (2nd ed. 1986), describes the requisites of an effective system of collective bargaining as follows at p. 4:

> What are the requirements of an effective system of collective bargaining? From the point of view of employees, such a system requires that they be free to [page370] engage in three kinds of activity: to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining.

95 The Woods Task Force Report at p. 129 identifies the work stoppage as the essential ingredient in collective bargaining:

> 408. Strikes and lockouts are an indispensable part of the Canadian industrial relations system and are likely to remain so in our present socio-economic-political society.

96 At page 138 the Report continues:

> 431. Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be , there is no viable substitute in a free society.

At page 175 the Report notes that the acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike. And at p. 176, it is said, "The strike has become a part of the whole democratic system".

97 The importance to collective bargaining of the ultimate threat of a strike has also been recognized in the cases.

Roach v. Canada (Minister of State for Multiculturalism and Citizenship) (C.A.)

Federal Courts Reports

Federal Court of Canada - Court of Appeal

MacGuigan, Linden and McDonald, JJ.A.

Heard: Toronto, November 4, 1993.

Judgment: Ottawa, January 20, 1994.

Court File No. A-249-92

[1994] 2 F.C. 406 | [1994] F.C.J. No. 33

Charles C. Roach (Appellant) v. The Minister of State for Multiculturalism and Citizenship (Respondent)

Case Summary

Citizenship and Immigration — Status in Canada — Citizens — Appeal from decisions under R. 419 striking out declaration as disclosing no reasonable cause of action — Appellant seeking Canadian citizenship but unwilling to swear allegiance to Queen because of republican views — Whether oath of allegiance in Citizenship Act unconstitutional — Nature of oath explained — Taking of oath not coercive burden infringing appellant's Charter rights — Comparison between citizens by birth and non-citizens seeking citizenship through naturalization meaningless — Plain and obvious appellant having no chance of success at trial.

Constitutional law — Charter of Rights — Appellant alleging violation of Charter rights based on requirement in citizenship application to take oath or make affirmation of allegiance to Queen — Oath of allegiance binding so long as Constitution unamended — Not diminishing exercise of fundamental freedoms in Charter, s. 2(b), (c), (d) — Appellant having no chance of success at trial — Constitution ultimate criterion measuring laws, actions, discriminatory burdens.

This was an appeal from the judgment of Joyal J. sustaining the decision of Giles A.S.P. under Rule 419 striking out the appellant's declaration on the ground that it disclosed no reasonable cause of action. The appellant, a Toronto lawyer born in Trinidad and Tobago who has been a permanent resident of Canada and British subject for more than 34 years, applied for Canadian citizenship but, because of his republican views, he was unwilling to swear allegiance to the Queen, which is required as part of the oath-taking ceremony. He alleged that being required to take an oath or make an affirmation of allegiance to the Queen was a violation of his Charter rights. For that reason, he sought a declaration that he was entitled to a grant of citizenship without having to take the oath or affirmation of citizenship in its present form. The Trial Judge held that the oath or affirmation was to the Queen as Head of State, that the requirement for such oath or affirmation could not be challenged on Charter grounds and that the appellant's remedy lay in the political realm. The issue in this appeal was whether the oath of allegiance to the Queen contained in the Citizenship Act could be considered as a violation of the appellant's constitutional rights under the Charter.

Held (Linden J.A. dissenting in part), the appeal should be dismissed.

Per MacGuigan J.A.: An oath is a solemn declaration before God or on something sacred that a statement is true; an affirmation fills the same role for those who do not wish to take an oath. The oath of allegiance to the Queen as Head of State for Canada is binding in the same way as the rest of the Constitution of Canada so long as the Constitution is unamended in that respect. Given that the appellant did not advocate revolutionary change, that is change contrary to the Constitution itself, his freedom of expression, freedom of peaceful assembly and freedom of

association under section 2 of the Charter could not be limited by the oath of allegiance which in no way diminishes the exercise of those freedoms. It was "plain and obvious" and "beyond doubt" that the appellant would have no chance of success at trial in that regard. In arguing that the process to obtain citizenship requires from non-citizens an oath of allegiance to the Queen, which Canadian citizens by birth are not required to take, the appellant made a meaningless comparison of groups. Birth-citizens are not required to take an oath of allegiance because they need not submit to a process to obtain the citizenship they already have. Oaths or affirmations express a solemn intention to adhere to the symbolic keystone of the Canadian Constitution, thus pledging an acceptance of the whole of our Constitution and national life. The appellant could hardly complain that, in order to become a Canadian citizen, he had to express agreement with the fundamental structure of our country. The Constitution is itself the ultimate criterion by which all laws, actions and discriminatory burdens are measured.

Per Linden J.A. (dissenting in part): One of the main reasons behind the high threshold for striking out a statement of claim (or declaration) as disclosing no reasonable cause of action is to prevent a court from embarking on a resolution of factual issues raised in a case in the absence of any evidence. It is only in the most obvious cases that the opportunity to present evidence and full legal argument should be denied a litigant. With respect to both freedom of conscience and freedom of religion, the appellant had to show that the burden imposed on him by the oath was more than trivial or insubstantial. The appellant has not raised a plausible argument about the imposition of a coercive burden on his conscientiously-held views which bridle at swearing an oath to anyone but a Supreme Being. His real objection was not to the method of oath making but to its content. His claim under paragraph 2(a) of the Charter regarding freedom of conscience should therefore be struck out. Similarly, his allegation that the oath of citizenship restricts his freedom of religion since the Queen is the "Head of the Anglican Church" must be struck out. The oath requires no statement of allegiance to Anglicanism nor to the Queen in relation to her role in the Church of England. The appellant's claim with respect to effects on his freedom of religion did not disclose a burden which is more than trivial or insubstantial. The relationship between an oath of allegiance to the Queen in her capacity of Head of State and the appellant's religious practice and beliefs was too remote. Although freedom of thought, belief and opinion in paragraph 2(b) of the Charter is distinct from freedom of conscience, much of the same analysis could be applied to these freedoms: there must be some coercive burden flowing out of the impugned law. Given that, nowadays, freedom to criticize the monarchy and other Canadian institutions is guaranteed by the Charter and that, by taking this oath, the appellant might feel inhibited to some extent in his anti-monarchy activities, his claim with respect to freedom of thought should not be struck out. While there was no evidence to suggest that the purpose of the oath or affirmation of citizenship is to curtail freedom of expression, strict adherence to the oath or affirmation of loyalty to the Queen might be felt by the appellant to prevent him from expressing his republicanism, even though it might not in law actually do so. The appellant's claim that the oath or affirmation abridges his freedom of expression as guaranteed by paragraph 2(b) of the Charter should, therefore, not be struck out. Freedom of peaceful assembly was geared toward protecting the physical gathering together of people and was not intended to protect the objects of an assembly that is organized to foster freedom of thought, belief, opinion or expression, or freedom of association, for that would be protected independently. The portion of the appellant's declaration relating to freedom of peaceful assembly should, therefore, be struck out. With respect to freedom of association under paragraph 2(d) of the Charter, it could not be said at this stage that the appellant, given the opportunity to adduce evidence and arguments, could not succeed on that point and, therefore, this portion of the declaration should not be struck out. The standard for cruel and unusual treatment under section 12 of the Charter is whether the treatment outrages standards of decency. The consequences to the appellant of not swearing the oath or making the affirmation could not be said to outrage standards of decency and therefore, this portion of the declaration should be struck out.

The appellant's claim that the oath or affirmation is contrary to subsection 15(1) of the Charter could be justified by the fact that a permanent resident desiring to become a naturalized citizen is required to take the oath while people who are Canadian citizens by birth are not. Non-citizens would be denied equality under the law in that the Citizenship Act appears to draw a distinction between two groups, namely people who attain citizenship automatically by birth and people who must apply for citizenship. In addition to the differential treatment, the appellant would have to demonstrate at trial that any inequality under the law is discriminatory. The appellant's claim under section 27 of the Charter should also be struck out as that provision is merely an aid to interpretation

and not a substantial provision that can be violated.

Statutes and Regulations Judicially Considered

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act, 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 2, 12, 15(1), 27. Citizenship Act, R.S.C., 1985, c. C-29, ss. 2, 5 (as am. by R.S.C., 1985 (3rd Supp.), c. 44, s. 1), 10, 12(3), 24. Citizenship Regulations, C.R.C., c. 400. Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by Canada Act 1982, 1982, c. 11 (U.K.), Schedule to the Constitution Act, 1982, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 9, 10, 11, 12, 13, 14, 15, 16, 17, 101. Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 41(a), 52. Criminal Code, R.S.C., 1985, c. C-46, s. 131 (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 17). Federal Court Rules, C.R.C., c. 663, R. 419.

Cases Judicially Considered

Applied:

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 142; (1989), 56 D.L.R. (4th) 1; [1989], 2 W.W.R. 289; 34 B.C.L.R. (2d) 273; 25 C.C.E.L. 255; 10 C.H.R.R. D/5719; 36 C.R.R. 193; 91 N.R. 255.

Considered:

R. v. Swain, [1991] 1 S.C.R. 933; (1991), 75 O.R. (2d) 388; 71 D.L.R. (4th) 551; 63 C.C.C. (3d) 481; 5 C.R. (4th) 253; 3 C.R.R. (2d) 1; 125 N.R. 1; 47 O.A.C. 81; Attorney General of Canada v. Inuit Tapirisat of Canada et al., [1980] 2 S.C.R. 735; (1980), 115 D.L.R. (3d) 1; 33 N.R. 304; Operation Dismantle Inc. et al. v. The Queen et al., [1985] 1 S.C.R. 441; (1985), 18 D.L.R. (4th) 481; 12 Admin. L.R. 16; 13 C.R.R. 287; 59 N.R. 1; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959; Benner v. Canada (Secretary of State), [1994] 1 F.C. 250; (1993), 155 N.R. 321 (C.A.); R. v. Bannerman (1966), 55 W.W.R. 257; 48 C.R. 110 (Man. C.A.); R. v. Morgentaler, [1988] 1 S.C.R. 30; (1988), 44 D.L.R. (4th) 385; 37 C.C.C. (3d) 449; 62 C.R. (3d) 1; 31 C.R.R. 1; 82 N.R. 1; 26 O.A.C. 1; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; (1986), 35 D.L.R. (4th) 1; 30 C.C.C. (3d) 385; 87 CLLC 14,001; 55 C.R. (3d) 193; 28 C.R.R. 1; 71 N.R. 161; 19 O.A.C. 239; Schachtschneider v. Canada, [1994] 1 F.C. 40; (1993), 154 N.R. 321 (C.A.); United States v. Schwimmer, 279 U.S. 644 (1929); Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; (1989), 58 D.L.R. (4th) 577; 25 C.P.R. (3d) 417; 94 N.R. 167; West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; (1987), 78 A.R. 1; 38 D.L.R. (4th) 161; [1987] 3 W.W.R. 577; 51 Alta. L.R. (2d) 97; 87 CLLC 14,021; [1987] D.L.Q. 225; 74 N.R. 99.

Referred to:

Omychund v. Barker (1744), 26 E.R. 15; R. v. Khan, [1990] 2 S.C.R. 531; (1990), 59 C.C.C. (3d) 92; 79 C.R. (3d) 1; 113 N.R. 53; 41 O.A.C. 353; R. v. B. (K.G.), [1993] 1 S.C.R. 740; R. v. Big M Drug Mart Ltd. et al., [1985] 1 S.C.R. 295; (1985), 60 A.R. 161; 18 D.L.R. (4th) 321; [1985] 3 W.W.R. 481; 37 Alta. L.R. (2d) 97; 18 C.C.C. (3d) 385; 85 CLLC 14,023; 13 C.R.R. 64; 58 N.R. 81; Schneiderman v. United States, 320 U.S. 118 (1943); R. v. Keegstra, [1990] 3 S.C.R. 697; (1990), 114 A.R. 81; [1991] 2 W.W.R. 1; 77 Alta. L.R. (2d) 193; 61 C.C.C. (3d) 1; 3 C.P.R. (2d) 193; 1 C.R. (4th) 129; 117 N.R. 284; R. v. Butler, [1992] 1 S.C.R. 452; R. v. Smith (Edward Dewey), [1987] 1 S.C.R. 1045; (1987), 40 D.L.R. (4th) 435; [1987] 5 W.W.R. 1; 15 B.C.L.R. (2d) 273; 34 C.C.C. (3d) 97; 58 C.R. (3d) 193; 31 C.R.R. 193; 75 N.R. 321; Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711; (1992), 90 D.L.R. (4th) 289; 2 Admin. L.R. (2d) 125; 72 C.C.C. (3d) 214; 8 C.R.R. (2d) 234; 16 Imm. L.R. (2d) 1; 135 N.R. 161; R. v. Turpin, [1989] 1 S.C.R. 1296; (1989), 48 C.C.C. (3d) 8; 69 C.R. (3d) 97; 39 C.R.R. 306; 96 N.R.

115; 34 O.A.C. 115; Symes v. Canada, [1993] 4 S.C.R. 695; Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219; (1989), 59 D.L.R. (4th) 321; [1989] 4 W.W.R. 193; 58 Man. R. (2d) 161; 26 C.C.E.L. 1; 10 C.H.R.R. D/6183; 89 CLLC 17,012; 45 C.R.R. 115; 94 N.R. 373; Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252; (1989), 59 D.L.R. (4th) 352; [1989] 4 W.W.R. 39; 58 Man. R. (2d) 1; 25 C.C.E.L. 1; 10 C.H.R.R. D/6205; 89 CLLC 17,011; 47 C.R.R. 274; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232; (1990), 111 N.R. 161; Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69; (1991), 82 D.L.R. (4th) 321; 37 C.C.E.L. 195; 91 CLLC 14,026; 125 N.R. 241; R. v. Seaboyer; R. v. Gayme, [1991] 2 S.C.R. 577; (1991), 7 C.R. (4th) 117; 128 N.R. 81; Schachter v. Canada, [1992] 2 S.C.R. 679; (1992), 93 D.L.R. (4th) 1; 92 CLLC 14,036; 10 C.R.R. (2d) 1; 139 N.R. 1; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519; (1993), 107 D.L.R. (4th) 342; 158 N.R. 1; R. v. Seaboyer (1987), 61 O.R. (2d) 290 (C.A.); R. v. Chief, [1990] N.W.T.R. 55; [1990] 1 W.W.R. 193; (1989), 39 B.C.L.R. (2d) 358; 51 C.C.C. (3d) 265; [1990] 1 C.N.L.R. 92; 74 C.R. (3d) 57; 44 C.R.R. 122 (Y.T.C.A.).

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APPEAL from Trial Division decision ([1992] 2 F.C. 173; (1992), 53 F.T.R. 241 (T.D.)) sustaining decision of Associate Senior Prothonotary striking out the appellant's declaration under Rule 419 on the ground that it disclosed no reasonable cause of action. Appeal dismissed.

Counsel

Charles C. Roach on his own behalf. Bonnie J. Boucher for respondent.

Solicitors

Charles C. Roach, Toronto, on his own behalf. Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

MACGUIGAN J.A.

1 In my view, Joyal J. as Trial Judge [[1992] 2 F.C. 173] and, before him, Giles A.S.P. were right in striking out the whole of the appellant's declaration under Rule 419 [Federal Court Rules, C.R.C., c. 663] on the ground that it disclosed no reasonable cause of action.

2 I have had the opportunity of reading the reasons for judgment of my brother Linden and I am in agreement with his explanation of the legislation, of the test for disclosing no reasonable cause of action, and of the nature of an oath, and with his striking out the appellant's claim with respect both to cruel and unusual treatment or punishment (section 12 of the Charter) [Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] and to the multicultural

heritage of Canadians (section 27). I am also in agreement with his reasons for striking out the appellant's declaration in relation to the freedom of conscience and religion (paragraph 2(b)), except that in my opinion the oath of allegiance could not be even a trivial or insubstantial interference with the appellant's exercise of those freedoms. I am not in agreement with the rest of my colleague's reasons for decision or with his disposition of the case.

3 An oath is a solemn declaration before God or on something sacred that a statement is true; an affirmation fills the same role for those who do not wish to take an oath. The oath of allegiance required under the Citizenship Act [R.S.C., 1985, c. C-29] is to the effect that the oath-taker (or affirmer) "will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors." Although there is an immemorial common law tradition behind the role of the monarch as Head of State, that is now subsumed by section 9 of the Constitution Act, 1867 [30 & 31 Vict., c. 3 (U.K.) (as am. by Canada Act 1982, 1982, c. 11 (U.K.), Schedule to the Constitution Act, 1982, Item 1) [R.S.C., 1985, Appendix II, No. 5]], which provides with respect to executive power that "The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen," and by section 17, which provides with respect to legislative power that "There shall be One Parliament for Canada, consisting of the Queen, or Upper House styled the Senate, and the House of Commons." Since Canada is a constitutional and not an absolute monarchy, the Queen does not rule personally, but rather may be said to "reign" by constitutional convention, through the advice of ministers drawn from the party with an actual or presumed majority in the House of Commons.[1]

4 If the provisions of the Constitution Act, 1867 and any others dependent on them (such as sections 10-16) were repealed or amended so as, for example, to substitute some differently designated person for the monarch, it cannot be doubted that the monarch would no longer be the Head of State for Canada, provided of course that the constitutional amendment were properly made under Part V of the Constitution Act, 1982 [Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], since "the office of the Queen" is specifically made amendable by paragraph 41(a) of the Constitution Act, 1982 "by resolutions of the Senate and House of Commons and of the legislative assembly of each province."

5 Against this constitutional background, the oath of allegiance has to be understood to be binding in the same way as the rest of the Constitution of Canada not forever, nor in some inherent way, but only so long as the Constitution is unamended in that respect.

6 It is a matter of common sense and common consent that it is neither unconstitutional, nor illegal, nor inappropriate to advocate the amendment of the Constitution. The proponents of the Meech Lake and Charlottetown Accords did not walk with trepidation in their advocacy of those amendments at least not on that score. Paragraph 41(a) of the Constitution Act, 1982 itself "dares" constitutionally to legitimize the abolition of the monarchy. All that is required for constitutional legitimacy is that the constitutionally provided amending formula be followed.

7 Given that the appellant does not advocate revolutionary change (i.e., change contrary to the Constitution itself),[2] his freedom of expression (paragraph 2(b)), freedom of peaceful assembly (paragraph 2(c)) and freedom of association (paragraph 2(d)) cannot conceivably be limited by the oath of allegiance, since the taking of the oath of allegiance in no way diminishes the exercise of those freedoms. The fact that the oath "personalizes" one particular constitutional provision has no constitutional relevance, since that personalization is derived from the Constitution itself. As it was put by Professor Frank MacKinnon, The Crown in Canada, Glenbow-Alberta Institute, 1976, at page 69, "Elizabeth II is the personal expression of the Crown of Canada". Even thus personalized, that part of the Constitution relating to the Queen is amendable, and so its amendment may be freely advocated, consistently with the oath of allegiance, either by expression, by peaceful assembly or by association.

8 This is sufficient to dispose of the appellant's challenge to the oath of allegiance on the basis of section 2 of the Charter. No facts would be pleaded that would prove the appellant's allegation. It is "plain and obvious" and "beyond doubt" that the appellant has no chance of success at trial in this regard.

9 The appellant also claims that the oath or affirmation is contrary to subsection 15(1) of the Charter, which reads

as follows:

> 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.

10 The authorities show that in addition to differential treatment, a complainant must establish that any such denial of equality is discriminatory: Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 142; R. v. Swain [1991] 1 S.C.R. 933.

11 Andrews is particularly helpful for the case at bar in this respect since it also dealt with the position of non-citizens. In Andrews, where a law society denied admission to the practice of law to non-citizens, discrimination was found to exist for two reasons: (1) a burden was imposed on non-citizen applicants for legal practice in the form of a three-year delay, the period of residence required for citizenship; (2) this burden was imposed in relation to non-citizenship, which was held to be an analogous category to those specifically enumerated in subsection 15(1).

12 In the case at bar it is not precisely citizenship which is in question, but rather the process required for citizenship. The appellant's objection is not even that a process is required for citizenship, but only that the process requires an oath of allegiance to the Queen, which Canadian citizens by birth are not required to take.

13 This is a meaningless comparison of groups. Birth-citizens are not, of course, required to take an oath of allegiance because they need not submit to a process to obtain the citizenship they already have. Their exemption, as it were, is not one from the oath itself, but from the citizenship process.

14 Moreover, the burden imposed on the appellant is only the minuscule one of the time and the effort involved in the uttering of the twenty-four words of allegiance. To hold this to be a coercive burden that would trigger the invocation of subsection 15(1) would in my opinion be to trivialize the Charter.

15 Of course, the total consequences of the swearing or affirming of these twenty-four words (as opposed to their nominal burden) are not at all trivial. Not only are the consequences as a whole not contrary to the Constitution, but it would hardly be too much to say that they are the Constitution. They express a solemn intention to adhere to the symbolic keystone of the Canadian Constitution as it has been and is, thus pledging an acceptance of the whole of our Constitution and national life. The appellant can hardly be heard to complain that, in order to become a Canadian citizen, he has to express agreement with the fundamental structure of our country as it is.

16 What our country may come to be, on the other hand, as I have suggested in relation to section 2 of the Charter, is for millions of Canadian citizens to work out over time, a process in which the appellant can himself share, if he only allows himself to do so. He cannot use his dream of a republican Constitution as a legal basis for denying the legitimacy of the present form of government. The present Constitution could indeed evolve into his ideal republic, provided that the intervening political process were peacefully constitutional. If the appellant, idiosyncratically, were to feel that thus pledging his allegiance to the existing Constitution were a "burden", this would not be a burden of which the law could take any cognizance. The Constitution, as it exists at any given time, cannot be unconstitutional, nor can it be constitutionally burdensome. It is itself the ultimate criterion by which all laws, actions and discriminatory burdens are measured.

17 Any remaining aspects of the appellant's claim under subsection 15(1) have already been disposed of in my consideration of section 2.

18 The Court raised with the parties the question of its jurisdiction under section 101 of the Constitution Act, 1867, to issue a declaration in such a case, and allowed them additional weeks after the hearing to submit argument on this question. I did not find these arguments, as presented, helpful, and, as the appellant's declaration is being struck out in any event, I do not find it necessary to resolve this issue as well.

19 The appeal must therefore be dismissed with costs.

McDonald J.A.

20 I agree.

* * *

The following are the reasons for judgment rendered in Englisy by

LINDEN J.A. (dissenting in part)

21 The issue on this appeal is whether the oath of allegiance to the Queen contained in the Citizenship Act, R.S.C., 1985, c. C-29, might, in the circumstances of this case, be found to be unconstitutional. More particularly, the appellant, a republican, claims that being required to take an oath of allegiance to the Queen is a violation of his constitutional rights guaranteed by several different sections of the Canadian Charter of Rights and Freedoms. His declaration was struck out pursuant to Rule 419 [Federal Court Rules, C.R.C., c. 663] as disclosing "no reasonable cause of action" by the Associate Senior Prothonotary, which decision was affirmed by the Trial Division. He now appeals to this Court.

22 The appellant, a member of the Ontario Bar, who was born in Trinidad and Tobago, has been a permanent resident of Canada as a British subject for more than 34 years. The appellant alleges that, over the years, his rights as a British subject and permanent resident have been eroded such that he can no longer vote in elections, stand for public office, or be employed in the Public Service. The appellant applied for and is eligible for Canadian citizenship. Prior to commencing this litigation, the appellant sought from various Government Ministers an exemption from the oath of citizenship in its present form. He was unsuccessful in his requests. The appellant is willing to take an oath to be a loyal Canadian citizen, to obey the laws of Canada and to fulfil his citizenship duties. However, because of his republican views, he is not willing to swear allegiance to the Queen, something which is currently required as part of the oath-taking ceremony.

23 The appellant commenced an action for declaratory relief against the Crown by filing a declaration, seeking a declaration that he is entitled to a grant of citizenship without having to take the oath or affirmation of citizenship in its present form. In the alternative, the appellant sought a declaration that he is entitled to an exemption from being required to take the citizenship oath or affirmation in its present form. In particular, the appellant alleged that being required to take an oath or make an affirmation of allegiance to the Queen is a violation of his Charter rights.

THE CITIZENSHIP ACT PROVISIONS

24 The eligibility requirements for Canadian citizenship are set out in section 5 [as am. by R.S.C., 1985 (3rd Supp.), c. 44, s. 1] of the Citizenship Act. When those requirements are met, the Minister must issue a citizenship certificate. According to subsection 12(3), however, the certificate does not take effect until the person to whom it has been issued complies with the requirements of the Act and the Citizenship Regulations, C.R.C., c. 400, respecting the oath of citizenship. An oath or affirmation of citizenship is the last step in attaining Canadian citizenship. Section 24 of the Act states:

> 24. Where a person is required under this Act to take the oath of citizenship, the person shall swear or affirm in the form set out in the schedule and in accordance with the regulations.

The Schedule to the Citizenship Act contains the oath or affirmation itself, in the following form:

> I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen.

25 The Minister is empowered by paragraph 5(3)(b) of the Citizenship Act to waive the requirement that a person take an oath of citizenship in the case of any person under a disability. It reads as follows:

> 5. . . .
>
> (3) The Minister may, in his discretion, waive on compassionate grounds,
>
> . . .
>
> (b) in the case of any person under a disability . . . the requirement that the person take the oath of citizenship.

Disability is defined in section 2 of the Citizenship Act as the incapacity of a minor or of a person who is mentally incompetent. The appellant, consequently, is not a person under a disability within the meaning of the Citizenship Act, so that the Minister is not authorized to waive the requirement of the citizenship oath for him. Were the Minister or the Citizenship Court more broadly authorized by Parliament to waive the requirement of the citizenship oath in appropriate cases, this litigation might have been avoided. However, as the legislation stands, the Court must consider the appellant's contention that the oath of citizenship is unconstitutional, at least in relation to his situation.

JUDGMENTS BELOW

26 The motion to strike was heard before the Associate Senior Prothonotary who granted the motion "without prejudice to the plaintiff's right to file a claim or declaration outlining a complete cause of action devoid of irrelevant material within the jurisdiction of the Court" (see page 22, Case). Costs of the motion were awarded against the appellant in any event of the cause.

27 The appellant appealed to the Trial Division, where his appeal was dismissed. Mr. Justice Joyal stated that, in Canada, the Queen is equivalent to "State" or "Crown" and that the oath or affirmation of citizenship requires an oath or affirmation to this country's Head of State. He held that it was not constitutionally significant that our Head of State is a monarch and an Anglican. Further, the appellant was free to make an affirmation if to make an oath was contrary to his conscience.

28 Mr. Justice Joyal concluded as follows [at page 179]:

> The appellant must be aware that Canada is a secular state and although many of its laws reflect religious tradition, culture and values, they are nonetheless secular or positivistic in nature. To grant exemptions of the kind claimed by the appellant would be to permit the imposition of private beliefs, religious or otherwise, on laws of general application, a condition which would be in contradiction with the principles of a secular state.

Mr. Justice Joyal stated that, in his view, the oath or affirmation could not be challenged on Charter grounds, and indicated that the appellant's remedy lay in the political realm. He dismissed the appeal with costs.

THE TEST FOR DISCLOSING NO REASONABLE CAUSE OF ACTION

29 The governing test for dismissing an action or striking out a claim as disclosing no reasonable cause of action is a difficult one to meet. Our Courts are rightly reluctant to snuff out potentially meritorious actions prematurely. We try to err on the side of giving each person a day in court, striking out claims only in the plainest and most obvious cases. As Mr. Justice Estey wrote for the Supreme Court of Canada in Attorney General of Canada v. Inuit Tapirisat

of Canada et al., [1980] 2 S.C.R. 735, at page 740:

> On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt". [Emphasis added.]

30 This standard was adopted by the Supreme Court of Canada in the context of a Charter claim in Operation Dismantle Inc. et al. v. The Queen et al., [1985] 1 S.C.R. 441. Madam Justice Wilson, in concurring reasons, stated, at page 486:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success". [Emphasis added.]

The majority in Operation Dismantle, supra, led by Chief Justice Dickson, cited Inuit Tapirisat, supra, and then quoted the concurring reasons of Madam Justice Wilson with approval.

31 In Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, Madam Justice Wilson did an extensive survey of the law on striking out claims for disclosing no reasonable cause of action. She concluded, writing for the Court, at page 980:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". [Emphasis added.]

Consequently, if it is "plain and obvious" or "beyond doubt" that the appellant cannot succeed, the declaration should be struck out, but if there is "some chance of success" or "a chance that the plaintiff might succeed", the action should be allowed to proceed to trial.

32 A document such as a statement of claim or, as in this case, a declaration does not contain the evidence required to prove the facts that the plaintiff alleges. The facts alleged may or may not be proven at the trial-that is, it may or may not be shown that the appellant holds the views he alleges he holds and it may or may not be shown that the potential negative consequences will actually transpire. One of the driving reasons behind the high threshold for striking out a statement of claim for disclosing no reasonable cause of action is to prevent a court from embarking on a resolution of factual issues raised in a case in the absence of any evidence. The danger of such a course is obvious: there is an inadequate record upon which to make the factual determinations necessary to the disposition of a case. Further, a statement of claim contains only a skeleton of a legal argument, which will be fleshed out in submissions before the trial Court. It is only in the most obvious of cases, therefore, that the opportunity to present evidence and full legal argument should be denied a litigant.

33 In applying this standard to the appellant's declaration, it should be borne in mind that these reasons are not in any way relevant to whether the appellant's action will or should succeed at trial; they are limited only to a consideration of whether he might succeed at trial. Consequently, these reasons must not be read as expressing any views, one way or the other, on the ultimate merits of any of the appellant's allegations.

THE APPELLANT'S CLAIM

34 The appellant's declaration alleges that the oath of citizenship is contrary to several sections of the Charter, including paragraphs 2(a), 2(b), 2(c), 2(d), section 12, and subsection 15(1). The appellant also claims that these Charter rights should be interpreted in accordance with section 27, which encourages the preservation and enhancement of the multicultural heritage of Canadians. I will deal with each of the appellant's arguments in turn.

35 It should be noted that the appellant has not distinguished in his declaration between taking an oath and making

an affirmation. The religious character of taking an oath is not an issue for the appellant and this is rightly so given the availability of the affirmation. In other words, the form of the oath is not in issue, only its content. The appellant is objecting to making any commitment of loyalty or allegiance to Her Majesty the Queen that is binding on his conscience, whether that commitment be evinced by way of oath or affirmation. Therefore, the word "oath" as used in the declaration should be read as referring to both an oath and an affirmation.

THE NATURE OF AN OATH

36 Through an oath or affirmation, a person attests that he or she is bound in conscience to perform an act or to hold to an ideal faithfully and truly. An oath "relies on the individual's inner sense of personal worth and what is right". It engages the "will and conscience of the taker of the oath." (See Gochnauer, Oaths, Witnesses and Modern Law (1991), 4 Can. J. Law & Jur. 67, at pages 71-73.) In the past it invariably invoked the aid of the Supreme Being as "rewarder of truth" and as "avenger of falsehood." (See Omychund v. Barker (1744), 26 E.R. 15, at page 32).

37 Nowadays, however, simple affirmations are generally accepted. Being allowed to affirm instead of swearing an oath was a major human rights achievement for our society. Minority religious groups in the past were denied rights because of their inability or unwillingness to swear the oath. For example, Professor Irving Abella in his fascinating book, A Coat of Many Colours, (1990), at page 20, tells how Ezekiel Hart, a person of the Jewish faith, ran and won an election as member of the Legislative Assembly of Quebec for Three Rivers in 1807. However, because he took the oath on the Old Testament with his head covered, rather than on the New Testament, he was barred from taking his seat and was replaced by the runner-up in the election. Hart ran and was elected again in 1808 and, though this time he indicated a willingness to swear the oath on the New Testament, he was again denied his seat on the basis that he would not be bound by such an oath and that he would "thereby profane the Christian religion". It was not until 1832 that Jewish people won the right to hold elected office in Quebec. The situation was worse in England, where it took 26 more years for Jews to be able to hold elected office. A similar sorry saga had to be enacted by Lionel de Rothschild, who had to be elected six times between 1847 and 1858 in the city of London before he was finally allowed to take his seat in the House of Commons, after swearing the oath on the Old Testament according to the Jewish tradition with his head covered. (See Morton, The Rothschilds: A Family Portrait, (1962), at page 163.) This problem, fortunately, no longer shames us.

38 We require oaths or affirmations as a method of binding the conscience in various circumstances such as testifying in Court, being admitted as a member of the Bar, as a Member of Parliament, on entering the Public Service, and, of course, there is also the oath of citizenship which is at issue in this appeal. These are all circumstances in which we seek to ensure certain paramount goals such as fidelity to the truth or loyalty to the country. As I stated in Benner v. Canada (Secretary of State), [1994] 1 F.C. 250 (C.A.), at page 281:

> Swearing an oath as a prerequisite to citizenship is a common practice followed in many countries. It is, in essence, a simple inquiry as to whether an individual is committed to the country and shares the basic principles or ideals upon which the country was founded.

This view was dramatically proclaimed in the American context, by Justice Felix Frankfurter (see, Levinson, Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths (1986), 84 Mich. L. Rev. 1440, at page 1441):

> American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution.

39 There is some jurisprudence on the relationship between oaths and the conscience of the oath-taker in the context of swearing to tell the truth in court proceedings. For example, in R. v. Bannerman (1966), 55 W.W.R. 257 (Man. C.A.), at page 284, Dickson J. (as he then was) stated that the "object of the law in requiring an oath is to get at the truth relative to matters in dispute by getting a hold on the conscience of the witness." This fundamental

relationship between the oath and the swearer's conscience has been reiterated in several Supreme Court decisions (see, for example, R. v. Khan, [1990] 2 S.C.R. 531, and R. v. B. (K.G.), [1993] 1 S.C.R. 740).

40 Criminal sanctions may even follow when persons who swear to tell the truth perjure themselves (see Criminal Code, R.S.C., 1985, c. C-46, section 131 [as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 17]). In addition, a person's citizenship may be forfeited if someone obtains it "by false representation or fraud or knowingly concealing material circumstances" (see section 10, Citizenship Act, supra).

41 It can be seen that an oath or affirmation is a solemn matter whose function in our society is to secure important goals such as truth, justice, good government and national security. As Gochnauer, supra, at page 99, has explained:

> As far back as we can trace the oath, it performs the social function of publicly committing the speaker to something in the strongest possible way. In the extremity of the undertaking it is equalled only by vows.

The appellant's declaration alleges that he adheres to this view of the oath. He states in paragraph 16: "The appellant believes that a public oath is the most solemn rite and that its terms must be faithfully observed."

42 An oath or affirmation, therefore, is not a matter to be taken lightly; when, for reasons of conscience, a person feels he or she cannot swear a certain oath or make a certain affirmation, one must carefully consider that position, for it shows that that person takes the oath seriously, something we wish to support.

THE FUNDAMENTAL FREEDOMS

43 The appellant contends that his fundamental freedoms will be violated if he is made to take the oath of loyalty to the Queen. Section 2 of the Charter protects what are referred to as fundamental freedoms:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

The appellant contends that each of these provisions are applicable in his case. I shall deal with them in turn.

(a) Freedom of conscience and religion

44 The appellant's first claim is that the citizenship oath in its present form violates his freedom of conscience under paragraph 2(a) since it is against his "conscience to make oaths to all but the Supreme Being and to principles such as truth, freedom, equality, justice and the rule of law." The appellant also claims that the oath or affirmation in its present form violates his freedom of religion under paragraph 2(a) inasmuch as the Queen is the "Head of the Anglican Church and the [appellant] is not of the Anglican faith."

45 There is little authoritative jurisprudence on freedom of conscience under paragraph 2(a) of the Charter. However, the concurring reasons of Madam Justice Wilson in R. v. Morgentaler, [1988] 1 S.C.R. 30, at page 179, are instructive in their approach to freedom of conscience. She stated:

> 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.

It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience. Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under paragraph 2(a) of the Charter. For example, a secular conscientious objection to service in the military might well fall within the ambit of freedom of conscience, though not religion. However, as Madam Justice Wilson indicated, "conscience" and "religion" have related meanings in that they both describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by paragraph 2(b).

46 In my view, with respect to both freedom of conscience and freedom of religion, the appellant will have to show that the burden imposed on him by the oath is more than trivial or insubstantial. As Dickson C.J. wrote in R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at page 759:

> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial.

The impact of a law or government action on freedom of conscience or religion has been called a "coercive burden" in cases such as Edwards Books, supra. In Edwards Books, supra, Chief Justice Dickson was discussing the state-imposed cost of Sunday-closing legislation on retailers who for religious reasons observe a sabbath or day of rest other than Sunday.

47 A similar analysis should be employed in assessing any interference with freedom of conscience. This would require a claimant to show that his or her conscientiously held moral views might reasonably be threatened by the legislation in question, and that the coercive burden on his or her conscience would not be trivial or insubstantial.

48 In my view, the appellant has not raised a plausible argument about the imposition of a coercive burden on his conscientiously held views which bridle at swearing an oath to anyone but a Supreme Being. Based on the facts as disclosed in the declaration and the statutory law, the appellant is not required to swear an oath to the Queen as he alleges, nor to anyone but a Supreme Being, if he chooses to swear. Moreover, he may decide to affirm rather than to swear, if that is objectionable to him. His real objection is not to the method of oath making, but to its content. His claim under paragraph 2(a) of the Charter regarding freedom of conscience should, therefore, be struck out. (This is not to say that the appellant might not have made a valid argument regarding freedom of conscience had he articulated a conscientious objection to the content of the oath or affirmation.)

49 Similarly, the appellant's allegation that the oath of citizenship restricts his freedom of religion since the Queen is the "Head of the Anglican Church" must be struck out. As Mr. Justice Joyal found, Parliament's purpose in framing the oath or affirmation was to require a statement of loyalty to Canada's head of state and its institutions, not to interfere with religious freedom. There is no mention in our Constitution nor in this oath of the Queen in her capacity as Head of the Church of England. The oath requires no statement of allegiance to Anglicanism nor to the Queen in relation to her role in the Church of England. Indeed, the Anglican Church of Canada is governed, not by the Queen, but by an independent Synod established in Canada. Therefore, the purpose of the oath or affirmation is not to interfere with the guarantee of freedom of religion, because its purpose was not in any way to insist upon loyalty to the Anglican Church.

50 Nor is the oath restrictive of the appellant's freedom of religion in its effects. The Supreme Court decided in R. v. Big M Drug Mart Ltd. et al., [1985] 1 S.C.R. 295, and Edwards Books, supra, that not only the purpose, but also the effects of legislation are relevant to determining its constitutionality. As Dickson C. J. stated in Edwards Books, supra [at page 752]:

> Even if a law has a valid purpose, it is still open to a litigant to argue that it interferes by its effects with a right or freedom guaranteed by the Charter.

I summarized the test under paragraph 2(a) with respect to effects on freedom of religion in my reasons in Schachtschneider v. Canada, [1994] 1 F.C. 40 (C.A.), at pages 65-66:

> Yet while any law that involves a so-called coercive burden on an individual's practice of their religion-which really means no more than that the law has some influence on their religious practice-may potentially fall within the ambit of paragraph 2(a), it is clear that not all such laws contravene that paragraph. A trivial or insubstantial interference with religion is insufficient to violate paragraph 2(a). There must be a substantial enough interference that one's religious practice might reasonably or actually be threatened.

Edwards Books, supra, made it clear that the same can be said of a reasonable or actual threat to a religious belief as well as to a religious practice (at page 759).

51 The appellant's claim with respect to effects on his freedom of religion does not disclose a burden which is more than trivial or insubstantial. The relationship between an oath of allegiance to the Queen in her capacity of Head of State and the appellant's religious practice and beliefs is too remote. Basically, the appellant is objecting to the religion of the Queen, which cannot affect him in any way. Ironically, rather than the oath interfering with his freedom of religion, it might be said that the appellant wants to limit the religious freedom of the monarch. This view reflects the conclusion of Mr. Justice Joyal who found that the appellant's arguments regarding the Queen as head of the Anglican Church involved a "dialectic which is bereft of any legal or constitutional content" (at page 179). The appellant's allegation that the oath violates his freedom of religion must, therefore, be struck out.

(b) Freedom of thought, belief, opinion and expression

52 The appellant claims that swearing an oath or making an affirmation of loyalty to the Queen abridges his freedom of thought, belief, opinion and expression under paragraph 2(b) of the Charter. There is a discrete body of jurisprudence on freedom of expression, and therefore I will treat that issue separately later.

53 Freedom of thought, belief and opinion is distinct from freedom of conscience. Freedom of thought, belief and opinion encompasses many ideas and principles that are not matters of conscience, nor of right or wrong; what is involved here are political, social, economic or cultural ideas. We are dealing here in the realm of reason, not of faith, nor of morality. It is obvious that there are no sharp dividing lines here; these matters may blur into one another, making them difficult to differentiate.

54 It appears to me, however, that much the same analysis could be applied to these freedoms as to freedom of conscience and freedom of religion. There must be some coercive burden flowing out of the impugned law. The appellant claims that, if he swore allegiance to the Queen, he would feel honour-bound to refrain from thinking and expressing beliefs and opinions about the abolition of the monarchy; hence, he argues, a coercive burden would be placed on the exercise of his freedom of thought, belief and opinion.

55 The interpretation of most people would not so restrict the freedom of one who swore allegiance to the Queen. The views expressed by my brother MacGuigan as to the current meaning of the oath of allegiance make sense. It may well be the correct interpretation. Obviously, the newly-elected Bloc Québécois Members of Parliament had no

difficulty swearing the oath of allegiance to the Queen, even though they are committed to working democratically to achieve a monarch-less independent state.

56 But it is not, with respect, plainly and obviously the meaning of the oath at this time. It must be recalled that there was a time when criticism of the monarchy was viewed as treason. Happily, that is no longer the case. Nowadays, freedom to criticize the monarchy and other Canadian institutions is obviously guaranteed by the Charter. It is unlikely that criminal proceedings for perjury would be undertaken against someone who violated his or her oath, but is it certain that steps might not be taken to cancel the citizenship of someone who, after swearing allegiance to the Crown, engages in activity which seeks to abolish it totally? If the oath of loyalty permits one to demonstrate that loyalty to the Crown by advocating its abolition, what is the point of that oath? Is that loyalty or is it disloyalty? Is the oath merely a meaningless formality? Is there any commitment to its content required? Does it have any purpose at all? If all the oath of allegiance achieves is to get someone to promise not to violate the criminal law and to avoid subversive and illegal political methods, something they are already obligated to do, is it of any value?

57 In my view, it is arguable, at least, that the oath of allegiance has some meaning other than merely promising to obey the criminal law and to use legitimate means for political change. What is involved here is not the mere utterance of a few words, as my brother MacGuigan suggests, but the expression of a "solemn intention to adhere to the symbolic keystone of the Canadian Constitution as it has been and is, thus pledging an acceptance of the whole of our Constitution and national life" as he also recognizes. If someone is fundamentally opposed to a significant aspect of that Constitution, and wishes to work toward its abolition, not merely its reform, it is arguable that that person may violate the oath by words and conduct in furtherance of that goal. It may not be unreasonable for the appellant, if he truly holds the beliefs he claims to hold, to feel that, by taking this oath, he is inhibited to some extent in his anti-monarchy activities. In other words, his serious view of the oath might be taken seriously. It may be that, after a trial, it might be concluded that the appellant was being made to choose between his political principles and his enjoyment of Canadian citizenship, something the Charter is supposed to prevent. It may be that Mr. Justice MacGuigan's view would prevail. It may be that section 1 might be invoked to justify any prima facie violation of the Charter, or it might not. In light of the uncertainty surrounding this question, it would be advisable, before resolving this matter, to have the benefit of factual underpinnings and full legal argument based on those facts.

58 On the applicability of freedom of thought to oaths of citizenship, I would like to refer to United States v. Schwimmer, 279 U.S. 644 (1929). In that case, a woman who was a conscientious objector was denied American citizenship since she stated that she would refuse to take up arms in defence of the United States, which was required by the citizenship oath at that time. In his dissenting reasons, Mr. Justice Holmes took the majority to task in ringing terms, at pages 654-655:

> [I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought-not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.

Mr. Justice Holmes' statement, protecting "freedom for the thought that we hate", which has carried the day in subsequent decisions of the United States Supreme Court, buttresses my conclusion that the appellant's claim with respect to freedom of thought should not be struck out (see, e.g., Schneiderman v. United States, 320 U.S. 118 (1943)).

59 Turning to freedom of expression, the appellant alleges that taking an oath or making an affirmation of loyalty to the Queen would, in the future, hinder him from expressing his republicanism. The leading case on freedom of expression is Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, in which the Supreme Court outlined the steps to be undertaken in analyzing an allegation of interference with freedom of expression.

60 The first step is whether the activity falls within the protected sphere of expression in that it is an activity that

attempts to convey meaning. The declaration, while poorly drafted, appears to contemplate expression in the form of speech. This would obviously pass the first step, since this speech would be an attempt to convey a message of republicanism. The content of the speech is irrelevant at this first stage in deciding whether the speech is protected under paragraph 2(b) (see, e.g., R. v. Keegstra, [1990] 3 S.C.R. 697, and R. v. Butler, [1992] 1 S.C.R. 452).

61 The second step is to determine whether the purpose or effect of the government action is to restrict freedom of expression. There is no evidence, nor do I think any could be led, to suggest that the purpose of the oath or affirmation of citizenship is to curtail freedom of expression.

62 Turning to the effect of the legislation, the burden will be on the appellant to show that the effect of the oath or affirmation is to restrict his freedom of expression and that his expression seeks to promote at least one of the principles underlying freedom of expression, namely seeking and attaining the truth, participation in social and political decision-making or individual self-fulfilment and human flourishing. Promoting republicanism likely falls within these parameters. Thus, strict adherence to the oath or affirmation of loyalty to the Queen might be felt by the appellant to prevent him from expressing his republicanism, even though it might not in law actually do so.

63 The appellant's claim that the oath or affirmation abridges his freedom of expression as guaranteed by paragraph 2(b) of the Charter should, therefore, not be struck out.

64 The appellant might also have argued that being compelled to make a statement of allegiance to the Queen is itself a violation of his freedom of expression, just as the United States Supreme Court held in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943). In that case a compulsory salute to the American flag was found to be a violation of freedom of expression. Mr. Justice Jackson wrote, at page 642 this oft-quoted passage:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion . . . or act their faith therein.

However, the appellant has not made this argument before this Court.

65 Before leaving this topic, it should be mentioned that one might argue that the appellant's personal feelings of inhibition regarding his belief in and expression of his republicanism are not constitutionally or legally irrelevant. An argument might be made that there is no nexus between the oath of citizenship and the appellant's freedom to believe in and to express his republicanism. It might be said that it is the appellant's republicanism, when combined with his belief that the terms of an oath must be faithfully observed, that prevents him from getting citizenship, and not the oath itself. This is not unlike the argument that was put before the Supreme Court in Edwards Books, supra, to the effect that it was the religion of Saturday observing retailers that imposed a burden on those retailers, and not the Sunday-closing laws. Chief Justice Dickson rejected this argument by comparing the relative positions of Saturday and Sunday observers in the absence of the impugned law (which were found to be the same), and then demonstrating that the law imposed on Saturday observing retailers a choice between breaking their sabbath or suffering a competitive disadvantage. Thus it was held that the law imposed a coercive burden on the free exercise of their religion by Saturday observers.

66 It may be contended that a careful analysis of the situation in the present appeal shows that it is equally wrong to say that it is the appellant who is inhibiting himself and not the law which is inhibiting him. Our courts must obviously beware of individuals who complain constantly that their freedom is threatened when it is not. However, one should compare the situation of someone born to Canadian citizenship and someone who is in all respects eligible for Canadian citizenship and faces only the oath as the final hurdle. Suppose that both of these people are republicans, who are extremely committed to their political beliefs, but they also believe that having sworn an oath of allegiance to an institution it would be wrong to advocate the abolition of that institution. In the absence of the oath of citizenship, both republicans would become citizens (the one on birth, the other through naturalization) and their positions would be equivalent. If the oath of citizenship is introduced by law for people seeking Canadian citizenship through naturalization, however, the republican who was not born a citizen appears to face a choice

imposed by law between adhering to his or her beliefs, and thereby foregoing Canadian citizenship, or violating his or her beliefs as to the meaning of an oath of allegiance after swearing one.

67 It may be said, then, that the law requiring an oath of allegiance may deny the appellant the freedom to believe in a political principle, if he is able to prove the facts alleged at trial. Of course, if the appellant succeeds in establishing that a limit has been placed on his freedom under paragraph 2(b), that limit may be justified pursuant to section l, but that is a question that is not at issue in this appeal, as I shall explain below.

(c) Freedom of peaceful assembly

68 The appellant next alleges that the oath or affirmation in its present form abridges his freedom of peaceful assembly under paragraph 2(c) of the Charter.

69 There is scant case law on the guarantee of freedom of peaceful assembly. However, what little there is would appear to indicate that freedom of peaceful assembly is geared towards protecting the physical gathering together of people. Nothing in the oath or affirmation prevents the appellant from assembling with others. In my opinion, paragraph 2(c) of the Charter was not intended to protect the objects of an assembly that is organized to foster freedom of thought, belief, opinion or expression, or freedom of association, for that would be protected independently. The portion of the appellant's declaration relating to freedom of peaceful assembly should, therefore, be struck out.

(d) Freedom of association

70 With respect to freedom of association under paragraph 2(d) of the Charter, the appellant's argument is that to uphold his pledge of loyalty to the Queen in the oath or affirmation of citizenship, he could not join republican associations or participate in any republican rallies or meetings. The appellant submits that he is a republican and that in order to adhere to an oath or affirmation of loyalty to the Queen, he would feel bound to abstain from joining republican associations or participating in the lawful activities of republican associations.

71 The leading case on paragraph 2(d) of the Charter is Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313. McIntyre J., who wrote for the majority, at page 393, did not discuss whether incapacitating an individual from joining certain political associations would violate freedom of association. However, he did set out a description of the function of freedom of association in a democratic society:

> Freedom of association is one of the most fundamental rights in a free society. The freedom to mingle, live and work with others gives meaning and value to the lives of individuals and makes organized society possible. The value of freedom of association as a unifying and liberating force can be seen in the fact that historically the conqueror, seeking to control foreign peoples, invariably strikes first at freedom of association in order to eliminate effective opposition. Meetings are forbidden, curfews are enforced, trade and commerce is suppressed, and rigid controls are imposed to isolate and thus debilitate the individual.

McIntyre J.'s broad statement of the purpose of paragraph 2(d) recognized that freedom of association is indispensable to the proper functioning of democracy. This could certainly comprehend the notion that a forced statement of loyalty to the Queen as representative of monarchism would violate freedom of association if, in fact, that oath of allegiance prevented an individual from joining an association of an anti-monarchical nature.

72 In particular, paragraph 2(d) protects the appellant's right to exercise his constitutional right to freedom of thought, belief, opinion and expression in combination with others. As McIntyre J. explained at page 409, supra:

> It follows from this discussion that I interpret freedom of association in s. 2(d) of the Charter to mean that Charter protection will attach to the exercise in association of such rights as have Charter protection when

> exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone.

Freedom of association, therefore, protects the collective aspect of the exercise of individual freedoms such as freedom of thought, belief, opinion and expression. The sharing of ideas and activities with others strengthens and nourishes the individual's convictions, and ultimately provides for vital developments and needed changes in a democratic society.

73 It may be argued that it strikes at the very heart of democracy to curtail collective opposition and incentive for change by demanding loyalty to a particular political theory. Similarly, it may be said that it is wrong to build a barrier to joining associations dedicated to a different political theory. The appellant, though perhaps not legally forbidden to do this, might well feel so circumscribed, given the primitive state of the law at this time. Therefore, I cannot say at this stage that there is no chance that the appellant, given the opportunity to adduce evidence and arguments, could succeed on this point, and, therefore, this portion of the declaration should not be struck out.

SECTION 12-FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT

74 Section 12 of the Charter is a legal right and guarantees freedom from cruel and unusual punishment or treatment:

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

The appellant contends that compelling him to take the oath or make the affirmation in its present form against his conscience under threat of exposure to loss of residential status and denial of citizenship is cruel and unusual treatment. This argument has no merit.

75 The standard for cruel and unusual treatment is whether the treatment outrages standards of decency (see R. v. Smith (Edward Dewey), [1987] 1 S.C.R. 1045, at page 1072, and Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711). The consequences to the appellant of not swearing the oath or making the affirmation cannot be said to outrage standards of decency. He may not obtain citizenship, something that is most unfortunate, but this is hardly something that could be classified as "cruel and unusual treatment." This portion of the appellant's declaration should be struck out.

SUBSECTION 15(1)-EQUALITY RIGHTS

76 The appellant claims that the oath or affirmation is contrary to subsection 15(1) of the Charter which reads as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the 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.

The appellant alleges that the oath or affirmation of citizenship is contrary to subsection 15(1) in three ways. First, a permanent resident desiring to become a naturalized citizen is required to take the oath while people who are Canadian citizens by birth are not. Second, a permanent resident who wishes to become a Canadian citizen and thereby attain full political rights is obliged to take the oath while residents who are citizens by birth are not required to take the oath to attain full political rights. Finally, the appellant claims that the oath sets up a class of human beings ("the Windsor family") who are represented as being perpetually superior to other human beings, which conflicts with the appellant's belief in the equality of all human beings because it prevents people born outside of Great Britain from attaining the highest office in Canada. I will address these allegations in reverse order.

77 The third claim under subsection 15(1) must be struck out. It is the monarchy itself, and not the oath or affirmation, which elevates the Windsor family to its exalted position. It is the traditions of the monarchy that also

prevent people born outside of Britain from attaining the highest office in this country. As for the appellant's claim that the oath conflicts with his belief in the equality of all human beings, this is more properly a claim that might have been brought under paragraph 2(a) or 2(b) but was not.

78 The second claim under subsection 15(1) must also be struck out. There are no facts presented in the declaration which, if true, would support the appellant's allegation that "residents who are not citizens by birth" cannot attain full political rights in Canada. There is no factual basis in the declaration for this claim.

79 I am of the opinion, however, that the appellant's final claim under subsection 15(1) should not be struck out. Chief Justice Lamer summarized the proper approach under subsection 15(1) in R. v. Swain, [1991] 1 S.C.R. 933, at page 992:

> The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (i.e., equality before the law, equality under the law, equal protection of the law and equal benefit of the law). This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in "discrimination". This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant's s. 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s. 15-namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

80 The appellant's declaration discloses that people who become Canadian citizens by birth are not required to take the oath or make the affirmation of citizenship. Conversely, non-citizens who wish to become Canadian citizens through the process of naturalization are required, in addition to being otherwise qualified, to take the oath or make the affirmation of citizenship. Therefore, taking the facts in the declaration as true, it is possible to say that non-citizens are denied equality under the law in that the Citizenship Act appears to draw a distinction between two groups, namely people who attain citizenship automatically by birth and people who must apply for citizenship. The Government is not required to provide for automatic citizenship upon birth in Canada or to Canadian parents. However, having created two legal categories of people (those who do obtain automatic citizenship and those who must apply for citizenship), the Government must not deny equality under the law to either of these two groups.

81 This does not mean that it is not permissible to set up a process for new citizens; it must not, however, be a discriminatory process. Thus, in addition to the differential treatment, the appellant will have to demonstrate at trial that any inequality under the law is discriminatory. As Lamer C.J. stated in Swain, supra, to establish discrimination, the claimant must show that there is differential treatment which imposes a burden or withholds a benefit on the basis of a personal characteristic that is related to one of the grounds enumerated in subsection 15(1) or an analogous ground. However, a claimant will not succeed in showing discrimination by merely pointing to a disadvantageous distinction drawn on the basis of a personal characteristic related to an enumerated or analogous ground. Courts must also ensure that the claim falls within the primary purpose of subsection 15(1), which is mainly "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society" (Swain, supra, at page 992). As Madam Justice Wilson stated in R. v. Turpin, [1989] 1 S.C.R. 1296, at page 1332:

> A finding that there is discrimination will, I think, in most but not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

82 Taking the facts in the appellant's declaration as true, the differential treatment of non-citizens with respect to the oath of citizenship may be said to withhold citizenship from a person who, because of his or her beliefs, feels he

or she cannot swear the oath. This, it may be argued, constitutes a denial of a benefit (citizenship) from someone, a benefit that apparently would not be withheld from a person of similar beliefs who was born a Canadian citizen.

83 According to the appellant, this differential treatment of non-citizens as a group is drawn on the basis of a personal characteristic (citizenship) which is also an analogous ground under subsection 15(1). As I stated in my concurring reasons in Schachtschneider, supra, one must distinguish between a ground of discrimination and the group enduring discrimination. For example, women as a group may endure discrimination on the ground of sex. The Supreme Court has recently recognized in the context of subsection 15(1) that a so-called sub-group may also experience discrimination on the basis of a broader ground (Symes v. Canada, [1993] 4 S.C.R. 695). This had already been accepted by the Supreme Court in the context of human rights legislation in Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, and Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252. I applied the reasoning in these cases to subsection 15(1) of the Charter in my reasons in Schachtschneider, supra, and the Supreme Court has also done so in Symes, supra. Thus non-citizens seeking Canadian citizenship through naturalization, as a group, may experience discrimination on the ground of citizenship.

84 Further, it is possible that non-citizens as a group are disadvantaged independently of the distinction at issue in this appeal and that the appellant may therefore be successful in showing the "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice" (Turpin, supra, at page 1333). The Supreme Court has already held in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 142, that citizenship is an analogous ground under subsection 15(1) of the Charter and that non-citizens constitute a politically disadvantaged group in Canadian society that can be characterized as a "discrete and insular minority". The appellant's claim may, therefore, arguably fall within the ambit of subsection 15(1).

85 Before leaving my discussion of subsection 15(1), I would like to add that the analysis under subsection 15(1) differs from the analysis under paragraph 2(a). Under paragraph 2(a), a plaintiff must show a coercive burden on his or her freedom of conscience or religion that is more than trivial or insubstantial. This is not the case with respect to subsection 15(1). As I stated in my reasons in Schachtschneider, supra, at page 79:

> Unlike the guarantee of freedom of religion in paragraph 2(a) of the Charter, however, the promise of equality in section 15 does not exclude claims on the basis that the violation is minuscule, trivial or insubstantial.

This follows from the decision of the Supreme Court in Andrews, supra. As McIntyre J. wrote, at page 182:

> Where discrimination is found a breach of s. 15(1) has occurred and-where s. 15(2) is not applicable-any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1. This approach would conform with the directions of this Court in earlier decisions concerning the application of s. 1 and at the same time would allow for the screening out of the obviously trivial and vexatious claim.

Consequently, even if it turns out that subsection 15(1) is violated by the requirement of the citizenship oath, it may be a reasonable limit, demonstrably justified in a free and democratic society. The respondent will bear the burden of proving this aspect of the case, at the trial.

86 For these reasons, the appellant's first claim under subsection 15(1) should not be struck out.

SECTION 27-MULTICULTURAL HERITAGE

87 The appellant raises section 27 of the Charter which states:

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

The appellant argues that the idea of an English hereditary monarchy precludes full participation in governing Canada by members of many different racial and multicultural groups. As with the appellant's other points, this argument is poorly framed since it appears to challenge the monarchy itself. Impliedly, however, the appellant is arguing that the oath of citizenship works against the preservation and enhancement of the multicultural heritage of Canadians in that it requires allegiance to an exclusively British institution that may be in conflict with the ideals of persons of non-British backgrounds.

88 It is not necessary to plead this provision. Nor is it a substantive provision that can be violated. Since section 27 does not protect a particular right or freedom, it being relevant only as an aid to interpretation, it should not be pleaded in the way it has been. His claim under section 27 should, therefore, be struck out.

SECTION 1

89 The appellant is not required in his declaration to anticipate or rebut the Government's arguments with respect to section 1 of the Charter. The likelihood of justification under section 1 for the oath or affirmation in its present form is, therefore, not relevant to this application to strike out the declaration, and I will, consequently, not consider at this stage any substantive arguments with respect to whether any potential Charter violations raised in the appellant's declaration are saved under section l.

SUMMARY OF CONCLUSIONS ON THE CHARTER

90 The appellant's claim with respect to freedom of conscience and religion under paragraph 2(a), his claim under paragraph 2(c), his claim under section 12, the second and third of his claims under subsection 15(1), and his claim under section 27 should be struck out. The remainder of the appellant's declaration, involving arguments under paragraphs 2(b) and 2(d), and his first claim under subsection 15(1) while not a model of clarity in drafting nor of comprehensiveness in facts and law, cannot be said, plainly and obviously, to disclose no reasonable cause of action and should not be struck out at this preliminary stage.

REMEDIES

91 In order for the appellant's declaration not to be struck out, he must have requested a remedy that is within the jurisdiction of the Court. The Court cannot declare, as the appellant has requested, that the appellant is entitled to a grant of citizenship without having to take the oath in its present form, since the appellant has no right or entitlement to citizenship.

92 The appellant has also requested a constitutional exemption from the taking of the oath. The submissions of the parties on this issue are distinctly lacking in analysis, particularly given the highly contentious subject of constitutional exemptions. Suffice it to say that it is unclear that a constitutional exemption is available in a case such as this, where the appellant seeks primarily to challenge not government action under a constitutional law, but the constitutionality of the very law itself. A constitutional exemption is a remedy available under subsection 24(1) of the Charter. But, where legislation is found to be unconstitutional, the proper remedial course is normally under section 52 of the Constitution Act, 1982, which provides that a law that is inconsistent with the Constitution is of no force and effect. Cases such as R. v. Smith (Edward Dewey), [1987] 1 S.C.R. 1045; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232; Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69; R. v. Seaboyer; R. v. Gayme, [1991] 2 S.C.R. 577; Schachter v. Canada, [1992] 2 S.C.R. 679; and Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, all appear to indicate that, where a law has been found unconstitutional and there is no delayed declaration of invalidity, a constitutional exemption may not be available. There exists also contrary authority (R. v. Seaboyer (1987), 61 O.R. (2d) 290 (C.A.); R. v. Chief, [1990] N.W.T.R. 55 (Y.T.C.A.)). Because of the uncertainty surrounding the matter at this time, I would leave the question of the appropriate remedy, if any, to the Trial Judge.

93 I note that the appellant's request for a declaratory judgment that he is entitled to an exemption from the

requirement of taking the citizenship oath in its present form could also be read as a request to sever the offending portion from the oath. This sort of remedy under section 52 of the Constitution Act, 1982 has been permitted by the Supreme Court in Schachter, supra.

CONCLUSION

94 In conclusion, I would affirm the Trial Court in part and allow the appeal in part and order that the appellant's claim under paragraphs 2(a) and 2(c), his claim under section 12, the second and third of his three claims under subsection 15(1) and his claim under section 27 be struck out. The claims under paragraphs 2(b) and 2(d) and the first claim under subsection 15(1) would, therefore, survive. A fresh statement of claim or declaration, consistent with these reasons and containing greater particularity, may be delivered within 30 days of the issuance of these reasons, if the appellant chooses to do so.

95 These reasons can, in no way, affect the possible merits of the remaining claims of the appellant. They merely indicate that it is not "plain and obvious" that some of them cannot ultimately succeed; they may or may not, depending on the evidence adduced and the arguments presented to the Trial Judge. Moreover, these reasons have not and cannot take into account any evidence offered or arguments that may or may not be made on behalf of the Government under section 1 of the Charter to justify any potential infringement of the appellant's Charter rights. All that has been done here is to identify those of the appellant's claims which had no chance of success, and to strike them out, and those that may have had a chance of success, and to refrain from striking them out, at this stage, leaving them for disposition after a trial.

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1 The conventions of the Canadian Constitution are endowed with constitutional authority by virtue of the words in the preamble of the Constitution Act, 1867, that Canada have "a Constitution similar in Principle to that of the United Kingdom." They could, of course, be specified or amended by constitutional amendment. The principal proposal to provide a realistic statement of the conventions underlying the Canadian system was that by then Prime Minister Trudeau, The Constitution and the People of Canada, published by the Government of Canada in 1969, and was never adopted.

2 If he did advocate revolutionary change, such advocacy could not, of course, receive constitutional protection, since it would be by definition anti-constitutional.

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Exploring a More Independent Freedom of Peaceful Assembly in Canada

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Exploring a More Independent Freedom of Peaceful Assembly in Canada

Abstract

There has been significant progress regarding the law on public demonstrations since the enactment of the Canadian Charter of Rights and Freedoms. However, the freedom of peaceful assembly, one of the four fundamental freedoms protected by section 2 of the Charter, is the least judicially explored freedom. Rather than undertake a free-standing freedom of peaceful assembly analysis, Canadian courts tend to subsume the analysis into freedom of expression. As illustrated by the increasingly frequent occurrence of demonstrations today, freedom of peaceful assembly is an emerging and ongoing issue in constitutional law. Accordingly, it is more crucial than ever that peaceful assembly law be developed and utilized in a manner consonant with the increasing frequency of demonstrations in today's society.

In this paper, the author undertakes a critique of the freedom of peaceful assembly analysis as currently applied by the courts and presents a doctrinal analysis aiming to establish potential features of a stand-alone freedom of peaceful assembly Charter analysis. In particular, the author addresses how Canadian courts should approach peaceful assembly as an independent freedom, in light of the judicial treatment of other freedoms in current jurisprudence.

Keywords

freedom of peaceful assembly, Charter jurisprudence, Constitutional Law, demonstrations, fundamental freedoms

EXPLORING A MORE INDEPENDENT FREEDOM OF PEACEFUL ASSEMBLY IN CANADA

BASIL S. ALEXANDER*

INTRODUCTION

There has been significant progress regarding the law on public demonstrations since the Supreme Court of Canada's 1978 decision in *Dupond v Montreal (City of)*.[1] In that decision, which predated the *Canadian Charter of Rights and Freedoms* (the "*Charter*"),[2] the majority of the court was hesitant to afford constitutional protection to public demonstrations. Citing the "inarticulateness" of demonstrations, Beetz J. in his majority decision held that demonstrations fell short of becoming "part of language."[3] Thus, demonstrations did not attract protection as part of freedom of speech. Further, Beetz J. stressed that "[t]he right to hold public meetings on a highway or in a park is unknown to English law."[4] As a result, this decision effectively allowed for complete prohibitions on demonstrations in Canada because it upheld the constitutionality of a thirty-day prohibition of any assembly, parade, or gathering in Montréal.[5]

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1 [1978] 2 SCR 770 [*Dupond*].

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 *Dupond*, *supra* note 1 at 797-98. Beetz J stated that demonstrations "are of the nature of a display of force rather than of that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse." *Ibid*.

4 *Ibid* at 797.

For historical perspectives on demonstrations, see generally: M Beare & N Des Rosiers, "Introduction" in M Beare, N Des Rosiers & A Deshman, eds, *Putting the State on Trial: The Policing of Protest during the G20 Summit* (UBC Press: Vancouver, 2015) at 1 [*State on Trial*]; R Stoykewych, "Street Legal: Constitutional Protection of Public Demonstration in Canada" (1985) 43:1 U Toronto Fac L Rev 43; and JD Inazu, "The Forgotten Freedom of Assembly" (2010) 84:3 Tul L Rev 565.

5 *Dupond*, *supra* note 1 at 782-88, 790, and 792-98. This case was decided on a division of powers basis and with a limited evidentiary record (i.e., primarily uncontested city reports regarding the need for the impugned bylaw). *Ibid* at 788. The record today would need to be more substantial given the nature and requirements of *Charter* litigation.

The enactment of the *Charter* "radically altered this perspective."[6] Subsections 2(b) and 2(c) of the *Charter*, the fundamental freedoms of expression and peaceful assembly, are now seen as "essential to the functioning of a free and democratic society."[7] All of the freedoms guaranteed by the *Charter* (e.g., freedom of religion, freedom of expression, freedom of peaceful assembly, and freedom of association, et cetera) protect "rights fundamental to Canada's liberal democratic society."[8] In 1999, for example, a Québec municipal court held that "the right to peaceful protest is an essential tool in democracy to promote legitimate interests, raise public awareness, and influence governments."[9] A Québec superior court also recently stated that demonstrators' access to public spaces (e.g., roads and parks) for the purpose of demonstrating is now protected in Canadian, American, and international law.[10] However, even with this progress, it is still unclear how demonstrations are to be treated by the legal system and, specifically, how the law may protect them.[11] In particular, it remains to be seen whether freedom of peaceful assembly should be further developed as an independent freedom in Canadian law.

Freedom of peaceful assembly is highly relevant to demonstrations. However, I argue that it is the least judicially explored freedom. Rather than undertake a free-standing freedom of peaceful assembly analysis, Canadian judges tend to examine related claims through a freedom of expression lens.[12] This has resulted in the existence of little to no detailed analyses under subsection 2(c) in the modern jurisprudence. In particular, the lack of focus on peaceful assembly raises concerns regarding stagnation of the law and the effectiveness of peaceful assembly as an individual freedom to safeguard demonstrations. This paper argues that taking a free-standing approach to peaceful assembly law would better protect demonstrations by further developing and reforming critical legal issues, such as the scope of protected activities and state

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6 *Attorney General of Ontario v Dieleman et al* (1994), 20 OR (3d) 229 at 285 (Gen Div).

7 *Garbeau c Montréal (Ville de)*, 2015 QCCS 5246 at para 1 [*Garbeau*] [translated by author]. See also *R v Singh*, 2011 ONSC 717 at para 39.

8 *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 48 [*Mounted Police*].

9 *R c Lebel*, [1999] JQ No 4995 at para 83 (CM) [translated by author].

10 See generally *Garbeau*, *supra* note 7 at paras 120-56.

11 See BS Alexander, "Demonstrations and the Law: Patterns of Law's Negative Effects on the Ground and the Practical Implications" (2016) 49:3 UBC L Rev 869; N Des Rosiers, "Conclusion: The Future of Protests in Canada" in *State on Trial*, *supra* note 4 at 319; G Babineau, "La manifestation: une forme d'expression collective" (2012) 53:4 Cahiers de droit 761 (QL); and F Makela, "La démocratie étudiante, la grève étudiante et leur régulation par le droit" (2014) 44:2 RDUS 307.

12 See Halsbury's Laws of Canada (online), *Constitutional Law: Charter of Rights*, "Fundamental Freedoms: Freedom of Assembly" (VI.3) at HCHR-42 "Freedom of Assembly"; *Smiley v Ottawa (City)*, 2012 ONCJ 479 at para 41; and *R v Behrens*, [2001] OJ No 245 (Ct J) at para 36.
In some cases, courts themselves noted how the peaceful assembly issues are "subsumed" by the freedom of expression analyses ultimately completed. See e.g. *Figueras v Toronto Police Services Board*, 2015 ONCA 208 at para 78; and *British Columbia Teachers' Federation v British Columbia Public School Employers' Assn*, 2009 BCCA 39 at para 39, leave to appeal to SCC refused, 2009 CanLII 44624.

justification. In light of the frequency of recent "mass arrests" taking place even when the majority of participants were not violent, Québec legal scholar Gabriel Babineau emphasized the necessity of legal protections for demonstrators who remain peaceful.[13] Similarly, Nathalie Des Rosiers noted that

> [i]n reality, protest occurs along a continuum of aggression. … [T]here ought to be a legal framework that both reflects the different types of protest and offers a proportional response. … It is when protests disturb the day-to-day operations of the general population that constitutional protection is essential.[14]

As part of such improvements, courts should use and interpret the freedom of peaceful assembly independently rather than applying freedom of expression analyses. An independent approach would allow for a better articulation of peaceful assembly's role in society as well as what peaceful assembly's core protected elements are.

Correspondingly, this article has two purposes: (1) to critique the freedom of expression analysis currently applied by the courts when hearing peaceful assembly claims; and (2) to present a doctrinal analysis with the aim of establishing the groundwork for a better understanding of the potential merits and features of a standalone freedom of peaceful assembly *Charter* analysis. Ultimately, the aim is to achieve a more comprehensive understanding of the fundamental freedom of peaceful assembly and its related content as a free-standing freedom in Canada.

Toward these ends, this article focuses on how Canadian courts should approach peaceful assembly as an independent freedom in light of the judicial treatment of other freedoms. The paper first explores why peaceful assembly ought to be treated as an independent freedom. It then examines several important commonalities among the fundamental freedoms and the resulting implications for a separate peaceful assembly analysis. The article then focuses on how the constitutional scopes of the other three freedoms are defined and applied. Some key differences are identified, which affect how Canadian courts understand, analyze, and protect each freedom. Finally, the paper argues that the "substantial interference" test is a stronger method for examining peaceful assembly and developing its corresponding content, rather than the current freedom of expression methodology and framework. The "substantial interference" approach would allow for a more thorough understanding of which activities are and ought to be covered by the freedom of peaceful assembly. The conclusion briefly outlines some key considerations in developing the principles necessary to conduct "substantial interference" comparisons in the context of peaceful assembly.

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[13] Babineau stated that the peaceful aspect of assembly should be "closely linked" to the concept of violence. Babineau, *supra* note 11 at paras 1-4 [translated by author]. See also Alexander, *supra* note 11.

[14] *State on Trial*, *supra* note 4 at 322. Des Rosiers discusses issues related to demonstration requirements, spontaneous demonstrations, communicating with police, police actions, and demonstrator anonymity. *Ibid* at 322-23.

I. PEACEFUL ASSEMBLY SHOULD BE INDEPENDENT FROM EXPRESSION

As noted above, courts currently subsume peaceful assembly analyses into those of freedom of expression. Namely, courts tend to view the impugned laws and the activities they interfere with through the lens of expression, rather than using a framework unique to peaceful assembly. This poses two problems for the coherent development of the freedom of peaceful assembly.

First, it makes peaceful assembly seem like a derivative of expression, as opposed to a free-standing freedom. While there is obvious overlap with freedom of expression, the *Charter* lists peaceful assembly separately, rather than as part of the group of protections included alongside expression.[15] It is noteworthy that freedom of peaceful assembly is not explicitly included with "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" as enumerated in subsection 2(b). There must be a purpose for this difference, especially since there is a presumption against tautology.[16] The separation in drafting reflects that peaceful assembly is a unique collective and expressive activity that involves rationales and issues warranting distinction from those included in the *Charter* guarantee of freedom of expression. Freedom of peaceful assembly is undoubtedly deserving of a unique focus given its role in Canadian and other liberal-democratic societies, both historically and recently.[17] Peaceful assembly should accordingly stand "as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests."[18]

Second, it is difficult to develop the necessary content, analyses, and themes of peaceful assembly in a comprehensive manner if our courts continue to focus on applying well-settled freedom of expression law and corresponding justification analyses.[19] As noted in *Villeneuve c Montréal (Ville de)*, there are few authorities dealing in detail with the freedom of peaceful assembly as it appears in Canadian law.[20] The 2015 Québec superior court case *Garbeau c Montréal (Ville de)* examines the related law in more detail than others.[21] The broad and inclusive nature of the freedom of expression framework, which instead orients litigants and judges toward section 1 justification analyses, was designed for general expression purposes— not specifically for peaceful assembly.

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15 *Charter*, *supra* note 2, ss 2(b)(c).

16 R Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at paras 8.23-8.27. *Cf* at paras 8.28-8.31.

17 See references *supra* note 4 and note 11.

18 *Mounted Police*, *supra* note 8 at para 49.

19 For further examples, see *Batty v Toronto (City)*, 2011 ONSC 6862 at paras 76ff [*Batty*]; and *Calgary (City) v Bullock (cob Occupy Calgary)*, 2011 ABQB 764 at paras 31ff [*Occupy Calgary*].

20 *Villeneuve c Montréal (Ville de)*, 2016 QCCS 2888 at para 386 [*Villeneuve*] [translated by author].

21 See *Garbeau*, *supra* note 7.

Given the continued utility of demonstrations in today's society for the expression of dissent, peaceful assembly warrants its own independent development. For example, in the United States, numerous demonstrations occurred during 2017 in response to a variety of issues, particularly following the election of President Donald Trump and his engagement with certain issues[22] (namely race-related issues).[23] Similarly, demonstrations are a major part of Canadian history. Examples include the Winnipeg General Strike and demonstrations during the Great Depression.[24] Demonstrations were and continue to be ideologically driven or targeted against bias and discrimination.[25] They also frequently involve Indigenous issues or issues connected to global summits, such as the Toronto G20 Summit in 2010.[26] Notably, several litigated cases arose recently in Québec, in part the result of greater demonstration activity by post-secondary education students after the Québec provincial government proposed a significant tuition increase in 2012.[27] More recently, far right and counter demonstrations occurred in Vancouver and Québec City.[28] These examples reflect the fact that freedom of peaceful assembly is an emerging, ongoing, and high-stakes issue in constitutional law. Accordingly, it is more crucial than ever that peaceful assembly law be developed and utilized in a manner consonant with the increasing frequency of demonstrations in today's society.

II. KEY THEMES AND COMMONALITIES AMONG THE FUNDAMENTAL FREEDOMS

To understand how an independent peaceful assembly freedom should be shaped, it is useful to first examine some themes associated with the fundamental freedoms as well as their applicability to peaceful assembly. As indicated, section 2 of

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22 See Crowd Counting Consortium, "Reports & Trends," online: <https://sites.google.com/view/crowdcounting consortium/reports-trends>; M Berman & W Lowery, "'It's now or never': How anti-Trump protests spread across the U.S.," *The Washington Post* (12 November 2016), online: <www.washingtonpost.com/news/post-nation/wp/2016/11/11/its-now-or-never-how-anti-trump-protests-spread-across-the-u-s/>; and S Jaffe, "Why Anti-Trump Protests Matter," *Rolling Stone* (15 November 2016), online: <www.rollingstone.com/culture/why-anti-trump-protests-matter-w450561>.

23 See Touré, "A Year Inside the Black Lives Matter Movement", *Rolling Stone* (7 December 2017), online: <www.rollingstone.com/politics/news/toure-inside-black-lives-matter-w513190>.

24 See *State on Trial*, *supra* note 4 at 5-9.

25 *Ibid* at 9-11

26 See *ibid* at 5 and 11-14.

27 For more information, see *Villeneuve*, *supra* note 20 at paras 100ff; *Québec (Ville de) c Bérubé*, 2016 QCCM 122 at paras 62-88 and 122 [*Bérubé*], aff'd 2017 QCCS 5163; and Makela, *supra* note 11.

28 See e.g. CBC News, "Protest against far-right rally draws thousands in Vancouver" (19 August 2017), online: <www.cbc.ca/news/canada/british-columbia/anti-racism-rally-vancouver-city-hall-1.4253117>; and CBC News, "Quebec City police arrest 44 at far-right protest and counter-demonstration" (25 November 2017), online: <www.cbc.ca/news/canada/montreal/quebec-city-police-arrest-44-at-far-right-protest-and-counter-demonstration-1.4419752>.

the *Charter* guarantees four fundamental freedoms: freedom of religion (s. 2(a)), freedom of expression (s. 2(b)), freedom of peaceful assembly (s. 2(c)), and freedom of association (s. 2(d)).[29] With respect to the general role of these four freedoms in Canadian society, Dickson J. made several oft-cited comments in *R v Big M Drug Mart Ltd*, a case regarding freedom of religion. For example, he noted that "a free society" aims at equal enjoyment of the freedoms, and that variability, rather than uniformity, is a key aspect of a "truly free society."[30] Significantly, he also stated that "[f]reedom can primarily be characterized by the absence of coercion or constraint" such that a person may "[act] of his [*sic*] own volition."[31]

> One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[32]

Dickson J. emphasized the freedoms' focus on limiting coercion and constraint. Accordingly, it is not surprising that the freedoms generally impose negative obligations on government actors (i.e., not to interfere), rather than positive obligations (i.e., to actively protect, assist, or facilitate the freedoms), unless exceptional circumstances apply.[33] Generally speaking, courts would likely interpret a free-standing freedom of peaceful assembly and its corresponding obligations on the state similarly, focusing largely on negative obligations.

While such a general approach would be appropriate for many issues related to peaceful assembly (e.g., whether and how people wish to assemble, and the variety of concerns that may result in assembly), the specific nature of the freedom of peaceful

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29 *Charter*, *supra* note 2.
Courts often use "freedom of religion" and "freedom of expression" as short-forms for the associated freedoms (i.e., "freedom of conscience and religion" and "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication"). Similarly, this article uses these short-forms for convenience. See e.g. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 345-47 (freedom of religion) [*Big M Drug Mart*]; and *Irwin Toy Ltd v Quebec (Attorney General*, [1989] 1 SCR 927 at 968-69 & 1005-06 (freedom of expression) [*Irwin Toy*].

30 *Big M Drug Mart*, *ibid* at 336.

31 *Ibid*.

32 *Ibid* at 336-37.

33 See *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 at paras 25-29 & 33; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at paras 19-29 (exception for legislative under-inclusion in the freedom of association context).

assembly likely calls for a deeper analysis respecting corresponding state and societal obligations. In particular, it is important for state obligations to be carefully laid out in the context of demonstration. Assemblies are collective actions that require physical space in order to be effectively carried out; however, the state often controls or regulates such location (e.g., spaces in front of or near government buildings, roads, and parks). Demonstrations are also often a means to express dissent to those in power. Further, the thrust of demonstrations is their disruptiveness or ability to draw attention. This necessarily involves interaction with law and regulatory enforcement as well as interactions with others' rights, societal norms, and expectations.[34] Special considerations relating to the state's obligations ought to be applicable to government actors to ensure that peaceful assemblies can occur and are not prevented. This will require separate and more comprehensive analyses on behalf of the judiciary.

Moreover, the courts' general reticence to impose positive obligations on the state in the *Charter* freedom context does not mean that the application of the fundamental freedoms is only characterized negatively. This is particularly true when considered from the perspective of potential claimants. For example, freedom of religion includes "the right to believe…what one chooses, to declare one's beliefs openly, …to practice one's religion in accordance with its tenets [and]…to teach and disseminate one's beliefs."[35] While LeBel J. considered these elements to be "positive aspects" of the freedom of religion,[36] they may only be viewed as positive from the perspective of claimholders. On the other hand, freedom of religion also includes "the right not to be compelled to belong to a particular religion or to act in a manner contrary to one's religious beliefs"—an entitlement framed in the negative.[37] Again, courts frame freedom of religion negatively, but in a manner that entitles claimholders rather than the government. The emphasis here is not on directing the state to refrain from constraining and coercing; rather, *claimholders* have the right to conduct activities and to be free from state constraint and coercion.

The freedom of association has been treated by courts in an analogous manner. It includes a negative prerogative not to associate (i.e., not to be part of a union or other group) as well as various positive elements, such as entitling persons to join with others in forming associations, to pursue constitutional rights, and "to meet on more equal terms the power and strength of other groups or entities."[38] Similarly, freedom of

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34 See e.g. *State on Trial*, *supra* note 4 at 322-23; Alexander, *supra* note 11.

35 *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 65, LeBel J dissenting [*Congrégation*]. See also *Big M Drug Mart*, *supra* note 29 at 336-37.

36 *Congrégation*, *ibid* at para 65.

37 *Ibid* [emphasis added, citation omitted]. See also *Big M Drug Mart*, *supra* note 29 at 336-37.

38 *Mounted Police*, *supra* note 8 at paras 41-42 & 65-66. However, section 1 of the *Charter* may justify an infringement of the entitlement not to be part of a union. See e.g. *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 281ff, 333ff, & 342.

expression entails a positive right to express oneself in numerous ways.[39] It has also been interpreted as including a negative right, to *not* be compelled to express something (e.g., "to say nothing or…not to say certain things").[40] These examples are not exhaustive, but they show how courts would and should use the claimant's perspective to help interpret the scope of an independent freedom of assembly. The examples also illustrate how the content of each freedom becomes clearer and more practically concrete when viewed predominantly from a claimant perspective. It is likely that the courts would analyze, interpret, and apply freedom of peaceful assembly in a manner similar to that of the other fundamental freedoms, given the freedoms' inherent syntactical and semantic similarities. For example, from a claimant perspective, there is a right to form or join a peaceful assembly or to choose not to do so, a peaceful assembly ought to be able to draw society's attention and interest to issues, and, finally, peaceful assembly is a way to communicate with and influence those in power, particularly when there are limited or no means to effect change in other ways. As has been seen with the other fundamental freedoms, a free-standing freedom of peaceful assembly would also develop practically over time.

Notwithstanding a *new* approach to applying freedom of peaceful assembly, it is well settled that courts are bound to use a generous and purposive approach in interpreting the *Charter*.[41] Courts determine the scope of application for a freedom such as peaceful assembly by analyzing its purpose "in light of the interests it was meant to protect."[42] Courts conduct this analysis

> 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 objects 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*.[43]

The *Charter* must "be placed in its proper linguistic, philosophic and historical contexts."[44] That said, courts are instructed to conduct an "activity-based contextual approach" that looks at the "activity in question in its full context and history" when considering the fundamental freedoms.[45] As will be discussed, the freedoms vary on

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39 See e.g. Halsbury's Laws of Canada, *Constitutional Law: Charter of Rights*, "Fundamental Freedoms: Freedom of Expression: Specific Types of Expression" (VI.2(2)) at HCHR-40 (online).

40 See e.g. *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1048 & 1080 (reference letter with specified content justified under section 1).

41 *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155-56 [*Hunter*]; and *Big M Drug Mart*, *supra* note 29 at 344.

42 *Big M Drug Mart*, *ibid*.

43 *Ibid*. See also *Mounted Police*, *supra* note 8 at paras 47-48.

44 *Big M Drug Mart*, *supra* note 29 at 344.

45 *Mounted Police*, *supra* note 8 at paras 47-48.

how their respective scopes are defined for the purpose of determining constitutional infringements. However, none of the freedoms are unlimited in terms of what they include, and the limiting factors inevitably inform courts' decisions about what is included or excluded in the scope of each freedom. For example, although subsection 2(c) is the only explicitly qualified freedom (i.e., "peaceful assembly"),[46] all of the other freedoms have been interpreted to exclude violence or injury from their scope. A religious practice may not injure others or their right to hold their own beliefs.[47] Protected forms of expression likewise do not include those that are violent.[48] Similarly, violent associational activities are not protected.[49] In the case of the freedom of peaceful assembly, the modifier "peaceful" ultimately reinforces the approach already taken with respect to the other *Charter* freedoms. It should also be noted that Canada's international obligations and related analyses may provide useful insights into how courts would approach and shape the much less litigated and still developing *Charter* freedom of peaceful assembly.[50]

Moving forward, a key interpretive question is whether courts will focus on individual or collective rights in their independent analyses of peaceful assembly. While one of the functions of the *Charter* is "the unremitting protection of individual rights and liberties,"[51] this does not mean that *Charter* rights do not have a collective dimension. In fact, in *Mounted Police Association of Ontario v Canada (Attorney General)*, the Supreme Court of Canada made it clear that "the *Charter* does not exclude collective rights" and that "its s. 2 guarantees extend to groups."[52] In support of this perspective, the Court noted that "peaceful assembly is…a group activity incapable of individual performance." The Court also cited additional examples in the expression, voting, and religion contexts,[53] and it ultimately held that freedom of association protects three classes of group activities.[54] The treatment of the fundamental freedoms by the Supreme Court of Canada in this case and others indicates that any approach to

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46 See *Charter*, *supra* note 2, s 2 [emphasis added]. See also *Villeneuve*, *supra* note 20 at paras 386-90 (peaceful assembly has internal requirement of peaceful).

47 *Big M Drug Mart*, *supra* note 29 at 346.

48 *Irwin Toy*, *supra* note 29 at 970.

49 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 107.

50 See e.g. *Garbeau*, *supra* note 7 at paras 143-53; and Organization for Security and Co-operation in Europe – Office for Democratic Institutions and Human Rights (OSCE/ODIHR) & Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, 2nd ed (Warsaw: OSCE/ODIHR, 2010) [OSCE/ODIHR Guidelines]. See also *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 69-79 [*Health Services*] (analogous example in the freedom of association context).

51 *Hunter*, *supra* note 41 at 155.

52 *Mounted Police*, *supra* note 8 at para 64 [emphasis added].

53 *Ibid*.

54 These consist of: "(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." *Ibid* at para 66.

peaceful assembly must recognize that "collective rights complement rather than undercut individual rights" and that "[b]oth are essential for full *Charter* protection."[55]

Thus far, this paper has focused on understanding how peaceful assembly would likely be interpreted in light of content and scope of issues common to all of the freedoms. However, fundamental freedom infringements are also inextricably subject to justification pursuant to section 1 of the *Charter*, the final step of most *Charter* analyses.[56] In addition to the requirement that the limit be prescribed by law,[57] the well-known *R v Oakes*[58] test governs what is considered a justifiable infringement.[59]

The past application of the *Oakes* test demonstrates the potential issues and considerations that would likely arise when considering whether peaceful assembly infringements are justified. For example, the regulation of roads in Québec and the reasons for such regulation have been found to be pressing and substantial objectives for a law limiting demonstrations on roads.[60] Justification often turns on the later stages of minimal impairment and proportionality. It is thus not surprising that claims involving demonstrators who erect permanent structures or shelters have not been successful at these stages of the *Oakes* test.[61] Municipal and superior courts in Québec have also found, in *Bérubé* and *Villeneuve* respectively, that section 1 justified a requirement for demonstrators to provide an itinerary in the form of a location or a route to assist police.[62] Such a requirement was found to be minimally impairing, as notice was the only requirement; no authorization or permit was required, and the only lesser alternative was to provide no notice at all.[63] These examples illustrate the kinds of issues that need to be proactively considered as part of developing the scope and content of an independent freedom of peaceful assembly.

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55 *Ibid* at para 65.

56 *Charter*, *supra* note 2, s 1.

57 *Ibid*, s 1.

58 [1986] 1 SCR 103 [*Oakes*].

59 In other words, whether there is "a pressing and substantial object" and whether "the means chosen are proportional to that object." The latter includes a rational connection to the objective, minimal impairment of the affected right, and "proportionality between the deleterious and salutary effects." *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 94 [*Carter*]. The *Oakes* test is the subject of extensive detailed commentary; this article does not review the test or its corresponding elements in further detail. For more information, however, see e.g. PW Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (looseleaf) vol 2, ch 38.

60 *Garbeau*, *supra* note 7 at paras 210-14 ("security, the free movement of persons and goods on public roads and access to the buildings that surround them") [translated by author].

61 See *Batty*, *supra* note 19 at paras 70-72 (Occupy Toronto case; infringement focus was on expression analysis); and *Occupy Calgary*, *supra* note 19 at para 12 (infringement of expression conceded).

62 *Villeneuve*, *supra* note 20 at paras 386-90; *Bérubé*, *supra* note 27 at para 133.

63 See *Villeneuve*, *ibid* at paras 140, 143-45, & 460-62; and *Bérubé*, *ibid* at paras 130-31. For clarity, notice could be provided to the last minute in these situations. *Villeneuve*, *ibid* at paras 143-45& 460; and *Bérubé*, *ibid* at para 131.
For a discussion of the guidelines and the American law regarding permit and authorization system, see *Garbeau*, *supra* note 7 at paras 471-478.

Once the core aspects of an independent freedom of peaceful assembly are better known and described in jurisprudence, related infringements can be more properly considered in relation to these areas. For example, in the context of freedom of association, an exclusion of Royal Canadian Mounted Police ("RCMP") members from collective bargaining was found to be unjustified.[64] This result was defensible, because other police forces used collective bargaining,[65] and the exclusion had the practical effect of preventing RCMP members from engaging in core activities associated with freedom of assembly. Complete prohibitions of core aspects should not be easily justified given the ensuing deleterious effects.[66] The same principle would apply to core aspects of an independent freedom of peaceful assembly. It is also important to understand how different perspectives on what might constitute a potential infringement may or may not align with what constitutes the core constitutional content at law. For instance, from the demonstrators' perspective, the 24-hour nature of the Occupy demonstrations was arguably their defining feature; any participating demonstrator would have seen limiting the hours as a practical ban. However, laws limiting the time and duration of demonstrations were viewed by courts as justified given the other interests involved and the presence of other alternatives.[67] Had these cases involved an independent analysis of the freedom of peaceful assembly, the courts would have better considered what constituted the core aspects of the freedom when conducting both their infringement and justification analyses.

This section has outlined a number of the considerations that ought to influence an independent freedom of peaceful assembly, particularly in light of the commonalities and themes found among the other fundamental freedoms. However, more juridical attention must be devoted to defining the scope of such a freedom, especially since no *Charter* right or freedom is unlimited.

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64 *Mounted Police*, *supra* note 8 at paras 135-39.

65 See e.g. *ibid* at paras 147, 151-53.

66 While it was not necessary for the majority in *Mounted Police* to conduct a proportionality analysis, the Court made comments that illustrate the negative impacts of a significant exclusion in the freedom of association context. For example, "[t]he function of collective bargaining is not served by a process which undermines employees' rights to choose what is in their interest and how they should pursue those interests." *Ibid* at para 85. Further, "[t]he function of collective bargaining is not served by a process which is dominated by or under the influence of management. This is why a meaningful process of collective bargaining protects the right of employees to form and join associations that are independent of management." *Ibid* at para 88 [citation omitted]. "If employees cannot choose the voice that speaks on their behalf, that voice is unlikely to speak up for their interests. It is precisely employee choice of representative that guarantees a representative voice." *Ibid* at para 101. The exclusion "fostered, rather than inhibited, dissatisfaction and unrest within the RCMP." *Ibid* at para 147.

67 *Batty*, *supra* note 19 at paras 106-11; *Occupy Calgary*, *supra* note 19 at paras 43-46.

III. A KEY DIFFERENCE BETWEEN THE FREEDOMS—DEFINING THE SCOPE

Each of the fundamental freedoms—peaceful assembly aside—uses different approaches in defining the constitutional scopes of the freedom at law. This is understandable given the different issues at play and the variety of activities protected by each freedom. It is necessary to define the scope of these freedoms, since no *Charter* right is absolute, and each will inevitably interact with other rights—including those held by the modern political state.[68] An understanding of how the courts interpret these scopes differently provides insight into the most beneficial approach to peaceful assembly over the long term.

The approach to freedom of religion, for example, focuses on what constitutes an infringement on the freedom. There are two parts to the test: first, whether a claimant "sincerely believes in a belief or practice that has a nexus with religion," and second, whether the law or action at issue is a "more than trivial or insubstantial" interference with the claimant's ability to act in accordance with his or her religious beliefs.[69] A majority of the Supreme Court of Canada has held that a case-by-case examination is necessary to determine if such interference occurs.[70] This is consistent with the variety of religious beliefs and practices for which constitutional protection could potentially be claimed. Furthermore, the interference must be such that it reasonably or actually threatens a religious belief or practice. If it does not threaten actual beliefs or conduct, it is a "trivial or insubstantial" interference.[71] In other words, there must be some impact or effect of the impugned law for there to be protection under the *Charter* freedom of religion.[72]

In contrast, freedom of expression takes a more expansive approach. If an activity "conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope" of the freedom.[73] This indicates a broad and inclusive approach.[74] The next step in the analysis addresses whether the purpose or the effect of the impugned government action restricts expression.[75] Given the broad nature of the first step, and the reality that *Charter* litigation would not occur unless the second step was likely to be fulfilled (i.e., in practice, it is a relatively low infringement threshold), freedom of expression jurisprudence focuses largely on whether the infringing law can

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68 See e.g. *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441 at 450 & 488-90.
69 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 32 [*Hutterian Brethren*].
70 *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 60.
71 *Hutterian Brethren*, *supra* note 69 at para 32.
72 See e.g. *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (public school prohibited wearing of kirpan, even with conditions).
73 *Irwin Toy*, *supra* note 29 at 969, 978, 1005-06 & 1007.
74 *Ibid* at 970.
75 *Ibid* at 971, 978-79, 1005-06 & 1007.

be justified.[76]

When applicable, the Supreme Court of Canada has also distinguished between form and content as part of the expression analysis. Generally, all content is worthy of protection, but the method or location may not be.[77] For example, the scope of freedom of expression is limited by the Supreme Court of Canada's holding that violent expression and expression on private property are not protected by the *Charter* freedom.[78] The Court similarly developed a test to determine whether expression on a particular government-owned property is covered by the freedom (e.g., public streets compared to private offices).[79] However, the resulting restrictions on scope are relatively small compared to the overall breadth of the freedom. It should also be noted that even if method or location do not exclude a particular expression from protection, these factors may still ultimately contribute to the section 1 analysis.[80]

Given the broad nature of this methodology, it is not surprising that Canadian courts conduct peaceful assembly analyses through an expression lens, or simply by importing the expression tests.[81] Such an approach is understandable because peaceful assembly is, by nature, an expressive activity.[82] However, this approach does not easily acknowledge the unique realities, motivations, and roles associated with peaceful assemblies, such as their collective nature, which differs from expression more generally.

Finally, the judicial approach to freedom of association focuses on "substantial interference," which, although it seems similar to the freedom of religion approach, uses slightly different language. There are various activities protected by freedom of association,[83] and courts will consider whether these activities and their corresponding

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76 Halsbury's Laws of Canada, *Constitutional Law: Charter of Rights*, "Fundamental Freedoms: Freedom of Expression: General Section 2(b) Doctrine" (VI.2(1)) at HCHR-39, "Scope of freedom of expression" (online).

77 *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 60 [*2952-1366*]; *Irwin Toy*, *supra* note 29 at 969-70.

78 *2952-1366*, *ibid* paras 60-61 & 72; *Irwin Toy*, *supra* note 29 at 969-70.

79 *2952-1366*, *ibid* at paras 73-80. The key question is whether expression in the place conflicts with the purposes of the freedom (i.e., democratic discourse, truth finding, and self-fulfillment). Two factors are to be accordingly considered: the historical or actual function of the place; and whether other aspects of the place suggest that expression there would undermine the freedom's values.

80 See e.g. *2952-1366*, *ibid* at para 99; and *R v Banks*, 2007 ONCA 19 at para 133, leave to appeal to SCC refused, 2007 CanLII 37182.

81 See generally *supra* note 12. See also: *Villeneuve*, *supra* note 20 at paras 381–85, 397, 407–37; *Batty*, *supra* note 19 at paras 70-75; *Occupy Calgary*, *supra* note 19 at para 31; and *Bérubé*, *supra* note 27 at paras 110-16.

82 See e.g. OSCE/ODIHR Guidelines, *supra* note 50 at 15 & 17 ("1.2 Definition of assembly. … [T]he intentional and temporary presence of a number of individuals in a public place for a common expressive purpose" and "3.3 … Assemblies are held for a common expressive purpose and, thus, aim to convey a message" [emphasis added]).

83 *Mounted Police*, *supra* note 8 at paras 66–67 & 80. For example, protected classes of activities include the right to join with others and form associations, to pursue other constitutional rights, and "to meet on more equal terms the power and strength" of others. Accordingly, the freedom guarantees "the right of

rights have been substantially interfered with. Substantial interference takes place when "the intent or effect [of a law or an action] … seriously undercut[s] or undermine[s]" the key activity,[84] such as in the context of collective bargaining. The courts' inquiries are contextual and fact-specific, and the focus is on whether there has been or are likely to be significant adverse impacts.[85] The inquiries usually focus on the importance of the affected matter and the extent to which it is impacted.[86] Substantial interference is more likely if a central issue is the one affected.[87] For example, in the collective bargaining context, the right to strike is vital; limiting association in a way that substantially interferes with such collective bargaining is, accordingly, a violation.[88] However, in order for courts to apply this approach effectively, one must understand which core activities and corresponding rights are protected as part of the freedom. Such tenets took a number of years to develop in the association context.[89]

IV. THE SUBSTANTIAL INTERFERENCE TEST IS BEST FOR PEACEFUL ASSEMBLY'S SCOPE

To better facilitate the development of peaceful assembly as an independent freedom, courts need to revise the default approach to its scope. The analyses used with respect to freedom of religion and freedom of association are compatible with freedom of peaceful assembly, given the freedoms' general similarities. Freedom of religion and freedom of association are both more concerned with specifically examining activities and degrees of infringement, whether interference is "more than trivial or insubstantial" or "substantial" respectively. It is unclear whether the two standards are identical, or if there is a possibility that an infringement may fall between the two (e.g., it is higher than "more than trivial or insubstantial" but not high enough to reach "substantial"). However, the practical difference between these two standards may be minimal given how the analyses in fact play out in their respective contexts. As well, there is always a spectrum of infringement: even if the degree of infringement plays a limited role at the scope-defining stage, it will likely still play a role in the section 1 justification stage.

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employees to meaningfully associate in the pursuit of collective workplace goals," which includes a right to a collective bargaining process.

84 *Health Services*, *supra* note 50 at para 92. Potential examples include: "union breaking" laws or actions; bad faith actions; and unilaterally nullifying negotiated terms without any meaningful discussion and consultation process.

85 *Ibid*.

86 *Ibid* at paras 93-94.

87 *Meredith v Canada (Attorney General)*, 2015 SCC 2 at para 52, Abella J dissenting; and *Health Services*, *supra* note 50 at paras 95-96.

88 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 24-25. Abella J noted that if "one of the meaningful dispute resolution mechanisms commonly used in labour relations" were to be used instead in the context of essential services legislation, it would be more likely to be justified under section 1. *Ibid* at para 25.

89 For a general summary, see *Mounted Police*, *supra* note 8 at paras 30-66.

Such an approach also allows for and results in unique analyses and outcomes that better account for peaceful assembly's unique features and character.

Given that this paper is concerned with the development of the legal principles underlying peaceful assembly, the lens of peaceful assembly itself indicates which approach is best. Accordingly, the substantial interference test offers more potential towards developing the freedom's scope and content. This is particularly so because an independent freedom of peaceful assembly is more akin to freedom of association than freedom of religion. While both freedoms have collective aspects, religion's approach makes sense in its own context, since there is a significant diversity of activities—within and varying across religions—that courts may need to analyze to determine whether there is constitutional protection. It is difficult for courts to develop a practical core of detailed, universal activities, as well as corresponding practice rights that would apply across all religions. More flexibility is needed, and most of the resulting limits occur as part of section 1 analyses. In contrast, there is a much narrower range of activities that warrant constitutional protection under the freedom of association. This is analogous to peaceful assembly, which is similarly limited in nature. A smaller range of protected activity allows for a narrower focus on precisely which activities and rights are central to the freedom. Consistent with the courts' mandated purposive approach "to consider the most concrete purpose or set of purposes that underlies the right or freedom in question, based on its history and full context,"[90] it follows that the courts should interpret a free-standing freedom of peaceful assembly in the latter manner.

Since scope aids in determining what precisely is protected by the freedom, the substantial interference test also allows for a stronger enunciation of the inherent core, for which there is constitutional protection. In turn, this may provide greater practical guidance regarding the *Charter* freedom's scope and content. Judicial treatment of freedom of association illustrates how purposes become more understandable and enforceable when they become more concrete.[91] A similar approach would be beneficial to a better understanding of peaceful assembly, such as where and how assemblies should occur.[92] Guidance from the courts in this context may also be particularly helpful to police and other state actors who interact with demonstrators, given that such state actors usually deal with demonstrations on the ground and have significant powers that can be employed against demonstrators.[93]

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[90] *Mounted Police*, *supra* note 8 at para 50 [emphasis added by author].

[91] For examples in the freedom of association context, see *supra* note 84 above.

[92] For example, the OSCE/ODIHR Guidelines provide that, "as a general rule, assemblies should be facilitated within 'sight and sound' of their target audience." OSCE/ODIHR Guidelines, *supra* note 50 at 17. This contrasts with the experience of the Toronto G20, as the meeting occurred at the Metro Toronto Convention Centre, but the official protest zone was some distance away on the north side of Queen's Park.

[93] For further discussion of these and related issues, see Alexander, *supra* note 11; and WW Pue, R Diab, & G Jackson, "The Policing of Major Events in Canada: Lessons from Toronto's G20 and Vancouver's

In addition, the threshold for "substantial interference" is higher by its nature than what is used now. As a result, if a finding of substantial interference to a claimant's freedom to assemble peacefully is made, there is a stronger likelihood that the protected activity in question will survive section 1 justification analyses. The infringement would require a higher threshold than the lower threshold it is currently subject to under subsumed freedom of expression analyses. This is especially important because it would increase pressure on the state to come up with stronger justifications for such infringements. As indicated, demonstrations and potential corresponding state interventions and responses are more prevalent now than ever. This has been illustrated by, among other incidences: the Toronto G20 Summit; Idle No More demonstrations (and those inspired by other Indigenous issues); the Occupy movement; student protests in Québec; far-right and counter-demonstrations; and other protests elsewhere—including the United States. The successful certification of more and more Canadian class actions involving demonstration issues also reinforces the importance of developing this area:[94] courts are evidently becoming more willing to intervene to protect the rights of those whose freedom to assemble peacefully have been collectively denied or impeded.

In spite of this, there are two caveats worth noting. First, the substantial interference test is helpful only when coupled with an understanding of what content the interference is relative to. In other words, the substantial interference test tends to rely on articulations of core activities in defining the scope of each freedom. The association cases took decades to develop in this respect. In contrast, there is currently a relative dearth of peaceful assembly cases. While the lack of freedom of peaceful assembly jurisprudence initially appears to be a significant issue, there are methods to mitigate this concern. For example, many of the principles discussed in other areas of *Charter* jurisprudence (i.e., regarding freedom of association and expression) may inform the development of peaceful assembly, and are applicable by analogy.[95] As well, the *Guidelines on Freedom of Peaceful Assembly* (the "Guidelines") by the Organization for Security and Co-operation in Europe – Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Venice Commission provide an excellent base on which to develop the scope and build the content of Canada's freedom of peaceful

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Olympics" (2015) 32:2 Windsor YB Access Just 181. See also *Garbeau*, *supra* note 7; *Villeneuve*, *supra* note 20; and *Bracken v Fort Erie (Town)*, 2017 ONCA 668 at paras 49-52, 54, 59 & 76-82. While an expression case, *Bracken* is an example of a town improperly characterizing uncivil dissent as violent, going too far, and effectively preventing that dissent.

94 See e.g. *Good v Toronto (Police Services Board)*, 2016 ONCA 250, leave to appeal to SCC refused, 2016 CanLII 76801; *Matton c Montréal (Ville de)*, 2017 QCCS 4297; *Charest-Bourdon c (Ville de)*, 2017 QCCS 4291; *Valade c Montréal (Ville de)*, 2017 QCCS 4299; *Dépelteau c Montréal (Ville de)*, 2017 QCCS 4298; *Beauchemin-Laporte c Montréal (Ville de)*, 2017 QCCS 4293; *Daigneault-Roy c Montréal (Ville de)*, 2017 QCCS 4292; and *Lebrun c Montréal (Ville de)*, 2017 QCCS 4288.

95 See e.g. *Mounted Police*, *supra* note 8 at paras 48, 57-58, 62, 69-70 & 80.

assembly.[96] Accordingly, this freedom will not be built from nothing.

Second, some may be concerned that the threshold of "substantial interference" has the effect of shifting the onus from the state, as part of justification, to the claimant, as part of the freedom's scope and content. However, given the "leeway" currently afforded to state justification in contemporary freedom jurisprudence,[97] as well as the nature of *Charter* litigation in general, it is unclear whether this shift has any real effect in practice. Both the claimant and the state must present their arguments and evidence, and regardless of who bears the burden or which issue—scope versus justification—the court will weigh more heavily in each case. There may be no real impact evident in practice. Most importantly, the nature of each individual case will likely determine what evidence is required more than any onus shift, and the *Guidelines* will likely help claimants meet some of their requirements. Finally, from a civil litigation perspective, it is often tactically better for claimants to set the initial characterization of issues rather than responding defensively to the government's narrative. Demonstrator perspectives can thus better frame the issues from the beginning, which is beneficial for understanding and developing the content of an independent freedom of peaceful assembly.[98]

CONCLUSION

Despite the relative lack of development of peaceful assembly as a free-standing *Charter* freedom, its independence has considerable potential. Accordingly, this article conducts some preliminary doctrinal steps in outlining a better approach to its analysis to help realize that potential in the Canadian context. In particular, courts ought to treat and develop freedom of peaceful assembly as an independent freedom instead of simply a form of expression. Commonalities among the fundamental freedoms provide some initial guidance regarding how courts should approach, interpret, and develop an independent freedom of peaceful assembly. Instead of using the freedom of expression framework—which seems to be the default at present—to determine scope and analyze peaceful assembly issues, courts should use the substantial interference approach of freedom of association. As indicated, its nature is closely akin to an independent freedom of peaceful assembly. Such an approach is also better suited to facilitate the

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96 OSCE/ODIHR Guidelines, *supra* note 50.

97 See e.g. *Hutterian Brethren*, *supra* note 69 at paras 35, 37, 55 & 67-71; *Cf* paras 143-49, 154, 156 & 173, Abella J dissenting.

98 In contrast, a criminal defence perspective may argue that it is better to have a lower threshold on what is considered interference, and leave the onus on the state. However, unlike criminal situations where legislatures and courts provide significant starting points, such as the *Criminal Code* and case law, peaceful assembly typically does not have such guidance. As well, since a claimant usually needs to prove his or her case on a "balance of probabilities" in such situations, rather than the lower standard of a "reasonable doubt" as in the case of the state, it is often tactically better to frame the issues from the beginning rather than in response to the opposing side's characterization.

development of peaceful assembly's content as a free-standing independent freedom.

While these theories are by no means comprehensive, this work sets the stage for the next key step: synthesizing and developing the key principles and content of the freedom of peaceful assembly. While this article has referred to some relevant materials that may be of assistance in this project (e.g., key Canadian cases and the *Guidelines* by the OSCE/ODIHR and the Venice Commission), such resources serve only as starting points. More comprehensive explorations are necessary. Many more questions remain unanswered. For example: what are the potential purposes and aims of demonstrations (e.g., political or broader), and how should they be incorporated as part of a constitutionally guaranteed freedom of peaceful assembly?[99] Are there releases of societal frustration or similar aspects that should be better recognized? Is there a role for demonstrations of a longer duration, or even demonstrations that are permanent? How should these and other considerations interact with the realities of a post–9/11 environment?[100] What are the experiences and approaches of other jurisdictions?[101] Among others, these questions illustrate the reasons why additional work is needed for the law of peaceful assembly to realize its full potential in Canada, especially given its fundamental role in society and its increased prevalence. Most crucially, a free-standing freedom of peaceful assembly needs to be developed in order to protect and benefit those people who may not otherwise be able to influence those in power.

[99] See e.g. Babineau, *supra* note 11.

[100] For example, increased investigatory and detention powers, as well as monitoring tools. See e.g. *State on Trial*, *supra* note 4 at Part 2; C Forcese & K Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015); AP Sherwood, "The 'State of Exception' Today: 9/11's Revolutionary Effect on Law, War and Bodies" (Paper delivered at *Law: Stagnation, Evolution or Revolution?*, Western Law's Interdisciplinary Graduate Student Conference, Faculty of Law, Western University, 19 May 2017).

[101] See e.g. Orsolya Salat, *The Right to Freedom of Assembly: A Comparative Study* (Oxford: Hart Publishing, 2015).